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Sometine in the early morning of June 3, 1961, a burglary occurred at the Bay Harbor Pool Room in Panama City, Fla. The burglar broke a door, smashed a cigarette machine and a record player, and stole money from a cash register. Police arrested Clarence Earl Gideon after he was found near the scene with a pint of wine and some change in his pockets. Later that day, a witness reported that he had seen Gideon in the pool room at around 5:30 a.m. Based on these facts, the police arrested Gideon and charged him with breaking and entering with intent to commit petty larceny.

Gideon, who could not afford a lawyer, asked the Florida circuit judge to appoint one for him arguing that the Sixth Amendment entitles everyone to a lawyer. His request was denied. Gideon, therefore, was forced to act as his own counsel and conduct the defense at his trial. Gideon was unsuccessful in his defense and was found guilty of breaking and entering and petty larceny. He was sentenced to five years in the state prison.

While serving his sentence in the Florida State Prison, Gideon began studying law. His studies reaffirmed his belief that his rights were violated when the Florida Circuit Court refused his request for counsel. From his prison cell, he handwrote a petition asking the United States Supreme Court to hear his case. He argued that his Sixth Amendment rights, as applied to the states by the Fourteenth Amendment, had been violated.

The Supreme Court assigned him a prominent Washington, D.C., attorney, Abe Fortis, of the law firm of Arnold, Fortis & Porter, and a future Supreme Court Justice. The Court, after hearing arguments, unanimously ruled in Gideon’s favor stating that the Sixth Amendment requires state courts to provide attorneys for criminal defendants who cannot otherwise afford counsel.

The final decision was announced on March 18, 1963. We are now celebrating 50 years of the “right to counsel” in the United States as guaranteed by the Sixth Amendment.

Many changes have come about in the prosecution and representation of indigent defendants since the ruling in Gideon. The decision in many ways created and in other ways expanded the public defender system. The need for more resources for public defenders in order to comply with the mandate of Gideon has not been met, especially in the areas of case loads and staffing, notably those with the unique training and qualifications necessary for the proper defense of capital cases. The American Bar Association and the National Legal Aid and Defender Association have now set minimum training requirements, case load levels, and experience requirements for its lawyers. We must endorse those requirements and advocate their implementation in Kentucky’s justice system.

It is my pleasure to join in the celebration of this anniversary of the Gideon decision. I must point out, however, that it is the responsibility of all the members of the Kentucky Bar Association (KBA) to take steps to promote the right to counsel and make it meaningful for all citizens of the Commonwealth. This right to counsel is threatened any time we have inadequate funding for our public defender system. Also of significance is the woeful lack of funding support for payment of conflict counsel to augment the public defender system.

The mission of the KBA includes the responsibility to promote the efficiency and improvement of the judicial system. This requires us to make efforts to assure the right to counsel to all citizens, no matter their financial circumstance. The quality of justice in our courts will suffer, and the needs and interests of judges, prosecutors, victims and the indigent accused will be jeopardized unless the public defender system is adequately funded, staffed and supported. As lawyers, we must take appropriate steps to support funding efforts.

While we celebrate the Gideon decision and the affirmation of the right to counsel for all defendants, we must remain vigilant to protect this right.
KBA 2013 ANNUAL CONVENTION: “PRESERVING JUSTICE,”
JUNE 19-21, GALT HOUSE HOTEL, LOUISVILLE

The Kentucky Bar Association will offer a wide variety of CLE programming of interest to practitioners across the Commonwealth during its 2013 Annual Convention at the Galt House Hotel in historic downtown Louisville, Wednesday, June 19, through Friday, June 21. This year’s convention theme, “Preserving Justice,” recognizes the importance of adequate funding for state courts; the 40th anniversary of the creation of the Kentucky Department of Public Advocacy in 2012; and this year’s 50th anniversary of the Supreme Court of the United States’ landmark decision in Gideon v. Wainwright requiring state courts to provide counsel in criminal cases for indigent defendants.

The 2013 convention will showcase three excellent featured programs organized through the dedicated efforts of the KBA Convention CLE Committee chaired by Richard Hay of Somerset. Additionally, the KBA extends its thanks to the 2013 Annual Convention Planning Committee Co-Chairs John Bilby, Douglass Farnsley, and Bobby C. Simpson, all of Louisville, for their leadership in guiding the committee in preparation for what promises to be an educational, exciting and entertaining event.

DAVID BOIES AND THEODORE B. OLSON TO SERVE AS FEATURED SPEAKERS ON OPENING DAY

Famed litigators David Boies and Theodore B. Olson will serve as the featured speakers on Wednesday, June 19, the first day of the KBA’s 2013 Annual Convention. The two men, once adversaries in the case of Bush v. Gore, have teamed in recent years to represent the plaintiffs in the historic civil rights litigation concerning California’s Prop 8 same-sex marriage ban. The case, Hollingsworth v. Perry, will be argued before the Supreme Court of the United States on March 26.

In 2010, Time Magazine selected Boies and Olson as two of the 100 most influential people in the world. Additionally, in 2011, the two men received the American Bar Association’s highest award, the ABA Medal, recognizing “exceptionally distinguished service by a lawyer or lawyers to the cause of American jurisprudence.”

Boies is the founder and chairman of Boies, Schiller & Flexner LLP, in Armonk, N.Y. In 1998-2000, Boies served as special trial counsel for the U.S. Department of Justice in its antitrust suit against Microsoft. He also served as lead counsel for former Vice President Al Gore in litigation relating to the 2000 election Florida vote count. In 2008, Boies successfully defended NASCAR against antitrust charges, and in 2010 and 2011, he represented plaintiffs suing to enjoin California’s ban on gay marriage as a violation of the federal Constitution.

Olson is a partner in Gibson, Dunn & Crutcher’s Washington, D.C., office, and is one of the nation’s premier appellate and U.S. Supreme Court advocates. The National Law Journal has repeatedly listed him as one of America’s Most Influential Lawyers. The American Lawyer and Legal Times have characterized Olson as one of America’s leading litigators. Olson was Solicitor General of the United States from 2001–2004, and from 1981–1984 he was Assistant Attorney General in charge of the Office of Legal Counsel in the U.S. Department of Justice. He has argued dozens of cases before the U.S. Supreme Court, including the two Bush v. Gore cases arising from the 2000 presidential election.
JEFFREY TOOBIN, NATIONAL LEGAL ANALYST AND AUTHOR, TO DISCUSS LAW, POLITICS AND THE MEDIA ON THURSDAY, JUNE 20

National legal analyst and author Jeffrey Toobin will discuss American law, politics and the media, while providing a unique look at the inner workings of the Supreme Court of the United States, as the convention's featured speaker on Thursday, June 20.

Toobin is a staff writer at The New Yorker and a senior legal analyst at CNN. The author of critically acclaimed best sellers, Toobin delved into the historical, political and personal inner workings of the Supreme Court and its justices in his book The Nine: Inside the Secret World of the Supreme Court. The Nine spent more than four months on the New York Times Best Seller list and was named one of the best books of the year by Time, Newsweek, Entertainment Weekly and the Economist. His newest book, The Oath: The Obama White House and the Supreme Court, a sequel to The Nine, is a gripping insider’s account of the momentous ideological war between the John Roberts Supreme Court and the Obama administration. The Oath was released in September, 2012.

Toobin is also the author of renowned bestseller Too Close to Call: The 36-Day Battle to Decide the 2000 Election, the definitive story of the Bush-Gore presidential recount and the basis for an HBO movie. With clarity, insight, humor and a deep understanding of the law, Toobin deconstructs the events, the players and the often-Byzantine intricacies of our judicial system, ending up with a remarkable account of one of the most significant periods in our nation’s history.

“THE HATFIELDS AND McCOYS: FROM FILING SUITS TO FIRING SHOTS” TO CLOSE OUT FEATURED CONVENTION PROGRAMMING ON FRIDAY, JUNE 21

The KBA will offer as its third day of featured programming “The Hatfields and McCoys: From Filing Suits to Firing Shots,” an in-depth discussion of the infamous family feud that captured the interest of the nation and cast long shadows on the reputation of an entire region of the country. The feud, centered along the Tug Fork of the Big Sandy River on the Kentucky-West Virginia border, spawned countless articles, studies, books, movies and television shows, but did these tell the true story, the complete story? Join our panel members on Friday, June 21, as they discuss the complicated story of the two families; the role that coal companies, timber and mining rights played in the feud; the Mahon v. Justice extradition case sparked by the feud that made it all the way to the Supreme Court of the United States; and the portrayal of the feud in movies and media. The panelists will include historical consultant and local expert Bill Richardson; constitutional law professor Paul Salamanca; author and history professor Altina Waller; and Darrell Fetty, producer of the recent award-winning History Channel miniseries, “Hatfields & McCoys.”

KBA MEMORIAL SERVICE TO BE HELD ON TUESDAY, JUNE 18

The Kentucky Bar Association will celebrate the lives and legacies of those KBA members who have passed since June 1, 2012, during its 22nd annual Memorial Service planned for 3:30 p.m., Tuesday, June 18, at the Cathedral of the Assumption, 433 South Fifth Street, Louisville.

While the memorial service in recent years has been held on Thursday during convention week, its move to Tuesday should encourage more participation and prevent a conflict for members who are busy attending CLE activities later in the week, according to KBA Convention Planning Committee Member Charlie Ricketts.

“It’s our hope that our members arriving in town just prior to the convention, and those who are situated locally, will join us for this beautiful, ecumenical service held in honor of our fellow Kentucky attorneys who have passed,” Ricketts said. “The service honors those individuals who have served for the most part of their entire lives in the pursuit of justice. The meting out and pursuit of justice is an honorable vocation, and by recognizing these individuals in a clerical atmosphere, we solemnify to the largest possible degree the closeness between the law we know as man and the law that is imposed upon us by the Almighty.”

Ricketts said the dignity of the event will be underscored by Supreme Court of Kentucky justices dressed in their robes. Additionally, members of the Kentucky Court of Appeals and local Circuit and District Court judges have been invited to attend. The service will feature various musical selections and will be officiated by representatives from different faiths. Family members of the deceased will receive personal invitations, but all KBA members are encouraged to attend.
I recently read an inspiring book humorously written by an attorney born and primarily raised in Kentucky. *You Can’t Teach Hungry*, by John Morgan, details a foundation for building a multi-million-dollar law firm by focusing on the fact that many modern law offices have no real plan! It is his observation that most lawyers do not run their practice like a business and in the book he gives suggestions for exercises, meetings, events and management tools that may be helpful to move to a more formal business strategy. He will have you laughing out loud with his many animal analogies and you will be startled with thought provoking self assessments as he convinces you that you should be building your law firm as The Greatest Show on Earth, not just a petting zoo!

The author outlines several concepts in the book and applies them to the concept of building a law firm. A summary of a few I found particularly interesting include: (1) Plant your tree today. The best day to plant a tree was 20 years ago, the next best day is today. (2) The parable of the Tortoise and the Hare: nothing is about today, everything is about tomorrow. This is a long race. (3) Knowing everything you know about your firm, would you hire you? Don’t bring a knife to a gun fight. (4) You are your own stock market. Your best investment is in yourself.

He also describes small details that are often overlooked by law firms that should be no-brainers, such as developing a system for intake of new cases, making sure your name is listed in phone directories of adjoining towns, making sure you have the right receptionist as the guardian of your firm, and other “back of the house” details that could be costing you millions.

Morgan also discusses common threads that define great companies that have collapsed, which include the inability of the leaders in the firm to recognize certain young lawyers as true superstars and instead always seeing that lawyer as an associate or a fledgling wannabe. On the other hand, he describes the importance of recognizing the cancer cells of a firm and effectively dealing with them before they infect the entire firm with their negativity, creating a corrosive environment.

Below is an excerpt from a phone interview I conducted with the author, John Morgan:

**JSW:** One of the exercises you suggest is rating every staff person and attorneys in groups of A-B-C, where the A’s must be kept at all costs and the C’s, who will be counter productive if allowed to continue, as they bring no value to the firm. What do you see as the main difference in A level and C level attorneys?

**JM:** The difference between the two levels of attorneys is work ethic. The harder you work, the better you will do. Even if you can’t outsmart someone, it is always possible to outwork them.

**JSW:** With that in mind, how do you recommend striking a work/life balance?

**JM:** If you work hard, you can have the nice things that are important for your personal life. I have noticed that young lawyers today, they want less material things in exchange for more time for their personal life. But more time for what? That’s what you have to decide on a personal basis. Do you need money and time for a vacation, more time to exercise during the day, more time to participate in your children’s school activities? How can you best use the time you have away from work?

**JSW:** You state that for each of us, our best investment is in ourselves. For an attorney five-10 years into their career, what do you suggest is an important self-investment?

**JM:** Spend time to make sure your core competence is better than everyone else. Create your own network of business so as to not be dependent on others. Most attorneys sit back and wait for momma bird to drop worms into their mouths. Figure out a way to grow up and get out of the nest before the hawk swoops in and gets you!

If you are interested in changing the culture of your law firm to be more productive, profitable and efficient, I encourage you to read what John Morgan has to say in his first book, *You Can’t Teach Hungry*. You will find that KNOWLEDGE IS POWER and you must SWIM UPSTREAM to reach dry land and the best, fertile soil!
HUGO’S TRUMPET

By Luke M. Milligan

Anthony Lewis’s book on the constitutional right to counsel, *Gideon’s Trumpet,* is rightly regarded as a fine and important work of non-fiction literature. Yet regrettably, Lewis’s narrative centers on a particular defendant (Clarence Gideon), and to a lesser extent, his able team of *pro bono* lawyers (led by Abe Fortas). With all respect to Lewis, it seems he confused the lead and supporting roles, for the hero of this particular constitutional story is undoubtedly Justice Hugo Black.

The Sixth Amendment, at first glance, reads clearly enough. It provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” But on reflection the text invites interpretation. The word “have” emerges as particularly troublesome. Does “have,” in this context, mean “be provided with,” or rather “not be denied?” Put differently: Does the Sixth Amendment recognize a right to the assistance of counsel? Or simply a right to the assistance of counsel? Setting aside its historical pedigree, the text can be read either way.

The Supreme Court resolved the ambiguity in 1938’s *Johnson v. Zerbst.* Justice Black, newly confirmed to the Court, authored the majority opinion identifying a constitutional right to appointed counsel. He wrote that the Sixth Amendment “withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives counsel.”

Black avoided any discussion of the Amendment’s original meaning (striking, in hindsight, for a justice who would eventually be regarded as the leading originalist of his generation). *Johnson* instead turned on “a realistic recognition” of an “obvious truth”: that the “average defendant does not have the professional legal skills to protect himself when brought before a tribunal with power to take his life or liberty.”

But bold constitutional interpretations do not always make for bold policy reform. *Johnson* was limited to federal prosecutions. And then, as today, the great majority of criminal cases are brought by state or local governments. In effect, Black’s liberal constitutional interpretation in *Johnson* was a necessary, but insufficient, condition for large-scale liberal policy reform concerning indigent criminal defendants. He understood that significant change would require, at some point in the near future, a second holding: that the right to appointed counsel had been “incorporated” through the Fourteenth Amendment to state and local governments.

The question of incorporation divided the Court. Black’s view, known as “total incorporation,” provided that the Bill of Rights applied in whole to state and local governments. The contending theory, “selective incorporation,” advanced by Justices Cardozo, Frankfurter, and Jackson, emphasized context: incorporation was to be confined to those rights essential to “fundamental fairness.”

Four years after *Johnson,* the Supreme Court voted 6-3 against incorporation of the right to appointed counsel. Employing “selective incorporation,” the majority in *Betts v. Brady* held that the right to counsel was not “fundamental.” It identified “a great diversity” in the founding-era laws regarding counsel and explained that state constitutions were limited to “the privilege of representation by counsel.” In dissent, Justice Black criticized the majority’s use of “selective incorporation.” He then argued that “selective incorporation,” while theoretically flawed, nonetheless required incorporation of the “fundamental” right to appointed counsel. Black explained that a practice “which subjects innocent men to increased dangers of conviction merely because of their poverty” cannot be “reconciled with common and fundamental ideas of fairness and right.” Anything less, he observed, defeats “the promise of our democratic society to provide equal justice under the law.”

In conclusion, Black pointed out that under the laws of most states, “no man shall be deprived of counsel merely because of his poverty.” To his opinion he attached an appendix listing state statutes, judicial opinions, and constitutional clauses providing for appointed counsel.

From Justice Black’s perspective, the correct reading of the Sixth Amendment in *Johnson* had been effectively neutralized by his colleagues’ flawed reading of the Fourteenth in *Betts.* This remained the state of constitutional law when, some 20 years later, Clarence Gideon was hauled into Florida state court on a felony burglary charge.

With neither a lawyer nor funds for one, Gideon asked that counsel be appointed to assist him at his trial. The court stenographer documented the following exchange:

**Trial Judge:** Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

**Gideon:** The United States Supreme Court says I’m entitled to be represented by counsel.

His request for appointed counsel refused, Gideon ultimately represented himself at trial (and, as the Supreme Court later put it, did “about as well as could be expected from a layman”). The jury found him guilty and he was sentenced to five years in state prison. While in prison Gideon drafted a habeas petition. He challenged his conviction and sentence on the ground that the Florida trial court’s refusal to appoint him counsel violated his rights.

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“guaranteed by the Constitution and Bill of Rights of the United States Government.” After habeas relief was denied by the Florida courts, Gideon petitioned the United States Supreme Court, which granted certiorari in order to give “another review” to Betts’s holding that the right to counsel was not “fundamental.”

Twenty-one years had passed since Justice Black lost the incorporation battle in Betts. But during that span of time much had changed. None of the six justices in the Betts majority remained on the Court. Moreover, state practices concerning indigent defendants had evolved. By the time Gideon was argued, 35 states recognized a right to appointment of counsel in even non-capital cases. And twenty-two state attorneys general signed an amicus brief stating that Betts “is at odds with the twentieth century notions of ordered liberty as it comprehends the right to counsel.”

Justice Black had little trouble finding a majority to overrule Betts. And to no one’s surprise, Chief Justice Warren assigned the opinion to Black.

Gideon holds that the Sixth Amendment right to appointed counsel is “fundamental” and thereby incorporated through the Fourteenth Amendment to state and local governments. Black’s majority opinion is relatively short, and, in terms of substance, more or less a restatement of the ideas he developed in his Johnson and Betts opinions. It offers three lines of reasoning. First, Betts made “an abrupt break” with the Court’s “well considered precedents.” Second, Betts denied “obvious truths” revealed through “reason and reflection” about the need for representation in modern criminal prosecutions. The claim that lawyers are “necessities, not luxuries,” wrote Black, is best demonstrated by the fact “[t]hat government hires lawyers to prosecute and defendants who have the money hire lawyers to defend.” Third, Betts failed to realize the nexus between the right to appointed counsel and the framers’ “noble ideal” of “fair trials before impartial tribunals.” Quoting the “moving words” of Justice Sutherland, Black wrote:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

The majority concluded that the right to appointed counsel applied to state and local governments. As a result, Gideon’s un-counseled Florida conviction was vacated (and several months later, on retrial with the assistance of counsel, Gideon was acquitted.)

When we reflect on the development of the right to appointed counsel, it seems a mistake to elevate the roles of Gideon or Fortas over that of Justice Black. Throughout his judicial career, Black remained firm in his belief that the right to appointed counsel was a constitutional law.

Black's majority opinion was to a The Fourteenth Amendment, in Pirson at 201, n. 1. Palko v. Connecticutt, 302 U.S. 319 (1937). To decide whether a right is “fundamental,” the Court explained that courts must consider “relevant data on the subject . . . afforded by constitutional and statutory provisions subsisting in the colonies and the states prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present case.” Betts, 316 U.S. at 465. Betts v. Brady, 316 U.S. 455 (1942).

Nonetheless the aspects of the right to counsel deemed necessary to due process had been broadened by the Court in the years between Betts and Gideon. See, e.g., Hamilton v. Alabama, 368 U.S. 52 (1961) (“When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted.”).


13. To assist Gideon in the preparation of his argument the Court appointed noted D.C. lawyer (and future Justice) Abe Fortas.


16. In order to keep his majority, Black compromised on his preferred methodology of “total incorporation.”

17. Black’s majority opinion was signed by Chief Justice Warren, and Justices Brennan, Stewart, White, and Goldberg. Justices Douglas, Clark, and Harlan each authored separate concurring opinions.


20. Lewis, supra at 201, n. 1.

ENDNOTES
2. U.S. CONST. amend. VI.
3. 304 U.S. 458 (1938).
4. Black was confirmed in 1937. He had most previously been the senior U.S. Senator from Alabama.
5. Cf. Betts v. Brady, 316 U.S. 455, 466 (1942) (“[It is evident that the [state] constitutional provisions . . . were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the State to provide counsel for a defendant.”).
7. The Fourteenth Amendment, in pertinent part, reads: “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.
8. See Adamson v. California, 332 U.S. 46, 72 (1947) (Black, J. dissenting) (“My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed, its submission and passage persuades me that one of the chief objects that the provisions of the Amendment’s first section, separately and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.”).
9. Palko v. Connecticut, 302 U.S. 319 (1937). To decide whether a right is “fundamental,” the Court explained that courts must consider “relevant data on the subject . . . afforded by constitutional and statutory provisions subsisting in the colonies and the states prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present case.” Betts, 316 U.S. at 465.
11. Nonetheless the aspects of the right to counsel deemed necessary to due process had been broadened by the Court in the years between Betts and Gideon. See, e.g., Hamilton v. Alabama, 368 U.S. 52 (1961) (“When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted.”).
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The History of the Right to Counsel for the Indigent Accused in Kentucky

By Robert C. Ewald, Daniel T. Goyette, Erwin W. Lewis, Edward C. Monahan

The tortuous path to providing compensated counsel for the indigent accused

When Kentucky entered the Union on June 1, 1792, the United States Constitution’s Sixth Amendment provided for the right to counsel. Kentucky’s first and subsequent Constitutions provided for the right to counsel in criminal proceedings.

Kentucky’s highest court has long recognized the importance and necessity of the right to counsel, stating in 1918 that it is “an ‘inherent and inalienable right’ that no defendant, whatever the crime charged against him, or however incensed the public may be on account of its commission, should be denied.”

Despite this recognition, the provision of counsel in the Commonwealth has proven problematic over the years.

A mid-20th century case, Gholson v. Commonwealth, illustrates the continuing problem of proceedings without counsel. In May 1947, 22-year old Ward Gholson was indicted in Pulaski County for carrying a concealed pistol. When Gholson was brought to trial in September 1947, he entered a plea of guilty without counsel. He was sentenced to two years in prison. In his unsuccessful motion for a new trial, he said he was not advised of his legal rights, did not have money to hire an attorney and was not assigned counsel by the court.

Overruling prior cases, the Court reversed Gholson’s conviction.

“In addition to legal rights and guarantees common justice demands that every person accused of a felony be given a fair and impartial trial. This would include the informing of an accused at the beginning of his trial by the judge relative to his legal rights and guarantees; and especially is this true where a plea of guilty is offered and entered. It is incumbent upon the trial judge to determine whether the waiver of a right to be represented by counsel is made ‘intelligently, competently, understandingly and voluntarily.’ In the absence of such a showing, as is revealed by the record in the case at bar, we think the accused should be granted a new trial.”

On the national level, the United States Supreme Court in Gideon v. Wainwright issued a constitutional mandate on March 18, 1963, to wit: a state seeking to take away a person’s liberty must provide an attorney to those accused persons too poor to hire their own in order to comply with the Sixth Amendment.
Amendment right to counsel. The right of one charged with crime to counsel was “deemed fundamental and essential to fair trials....”

Through the 1960’s, Kentucky’s system of providing counsel to the indigent accused primarily involved the appointment of an attorney by the presiding judge without benefit of any compensation or resources. Conscripted counsel had little or no ability to decline such appointments and, more often than not, he/she was not provided with adequate time, investigative support or experts necessary to be effective. These appointments fell disproportionately on the newer members of the bar who had little experience.

In January 1965, the Governor’s Conference on Bail and Right to Counsel was held in Louisville, Kentucky. Judge John S. Palmore addressed the conference on the issue of right to counsel, and he observed that, “counsel for the indigent in this state always have served by court appointment and without pay. It is hoped that the work of the Governor’s Task Force will bring legislation resulting in something better.”

Although repeatedly unsuccessful in convincing Kentucky’s highest Court that the judiciary should order payment for indigent defense counsel, Kentucky’s appointed attorneys did persuade Kentucky’s highest Court to directly encourage the General Assembly to provide a systematic solution for compensating attorneys who were being required by the courts to represent the indigent accused.

In March of 1966, in the case of Warner v. Commonwealth, the attorney involuntarily appointed to represent an indigent defendant argued that the appointment “constitutes a taking of the attorney’s property for which the government is required, under the Fifth Amendment to the United States Constitution, to compensate him.” The Court denied the claim saying that counsel was fulfilling the uncompensated responsibilities of being an officer of the court. However, the Court noted that:

“While we think there is merit in the proposition that assigned counsel should be compensated, we are not convinced that the point of time has arrived at which this Court should rule that the traditional concept of the duty of the attorney as an officer of the court to represent the indigent is no longer valid, and that the public treasury can be compelled by court order to make compensation. We think it is appropriate for the time to defer to legislative action.”

By 1967, Kentucky was “one of only six states which did not pay assigned counsel under any circumstances.” In January of 1967, in Jones v. Commonwealth, the Court denied the request of the appointed attorney for reimbursement of out-of-pocket expenses, continuing to “defer to legislative action.”

As it became evident that a systematic legislative resolution was not forthcoming, the Court’s language began to intensify. In March of 1968, in Commonwealth, Department of Corrections v. Burke, the Circuit Court awarded $1,500 to a Pike County appointed attorney to be paid out of a $100,000 fund appropriation in 1966-68 for public defenders, which contained no legislative direction for its use and expenditure. The Court refused to allow for payment of the fee, while continuing to defer to the legislature in what was clearly considered a serious matter that had merit. The Court expressed “the wish that other departments of government recognize this grave problem and take appropriate steps, as has been done in other states, to rectify the situation.”

In May of 1970, in the case of Jones v. Commonwealth, the Court again denied a fee to an appointed counsel, but warned about continued refusal to address this problem, stating that:

“since the providing of counsel for indigent defendants in crim-
nal prosecutions in the state courts is an obligation imposed on the state by the constitutions, it would appear that the payment of reasonable compensation to such counsel would be in the category of an essential governmental expense. If so, the lack of an appropriation would not be a bar to a judicial order for payment.”

The Court also warned about drastic consequences for public safety if the problems were not resolved.

“Both the federal and state constitutions prohibit the trial of an indigent defendant without counsel. This means that in a case being prosecuted in a Kentucky court the state either must see that the defendant is provided counsel or it cannot proceed with the prosecution. If it should be determined that attorneys cannot constitutionally be compelled to serve as counsel without compensation, in circumstances where the burden of such service will amount to a substantial deprivation of property, it would seem that the state would be left with the choice either of not prosecuting indigents or of providing compensation for appointed counsel.”

Some counties began to address the need for indigent defense counsel with programs funded by local lawyers, grants and the county government. Boyd and Fayette counties began such programs with part-time lawyers in the 1960’s. The first full-time public defender program was organized in Jefferson County in 1971.

In 1917, a Legal Aid Society was formed in Fayette County, the 52nd in the nation. It was primarily focused on civil cases but lent “its efforts in criminal cases where legal advice cannot be secured by the defendants.” On April 20, 1964, Fayette County Legal Aid formed to “promote and sustain legal aid to indigent clients.” Shelby Hurst, Thomas Bell and Eugene Mooney were the initial members of its first board of directors. The first executive directors were Scotty Baesler in 1970, followed by Robert Jackson and, in 1976, Clyde Simmons, who was executive director until fired “amid controversy over suits filed protesting the transfer of juveniles from the Kincaid Home to the county jail.” He was followed in 1977 by Tom Towles, who resigned in February 1978. Don Paris took over in the spring of 1978 until he was elected district court judge. Tom Clark was appointed acting director in 1978. The office became a full-time program in 1979. Joe Barbieri became director shortly thereafter and continued until 2007. In 2007, the office became a part of the DPA full-time system after Mayor Newberry and the Urban County Council decided to eliminate its financial contribution to the program.

With participation by county government and local industry, Boyd County began to provide public defender services in an organized way in the 1960’s. It became full-time in 1972. John Simpson, a Duke Law School graduate, was its first full-time director and served from November 1972 until 1978 when he ran for judge. Bill Mizell was the director from 1978 until 1999. He became an assistant county attorney and Brian Hewlett took over in 1999. Boyd County became a state-run office in 2007 with Brian Hewlett continuing as the directing attorney.

Prior to 1971, the Louisville Bar Association provided a roster of young lawyers to the criminal court judges for appointment in indigent criminal cases. On August 16, 1971, the Louisville and Jefferson County Public Defender Corporation was organized and formally incorporated by Robert C. Ewald and A. Wallace Grafton, Jr., Wyatt, Grafton & Sloss, along with Wallace H. Spalding, Jr., thereby creating the first full-time, fully staffed public defender office in the Commonwealth, which had further significance because it was in the state’s largest and busiest jurisdiction.

Col. Paul G. Tobin (U.S. Army, Ret.) was appointed as its first executive director in 1972 and served in that capacity until his retirement in 1982. Daniel T. Goyette joined the Louisville-
Jefferson County Public Defender’s Office on Oct. 15, 1974, and quickly became the chief trial attorney. He served as deputy chief public defender and associate director of the office from 1977-1982, and he has been its chief public defender and executive director since August 1982. The program has argued six cases before the Supreme Court of the United States.28

A group of attorneys appointed by the president of the Kenton County Bar Association, which included Bob Carran, Dick Sluckich, Don Stepner, Dick Nelson, Tom Smith and Al Hawes, met in April 1972 to set up the Kenton County Public Defender Program. Any member of the county bar could join the open roster system that Bob Carran administered for 23 years. A training program was instituted for new attorneys beginning with bench trials, then moving to misdemeanor jury trials and on to a felony trial with a co-counsel. The program began with 25 lawyers and reached 50 lawyers in the 1980’s. When the caseloads increased and the funding did not keep pace, the program was forced to reduce compensation to quarterly payments that were prorated with hourly rates routinely below $15 per hour, occasionally less than $10 an hour, and even as low as $6 an hour. Eventually, a full-time office was established in Kenton County in 1995.

Kentucky Bar Association’s efforts to advance a systematic statewide solution

As the statewide organization with responsibility for promoting the efficiency and improvement of the judicial system, the KBA has been and continues to be focused on ensuring the provision of counsel for indigents accused of crimes. The KBA actively sought to prevent attorneys from being forced to represent defendants without compensation. In 1968 the KBA Board of Governors recommended that the legislature “provide for a Public Defender at the appellate level to handle appeals of all indigent defendants” and “legislation be enacted to provide compensation for attorneys appointed to represent indigent defendants in criminal cases in trial courts.”29 The board was involved in legal challenges and in discussions with the Court of Appeals about the problems stemming from lack of indigent defense counsel. When legislation was passed, the board recommended individuals to the Governor for appointment as the first chief defender for the state.30 Through the years, the KBA has called for adequate funding and facilitated measures to advance the provision of counsel.

Judicial and legislative action brought about a statewide system in 1972

Senate Bill 261 passed the 1970 General Assembly. It would have created a Kentucky public defender system for cities of the first class. However, on March 30, 1970, Governor Louie Nunn vetoed SB 261 stating:

“By the authority vested in me by Section 88 of the Constitution of Kentucky, I hereby veto Senate Bill 261 because: Today, the institutions of law and justice require support and sacrifices perhaps as never before. This is not the time for those most concerned and involved with administering and advocating justice to be encouraged to abdicate a time-honored duty to defend the accused....”

On Sept. 22, 1972, in Bradshaw v. Ball,31 Kentucky’s highest court characterized the involuntary representation of indigents as an “intolerable condition” and held it was an unconstitutional taking of an attorney’s property – his service to the client – without compensation.

While the appeal in Bradshaw was pending, the 1972 General Assembly, at the request of Governor Wendell H. Ford, responded to the growing complaints of the bar, legal commentators32 and the admonitions of the Court, and created the Office of Public Defender, currently the Department of Public Advocacy (DPA), assigning it the responsibility to represent all indigent persons in Kentucky charged with or convicted of a crime. House Bill 461, sponsored by Representatives Kenton, Graves and Swinford, passed the House 60-18 on March 7, 1972, and the Senate 26-5 on March 14, 1972. Kentucky’s statewide defender system was born. The legislature allocated $1,287,000 for FY 73 and FY 74.33

Urgent need for significant change: This we shall have!

Announcing the establishment of the statewide public defender office and the appointment of Anthony Wilhoit as the first chief defender on Oct. 17, 1972 in Louisville, Governor Wendell Ford said,

“We know the unhappy result of the law’s failure to meet the just expectations of those governed by it. Law loses its stabilizing influence; at best the result is alienation and lack of trust of the legal system. At worst, there is unrest and violence. ...It has been said the quality of a nation’s civilization depends on the way it enforces its criminal laws. And there can be no civilized enforce-

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ment of criminal law without full legal assistance to the accused. This we shall have!"

Thus, in the fall of 1972, the Office of the Public Defender began to organize, almost from scratch, the public defender system. One method of delivering services was a so-called "assigned counsel" system in which judges appointed individual attorneys and those attorneys submitted bills for each case to the judge and then to the state office for approval, modification and payment. Another method involved a contract system in which the county, state defender and local lawyers entered into a contract for a fixed annual funding amount that was paid quarterly, irrespective of how many cases were assigned. Different funding formulas were attempted, e.g., using a funding rate of $14,000 per circuit judge; a $40 per capita rate; hourly rates for legal services at $20/hour for out-of-court work and $30/hour for in-court work, etc. Counties were asked to contribute funding and for many years some did.

Difficulties with the early methods of providing services soon became apparent. Funding was inadequate to meet the requirements and demands of the caseload. Money for assigned counsel was unpredictable, and the billings often exceeded the allotted amount. Budgeting was difficult at best because hourly payments to private attorneys were virtually impossible to forecast. Frequently in the late 1970's budget shortfalls were common. Contract systems were unsound, conflict-ridden and generally troubled as well. Money provided by the state was insufficient, and county fiscal courts, which had been envisioned in the statute as significant financial contributors to the system, failed to deliver or routinely fell short, with some notable exceptions. Further, attorneys were often inexperienced and untrained, turnover was high, and supervision was almost nonexistent. With 120 counties, the public defender system was mostly a patchwork of inconsistent quality. 35

Many at the local level believed the criminal justice system costs were state responsibilities. Gradually, counties contributed less and less money, and in the rural counties more and more local lawyers were unwilling to work for what amounted to meagerly subsidized pro bono compensation. As a result, more counties defaulted to a full-time office that was organized and run by the state office. In the late 1970's, DPA received grants from the Law Enforcement Assistance Administration to provide for additional full-time offices in the Appalachian counties.

In 1982, the Public Advocacy Commission, the equivalent of the state public defender board of directors, was created as a primary way to advance the political and professional independence of the program consistent with the Code of Professional Responsibility and the ABA standards. Under KRS Chapter 31, it was given responsibility for providing the names of three qualified attorneys to the Governor for appointment to the position of public advocate and for reviewing of the "performance of the public advocacy system." That same year the assigned counsel method of delivery was abolished, leaving only the contract and full-time methods for providing trial level counsel. Upon review of the challenges facing the system, the Public Advocacy Commission in 1990 established as one of its primary goals the complete implementation of the full-time system in Kentucky. Funding had been provided by the General Assembly in 1996 for Commonwealth's Attorneys to convert to full-time. In 1998, funding was provided to open five new DPA offices. Additional funding in 2000 and 2004 allowed for all 120 counties to be served by a full-time defender office and, with the opening of the Barren County office in 2005, the full-time system was completely implemented throughout the state. The impact and results of this effort cannot be overstated.

Fulfillment of the constitutional mandate awaits

Ironically, while the establishment of the statewide public defender system was a significant and important achievement, it also has produced a certain incongruity and a disquieting concern. On the one hand, Kentucky has a statewide defender program with a strong statutory structure that meets many of the national standards for the provision of counsel for indigents. It has consistently delivered effective defense services at trial and post-trial, in the process avoiding and correcting many wrongful convictions. It provides central coordination and planning for evidence-based allocation of resources according to needs, it is efficient and responsive to clients and courts alike, it operates a nationally acclaimed training and education program, and it is staffed by many who are recognized experts in the field of criminal defense at all levels. Yet, on the other hand, the statewide defender program has been plagued throughout its existence by chronic and pervasive funding problems and burdened with unethical caseloads. With 31 defender trial offices competing against 120 County Attorney offices and 57 Commonwealth Attorney offices, there are significant inequities, inefficiencies and logistical challenges that persist.

Defender resources remain acutely inadequate and insufficient. The defender program provided representation in 161,287 cases in Fiscal Year 2012. This means that public defender trial caseloads in FY12 averaged 474 newly opened cases per attorney at a funding level of $212 per trial case. Defenders contracted 3,937 cases to private lawyers at an average of $341 per case. The quality of representation remains at risk with such inadequate funding and deficient resources.

Lawyers make a difference

Lawyers make a difference in our American way of life, a way of life that evolved and developed from our revolutionary abhorrence of tyranny and devotion to liberty. As we celebrate the 50th anniversary of Gideon, and Kentucky’s 40th year of complying with its mandate by providing counsel to the indigent accused through its statewide public defender program, there is much more that must be done to fulfill the federal and state constitutional requirements that all citizens charged with a crime have a right to counsel in our Commonwealth, no matter what their financial status. Common justice demands as much...
ENDNOTES
1. “History...provides a terrain for moral contemplation. Studying the stories of individuals and situations in the past allows a student of history to test his or her own moral sense, to hone it against some of the real complexities individuals have faced in difficult settings. People who have weathered adversity not just in some work of fiction, but in real, historical circumstances can provide inspiration.” Peter N. Stearns, American Historical Association.
2. “In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence.” (Ratified Dec. 15, 1791).
3. “That in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel....” Article XI, Section 10, First Kentucky Constitution ratified April 19, 1792.
4. “In all criminal prosecutions the accused has the right to be heard by himself and counsel....” Section 11, Fourth Kentucky Constitution ratified August 3, 1891.
5. McDaniel v. Commonwealth, 205 S.W. 915, 919 (1918). “The Constitution of the state, in section 11, declares in part that, ‘in all criminal prosecutions the accused has the right to be heard by himself and counsel,’ and nobody will dispute that under our form of government the right of the accused in every case to be heard by himself and counsel is, as provided in section 1 of the Constitution, an ‘inherent and inalienable right’ that no defendant, whatever the crime charged against him, or however incensed the public may be on account of its commission, should be denied. Its denial would be destructive of the majesty of the law and create in the minds of good citizens and right-thinking people a fear that courts were not courageous or powerful enough to protect from mob violence persons charged with crime, when everybody ought to feel and know that courts are both courageous and powerful enough, when their courage and power is put to the test, to withstand the demand of inflamed and angry citizens for the life of an accused, and to give him that trial in form as well as substance which every citizen is entitled to in a court of justice.”
6. 212 S.W.2d 537 (Ky 1948).
7. Emphasis added, 212 S.W.2d at 540.
9. Id. at 344.
11. 400 S.W.2d 209 (KY 1966).
12. Id. at 211.
13. Id. at 211-12.
14. David Emerson, Recent Cases, 55 KY L. J. 703, 709 (1967). The other states were Louisiana, Missouri, South Carolina, Tennessee and Utah.
15. 411 S.W.2d 37 (KY 1967).
16. Id. at 38.
17. 426 S.W.2d 449 (KY 1968).
18. “We are cognizant of the increasing demand made upon the members of the legal profession to furnish constitutionally guaranteed counsel services to indigent persons charged with crimes. It is contended by appellee that since society is required to furnish these services, society should assume the responsibility of paying adequate compensation for them. We cannot refute this proposition. It is only fair and just. The difficulty is that there exists at the present time no authorized procedure for paying such claims, nor a fund out of which they may be paid.” Id. at 450.
19. Id. at 451.
20. 457 S.W.2d 627 (Ky. 1970).
21. Id. at 632.
22. Id. 631-32.
25. Fayette County Legal Aid has seen many litigators and leaders of note, including: Herb Ponder, Fred Saunders, Glen Bagby, Hon. Maria Ransdell, Hon. Ernesto Scorsone, Margret Kannensohn, Kathy Stein, Russ Baldani, Ray Debolt, Joe Bouvier, Larry Roberts, Tom Clark. Sam Milner, Lyle Robey, and Julius Rather, and Hon. James Keller served as the president of the Corporation. Bo Fugazzi served as chair of Fayette County Legal Aid.

26. Simpson was a former assistant Commonwealth’s attorney and county probation and parole officer. He was appointed by the County Fiscal Court on a 2-2 vote with the County-Judge Executive’s vote for him breaking the tie. “Boyd County was the first county in the Commonwealth to enact an ordinance calling for appointment of a public defender under a new system enacted earlier this year by the state’s General Assembly.” The Ashland Independent, Nov. 22, 1972 at p. 1.

27. Its initial Board of Directors consisted of Robert C. Ewald, A. Wallace Grafton, Jr., Hon. Michael O. McDonald, Matthew B.J. Quinn, Jr., John T. Fowler, J. Bruce Miller, and Daniel D. Briscoe.


29. This was on motion of Mr. Eblen and Mr. Ebert. KBA Board of Governors Minutes, Feb. 7, 1968.

30. The board created a Committee “to confer with the Court of Appeals relating to the Jones case. KBA Board of Governors Minutes, Nov. 11-12, 1970. The board approved costs in a case seeking compensation. KBA Board of Governors Minutes, Jan. 15-16, 1971. The board approved payment of “all bills in connection with the action” against the state treasurer for compliance the Franklin Circuit Court’s order of attorney fees in Bradshaw. KBA Board of Governors Minutes, May 14-15, 1971. The board authorized the KBA Executive Director to explore seeking “funds from the Kentucky Crime Commission to maintain a pilot program…” KBA Board of Governors Minutes, July 30-31, 1971.

The board noted that a public defender bill passed and the board was to submit 5 names to the Governor for the first chief defender and the KBA President appointed a “committee to screen applicants for the position.” KBA Board of Governors Minutes, March 24-25, 1972. The board authorized a $1,000 stipend to Carl H. Ebert for his representation in Bradshaw. KBA Board of Governors Minutes, July 14-15, 1972. In the fall 1972 the board submitted 5 names to the Governor for head of the office of public defender. William E. Rummage was KBA President. KBA Board of Governors Minutes, Sept. 15, 1972.

31. 487 S.W.2d 294 (Ky. 1972). The plaintiffs seeking compensation for their services were Louis A. Ball, who later became Campbell County Commonwealth’s Attorney; Raymond E. Lape, who later was elected Kenton Circuit Court Judge; John A. Diskin, who later served as a Campbell County Circuit Court Judge; and Kevin Quill, who became an assistant Commonwealth’s attorney. They were represented by Carl H. Ebert. “Through his volunteer efforts, he did away with pro bono representation by giving pro bono representation.” Louis A. Ball, Ball v. Bradshaw: 20 Years Later, The Advocate, Vol. 14, No. 5 (Oct. 1992) at p. 6. Ball also noted that only a handful of young attorneys were being appointed and it impaired their ability to make a living. “In 1970 it was a shame that the representation of the accused often fell to naïve and inexperienced lawyers. Unfortunately, by the time experience and expertise was acquired, the lawyers moved...
on and the situation repeated itself.” Id.

32. B. Deatherage, Comment, The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression, 60 Ky. L.J. 710, 722 (1972) (The social costs of the present system should also be considered. An indigent defendant...cannot be expected to feel that justice has been administered when his newly licensed, court-appointed, uncompensated attorney attempts to persuade him to plead guilty because the attorney doesn’t want to bear the cost of a full trial.”); Jennings T. Bird, The Representation of Indigent Criminal Defendants in Kentucky, 53 Ky. J. 512 (1965); Daniel G. Grover, Gideon’s Trumpet: Taps for an Antiquated System? A Proposal for Kentucky, 54 Ky. J. 527, 533 (1966) (“Evaluation of the current system of representation for indigents reveals an urgent need for substantial change..... This result is even clearer after a review of the unanimous criticism of the bench and bar of the state.”)

33. “The Court of Appeals has ruled several times that lawyers representing indigents are not entitled as a matter of right to compensation from either local or state authorities. One of the purposes of the Act was to eliminate this inequity.” Robert C. Ewald, A. Wallace Grafton, Jr., The Kentucky Public Defender System, 36 Ky.S.B.J. No. 3, at 41.


35. An extensive review of the early development of the statewide defender program is found in Ernie Lewis, DPA Plan for Increase in Full-Time Offices, The Advocate, Vol. 19, No. 5 (September 1997) at pp.4-11.

36. The 12 person Kentucky Public Advocacy Commission consists of a representative from each of the three Kentucky law schools, three members appointed by the Gover-

37. The existence and function of the Commission helps preserve the independence of DPA as recommended and deemed essential by the American Bar Association as set forth in the ABA Ten Principles of a Public Defense Delivery System (February 2002): Principle #1: “The public defense function, including the selection, funding, and payment of defense counsel, is independent.”


40. Kentucky public defenders have influenced the development of constitutional law in 22 U.S. Supreme Court decisions and grants of writs from 1978 – 2012. Defenders have been responsible for hundreds upon hundreds of reversals in cases in the state appellate courts. Since 2000, 14 people have been proven to have been wrongfully convicted of serious felony offenses in Kentucky, the most recent being Kerry Porter, who was exonerated in December 2011 after 14 years in prison. The wrongfully convicted individuals served an average of 8 years in prison before their convictions were overturned and they were released from custody.

41. In 2008, the Department of Public Advocacy’s funding was reduced by millions of dollars. Consequently, a declaratory judgment action was filed to address the inability of DPA to continue providing representation to the tens of thousands of clients appointed public defenders in courts throughout the state. After extensive litigation, the Franklin Circuit Court dismissed the action and the Kentucky Supreme Court eventually dismissed the appeal as moot because the executive branch and the General Assembly allocated additional funding totaling $3.7 million so that services and operations could continue for the remainder of the fiscal year. For an extended discussion see: Norman Lefstein, Securing Reasonable Caseloads: Ethics and Law ion Public Defense at pp. 176-78.

42. DPA Fiscal Year 2012 Annual Litigation Report at pp. 3, 14.
The Cost of Representation Compared to the Cost of Incarceration:
How Defense Lawyers Reduce the Costs of Running the Criminal Justice System

By John P. Gross and Jerry J. Cox

Fifty years ago the United States Supreme Court recognized the “obvious truth” that a lawyer is a necessity and not a luxury when facing a criminal charge. While the need for the able assistance of counsel may have been obvious to the Court, legislators haven’t always seen things quite so clearly. The reluctance to adequately fund indigent defense is undoubtedly based on the belief that spending money on criminal defense is not politically expedient, particularly when defendants are perceived as mostly guilty. Providing defense attorneys with more resources is therefore seen as a waste of money; attorneys will only delay the inevitable conviction and will make the criminal justice system less efficient. Indigent defense providers have typically responded to this sort of prejudice by pointing out that every defendant is presumed to be innocent and is entitled to due process of law. While that is certainly true, those arguments too often fall on deaf ears.

Advocates for increased funding for criminal defense now have a growing body of empirical research that supports the argument the adequately funding of indigent criminal defense results in a more efficient justice system. The criminal justice system is just that: a system. When one component of that system is not well maintained, the entire system functions less efficiently. In addition to arguing that able representation provides an immeasurable benefit to a defendant and the quality of justice he receives in our courts, indigent defense providers are now communicating the very real fact that good representation of indigent criminal defendants provides a measurable cost savings to the entire system. The inadequate funding for indigent defense not only erodes the public trust, but results in wrongful convictions which in turn, contribute to higher incarceration rates. Wrongful convictions also increase the number of post-conviction appeals and attacks on convictions. Research suggests that inadequate funding for indigent defense ultimately results in higher incarceration costs and higher appellate costs. Arising from the higher rates of incarceration and the continuation of post-conviction appellate attacks. This research suggests that underfunding indigent defense does not actually save the state money; rather, it increases the burden on the taxpayers.

As one Harvard University researcher concludes, “When the system includes well-trained public defenders cases move faster, helping the court manage growing caseloads, and the system tends to generate and implement innovative programs.” Adequately resourced defense attorneys increase the effectiveness of this system. The interconnectedness of our criminal justice system requires that every person operating within that system have access to adequate resources in order to ensure a just result.

With that in mind, there is a growing recognition of the inverse correlation between taxpayer spending on indigent defense and incarceration costs. A Justice Policy Institute report entitled “System Overload: The Costs of Under-Resourcing Public Defense” identifies five ways in which the poor quality of public defense can increase incarceration costs: 1) more pretrial detention for people who do not need it; 2) increased pressure to plead guilty leading to wrongful convictions; 3) wrongful convictions and other errors at trial; 4) excessive and inappropriate sentences; and 5) increased barriers to reentry. The choice for policy makers is a simple one: either spend the money necessary to ensure that every defendant has an adequate defense, or continue to pay the costs associated with a criminal justice system that incarcerates 1 out of every 100 adults in the country.

The Sooner Able Counsel is Provided, the Better

Several studies demonstrate the importance of providing able counsel at a defendant’s first appearance before a judicial officer. Many jurisdictions are seeking to implement evidence-based practices when making decisions about pretrial release. In the report “Philadelphia’s Crowded, Costly Jails: The Search for Safe Solutions,” it is estimated that the City of Philadelphia spends seven cents out of every tax dollar on holding people in its jail. In an effort to reduce the overall jail population, the report makes recommendations which include expanding options for diverting cases away from the courts and creating a broader range of pretrial services.

A 2010 study, “Baltimore Behind Bars: How to Reduce the Jail Population, Save Money and Improve Public Safety,” concludes that it costs $100 a day to hold a person in custody in the Baltimore Detention Center but that providing pretrial release services to defendants would cost on average $2.50 per person per day.
“Do Lawyers Really Matter? The Empirical and Legal Case for Attorneys at Bail” studies the effect that lawyers have on pretrial release decisions in Baltimore, Md. The study concludes that having adequately prepared and resourced defense attorneys at the first appearance results in defendants being released on their own recognizance twice as often than if they were unrepresented, and bail being reduced four times as often for the remaining defendants. This translates into a 20 percent reduction in the average amount of time spent in jail per defendant. Having representation at the initial appearance means that fewer defendants will be held in custody unnecessarily and that will help reduce the high costs of incarceration. The end result is that whatever it might cost to have defense counsel present at a first appearance, in the end, counsel pays their own way through lowered incarceration costs. Defense counsel is in a position to provide the court with the type of information that will lead to more rational conditions of release or detention and to advocate for the use of less costly pretrial release services.

An important corollary discovered in a study released in 2012 by the New York City Criminal Justice Agency entitled “A Decade of Bail Research in New York City,” is that defendants who are incarcerated pre-trial have worse case outcomes than those defendants who are allowed to remain at liberty. The study found that defendants who are detained pretrial are more likely to be convicted; if convicted, they are more likely to be sentenced to incarceration; and if incarcerated, their sentences are likely to be longer. This suggests that the decision to detain pretrial not only imposes greater incarceration costs but also results in higher post-conviction incarceration costs due to the increase in the rates of conviction and the increase in the average length of sentence as compared to those defendants not incarcerated prior to trial.

There is yet another reason that defense counsel needs to be involved from the moment a defendant is charged with a crime. Defense counsel needs to conduct an immediate investigation into the facts of the case and into the background of the defendant. As time passes, witnesses become more difficult to locate and their memories fade. Physical evidence may be lost or begin to deteriorate. Defense counsel with access to adequate resources to begin the investigation process should be involved from the inception of the case for both cost savings and to maintain the due process rights of defendants.

Better to get it Right the First Time

Underfunding indigent defense inevitably leads to excessive caseloads for defense attorneys. Just like everyone else, when defense attorneys do not have the time or resources necessary to do their job properly, mistakes will be made. Taxpayers pay a price for these mistakes. A 2011 report by the Better Government Association and the Center on Wrongful Convictions at Northwestern University, entitled “A Tale of Lives
Lost, Tax Dollars Wasted and Justice Denied,” concludes that wrongful convictions in 85 Illinois cases cost taxpayers $214 million.10 Similarly, “Faces of Failing Public Defense Systems: Portraits of Michigan’s Constitutional Crisis,” a report prepared by the ACLU in 2011, documents the exoneration of 13 defendants who were convicted because of attorney errors directly attributed to the inadequate funding of Michigan’s county based indigent defense system, which ended up costing taxpayers $13 million.11 The director of Michigan’s State Appellate Defender Office estimates that over a period of five years the underfunding of indigent defense led to nearly $70 million in unnecessary incarceration costs, which does not take into account the additional costs associated with appellate litigation—the cost of appellate defense counsel, the cost of prosecutors, and the cost of appellate courts.12

The Kentucky DPA’s Post Trial Division has identified 14 wrongful convictions where the defendants collectively spent approximately 112 years in jail before having their convictions overturned.13 For the defendants who have been wrongly convicted, it is impossible to put a price on those lost years, but there is a very real price to be paid by taxpayers. A Vera Institute of Justice Report entitled “The Price of Prisons: What Incarceration Costs Taxpayers” estimates that it currently costs Kentucky $14,603 a year to house an inmate.14

Our adversarial system breaks down when the defense is underfunded; it becomes not only inaccurate but inefficient. Attorney General Eric Holder has noted the consequences of underfunding public defense: “When defendants fail to receive competent legal representation, their cases are vulnerable to costly mistakes that can take a long time to correct. Lawyers on both sides can spend years dealing with appeals arising from technical infractions and procedural errors. When that happens, no one wins.”15

Finding Cheaper and Safer Options
The active participation of adequately resourced defense counsel from the inception of a case ensures that defendants will have access to diversion programs, which are typically much cheaper and more effective at reducing recidivism than incarceration. Defense attorneys are in a unique position to help identify defendants who have substance abuse issues or mental health problems. A national study of people in jails across the country found that 68 percent of people in jails suffered from dependence or abuse of alcohol or drugs.16 According to a report from the Vera Institute of Justice Substance Abuse and Mental Health Program, 33 percent of adult District of Columbia jail residents had some indication of a mental health need, but criminal justice agencies failed to identify this need 46 percent of the time.17 Early intervention in a defendant’s case increases the likelihood that defense attorneys will be able to identify defendants with sub-

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stance abuse issues or mental health problems and can begin to seek out appropriate alternatives and treatment options for them. Once again, defense counsel is in a position to provide the court with the type of information that will lead to more rational conditions of release or confinement pretrial, as well as conditions of release or confinement post-conviction, with resulting cost savings to the overall justice system.

The Real Costs of Incarceration

The studies referenced above identify the short-term savings associated with a reduction in incarceration rates; however there is also evidence to suggest that there are long-term financial benefits associated with such a reduction. A 2010 study by the Pew Center on the states entitled “Collateral Costs: Incarcerations Effect on Economic Mobility” finds that incarceration carries significant and enduring economic repercussions. Former inmates work fewer weeks per year, earn less money and have limited upward mobility compared to those not formerly incarcerated. Past incarceration is found to reduce subsequent wages by 11 percent, cut annual employment by nine weeks and reduce yearly earnings by 40 percent.

The Texas Criminal Justice Coalition’s 2010 report “Costly Confinement & Sensible Solutions: Jail Overcrowding in Texas” concludes that long waits in jail lead to a loss of employment and housing for defendants which contribute to recidivism. The report emphasizes the important role counsel plays in helping a defendant navigate the criminal justice system and calls for representation prior to a defendant’s first court appearance or plea negotiations. It also concludes that public defender programs not only increase the quality of indigent defense services but that they also decrease societal costs. Defense attorneys have the ability to significantly reduce the number of days between an individual’s arrest and trial, which reduces the unnecessary and harmful collateral consequences of job and housing loss from incarceration, promotes family stability and reduces overcrowding and substantial jail costs.

It is important to note that while there are certainly costs associated with incarceration, for both the defendant and the state, there are also the costs imposed by a conviction, even a conviction that does not result in incarceration. A survey of statutory collateral consequences of conviction in Kentucky identifies adverse consequences in the following areas: civil rights, civil liberties, parental rights, public offices and officials, professional or occupational licenses, employment and employment benefits, applications and disclosures, licenses and permits, penalty enhancements, sex offender registration, contractual relations and, lastly, disqualification as an heir or beneficiary. The presence of counsel is a necessity even in those cases where a judge isn’t considering imposing a sentence of incarceration.

Adequate Resources for Criminal Defense Reduces Costs

Ultimately, the early appointment of adequately resourced defense counsel benefits not just the defendant but the entire criminal justice system. The involvement of the attorney leads to a more reasoned bail determination that will reduce the costs of pretrial detention. It allows the attorney to identify the defendant who will benefit from alternatives to incarceration, such as drug or alcohol treatment programs, which are less costly and more effective at reducing recidivism than incarceration. It also permits the defense to conduct a prompt investigation of the case, which helps the defendant make an informed decision regarding whether or not to enter into a plea bargain. This in turn leads to greater efficiency which reduces court costs. It allows for the preservation of evidence, which enables the defendant to prepare and present an adequate defense, thereby increasing the accuracy of the trial outcome and reducing the possibility that an innocent defendant will be incarcerated. Defense counsel with adequate resources make fewer errors and thus, reduce the number and length of the appellate process after conviction.

The reality is defense attorneys reduce incarceration costs, increase efficiency and increase the accuracy and reliability of our criminal justice system. Defendants benefit, society benefits and even the victims of crime benefit by having their complaints resolved quickly and accurately. As Kentucky’s highest Court has stated: “It is in the public interest that the administration of criminal justice proceeds fairly, impartially, expeditiously and efficiently.”

There can be no doubt that declining revenues force states to make cuts in essential services. When faced with these harsh economic realities, the question that is usually posed by legislators to advocates for the right to counsel is: “How can we afford to give more money to lawyers for poor people?” Based on the empirical evidence, the simple answer is: “How can we afford not to?”

Jerry J. Cox is an attorney in Mount Vernon, Ky. Cox serves as chair and has been a member of the Public Advocacy Commission, the governing board for Kentucky’s statewide public defender program, since 1993 and has been its chair since 2010. Cox did contract public defender work in Rockcastle County in the 1970s. He has trained extensively for DPA at its annual conference and at its Trial Practice Institute. He is National Association of Criminal Defense Lawyers president-elect and a past president of the Kentucky Association of Criminal Defense Lawyers. Cox has been practicing criminal defense law for over 40 years, and is a 1968 graduate of the University of Kentucky College of Law and a 1965 graduate of Berea College. He is a member of the American and Kentucky Bar associations and has served on the KBA’s Unauthorized Practice of Law Committee (1993-2010, chair 2007-2010), Criminal Rules Committee (1995-2007), Legislative Committee (1999-2005). He also served on the Kentucky Criminal Justice Council’s Drug Strategy Committee (1999), and the Kentucky Bar Foundation (president, 2002).
ENDNOTES


50TH ANNIVERSARY OF GIDEON V. WAINWRIGHT

Lawyers are Essential in Making “Justice For All” A Reality

By Chief Justice John D. Minton, Jr.

Counsel for indigent criminal defendants

Fifty years ago, the United States Supreme Court concluded in Gideon v. Wainwright that, “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”

As celebrated in this edition of the Bench & Bar and similarly commemorated in state bar journals across the nation in 2013, the Gideon decision establishing the constitutional right to counsel has affected more persons in our criminal justice system than any other decision of the Supreme Court.

The “obvious truth” recognized federally by Gideon found expression in our state law from the founding of the Commonwealth. Former Chief Justice of Kentucky John Palmore noted in a January 1965 address to the Governor’s Conference on Bail and Right to Counsel that “[t]he bill of rights in each of our four constitutions, beginning in 1792, has provided that ‘in all criminal prosecutions the accused has the right to be heard by himself and counsel,’ and from time immemorial our courts have given this provision the same meaning the Supreme Court gives to the parallel guaranty in the Sixth Amendment of the federal constitution.”

The “obvious truth” recognized federally by Gideon found expression in our state law from the founding of the Commonwealth. Former Chief Justice of Kentucky John Palmore noted in a January 1965 address to the Governor’s Conference on Bail and Right to Counsel that “[t]he bill of rights in each of our four constitutions, beginning in 1792, has provided that ‘in all criminal prosecutions the accused has the right to be heard by himself and counsel,’ and from time immemorial our courts have given this provision the same meaning the Supreme Court gives to the parallel guaranty in the Sixth Amendment of the federal constitution.”

The Kentucky Court of Appeals – Kentucky’s highest court at the time – recognized the right to counsel for indigent criminal defendants in the 1908 decision of Williams v. Commonwealth, noting that “[i]t has been the custom of the courts of this state . . . when a prisoner is unable to employ counsel, for the court to designate someone to defend him, and it is the duty of such counsel, which he owes to his profes-

Counsel for indigent criminal defendants

sion, when so designated, not to withhold his assistance nor spare his best exertions in the defense . . . .”

Despite this early recognition of the constitutional right to counsel, a statewide public defender system was not created in Kentucky until 1972 when the Kentucky General Assembly enacted House Bill 461. Before that time, some counties contracted with local lawyers to provide indigent defense in circuit court. Frequently, the circuit judge appointed members of the local bar to represent indigent defendants in criminal cases, regardless of the lawyer’s experience, ability or knowledge of criminal law. And there was no provision for compensation or reimbursement of expenses in these cases, so appointed lawyers bore the burden of their representation.

Shortly after passage of House Bill 461, Governor Wendell Ford announced the appointment of Anthony Wilhoit as the state’s first public advocate. And the Kentucky Court of Appeals rendered Bradshaw v. Ball, which declared the representation of indigent criminal defendants without compensation or reimbursement of expenses to be a “substantial deprivation of property and constitutionally infirm” and required the state to “furnish the indigent a competent attorney whose service does not unconstitutionally deprive him of his property without just compensation.”

In the half-century since Gideon, Kentucky has taken great strides to implement a statewide public defender system that provides competent, professional representation to indigent defendants. This system mirrors our statewide unified court system and affords consistency across the Commonwealth with respect to the delivery of services in criminal matters. The provision of quality legal service to indigent defendants is imperative to the proper functioning of the courts and to achieving just and reliable results in criminal cases.

Legal Services in Civil and Criminal Cases

During the past several years, the Kentucky Bar Association has focused efforts on increasing pro bono participation among its members through the Kentucky Volunteer Lawyers Program. And the Kentucky Supreme Court enhanced that effort with the creation of the Kentucky Access to Justice Commission in 2010. The 2012 KBA Convention marked the kick-off of the “Power of One – How a Lawyer Can Change a Life” campaign, the goal of which is “to improve access to the judicial system for low-income Kentuckians with civil legal needs by increasing the number of volunteer lawyers and cultivating a culture among the bar that encourages pro bono work.”
In a 1961 speech to the Massachusetts legislature, President-Elect John F. Kennedy alluded to a well-known parable of faithful servanthood when he stated, “For of those to whom much is given, much is required.” As lawyers, we enjoy the great privilege of practicing law. And we owe it to the public, and our profession, to, as President John Adams said, “assist the helpless and friendless in a worthy cause . . . to devote [our] skill and energy to the plight of another, without the promise of a material reward for oneself . . . .”

The message of the Power of One campaign is that each Kentucky lawyer has the power to change the life of a fellow Kentuckian by providing pro bono services to the most underserved and economically challenged members of our communities. And, it should be noted, Kentucky lawyers also hold the power to affect the lives of indigent defendants in criminal cases by participating in assigned counsel programs that assist the Department of Public Advocacy and the Louisville-Jefferson County Public Defender Corporation with conflict cases at the trial and appellate levels for significantly reduced compensation.

Although the Power of One campaign focuses on pro bono participation in civil cases, there is a constant and increasing need for lawyers to volunteer to take conflict cases in criminal matters. Across the state, public defenders are seeking lawyers to represent clients in conflict situations in district and circuit court and to represent clients in appeals of criminal convictions to the Kentucky Court of Appeals and the Supreme Court of Kentucky.

Lawyers who volunteer to accept conflict cases involving indigent defendants for the modest compensation provided by defender offices have the opportunity to make a significant difference in the lives of people in their communities and to ensure the efficient operation of the criminal justice system. The DPA provides training and resources to lawyers who agree to do conflict work in criminal matters and, perhaps most importantly, malpractice coverage in those cases in which they accept conflict appointments.

As we mark the 50th anniversary of the Gideon decision, we should reflect on the steps that have been taken across the country and in our Commonwealth to provide meaningful counsel to indigent defendants in criminal matters. And we should be proud of the statewide public defender services provided by the Kentucky Department of Public Advocacy and the Louisville-Jefferson County Public Defender Corporation.

I encourage all of you to consider joining the conflict panel of the defender office in your jurisdiction to ensure that the “obvious truth” of Gideon is real in Kentucky’s courts.

ENDNOTES
2. Id. at 344.
4. 110 S.W. 339 (Ky. 1908).
5. Id. at 340.
6. The Louisville-Jefferson County Public Defender Corporation was organized and incorporated in 1971.
7. 487 S.W.2d 294 (Ky. 1972).
8. Id. at 298.
12. Letter from John Adams to Jonathan Sewall, 1759.
The information and security game keeps changing for lawyers and their clients. One aspect of this is the growing asset-base of our clients in information itself. Information as an asset may be from the value of rights in trade secrets and copyright, the competitive position offered from certain knowledge and the ability to provide service to their clients and customers better than others. Another is in the ever more essential information technology used to speed and direct commerce today, something that needs to work well day in and day out. These are protected by a variety of practices and technologies. The effectiveness of those protections may not be as good as they should be.

PriceWaterhouseCooper’s recent survey of information security indicates industry is satisfied with these protective measures and, in fact, many deem themselves leaders in this. Yet from their detailed responses far fewer actually had an overall security strategy, focused executive control, effectiveness reviews and comprehension of security events of the past year. In other words, they were confident of their InfoSec systems without evidence to support it.

Related to this was confidence by a strong majority that their organizations had a “culture of security.” Yet, again, far fewer actually had practices in place that would effectively implement that culture. Most still did not require third-party vendors to report breaches affecting their data nor comply with their privacy policies. Less than half said they used only the customer data they needed, creating unnecessary target risk.

Even wonder why so many people want your Social Security number? Ever ask why? The PWC survey found, even in that general confidence, an emerging trend downward in system confidence, what they styled as “A hint of doubt…” The number of security incidents increased from the previous year though the financial losses from them declined. But there was no consistency in measuring and attribution for losses, including loss of good will and loss of business. This was matched by an overall decline in the use of security technologies and polices, perhaps due to economic constraints.

Lastly, concern with the security of mobile devices, cloud services and social media was growing, but less than half had security strategies for any of these.

It is as if only half of the business world locked their doors when going home at night. This is consistent with a series of reports on inadequacies in our information security regime going back to the last century.

This is all within a seemingly pre-modern environment where a law enforcement response may be an afterthought.

The U.S. Department of Justice is addressing some of these issues, particularly as to information of special competitive or national security value.

In Kentucky, the Federal Bureau of Investigation has held an ongoing series of sessions to address the exfiltration of competitive information out of universities to overseas organizations. It is expanding this with a new program on information security practices, policies and responses.

Key to both programs is first prevention and then incident response involving federal law enforcement.

Businesses are sensitive about involving anyone in a security breach involving information because of the potential damage to good will and customer relations. Calling in the FBI brings its own concerns. These programs are meant to walk through the process of using federal law enforcement and its considerable resources to aid in responding to a breach, just as local police would be called about a burglary.

A federal response may, in fact, be the only effective law enforcement response for new technology and data-intensive companies. While insider threats remain high, focused external attacks continue as very significant threats. Many of these are from technologically-sophisticated countries far away such that only an agency with transnational resources can effectively respond.

As lawyers our clients may call on us to help mediate a law enforcement response to a security breach. It will be an important role in bringing accountability to this environment. It will also help protect our clients when, one day, they may be called to account for their inability to protect their customers.

ENDNOTES
2. See, for example, the National Cyber Leap Year Summit 2009 Co-Chairs Report, Sept. 16, 2009.
By Phillip M. Sparkes  
NKU Chase College of Law

The proper use of verbs is indispensable to clear communication. The verb is the heart of a sentence. The stronger and sharper the verb, the clearer is a sentence’s meaning. Moreover, without a verb no group of words is grammatically a sentence.

English verbs have five properties: person, number, tense, voice, and mood. Person is the property that identifies whether the subject of the verb is speaking (first person), being spoken to (second person), or being spoken about (third person). Number refers to whether a verb is singular or plural. Tense refers to the time of the action of a verb. Depending upon which grammatical one cites for authority, English has as few as two or as many as 12 tenses. Linguistic disagreements aside, for the native speaker of English, person, number, and tense tend to be straightforward. Even without formal instruction in grammar, the native speaker can hear when a verb does not agree with its subject or when a verb’s tense is wrong.

Awareness of voice and mood comes later, perhaps as a middle school student in a language arts class or later still when preparing to take college entrance exams. Voice indicates whether the subject of the verb is acting or being acted upon. In the active voice, the subject performs the action; in the passive voice, the subject receives the action. Voice gets much attention in legal writing circles because, as Goldstein and Lieberman say in *The Lawyer’s Guide to Writing Well*, lawyers overuse the passive voice.

Mood is the property that allows speakers to express their attitude toward what they are saying. Linguists have identified many moods in the languages of the world, but English commonly uses only three: the indicative, the imperative, and the subjunctive. In the indicative mood, the speaker displays an attitude of definiteness; in the imperative mood, the speaker displays an attitude of insistence; and in the subjunctive mood, the speaker displays an attitude of tentativeness. Understanding verb moods is important because they help provide context for what the writer is trying to say.

**Imperative Mood**

A sentence in the imperative mood indicates that the speaker desires for the action expressed in the sentence to take place. Some of the simplest sentences in English are imperative sentences consisting of a single verb. The imperative mood has many uses as demonstrated by the following sentences.

Stop! (Single verb; sounds a warning.)
Everyone get on the bus. (Issues a command.)
Climb every mountain / Ford every stream / (Offers advice.)
Turn left at the light onto South Main Street. (Provides directions.)
Sign on the dotted line. (Gives an instruction.)
Keep off the grass. (Announces a prohibition.)
Help yourself to the salad bar. (Makes an offer.)

Notice that in most of these sentences, the subject (you) is implied and that all of them are in the second person. A rare exception to the second person construction occurs in a sentence like “Let’s go.” Each of the examples above is a “neutral” imperative. In contrast, an imperative sentence can take either emphatic or negative form by respectively appending do or don’t to a neutral imperative.

Wait for me, please. (neutral imperative)
Do wait a moment. (emphatic imperative)
Don’t wait up for us. (negative imperative)

Much task-based writing uses the imperative mood (together with active voice, present tense, and second person) to convey what the reader must do. Think of a checklist you might develop for a client who consults you about a will. However, in instrumental legal writing – the stuff of contracts, wills, regulations, by-laws, and similar documents that set down rules – legal drafters often try to use the imperative when they mean instead to state a legal fact or conclusion. That is the proper purpose of the indicative mood.

**Indicative Mood**

The indicative mood is the verb mood used in ordinary speech or writing when making statements or asking questions. Most of the sentences in this essay are in the indicative mood. It is, in effect, the default mood in English.

Any verb tense can be deployed with the indicative mood, but in instrumental legal writing the present tense is preferable. As Martineau and Salerno observe, “The legal drafter is seldom tempted to use the past tense, but there is a strong temptation to use the future tense. The drafter quite naturally thinks in terms of the future because whatever is written today will almost always affect only events in the future.” Using the present tense and the indicative mood avoids two problems, both related to the use of the word shall.

English commonly forms the future tense by combining the modal verbs...
shall or will with the bare infinitive of
the main verb – “We shall overcome”
or “I will be true.” Using the future
tense when drafting legal instruments
ignores the fact that a document speaks
when it applies, not when it was
drafted. The operative provisions of a
statute, a contract, or a will, apply in
the present.7

Take, for example, a contract provi-
sion like this: “The law of the
Commonwealth of Kentucky shall gov-
er this Agreement.” Imagine that two
years after execution a dispute arises
and the parties turn to the agreement to
resolve a choice of law question.
Technically, the contract says that
Kentucky law will govern at some
unstated time in the future, but that
makes no logical sense. Drafting in the
present tense resolves the ambiguity:
“The law of the Commonwealth of
Kentucky governs this agreement.”

The second problem avoided by use
of the present tense and the indicative
mood is the false imperative. The
grammatical signal for the imperative
is the use of the word shall: “The
Seller shall deliver the goods to the
Buyer at the Buyer’s place of busi-
ness.” When the imperative is used
properly, someone (here the contracting
Seller) must do or refrain from doing
something.

The false imperative, however, sub-
jects some inanimate thing to an
obligation. The drafter uses shall to indi-
cate a legal fact or a legal result rather
than to command.

False imperative: A code enforce-
ment board shall consist of no
fewer than three (3) members ….
(KRS 65.8811)

Alternative: A code enforcement
board consists of no fewer than
three (3) members ….

False imperative: As used in this
chapter and other provisions of
law, “state local finance officer”
shall mean the commissioner of the
Department for Local
Government … (KRS 68.001)

Alternative: As used in this chapter
and other provisions of law, “state
local finance officer” means the
commissioner of the Department
for Local Government ….

False imperative: A violation of this
subsection by a state employee
shall be considered cause for dis-
missal …. (KRS 216.530)

Alternative: A state employee’s viola-
tion of this subsection is cause for
dismissal.

Constructions such as these false
imperatives are so common that to
many legal drafters they sound right.
Nevertheless, the error is easy to spot –
look for an inanimate object preceding
the word shall. Here is another test –
mentally substitute “has a duty to” for
shall (or “has a duty not to” for shall
not). If the substitute phrase makes
sense, the use is proper.

Subjunctive Mood

The subjunctive has almost disap-
peared from the language and is thus
more difficult to use correctly than
either the indicative mood or the imper-
ative mood. Of the three moods, the
subjunctive is the one most likely to
cause problems for writers.

The most common use of the sub-
junctive mood is after if in clauses that
state a hypothetical or a situation con-
trary to fact.

Subjunctive: If I were the defendant,
I would settle the case.

Indicative: I think the defendant
should settle the case.
Subjunctive: If she had run, she might have become a judge.
Subjunctive: Had she run, she might have become a judge.
Indicative: She did not become a judge.

Clauses that begin with *if* need not always be in the subjunctive mood. For example, if you suppose something that could be true, you can correctly say, “If I was his lawyer, I could settle that case.” The subjunctive also finds use in clauses beginning with *that* and expressing a requirement, suggestion, recommendation, or wish.

Subjunctive: The doctor advised that I be allowed visitors.
Indicative: The doctor said I could have visitors.
Subjunctive: The airline recommends that you be at the airport by noon.
Indicative: The airline told you to arrive at the airport by noon.
Subjunctive: Diane asked that her necklaces be put in the safe.
Indicative: Diane wanted to keep her necklaces in the safe.

Notice that in these examples the subjunctive mood uses *be* regardless of person or number. Absent the need for *be*, a sentence in the subjunctive mood would use the present tense stem alone: “I insist that he resign immediately.” A verb in the subjunctive mood has no third-person-singular variation.

No single part of speech gives a writer more grief than the verb. Just don’t let it put you in a bad mood.

ENDNOTES

1. Those grammarians who designate only two tenses (present and past) base their classification on the form changes of single word verbs (e.g., walk, walked). They do not include the future tense because it takes the present tense form plus an auxiliary verb (will walk). Grammarians who consider both auxiliaries and single word form changes describe six tenses (past, present, future, past perfect, present perfect, and future perfect). See John C. Hodges and Mary E. Whitten, *HARBRACE COLLEGE HANDBOOK* 66-67 (6th ed. 1967). *But see* Diana Hacker, *A Writer’s Reference* 180-84 (6th ed. 2007). (A popular reference work at the college level, it lists nine tenses present, past, and future with simple, perfect, and progressive forms of each). Still others describe only three tenses (past, present, and future), each with four “aspects” (simple, perfect, progressive, and perfect progressive). *See*, e.g., Bryan A. Garner, *THE REDBOOK: A MANUAL ON LEGAL STYLE* 137 (2002). Aspect thus becomes a sixth property of a verb that expresses how the action, event, or state denoted by a verb relates to the flow of time. *See*, e.g., Heather Marie Kosur, *Verb Aspect: Simple, Prefect, Progressive, Perfect-Progressive*, Suite101.com, (last visited Feb. 1, 2013).

7. *See BILL DRAFTING MANUAL* cited at note 5 (“A statute is regarded as constantly speaking. It speaks as of the time when it is read or applied. It must, therefore, be written in the present tense, except for stating a condition precedent to its operation, which should be phrased in the perfect tense if it is required to be completed before the statute applies.”)
Congratulations!

To the following members who reported 50 or more Pro Bono hours on their 2012-2013 Annual Dues Statement.

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James G Adams III
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Angela Kortz Funke
Rona D Gault
James Burns Galbraith
Marcus Daniel Gale
G. Keith Michael Hoge
Chadwick Neal Gardner
Robert C Garrison
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Tamera Sue Geier
Timothy J Gillenwater
Jill Lynn Giordano
Rhonda S Girdler
Trista P Goldberg
Elisabeth P Goldman
Steven D Goodrum
John Sale Gordon
Paul Hatton Gosnell
Stephan Wright Grace
Alissa J Graf-Schald

Rebecca Marie Gray
Douglas L Greenburg
George D Gregory
James Richard Gregory Jr
William D Gregory
Andrey Cary-Gregory-Mabrey
Maxine Sue Grossinger
Margo L Grubbs
Sheriff Gaudion
Martin Andrew Haas Jr
Christopher W Haden
William M Haden
Patrick Henry Haggerty
Donna R Hall
Sherri Dawn Hall
William M Hall Jr
John Richard Hamilton
Michael Allen Hamilton
Joni L Hamption
John V Hanley
Paula Lynne Harbour
Dennis Allan
James Austin Harmon Jr
Christopher M Harrell
Glenda Jo Jochem
Jack D Harrington
Robert E Harrison
Deborah Lynne Harrod
Alan J Hartman
Edmond J. Haughen
Terry Dennis Edwards
Sarah E Egbert
Marina Finegold
John C Fischer
Jerome S Fish
Thomas William Fitzgerald
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30 Bench & Bar March 2013
Subject: Ethical Considerations Relating to a Lawyer’s Use of Social Network Sites to Benefit a Client

Question: May a lawyer access or otherwise use the social network site of a third person to benefit a client?

Answer: A lawyer may access or otherwise use the social network site of a third person to benefit a client, as long as the conduct does not violate the Rules of Professional Conduct.


Introduction

The dramatic changes in information technology and the growth of social network sites such as Facebook have significantly changed the way people communicate. At the same time, these changes have made a wealth of personal information available over the internet. While many use these networks for social purposes, connecting with friends and family, they also can be used for business and professional purposes and may be a valuable resource for a practicing lawyer. Information posted on the social network site of an adverse party, a witness, juror or other third person could be very useful to the lawyer investigating a matter on behalf of a client.

The Committee has received several inquiries regarding the use of social network sites and the extent to which lawyers may go to obtain access to information from the site of an opponent or other third person. In addressing these issues, the Committee perceived two challenges. First, ethical issues raised by modern technology were not even imagined by the drafters of the Rules of Professional Conduct. However, after considerable discussion the Committee concluded that, despite the advances in technology, the core ethical principles upon which the profession has relied for generations – honesty and fairness – remain unchanged. In the final analysis, though social networking may appear to raise new ethical issues that might require new rules, the current rules adequately address those issues that have been brought to the attention of the Committee. For example, if the Rules of Professional Conduct prohibit lawyers from contacting jurors or communicating with represented parties in the non-technical world, they prohibit such conduct in the virtual world. The underlying principles of fairness and honesty are the same, regardless of context.

The second challenge related to the specific scenarios that the Committee was asked to address. We quickly realized that social networking is extraordinarily complex and is being modified constantly. In addition, new systems are being developed every day and it is beyond the Committee’s capacity to imagine what might develop in the future. Because of this, it is not possible to draft an opinion with specific scenarios that would be comprehensive and enduring. Nevertheless, the Committee believes it would be helpful to address the basic Rules of Professional Conduct that might be implicated when a lawyer accesses or otherwise uses a social network site to benefit a client. Specifically, those rules are:

- SCR 3.130(4.1) Truthfulness in Statements to Others
- SCR 3.130(4.2) Communication with Person Represented by Counsel
- SCR 3.130(4.3) Dealing with Unrepresented Person
- SCR 3.130(3.5) Impartiality and Decorum of the Tribunal
- SCR 3.130(8.4(a)(c)) Misconduct

Some inquiries have focused on whether a lawyer may access the site of a third person. If the site is “public,” and accessible to all, then there does not appear to be any ethical issue. If, however, access is limited, then there may be issues of what the lawyer can do to gain access. The Rules of Professional Conduct require truthfulness and honesty in dealing with others. Specifically, SCR 3.130 (4.1) prohibits a lawyer from making false statements. Also relevant is SCR 3.130(8.4), which prohibits the lawyer from engaging in dishonest conduct.

Social network sites generally permit certain people to send messages to others. A lawyer’s communication with someone represented by counsel is addressed by SCR 3.130(4.2), which generally prohibits direct contact. To the extent that someone is represented by counsel, it would apply. The Commentary to Rule 4.2 explains that the rule is to protect against uncounseled disclosures and applies even though the represented person initiates or consents to the contact. If a person with whom the lawyer is communicating is unrepresented, such as a witness, then SCR 3.130 (4.3) would apply. The Rules of Professional Conduct, as well as various statutes and court rules, prohibit improper contact with jurors. Those prohibitions would apply in the social network context as well.

Finally, questions have arisen as to whether a lawyer may request a third person, such as a paraprofessional, investigator or other non-lawyer staff member, to obtain information through means that the lawyer could not ethically use. SCR 3.130 (8.4) normally would prohibit such conduct. As a general rule, a lawyer cannot use another to do that which the lawyer is prohibited from doing.
Social networking and other technological advances have provided, and will continue to provide, endless possibilities for obtaining information that may be useful in the representation of a client. These systems are extraordinarily complicated and constantly changing, and thus it would be impossible to address every possible ethical consideration that might arise in conjunction with the use of social network sites. Several core principles are clear. Every lawyer is bound by the Rules of Professional Conduct. Those rules prohibit a lawyer from misrepresenting material facts, or engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. They also provide that a lawyer may not communicate with persons represented by counsel or state or imply disinterest in dealing with unrepresented persons. In addition, the rules prohibit improper contact with jurors. Finally, Rule 8.4(a) prohibits a lawyer from using a third person to engage in conduct that would violate the Rules of Professional Conduct, if done by a lawyer. A lawyer must keep all of these rules in mind when deciding the appropriate use of social network sites.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.330. Note that the Rule provides: “Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act performed by that attorney in compliance with an informal opinion furnished by the Ethics Committee member pursuant to such attorney’s written request, provided that the written request clearly, fairly, accurately and completely states such attorney’s contemplated professional act.”

1. Social networks, as commonly understood at the time this opinion was written, include web-based services that allow individuals to build a public or semi-public bounded system; to identify users with whom they share a connection and view and traverse their list of connections and those made by others in the system. boyd, d. m. and Ellison, N. B., Social network sites: Definition, history, and scholarship, Journal of Computer-Mediated Communications (2007), http://jcmc.indiana.edu/vol13/issue1/boyd.e Ellison.html.

2. This opinion only addresses ethical considerations relating to the lawyer’s use of social network sites of third persons. It does not address the ethical restrictions on a lawyer’s use of his or her own social network site for advertising or other purposes.


4. SCR 3.130(4.1) provides: “In the course of representing a client a lawyer:(a) shall not knowingly make a false statement of material fact or law to a third person; and (b) if a false statement of material fact or law has been made, shall take reasonable remedial measures to avoid assisting a fraudulent or criminal act by a client including, if necessary, disclosure of a material fact, unless prohibited by Rule 1.6.”

5. SCR 3.130(8.4(a),(b),(c)) provides: “It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation….”

6. SCR 3.130(4.2) provides: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

7. See Comments 1 and 3 to Rule 4.2.

8. SCR 3.130(4.3) provides: “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person. The lawyer may suggest that the unrepresented person secure counsel.”

9. SCR 3.130(3.5) provides: “A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate ex parte with such a person as to the merits of the case except as permitted by law or court order; (c) communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law, local rule, or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment; or (d) engage in conduct intended to disrupt the tribunal.”

10. SCR 3.130(8.4) provides that it is “professional misconduct for a lawyer to assist or induce another to engage in conduct that violates the Rules of Professional Conduct.”

11. Comment 1 to Rule 8.4 provides: “Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf.”
Subject: Plea Agreements Waiving the Right to Pursue an Ineffective Assistance of Counsel Claim

Question 1: May a criminal defense lawyer advise a client with regard to a plea agreement that waives the client’s right to pursue a claim of ineffective assistance of counsel as part of the waiver of the right to collaterally attack a conviction covered by the plea agreement?

Answer: No.

Question 2: May a prosecutor propose a plea agreement that requires a waiver of the defendant’s or potential defendant’s right to pursue a claim of ineffective assistance of counsel relating to the matter that is the subject of the plea agreement?

Answer: No.

References:

Question 1 Discussion

Defense Counsel May Not Advise a Client about a Plea Agreement Involving a Waiver of the Right to Pursue an Ineffective Assistance of Counsel Claim Related to the Subject of the Plea Agreement

Prosecutors sometimes propose plea agreements that bar collateral attacks on convictions that result from the plea agreements. Sometimes these plea agreement proposals require the defendant to waive the right to pursue a claim of ineffective assistance of counsel. The question that has arisen is whether defense counsel may ethically advise the client about a plea agreement proposal that bars the client from later pursuing a claim of ineffective assistance of counsel related to the conviction that results from the plea agreement. In effect, the question is whether defense counsel may advise the client regarding a waiver of a claim of ineffective assistance of counsel that would be based on the attorney’s own conduct in representing the client. Because the offered plea agreement creates a conflict of interest under SCR 3.130(1.7) for the attorney that cannot be waived, such an attorney ethically cannot advise a client about such an agreement.

SCR 3.130(1.7(a)) states in pertinent part:
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: …
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The lawyer in the plea agreement setting has a “personal interest” that creates a “significant risk” that the representation of the client “will be materially limited.” The lawyer has a clear interest in not having his or her representation of the client challenged on the basis of ineffective assistance of counsel. The lawyer certainly has a personal interest in not having his or her representation of the client found to be constitutionally ineffective.

Even in cases of concurrent conflict, SCR 3.130(1.7) allows a representation to occur if, among other requirements, “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” SCR(1.7(b)(1)). A lawyer cannot reasonably believe that he or she can provide competent representation when the lawyer is tasked with advising the client about a plea agreement involving a waiver of the right to pursue a claim of ineffective assistance of counsel when that claim would be based on the attorney’s own conduct in representing the client.

This reasoning is consistent with the reasoning surrounding SCR 3.130(1.8(h)(1)). Rule 1.8(h)(1) states: “A lawyer shall not: (1) make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.” Thus, a lawyer cannot ethically advise the client when the issue is the attorney’s own conduct.

Rule 1.8(h)(1) does not directly apply to the plea agreement situation because the issue in the plea agreement situation is a waiver of the client’s ineffective assistance claim, not a waiver or limitation of a malpractice claim. Yet, the underlying basis for a malpractice claim is the attorney’s own professional conduct. Likewise, the underlying basis for an ineffective assistance of counsel claim is the attorney’s own professional conduct. If a lawyer ethically cannot advise a client about a malpractice limitation, a lawyer ethically cannot advise a client about an ineffective assistance of counsel waiver.

A Prosecutor May Not Propose a Plea Agreement Requiring a Waiver of the Right to Pursue an Ineffective Assistance of Counsel Claim Relating to the Matter that is the Subject of the Plea Agreement


As Comment 1 to SCR 3.130(3.8) states:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

SCR 3.130(3.8) Cmt 1. SCR 3.130(3.8(b)) requires a prosecutor to “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.” In addition, SCR 3.130(8.4(a)) states:

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

SCR 3.130(8.4(a)).

It is inconsistent with the prosecutor’s role as a minister of justice and the spirit of SCR(3.8(b)) for a prosecutor to propose a plea agreement that requires the individual to waive his or her right to pursue a claim of ineffective assistance of counsel. Accord Mo. S. Ct. Adv. Comm. Formal Op. 126 (2009).


Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. Note that the Rule provides: “Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act performed by that attorney in compliance with an informal opinion furnished by the Ethics Committee member pursuant to such attorney’s written request, provided that the written request clearly, fairly, accurately and completely states such attorney’s contemplated professional act.”
UNAUTHORIZED PRACTICE OF LAW OPINION KBA U-64
November 2012

Question 1: Can a non-lawyer request that a board or agency initiate an administrative action and grant a hearing or file an answer on behalf of an otherwise unrepresented corporation or other artificial entity in an administrative hearing?

Answer: No.

Question 2: Can a non-lawyer call himself or others, on behalf of an otherwise unrepresented corporation or other artificial entity, as a witness and provide fact testimony at an administrative hearing?

Answer: No.

Question 3: Can a hearing officer call a witness to provide fact testimony at an administrative hearing?

Answer: Qualified yes. While the hearing officer may not call a witness specifically on behalf of the corporation or other artificial entity the hearing officer may call a witness in order to elicit all relevant facts that may be necessary to conduct the hearing.

References:

AUTHORITY
SCR 3.020 defines the practice of law. The Supreme Court of Kentucky has the exclusive authority to promulgate rules governing the practice of law. Turner v. Kentucky Bar Association, 980 S.W.2d 560 (Ky. 1998).

The compelling reason for such regulation is to protect the public against rendition of legal services by unqualified persons. Comment to Kentucky Rule of Professional Conduct SCR 3.130-5.5.

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

The “unauthorized” practice of law is the performance of those defined services by non-lawyers for others. Countrywide Home Loans, Inc. et. al v. Kentucky Bar Association, 113 S.W. 2d 105 (Ky. 2003).

Corporations are not permitted to practice law in the Commonwealth. Kentucky Bar Association v. Tussey, 476 S.W.2d 177 (Ky. 1972); KBA U-32; Kentucky Bar Association v. Legal Alternatives, Inc., 792 S.W.2d 368 (Ky. 1990).

OPINION

The questions presented in this opinion are not completely new and for the most part have been addressed in previous formal unauthorized practice opinions.

The KBA, in Opinion U-52, addressed these issues in part when presented with the question of whether or not a non-lawyer may represent parties before the Kentucky Department of Workers’ Claims. The opinion held that non-attorneys may not represent parties before the agency because “[r]epresentation of parties before administrative agencies is the practice of law, as it necessarily involves legal advice, counsel and advocacy.”

Also, U-52, summarizing previous related opinions, stated:

“Non-lawyers have been prohibited from representing corporations and individuals before the Kentucky Department of Transportation (Opinion KBA U-3); before a city civil service commission (Opinion KBA U-12); before the Kentucky Unemployment Insurance Commission (Opinion KBA U-15); before the Kentucky Board of Tax Appeals (Opinion KBA U-17) and in quasi-adjudicative proceedings before zoning boards and zoning authorities (Opinion KBA U-43) See also Kentucky State Bar Assn. v. Henry Vogt Machine Co., Ky., 416 S.W.2d 727 (1967).”

In addition to the UPL Opinions referenced above, the Bar Association has also held that a non-attorney may not appear before a faculty grievance committee as a representative of another individual in proceedings before the university faculty grievance committee. (KBA U-34). Furthermore, U-34 advises that where a member of a quasi-judicial body knows that the person is not licensed to practice law in the Commonwealth of Kentucky, that member would be aiding in the unauthorized practice of law to allow the non-attorney to appear in front of that committee. However, Secretary, Labor Cabinet v. Boston Gear, Inc., 25 S.W.3d 130 (Ky. 2000) clarifies that it may be necessary for a hearing officer to “‘fully elicit’ all relevant facts” at a hearing, which may require taking testimony from a non-attorney. Id. at 134. That would not be considered the unauthorized practice of law.

Note to Reader
This unauthorized practice opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides in part: “Both informal and formal opinions shall be advisory only.”
## Kentucky Bar Association
### Statements of Financial Position
#### June 30, 2012 and June 30, 2011

**Unaudited***

<table>
<thead>
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<th>June 30, 2012</th>
<th>June 30, 2011</th>
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<tr>
<td>Cash</td>
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<td><strong>Total Assets</strong></td>
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<td><strong>$10,074,955</strong></td>
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|                      |                |                |
| **LIABILITIES:**     |                |                |
| Accounts payable     | 220,688        | 316,937        |
| Due to affiliate     | 1,520          | 517            |
| Accrued expenses     | 403,227        | 349,057        |
| Funds held           | 89,114         | 65             |
| Current maturities of bonds payable | 110,000 | 105,000 |
| **Total Current Liabilities** | **824,549** | **771,576** |
| Deferred revenue     | 15,811         | 61,066         |
| Bonds payable, less current maturities | 1,450,000 | 1,560,000 |
| **Total Liabilities** | **2,290,360** | **2,392,642** |

|                      |                |                |
| **NET ASSETS:**      |                |                |
| Unrestricted -       |                |                |
| Board designated     | 393,590        | 772,333        |
| Undesignated         | 7,336,706      | 6,909,980      |
| **Total Liabilities & Net Assets** | **$10,020,656** | **$10,074,955** |

* Pursuant to SCR 3.120 (8), there shall be an annual audit of the Kentucky Bar Association. The Audited Financial Statement and Report can be found on the website at http://www.kybar.org/documents/membership/KBA_financial_stmt.pdf
WHEREAS, March 18, 2013, commemorates the 50th anniversary of the landmark decision, Gideon v. Wainwright; and

WHEREAS, this historic decision by the Supreme Court of the United States recognizes a constitutional right to the appointment of counsel for indigent criminal defendants charged with felonies; and

WHEREAS, the Court proclaimed: “The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours”; and

WHEREAS, the mission of the Kentucky Bar Association requires it to bear a substantial and continuing responsibility in promoting the efficiency and improvement of the judicial system; and

WHEREAS, the conveyance of this responsibility supports the association’s commitment to various efforts supporting the right of counsel to all citizens, no matter their financial status;

NOW, THEREFORE, BE IT HEREBY RESOLVED that the Kentucky Bar Association resoundingly voices its continued commitment to furthering the public’s education on the importance of the Court’s decision in Gideon v. Wainwright and to ensuring its critical safeguards are fulfilled.

This Resolution shall be made a part of the minutes of the regular meeting of the Board of Governors held on the 18th day of January, 2013.

This 18th day of January, 2013.

[Signature]
W. Douglas Myers, President

Attest:

[Signature]
John D. Meyers, Executive Director
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- Free extended reporting period endorsement (“tail” coverage) for retiring or disabled attorneys who have been with Lawyers Mutual for five consecutive years
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- New lawyer discount of 60% in the first year of practice (with graduated discounts through the fourth year of practice)
This opinion addresses the following question:

MAY A DISTRICT COURT TRIAL COMMISSIONER CONTINUE TO SERVE IN THAT CAPACITY IF THE COMMISSIONER’S LAW PARTNER BECOMES AN ASSISTANT COMMONWEALTH’S ATTORNEY?

The Committee is of the opinion, Judge Taylor dissenting, that if the Commissioner’s law partner should become an Assistant Commonwealth’s Attorney, there would be an appearance of impropriety and the Commissioner could not continue to serve.

THE FACTS AS STATED BY THE COMMISSIONER

The Commissioner offers for consideration the fact that he serves under the authority of SCR 5.000 et seq. and has only the powers specifically listed under SCR 5.030. As to criminal cases he recites that he only has authority to issue search warrants and warrants of arrest; to examine any charge and commit the defendant to jail or hold him to bail or other form of pretrial release; and to accept a plea of guilty at the time the charge is examined, and impose a sentence for an offense punishable only by fine of $500 or less. He recites that he is not permitted to conduct preliminary hearings, or hold any hearings on which jail is a potential sentence, whether it is a misdemeanor or felony.

The Commissioner advises that the Commonwealth’s Attorney does not appear before the District Court in his judicial circuit, and that the Commonwealth’s Attorney has never approached him for the issuance of search warrants or warrants of arrest. He advises that his partner would keep no files pertaining to his employment at the partnership office, as all such files are kept at the office of the Commonwealth’s Attorney. He states that neither his partner, nor anyone from the office of the Commonwealth’s Attorney, would practice before him as Trial Commissioner, and that he would not practice any criminal law in the circuit court while his partner was an Assistant Commonwealth’s Attorney.

AUTHORITIES CITED BY THE COMMISSIONER

The Commissioner cites the following as support for his position that the appointment of his partner as an Assistant Commonwealth’s Attorney would not create a conflict.

On July 24, 1989, the Commissioner wrote the Committee a letter posing the same question now in issue. On August 7, 1989, the Commissioner had a telephone conversation with then Committee Chairman, B. M. Westberry, regarding the question. The Commissioner’s handwritten notes memorializing that conversation indicate that a copy of JE 47 would be sent to him, with the following response by Chairman Westberry:

No problem but I must disqualify from appearance before me by Comm. Attys office.

By letter of August 7, 1989, the Executive Secretary of the Committee sent the Commissioner a copy of JE 47.

In JE 47, published in October of 1983, the question posed was:

Where the county attorney and the trial commissioner for district court are partners in civil practice, must the trial commissioner disqualify himself in all cases in which the county attorney appears, both civil and criminal

The Committee responded: “Yes, except in emergency situations where a failure to act would result in a frustration of the criminal justice process.” The opinion referred to JE 44, published in January of 1983, in which the pertinent question was:

May the partner of a district court trial Commissioner practice in that court? If so, are there any limitations on the practice in which he may engage?
The Committee responded: “He may practice in that court as in any other court. In cases in which the trial Commissioner is acting, the latter must disqualify himself in appropriate cases as provided in Canon 3C.”

In both JE 44 and JE 47 the essential reasoning was that there was an appearance of impropriety.

The Commissioner also cites the Committee to KBA E-214, published in March of 1979, and JE 47 also refers to that ethics opinion.

**OPINION**

With due respect for the cited KBA ethics opinion and JE 44 and JE 47, those opinions were issued without the benefit of *Commonwealth v. Brandenburg*, 114 S.W.3d 830 (Ky. 2003), and it is that case by which the Committee is to be guided in responding to the immediate question. There, the Court stated, at 832:

The sole issue before us is whether a trial commissioner who is married to an employee of the Commonwealth Attorney’s office, “manifest[s] that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure.” [Citation omitted] We hold that in the case *sub judice*, the trial commissioner, due simply to her marital status, was not the neutral and detached magistrate that the Fourth Amendment to the United States Constitution, Section 10 of the Kentucky Constitution, and the United States Supreme Court guarantee.

*Brandenburg* went on to discuss the application of the Code of Judicial Conduct, SCR 4.300. The Court noted that Canon 2 of the Code states, “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” Canon 3E(1) requires that a judge disqualify himself when his impartiality “might reasonably be questioned.” The Court also said:

SCR 5.070 makes trial commissioners of the district court subject to the Supreme Court’s rules governing the retirement and removal of judges. Also, SCR 5.050 governs the disqualification of trial commissioners and holds that “[a] trial commissioner shall disqualify himself in all matters in which he has an interest, relationship or bias that would disqualify a judge.”

At 833, the Court stated:

The Court of Appeals has addressed such a situation in *Dixon v. Commonwealth*, Ky. App., 890 S.W.2d 629 (1994), wherein it held that a trial commissioner who was the law partner of the County Attorney was not a neutral and detached magistrate capable of making probable cause determinations for search warrants. *Id.* at 630. The court in *Dixon* found that the mere association with the County Attorney created an appearance of impropriety, in violation of Canon 2 of the Code, which destroyed the trial commissioner’s character as a neutral and detached issuing authority. *Id.* at 631. We agree with the Court of Appeals’ reasoning in *Dixon*, and hereby extend the holding of that case to apply to situations such as in the case at bar, where the trial commissioner is the spouse of an employee of the Commonwealth Attorney’s office.

Referring to its own opinions on similar matters, the Court stated:

However, this Court has spoken to this issue on only a few instances. In *O’Hara v. Kentucky Bar Association*, Ky., 535 S.W.2d 83 (1975), we affirmed an ethics opinion adopted by the Kentucky Bar Association that stated a trial commissioner could not be a member of the same law firm as the Commonwealth Attorney.

*Brandenburg* concluded, at 834:

Today’s opinion takes a harsher stance against the propriety of judges and trial commissioners having close personal relationships with others who may be in a position to influence their decision-making. We reiterate that there need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns.

Returning to *Dixon, supra*, the Committee perceives no difference, for purpose of analysis, between a trial commissioner being a partner of a county attorney or being the partner of an attorney for the Commonwealth, since both county and Commonwealth’s attorneys have prosecutorial duties.
The opinion in *O’Hara, supra*, is a model of brevity, but powerful in its simplicity.3 The Court said:

The appellants, members of the same firm who have occupied those positions for a number of years, argue that there have never been accusations or insinuations of impropriety during the time of this professional association or of a failure to fulfill the duties required by their respective offices. They point out the unlikelihood or virtual impossibility of effecting any impropriety with regard to their respective offices. The appellees say that no impropriety is suggested with regard to these appellants.

The point is not whether impropriety exists, but that any appearance of impropriety is to be avoided. We are of the opinion that such association carries with it an appearance of impropriety so that it should not be permitted.

The Committee believes that the conclusions of the Court in *Brandenburg, Dixon* and *O’Hara* compel our opinion that, should the law partner of the inquiring Commissioner become an Assistant Commonwealth’s Attorney, there would be an appearance of impropriety, and the Commissioner could no longer serve as a commissioner.

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

Sincerely,

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

cc: Donald H. Combs, Esq.
The Honorable Jeff Taylor, Judge
The Honorable Jean Chenault Logue, Judge
The Honorable Jeffrey Scott Lawless, Judge
Jean Collier, Esq.

1. Current Canon 3E.
2. While this Committee takes no issue with the substance of KBA E-214, it should be noted that ethics opinions of the Kentucky Bar Association apply only to lawyers. Judges, and those persons acting in a judicial capacity, are governed by the Kentucky Code of Judicial Conduct, SCR 4.300 et seq.
3. The Committee recognizes that the Court was considering a KBA ethics opinion, but believes the principles involved are directly on point.
IN RE:
ORDER AMENDING
RULES OF THE SUPREME COURT (SCR)
2013-04

The following rule amendment shall become effective upon entry of this order.

SCR 4.300 Kentucky Code of Judicial Conduct

CANON 5: A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

The amendments to subsections (1) and (2) and the Commentary of section (A) and subsection (2) of section (B) of CANON 5 of SCR 4.300 shall read:

A. Political Conduct in General.
   (1) Except as permitted by law, a judge or a candidate for election to judicial office shall not:
      (a) campaign as a member of a political organization;
      (b) act as a leader or hold any office in a political organization;
      (c) make speeches for or against a political organization or candidate or publicly endorse or oppose a candidate for public office;
      (d) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, except as authorized in subsection A(2);

   Commentary
   A judge or a candidate for election to judicial office retains the right to participate in the political process as a voter. A judge or a candidate for election to judicial office may publicly affiliate with a political organization but may not campaign as a member of a political organization.

   Where false information concerning a judicial candidate is made public, a judge or candidate having knowledge of the facts is not prohibited by Section 5A(1) from making the facts public.

   Section 5A(1) does not prohibit a judge or candidate from privately expressing his or her views on judicial candidates or other candidates for public office.

   (2) A judge or a candidate for election to judicial office may purchase tickets to political gatherings for the judge or candidate and one guest, may attend political gatherings and may speak to such gatherings on the judge’s or candidate’s own behalf.

B. Campaign Conduct.
   (2) A judge or a candidate for judicial office shall not solicit campaign funds in person. A judge or a candidate for judicial office may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy. A candidate’s committees may solicit funds for the campaign no earlier than 180 days before a primary election. A candidate’s committees may not solicit funds after a general election (See KRS 121.150). A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or a member of the candidate’s family

Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting.

All concur.

ENTERED this the 18th day of February, 2013.

CHIEF JUSTICE JOHN D. MINTON, JR.
Barry Scheck Delivers Special Lecture to Chase Students and Faculty

Barry Scheck, professor of law and co-director of the Innocence Project at Benjamin N. Cardozo School of Law at Yeshiva University, delivered a special lecture to Chase students and faculty on January 15.

Professor Scheck is known for his landmark litigation setting standards for forensic applications of DNA technology. His work in this area has shaped the course of case law across the country and led to an influential study by the National Academy of Sciences on forensic DNA testing, as well as important state and federal legislation. In addition to the work he has done through Cardozo’s Innocence Project, which has represented dozens of men who were exonerated through post-conviction DNA testing, Scheck has represented such notable clients as Hedda Nussbaum, O. J. Simpson, Louise Woodward, and Abner Louima. Prior to joining the Cardozo faculty, he was a staff attorney at the Legal Aid Society of New York.

Chase alumnus Martin Pinales ’68 facilitated Professor Scheck’s visit to Chase.

Randy Barnett Presents the Career of Chief Justice Salmon P. Chase

Randy Barnett, Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center, delivered his presentation, “From Anti-Slavery Lawyer to Chief Justice: The Remarkable Career of Salmon P. Chase,” to Chase students and faculty on February 6.

Professor Barnett is one of the most renowned and widely cited constitutional law scholars in the nation. Among his many accomplishments, he is the author of Restoring the Lost Constitution: The Presumption of Liberty; he briefed and argued Gonzalez v. Raich in the U.S. Supreme Court for the respondent; and he was the chief architect of the argument that the individual mandate provision of the Affordable Care Act violates the Commerce Clause.

Rental P. Chase, the College of Law’s namesake, began his legal career as a young lawyer defending runaway slaves in Cincinnati. He went on to serve as U.S. Senator from Ohio, Governor of Ohio, a candidate for the Republican presidential nomination, Secretary of the Treasury under President Abraham Lincoln, and Chief Justice of the United States.

Professor Nicole Huberfeld Quoted in New York Times Article

Professor Nicole Huberfeld, Gallion & Baker Professor of Law at the University of Kentucky College of Law and Bioethics Associate at the University of Kentucky College of Medicine, was quoted in a Jan. 29, 2013, New York Times article, “To Open Eyes, W-2s List Cost of Providing a Health Plan,” about the surprise many find when they realize the total cost of their employer-sponsored health coverage.

The 2010 health care law requires disclosure of these costs, starting this year. “Most people who get health insurance from their employers have no idea how much it costs,” Professor Huberfeld says in the article. “Many Americans believe this is something they get free. But employers pay lower wages because they provide insurance.”

Professor Huberfeld teaches structural constitutional law and a variety of healthcare law classes as well as lectures at the College of Public Health and the College of Medicine. Her scholarship focuses on the cross-section of constitutional law and federal healthcare programs with a particular interest in federalism and Spending Clause jurisprudence. Her article entitled Federalizing Medicaid, 14 U. Pa. J. CONST. L. 431 (2011), was cited by Supreme Court Justice Ruth Bader Ginsburg’s opinion in NFIB v. Sebelius. Huberfeld has recently completed work on Plunging into Endless Difficulties: Medicaid and Coercion in the Healthcare Cases (with Weeks Leonard and Outterson), which is forthcoming in Boston University Law Review.

Judicial Conversation Series Announced

The University of Kentucky College of Law is pleased to announce the 2013 Judicial Conversation Series: a series of thoughtful and engaging interactions
between members of Kentucky’s highest court and students preparing for a career in law. Each forum will take place in the College of Law Courtroom, 620 South Limestone. All Judicial Conversation Series forums are open to the public. Check back on www.law.uky.edu/speakers for updates and a full list of upcoming 2013 speakers.

February 6: Justice Bill Cunningham
February 27: Justice Daniel J. Venters
March 20: Justice Lisabeth Abramson
April 3: Deputy Chief Justice Mary C. Noble

Date TBA: Justice Will T. Scott
Date TBA: Chief Justice John D. Minton, Jr.

KENTUCKY BAR NEWS

Extra-curricular Criminal Law Opportunities

Brandeis students are exposed to much more than the criminal black letter law as they have the opportunity to enroll in either a criminal justice externship or the Kentucky Innocence project. Students enrolling in the criminal justice externship may be assigned to one of the following agencies: Louisville-Jefferson County Public Defender, Jefferson County Attorney, or Commonwealth Attorney. Students are assigned to cases coming into those offices and prepare and try them under the supervision of both an attorney in the agency and a member of the Brandeis School of Law faculty. These externships are very popular and often result in permanent job placements for our students.

The Kentucky Innocence project (KIP), part of the Kentucky Department of Public Advocacy, offers students the opportunity to work with incarcerated men and women on their legitimate claims of innocence. KIP teaches students the fundamental components for effective criminal defense investigative practice. The KIP student has the opportunity to employ newly-acquired investigative skills and knowledge offered in the classroom setting to cases containing exculpatory evidence, possibly leading to attempts to overturn wrongful convictions. Students participating in this externship develop essential lawyering skills including investigating, counseling, record keeping, and interviewing witnesses and experts. Students work under the supervision of an attorney with the Kentucky Department of Public Advocacy. The externship requires a two-semester commitment.

As in the past, Brandeis will send a team to compete in the Annual Herbert J. Wechsler National Criminal Law Moot Court Competition. This year the 15th annual competition will be held in Buffalo, New York on March 23. Named after the drafter of the Model Penal Code, the Wechsler Competition is the only National Moot Court Competition in the United States to focus on topics in substantive criminal law. Problems address the constitutionality and interpretation of federal and state criminal
statutes as well as general issues of federal and state criminal law. This year, Brandeis team members Cassie Kennedy and Emily Peeler are being coached by Annie O’Connell and Ted Shouse. We hope they will perform well and join our Arbitration and Negotiation Teams who advanced to the Nationals in their respective competitions.

Brandeis Alums Some of the Best in the Field

All of these opportunities help to make Brandeis graduates some of the best prosecutors and criminal defense attorneys in the state. Two long-time members of the criminal bar are Brandeis graduates who recently retired from the Jefferson County Commonwealth Attorney’s Office. After 16 years in their current posts and many more years in the field, R. David Stengel L76, Commonwealth’s Attorney for Louisville and Jefferson County, and Harry J. Rothgerber L74, the First Assistant Commonwealth’s Attorney retired. They served during the largest increase in the number of criminal indictments in the history of this jurisdiction, and countered this crime trend by implementing a significant increase in prosecutors (currently 48) and support staff, funded by both the State and Louisville Metro governments. As the largest and most active felony prosecutor’s office in the Commonwealth, Stengel’s office handled more than 3,900 new indictments that were issued by the Jefferson County Grand Jury in 2012. That is an amazing number when compared to the rest of the state.

The initiatives begun by Stengel and Rothgerber made the Commonwealth’s Office a leader both in the state and the nation. Some of the successful initiatives under their leadership include:

• a Special Prosecutions Unit, in collaboration with the Jefferson County Attorney’s Office, which targeted serious and violent juvenile offenders dramatically decreasing violent juvenile offenses;
• an Elder Abuse Unit and Liaison, the first such felony prosecutorial initiative in Louisville;
• one of the premier case tracking and management programs in the country;
• a Detective Unit which took over all extradition duties from the police in 1998 at a huge cost savings to taxpayers; and
• a Restitution Coordinator who eventually processed orders for millions of dollars on behalf of victims.

This administration was not afraid to take on controversial issues including:

• prosecuting more accused lawyers, police officers, priests and public servants than the previous six administrations combined;
• raising national awareness of heat-related football training issues as a result of the homicide prosecution in Comm. v. Stinson, the football coach who was ultimately acquitted;
• cooperating with the Innocence Project to quickly vacate convictions of men who likely were wrongfully convicted;
• and fighting for fair play for convicted felons who paid their debt to society, consistently testifying for the restoration of their civil rights and for an easier expungement process.

Stengel and Rothgerber were committed to helping the staff grow and develop professionally. They elevated many women to leadership roles in the office and all assistants were encouraged to excel. This ultimately led many of the assistants to becoming judges, elected officials, federal prosecutors, and key players in the Attorney General’s Office, Auditor’s Office and other state agencies and departments.

Brandeis Law School is very proud of both of these graduates. They are two examples of many fine men and women we have produced who work tirelessly in the criminal justice field.

Before You Move...

Over 17,000 attorneys are licensed to practice in the state of Kentucky. It is vitally important that you keep the Kentucky Bar Association (KBA) informed of your correct mailing address. Pursuant to rule SCR 3.175, all KBA members must maintain a current address at which he or she may be communicated, as well as a physical address if your mailing address is a Post Office address. If you move, you must notify the Executive Director of the KBA within 30 days. All roster changes must be in writing and must include your 5-digit KBA member identification number. There are several ways to do this for your convenience.

VISIT our website at www.kybar.org to make ONLINE changes or to print an Address Change/Update Form

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

Kentucky Bar Association
Executive Director
514 W. Main St.
Frankfort, KY 40601-1812

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

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

Executive Director/Membership Department (502) 564-3225

* Announcements sent to the Bench & Bar’s Who, What, When & Where column or communication with other departments other than the Executive Director do not comply with the rule and do not constitute a formal roster change with the KBA.
SUMMARY OF MINUTES
KBA BOARD OF GOVERNORS
MEETING
NOVEMBER 16-17, 2012

The Board of Governors met on Friday and Saturday, Nov. 16-17, 2012. Officers and Bar Governors in attendance were, President D. Myers; President-Elect T. Rouse; Vice President B. Johnson; and Immediate Past President M. Keane and Young Lawyers Division Chair J. Wright. Bar Governors 1st District – J. Freed, S. Jaggers; Bar Governors 2nd District – T. Kerrick, R. Sullivan; 3rd District – R. Hay, G. Wilson; 4th District – D. Ballantine; 5th District – A. Britton, W. Garmer; 6th District – D. Kramer, S. Smith; and 7th District – M. McGuire, B. Rowe. Bar Governors absent were: D. Farnsley.

In Executive Session, the Board considered six (6) discipline cases, seven (7) discipline default cases and one (1) restoration case. Malcolm Bryant of Owensboro, Brenda Hart of Louisville, Roger Rolfe of Florence and Dr. Robert Strode, 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 a status report from 2013-2014 Budget & Finance Committee, Kentucky Lawyer Assistance Program (KYALP) and Rules Committee.
• Approved the adoption of KBA U-64 as a formal unauthorized practice of law opinion regarding “administrative hearings.”
• President-Elect Thomas Rouse reported that the Board of Governors Summer Meeting would be held on July 25-28, 2013 at General Butler State Park in Carrollton, Ky.
• Approved the appointments of 7th Supreme Court District Bar Governor Bobby Rowe of Prestonsburg, as the Board of Governors representative and Dr. Brian Greenlee of Lexington as the non-lawyer citizen member to the KYALP Commission for four-year terms ending on June 30, 2016. In addition, approved the appointment of Catherine Fuller of Paducah from the 1st Supreme Court District to fill a reminder of a term ending on June 30, 2015.
• Young Lawyers Division Chair Jackie Sue Wright addressed the following YLD activities and projects: Diversity Committee, Communications Committee, Membership Committee, Law Student Outreach Committee, Awards, ABA GP Solo Division and Young Lawyers May 2014 Spring Conference.
• Approved the following opinions as formal ethics opinions E-434 relating to a lawyer’s use of social network sites to benefit a client and E-435 regarding plea agreements including waiver of ineffective assistance of counsel.
• Attorneys’ Advertising Commission Chair David Latherow presented the Commission’s annual report.
• Clients’ Security Fund Chair Gary Crabtree presented the annual report of the Fund.
• Approved the re-appointment of John G. Prather, Jr., of Somerset to the Audit Committee for a second three-year term expiring Dec. 31, 2015.
• Approved the appointment of William M. Johnson of Frankfort as a Trustee on the Bar Center Board of Trustees for another three-year term expiring on Dec. 31, 2015.
• Approved the appointment of John Grant of Lexington to the Joint Local Federal Rules Commission for the Eastern District of Kentucky for a four-year term commencing on Jan. 1, 2013 and expiring on Dec. 31, 2016.
• Approved the lists of CLE non-compliant and unpaid dues attorneys for Show Cause Notices to be sent.
• Approved the appointment of Jennifer Barber of Louisville to the Kentucky Bar Foundation for the Fourth Supreme Court District to fill the unexpired term of Jeff McKenzie expiring on June 30, 2014.
• Approved the authorization of a KBA Legislative Outreach event, tentatively scheduled for Feb. 21, 2013, for a KBA day at that the Capitol to emphasize to the General Assembly the importance of funding matters for the Court of Justice. Also authorized the appointment of Vice President William E. Johnson of Frankfort to serve as chair of the Legislative Outreach Committee and to appoint a committee to coordinate the event.
• Approved to waive registration fees for the judges for the KBA 2013 Annual Convention in Louisville.
• Approved to refer the matter of the request from the National Association of Criminal Defense Lawyers with regard to a proposed Senate Bill creating a procedure to have early review of questionable evidentiary issues to the KBA Legislative Committee for further review.
• Executive Director John D. Meyers advised that there were five uncontested seats for the Board of Governors and there were two contested elections for the Board of Governors and there were two contested elections as follows: Fourth Supreme Court District Amy D. Cubbage of Louisville and Ann Oldfather of Louisville and in the Sixth Supreme Court District T. Lawrence Hicks of Edgewood and J. Stephen Smith of Ft. Mitchell. Ballots for these two elections will be mailed Dec. 15, 2012 and returned by Jan. 15, 2013. Meyers also reported that there was no opposition for the Office of Vice President and President-Elect. Douglass Farnsley of Louisville will take office as Vice President and William E. Johnson of Frankfort will take office of President-Elect on July 1, 2013 for one-year term.
• Approved the 2013 Holiday Schedule for the Bar Center staff.

To KBA Members
Do you have a matter to discuss with the KBA's Board of Governors? Board meetings are scheduled on May 17-18, 2013
June 18, 2013
To schedule a time on the Board's agenda at one of these meetings, please contact John Meyers or Melissa Blackwell at (502) 564-3795.
The Administrative Office of the Courts is pleased to oversee the Legal Training for Dependency, Neglect and Abuse Cases (formerly the Guardian ad Litem Training Program). Since 1999, the AOC has been responsible for preparing attorneys to provide legal representation to dependent, neglected and abused children throughout Kentucky. The goal of the program is to produce highly qualified guardians ad litem by offering training sessions, providing educational materials and serving as a comprehensive resource.

These programs provide an overview of Kentucky statutory and case law while also meeting the federal requirements set forth in CAPTA (Child Abuse Prevention and Treatment Act) and ASFA (Adoption and Safe Families Act).

**CLE Credits.** The advanced program offers 5.75 credit hours of continuing legal education, which includes 1 credit hour of ethics.

**CEU Credits.** The AOC has applied for continuing education units from the Kentucky Board of Social Work.

There is a $25.00 registration fee for attorneys seeking CLE Credits.

FOR MORE INFORMATION
Attn: Legal Training
Department of Family and Juvenile Services
Administrative Office of the Courts
100 Millcreek Park
Frankfort, Ky. 40601 Phone 800-928-2350, x50510 • Fax 502-573-1412
DNATraining@kycourts.net

**Alexander Hamilton Historical Society Will Hold Annual Symposium at U of L on April 13**

The Alexander Hamilton Historical Society of Kentucky (AHHS) will hold its 2013 Symposium on Saturday, April 13. It runs 10:00 a.m.-12:30 p.m. at the University of Louisville McConnell Center’s Chao Auditorium, on the lower level of Ekstrom Library on Belknap Campus.

This year’s theme is “Federalism: National Power vs. State Power.” The symposium chair and moderator is Dr. Charles Ziegler, professor of Political Science, University Scholar and Grawemeyer Awards Director, University of Louisville.

The symposium features the following presentations: “The Founders and Federalism,” by Dr. Aaron Hoffman, assistant professor of Political Science, Bellarmine University; “The Constitution and Federalism,” by Mark Webster, attorney at law; “The Supreme Court and Federalism,” by Jane Lollis, attorney at law; and “The Politics of Fiscal Federalism,” by Dr. Jasmine Farrier, assistant professor of Political Science, University of Louisville.

The symposium is free and open to the public. A question and answer session follows the presentations. Free parking is available on campus; paid parking is available in the Speed Museum parking garage and other areas.

For additional information, contact Rick Kincaid at rkincaid@aol.com or call 502-897-0585. Regular AHHS meetings are held on the third Saturday of each month at 10:30 a.m. at the St. Matthews-Eline Library, 3940 Grandview Avenue, in St. Matthews City Hall. They are always free and open to the public. Lynn Olympia serves as president and can be reached at Olympia1231@aol.com or (502) 709-5070.

**KYLAP TO PARTNER WITH LMICK FOR ETHICS PROGRAM**

The Kentucky Lawyers Assistance Program (KY LAP) is proud to announce a partnership with Lawyers Mutual Insurance Company of Kentucky (LMICK) to provide 3.5 hours of free ethics (pending CLE approval) at two locations this spring. A working lunch will be provided. The programs will be from 10:00 a.m. to 2:00 p.m. The scheduled programs are:

**Paducah:** Thursday, May 30, at The Carson Center, 100 Kentucky Avenue;

**Pikeville:** Friday, May 31, at the Eastern Kentucky Exposition Center, 126 Main Street.

Please RSVP to Nancy Meyers at Meyers@lmick.com or call 502-568-6100 with your name, firm, event date, and your choice of vegetarian or regular boxed lunch.
Citizen Foster Care Review Boards throughout Kentucky are seeking volunteers to make a difference in the lives of local children in foster care. Volunteers are needed to review cases of children placed in foster care because of dependency, neglect and abuse to ensure these children are placed in safe, permanent homes as quickly as possible. Volunteers are not required to reside in the county where a board meets.


The Kentucky General Assembly created the Citizen Foster Care Review Board, or CFCRB, in 1982 as a way to decrease the time children spend in foster care. CFCRB volunteers review Cabinet for Health and Family Services files on children placed in out-of-home care and work with the cabinet and courts on behalf of the state’s foster children. The volunteer reviewers help ensure that children receive the necessary services while in foster care and are ultimately placed in permanent homes.

All volunteers must complete a six-hour initial training session and consent to a criminal record and Central Registry check. A recommendation is then made to the chief judge of the District Court or Family Court for appointment.

To view meeting schedules of the boards in need of volunteers, visit www.courts.ky and click on the CFCRB headline when it appears in the photo box at the top of the page. To volunteer or get more information, contact the Department of Family and Juvenile Services at the Administrative Office of the Courts in Frankfort at 800-928-2350 or newvolunteerapplicant@kycourts.net.

Citizen Foster Care Review Board
Approximately 800 volunteers across the state serve as members of the AOC’s Kentucky Citizen Foster Care Review Board. The boards operate within the AOC’s Division of Dependent Children’s Services, a division of the Department of Family and Juvenile Services. As the operations arm for the state court system, the AOC supports the activities of nearly 3,300 court system employees and 403 elected justices, judges and circuit court clerks and executes the Judicial Branch budget.

In Memoriam

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<tr>
<th>Name</th>
<th>City</th>
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<tr>
<td>John C. Anggelis</td>
<td>Lexington KY</td>
<td>1/9/2013</td>
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<td>Andrea Nicole Bostrom</td>
<td>Versailles KY</td>
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<td>John T. Fowler III</td>
<td>Louisville KY</td>
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<td>Mark Anthony Gabis</td>
<td>Owensboro KY</td>
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<td>Nathan S. Lord</td>
<td>Louisville KY</td>
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<td>John Joseph McCarthy</td>
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<td>Escum Lionel Moore Jr.</td>
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<td>Robert E. Vick</td>
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<td>Joseph C. O’Bryan</td>
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<td>Franklin Everett Warren</td>
<td>Louisville KY</td>
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<td>Charles E. Palmer Jr.</td>
<td>Lexington KY</td>
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<td>Lee Ann Webb</td>
<td>Louisville KY</td>
<td>1/23/2013</td>
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KENTUCKY BAR FOUNDATION

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Commitment to Strengthening Our Justice System and the Legal Profession Which Upholds its Standards

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Your contribution makes it possible for the Kentucky Bar Foundation to further the public’s understanding of the judicial system and the legal profession through programs and philanthropic partnerships that help those in need.

I want to be a Patron of the Kentucky Bar Foundation!

☐ Please accept my pledge to contribute $100 annually to the Kentucky Bar Foundation for the next five years, which creates a total commitment of $500. My first installment of $100 is enclosed.

☐ Please accept my pledge to contribute $150 annually to the Kentucky Bar Foundation for the next five years, which creates a total commitment of $750. My first installment of $150 is enclosed.

☐ Please accept my pledge to contribute $200 annually to the Kentucky Bar Foundation for the next five years, which creates a total commitment of $1,000. My first installment of $200 is enclosed.

Contributions to the Kentucky Bar Foundation are tax-deductible to the extent allowed by law.

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The Kentucky Bar Foundation, Inc.
514 West Main Street
Frankfort, KY 40601-1812

50 Bench & Bar January 2013
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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.
We would like to thank those individuals and organizations whose contribution of time, expertise and funding helped make the February 2013 New Lawyer Program a great success.

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Mark Your Calendar

KENTUCKY LAW UPDATE 2013
ADVANCING THE PROFESSION THROUGH EDUCATION

Mark your calendars now! The final dates and locations for the KBA’s 2013 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 will be available in late May. In the meantime visit www.kybar.org/186 for more information.

September 10-11 - Russell (Ashland)
Bellefonte Pavilion

September 26-27 - Lexington
Lexington Convention Center

October 3-4 - Owensboro
RiverPark Center

October 9-10 - London
London Community Center

October 24-25 - Louisville
KY International Convention Center

October 30-31 - Gilbertsville
KY Dam Village State Resort Park

November 6-7 - Bowling Green
Holiday Inn & Sloan Convention Center

November 21-22 - Prestonsburg
Jenny Wiley State Resort Park

December 5-6 - Covington
Northern Kentucky Convention Center

“Within twelve (12) months following the date of admission as set forth on the certificate of admission, each person admitted to membership to the Kentucky Bar Association shall complete the New Lawyer Program.”

SCR 3.652 New Lawyer Program

Kentucky Bar Association

2013 New Lawyer Program

in conjunction with:

June 19-20, 2013
Galt House Hotel
Louisville, KY

Visit www.kybar.org/195 for more information
Congratulations to the following members who have received the 2012 CLE Award by obtaining a minimum of 62.5 CLE credit hours within a three-year period, in accordance with SCR 3.680. The CLE Commission applauds these members for their efforts to improve the legal profession through continuing legal education.
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Congratulations to the following members who have received the CLE award by obtaining a minimum of 62.5 CLE credit hours within a three-year period, in accordance with SCR 3.680, and renewing the award by obtaining at least 20 hours in subsequent years. The CLE Commission applauds these members for their efforts to improve the legal profession through continuing legal education.

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Christopher W. Jones
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Kenneth Thomas Williams II
Wesley Kiser Williams
Mildred Gail Wilson
Linda Carnes Wimberly
Jennifer L. Wittmeyer
Jamahl Lashon Woolridge
Gerald Edward Wuetcher
Wilbur M. Zevely
Michael Dean Zimmerman
Prominent construction attorney William G. (Bill) Geisen has joined Stites & Harbison, PLLC, as a member of the firm’s Construction Service Group. Geisen is the only attorney from the Greater Cincinnati area who is a fellow in the American College of Construction Lawyers, an honor reserved for the top one percent of the U.S. construction bar. Geisen will continue his practice in the Cincinnati/Northern Kentucky market. Stites & Harbison is in the process of opening an office in the RiverCenter II building in Covington. This will be the firm’s first office in the Greater Cincinnati area and will extend the firm’s daily practice into Northern Kentucky, Ohio and southeastern Indiana. Geisen’s construction practice focuses on contract negotiation, dispute resolution and litigation.

Congratulations to Brandon Faulkner of our Lexington office as he was recently named partner of Quintairos, Prieto, Wood & Boyer, P.A. Faulkner was an assistant Commonwealth attorney for several years focusing on gang and narcotics related prosecutions before he went into private practice. He is now instrumental in driving our long-term care defense practice in the eastern part of Kentucky which includes some of the nation’s most difficult defense venues. Faulkner also handles professional liability defense as well as product liability matters.

Frost Brown Todd recently named Richard E. Plymale and David C. Trimble as members of the firm. Plymale practices in the Business Litigation Group. With over 20 years’ experience as a civil and criminal trial lawyer, he concentrates his practice in white collar crime defense, representing corporations and executives subject to federal and state criminal and civil investigation proceedings, including health care providers and organizations undergoing audits and investigations. Trimble is in the Insurance and Tort Defense Practice Group. He has represented insurance industry clients in coverage, regulatory, and bad faith/unfair claims practices matters throughout Kentucky and Tennessee. Trimble has also represented healthcare industry clients through multiple professional malpractice carriers and several hospitals in malpractice defense matters, including University of Kentucky Medical Center, Trover Clinic/Regional Medical Center, St. Joseph Hospital, and Marymount Medical Center. He also has represented individual physicians and medical practice groups in licensure issues.

Christy J. Adams is pleased to announce the commencement of her new practice, C. J. Adams Law, PLLC, located at 200 S. Buckman Street, Shepherdsville. She plans to concentrate her practice in the areas of bankruptcy and creditors rights, probate, wills, collections, and general civil practice. Adams is available to assist clients in Bullitt, Nelson, Larue, Jefferson, and other nearby counties. The telephone number is (502) 543-2210 and email address is cjadamlaw@gmail.com.

The law firm of Stevenson, Land & Tierney (formerly Stevenson & Land) is pleased to announce that Matthew C. Tierney has become a partner in the firm. Tierney focuses primarily in the areas of civil litigation, real estate, estate planning and creditor-debtor law, including bankruptcy. Tierney is a 2003 graduate of Centre College and 2008 graduate of Thomas M. Cooley Law School. He is admitted to practice law in all state courts and U.S. District Court, Western Division. Tierney joined the firm following his admission to the Kentucky Bar in May 2008. He is a member of the board of directors of Daviess County Senior Services, Inc.

J. Guthrie True, Richard M. Guarnieri, and William C. Ayer, Jr., are pleased to announce the formation of True Guarnieri Ayer, LLP. Also joining them as an associate is Whitney True Lawson. True is a 1981 graduate of Georgetown College and a 1984 graduate of the University of Kentucky College of Law. Guarnieri is a 1983 graduate of Centre College and a 1986 graduate of the University of Kentucky College of Law. Ayer is a 1965 graduate of Murray State University and a 1968 graduate of the University of Kentucky College of Law. Lawson is a 2007 graduate of Transylvania University and a 2011 graduate of the University of Louisville Louis D. Brandeis School of Law. True Guarnieri Ayer, LLP is located at 124 West Clinton Street, Frankfort, Ky., and is found on the web at www.truelawky.com. The firm is engaged in civil and criminal trial and appellate practice, as well as the practice of administrative law.

United States District Judge Charles R. Simpson III announced that, after over 26 years of active service, he will take senior status, effective Feb. 1, 2013. Judge Simpson was appointed to the court in 1986 by then President-Ronald W. Reagan. He had previously been in private practice as a lawyer. He served as chief judge from 1994 to 2001. Judge Simpson was named Judge of the Year by the Louisville Bar Association in 2000. The Kentucky Bar Association named him as Kentucky’s Outstanding Judge in 2005. He received the Outstanding Alumnus award from the University of Louisville Louis D. Brandeis School of Law in 1999, and in 2006 was the recipient of the Grauman Award, the law school’s highest honor. Judge Simpson served in 2006 and 2007 as a member of the Judicial Conference of the United States, the federal judiciary’s governing board, which is chaired by the Chief Justice of the United States. He represented the Federal District Judges from Kentucky, Michigan, Ohio and Tennessee. Judge Simpson is a 1967 graduate of the University of Louisville and its Brandeis School of Law in 1970.

Weber & Rose, P.S.C., is pleased to announce that Susan T. Merrill is of counsel with the firm. Merrill received her J.D. from the University of Louisville Louis D. Brandeis School of Law in 1995 and her B.A. from Baylor University in 1991. During law school Merrill served as president, Moot Court Board, 1994-95, she received the Leon Siedman Memorial Scholarship for leadership and service, 1995; she was on the Intellectual Property Law Moot Court Team, 1995; Susan was the runner-up, Pirtle-Washer Moot Court Competition, 1993. Merrill concentrates her practice in the areas of corporate law & estate planning. She represents business clients on a broad array of corporate matters including business formation, mergers & acquisitions, commercial real estate leases & purchases, employment law matters, business succession planning, estate & charitable gift planning, probate law and adoptions.

Prior to coming to Weber & Rose, she served as general counsel to a mid-sized regional manufacturing company.

Gregg Y. Neal and Todd Davis with Neal & Davis, PLLC, 931 Main Street, Shelbyville, are pleased to announce that Matthew H. Chandler has joined the
firm. Chandler is a native and resident of Shelbyville. He received his law degree in 2001 from the University of Kentucky College of Law. Prior to law school, Chandler worked as a certified public accountant. Chandler’s experience includes business and corporate law, real estate, probate, estate planning, litigation and divorce. Chandler can be contacted at (502) 633-6002.

Frost Brown Todd is pleased to announce the addition of a new associate, Amy E. Cooper, to the firm’s Louisville office. Cooper will be a part of the firm’s health law service team in its regulated business practice group. During law school and following graduation, she was a certified legal intern and then post-graduate fellow for the Disability Law Clinic at Indiana University, representing and assisting in representation of clients in Medicaid and Social Security Disability hearings. She also served as a research assistant for the Center for Law, Ethics, and Applied Research in Health Information at Indiana University, researching HIPAA and HITECH regulations as well as state laws related to health information. Cooper earned her J.D., cum laude, at Indiana University Maurer School of Law. She earned her B.A. in economics, summa cum laude, from Simmons College in Boston.

The law firm of Stevenson, Land & Tierney is pleased to announce that Shannon M. Tanner has joined the firm as an associate. Tanner’s practice will focus on civil matters in both Kentucky and Indiana. As resident of Spencer County, Ind., Tanner attended Kentucky Wesleyan College where she graduated magna cum laude. After graduation, Tanner worked for NASA, before attending the Indiana University School of Law where she served as a managing editor for the Federal Communications Law Journal and attained Dean’s Honors. She obtained her license to practice in Indiana in 2001 from the University of Kentucky School of Law and although her practice is broad based, she has become particularly adept at defending insurance companies against bad faith allegations in some of the most difficult venues in the country.

Stites and Harbison, PLLC, is pleased to announce that the following attorneys have been elected to join the partnership: Sharon Gold, Sara Veeneman, and Matthew Williams. Gold concentrates her practice in all areas of commercial litigation including class actions, interference with business cases, breach of contract matters, breach of fiduciary duty actions, products liability suits, and other complex litigation. Gold practices in the firm’s Lexington office. Veeneman is a member of the firm’s Litigation & Dispute Resolution Service Team. She concentrates her practice in commercial litigation and appellate law. Veeneman practices in the firm’s Louisville office. Williams concentrates his practice in the area of intellectual property law including patent prosecution and enforcement, trademark prosecution and enforcement, trade secrets, copyrights, client counseling, transaction support, IP licensing, and IP litigation. Williams practices in the firm’s Louisville office. The firm also named Byron Leet, Frank Mellen and Turney Berry to its executive committee.

Wyatt, Tarrant & Combs, LLP, is pleased to announce that the following attorneys have been elected to join the partnership: Sharon Gold, Sara Veeneman, and Matthew Williams. Gold concentrates her practice in all areas of commercial litigation including class actions, interference with business cases, breach of contract matters, breach of fiduciary duty actions, products liability suits, and other complex litigation. Gold practices in the firm’s Lexington office. Veeneman is a member of the firm’s Litigation & Dispute Resolution Service Team. She concentrates her practice in commercial litigation and appellate law. Veeneman practices in the firm’s Louisville office. Williams concentrates his practice in the area of intellectual property law including patent prosecution and enforcement, trademark prosecution and enforcement, trade secrets, copyrights, client counseling, transaction support, IP licensing, and IP litigation. Williams practices in the firm’s Louisville office. The firm also named Byron Leet, Frank Mellen and Turney Berry to its executive committee.

Dinsmore & Shohl LLP is pleased to announce that Michael C. Merrick has been promoted to the firm partnership. Merrick will work out of the Louisville office and helping clients resolve business
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Fulton & Devlin, LLC, is pleased to announce that Caroline Pitt Clark has joined the firm. Clark was an Administrative Law Judge with the Department of Workers’ Claims from 2008 through 2012, and prior to that she served as commissioner of the Kentucky Public Service Commission. She is a graduate of the University of Kentucky College of Law, Centre College, and Sacred Heart Academy. She concentrates her practice in the areas of workers’ compensation law, civil litigation, subrogation, and white collar criminal defense.

Jefferson County Attorney Mike O’Connell has appointed three new Assistant County Attorneys: Karen Davis, Mark Luecke, Brenda Rojas.

Bingham Greenebaum Doll LLP is pleased to announce that Daniel E. Fisher has rejoined the firm’s Corporate and Transactional Practice Group. Fisher will be located in the Louisville office, helping to expand the regional impact of the firm with his services. He focuses his practice on complex business and financial transactions, primarily focusing on the health care and health insurance industries. Fisher graduated from the University of Arizona James E. Rogers College of Law, a Master of Arts degree from the University of San Francisco, and a Bachelor of Arts degree from the University of Pennsylvania. She is admitted to practice law in Oregon and Kentucky, and is a 2009 graduate of Leadership Bowling Green. Smith came to work at ELPO as an attorney in 2006. His practice focuses on civil litigation and corporate defense work. He holds a J.D. from the University of Kentucky College of Law and a Bachelor of Arts degree from Centre College. He is admitted to practice law in Kentucky and is a 2007 graduate of Leadership Bowling Green. He currently serves as president of the Bowling Green-Warren County Bar Association.

Middleton Reutlinger is pleased to announce that Billy J. Mabry has joined the firm. Mabry concentrates in the health law field having more than 20 years of experience representing hospitals, physicians, home health agencies, nursing homes, provider sponsored organizations, teaching facilities, diagnostic centers, ambulatory centers and others. He has represented health care providers across the nation and in England. He has a keen knowledge and understanding of the healthcare industry not just as a lawyer, but from an operations standpoint too.

Kentucky ElderLaw, PLLC, in Louisville, is pleased to announce that Misty Clark Vantrease and Kelly Gannott have become full equity partners in the firm. Along with Bernard and Rhoda Faller, they focus solely on the needs of older citizens and other persons needing similar care. Vantrease is the chair-elect of the Elder Law Section of the Kentucky Bar Association. Gannott joined the firm in early 2011 after operating her own elder law practice.

Gernt & Kearsns Co., L.P.A., recently announced the appointment of Todd V. McMurtry as a partner in the firm’s Litigation Practice Group. McMurtry brings with him over 20 years of litigation experience and is licensed in both Ohio and Kentucky. Since its inception in 1987, Gernt& Kearsns, Co., L.P.A. has evolved into a full service creditor’s rights law firm dedicated to the representation of the banking industry in its admitted states of Ohio, Kentucky, Indiana and Michigan.

Frost Brown Todd is pleased to announce the appointment of four new members in the Louisville office. The new members are: Nathan L. Berger, Joseph B. Miller, D. Christopher Robinson, and LaQuita S. Wornor. Berger focuses his practice on assisting public and private companies with general business and corporate issues, acquisitions and divestitures, among other strategic transactions. He frequently works with financial institutions regarding regulatory issues and intra interstate reorganizations and acquisitions. In addition to this, his bank regulatory practice includes the review, analysis and negotiation of various agreements and regulatory actions for financial institutions. Miller works in the areas of mergers and acquisitions, private equity and venture capital transactions, the formation of private investment funds and general entrepreneurial/startup and small business advice. He has extensive experience with M&A transactions involving both public and private companies that range in different sizes. He also regularly assists entrepreneurs, startups and larger, closely-held companies on a range of general business matters. Robinson is a trial lawyer in the firm’s litigation department. He specializes in mass torts, products liability, and general tort defense, but he also represents clients in a variety of commercial disputes involving contract interpretation and enforcement. In particular, Robinson represents major agricultural equipment manufacturers on a national basis, providing legal advice and guidance in over thirty jurisdictions. Wornor practices in the firm’s Labor and Employment Department. Her practice is focused on representing employers in matters arising from both labor relations and employment litigation. She has experience litigating age, sex, disability, and race discrimination claims, as well as Family and Medical Leave Act (FMLA), and Uniformed Services Employment and Reemployment Rights Act (USERRA) claims. Wornor has labor arbitration experience and she often advises clients on issues arising from the National Labor Relations Act.

Billings Law Firm, PLLC, is pleased to announce that Gary W. Thompson has joined their office as an associate attorney. Thompson received his B.A. in biblical studies from Boyce College, a school of the Southern Baptist Theological Seminary. He then received his J.D., summa cum laude, from the Mississippi College School of Law, where he was executive editor of the Mississippi College Law Review. Upon graduation, Thompson was admitted to practice law in Kentucky and Tennessee and served as law clerk for the Honorable Greg
Lay in Laurel and Knox Circuit Court. After his clerkship, Thompson moved to Lexington, with his family and entered into practice with a civil defense firm that exemplified professionalism and where he gained invaluable litigation experience. Thompson’s practice with Billings Law Firm is devoted primarily to litigation and real estate matters.

Clay B. Wortham has joined McBrayer, McGinnis, Leslie and Kirkland, PLLC’s Lexington office as an associate in the Health Care Department. He provides health law regulatory and transactional advice to health care providers and related entities, including hospitals, pharmaceutical companies, health plans and physician groups. Clay joins McBrayer from the Chicago law firm of Quarles & Brady LLP.

Garvey Shearer, PSC, is proud to announce that Jason E. Abeln was named partner in the firm. Abeln joined Garvey Shearer as an associate in 2010 and has worked with the founding partners since his graduation from the University of Cincinnati College of Law in 2005. Licensed in state and federal courts in Ohio and Kentucky, his practice focuses on civil trial and appellate litigation. He represents businesses and individuals in cases ranging from automobile accidents to contract disputes to federal class action regulatory compliance. In addition to practicing law, Abeln served on the board of the Young Lawyers Division of the Cincinnati Bar Association for four years before being elected secretary of the executive board of the YLS, then vice chair, and currently chair elect. Abeln earned a Bachelor of Arts in history in 2002 from Thomas More College where he graduated summa cum laude.

Fowler Bell PLLC is pleased to announce Laura Salzman has joined the law firm as an associate practicing in commercial litigation and collections. She holds a political science undergraduate degree from Northern Kentucky University and her J.D. is from the University of Kentucky College of Law. She also voluntarily serves with the Fayette County Foster Care Review Board.

Paul J. Wischer is the newest associate at Ziegler & Schneider, P.S.C., in Crescent Springs, Ky. Wischer previously worked with Ziegler & Schneider as a law clerk while attending Northern Kentucky University’s Salmon P. Chase College of Law where he graduated cum laude. As an associate, Wischer will work primarily in the firm’s Business/Corporate and Municipal/Government Practice Groups. He is currently licensed in the state of Kentucky and is a member of the Kentucky, Northern Kentucky and American Bar associations.

Stoll Keenon Ogden PLLC is pleased to announce that attorney Allison J. Donovan has been promoted to member of the firm. Donovan practices law in the area of business services with a focus on mergers and acquisitions. She also practices in banking, securities and real estate law. Donovan is a graduate of the University of Kentucky College of Law and enjoys involvement in community organizations and efforts, including the American Heart Association’s Lexington chapter and Junior Achievement.

Stoll Keenon Ogden PLLC (SKO) is pleased to announce that attorney Charles Lamar Tim Kline, a 1995 graduate of Daviess County High School, who joined SKO in 2010 after three years practicing in a top New York City firm, will also practice in the Owensboro office. SKO’s office opened in late-January and is located at 101 East Second Street, Suite 200.

Grant M. Axon is pleased to announce the formation of his law firm, Grant M. Axon, PLLC. Axon is a 2012, cum laude graduate of the University of Louisville. Grant M. Axon, PLLC, is located at 509 East Main Street, Warsaw, KY 41095. The firm can be contacted directly at (859) 567-2000, or by facsimile at (859) 567-2966. Grant M. Axon, PLLC, concentrates its practice in litigation involving personal injury, criminal, family and tax issues.

Stites & Harbison, PLLC, has created a new position, chief talent officer (CTO), which will oversee the firm’s efforts to attract and retain top legal talent in our nine offices throughout the Southeastern U.S. The CTO will oversee all firm recruiting, professional development and diversity efforts of the firm. Shannon Antle Hamilton, an employment law attorney with Stites & Harbison since 1988, has been named the firm’s chief talent officer. In her new role, Hamilton will continue her duties and role as co-chair of the Employment Law Service Group and will also practice as a member of the firm. Hamilton is a current member and the first chair of the firm’s Diversity Committee and was instrumental in the drafting and adoption of the firm’s Diversity Plan. Hamilton also previously served on the Recruiting Committee, personally interviewing candidates for summer, associate and lateral positions.

Greg S. McDonald is an associate in the Louisville office of Quintairos, Prieto, Wood & Boyer, P.A. McDonald focuses his practice in the areas of long-term care defense, insurance defense, insurance coverage and workers’ compensation defense litigation. McDonald’s practice in the areas of commercial and civil litigation is augmented by his past experience as an attorney with two Louisville law firms specializing in long-term care defense and medical malpractice claims. McDonald received his J.D. from the University of Louisville Louis D. Brandeis School of Law in 2002 and Master’s degree of business administration from Bellarmine College in 1995. He earned a Bachelor of Arts degree from Miami University in Ohio in 1985. He is a member of the Louisville and Kentucky Bar Associations.

Reminger Co., LPA, elected Matthew T. Lockaby as shareholders during their annual November shareholder meeting. Lockaby focuses his practice on the defense of employment, product liability, personal injury, and class action claims.

Adams, Stepner, Woltermann & Dusing, PLLC, is pleased to announce the following appointments for the 2013 calendar year: Jeffrey C. Mando—head of Civil Litigation Practice Groups, Mary Ann Stewart—Government Practice chairperson, Stacey L. Graus—General Civil Litigation chairperson; Dennis R. Williams—Business Law chairperson, Michael M. Sketch—Commercial Banking and Real Estate chairperson, James G. Woltermann—Estate Planning, Probate, and Elder Law chairperson, and Benjamin G. Dusing—Federal White Collar Criminal Defense chairperson. The law firm is proud to offer its clients and prospective clients a full range of legal services in this competitive business environment. Adams, Stepner, Woltermann & Dusing, PLLC, continue to make strides to meet the legal needs of Greater Cincinnati, as well as through Kentucky and the local region. The firm continues to offer focused representation and exceptional client service and value to its clients.

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March 2013
He has represented employers in state and federal courts and state administrative agencies in connection with a wide variety of workplace issues and handled all phases of class action litigation, from initial removal to federal court, to defeating class certification, to negotiating and managing settlement. As a member of the American Bar Association, he serves on both the Class Action and Derivative Suits Committee and the Employment Law Committee. He is also a member of the Kentucky Bar Association, Fayette County Bar Association, Federal Bar Association, Defense Research Institute and Kentucky Defense Counsel. Lockaby can be reached by calling 859-426-4631 or by emailing mlockaby@reminger.com.

**WHO, WHAT, WHEN & WHERE**

**Middleton Reutlinger** is pleased to announce that **Manav Das, Ph.D.**, has joined the firm. Dr. Das is a registered patent attorney in the firm’s intellectual property practice group. His areas of concentration include patent prosecution and intellectual property litigation. Dr. Das has a background in mathematics and computer science. He received his J.D. from the University of Louisville Louis D. Brandeis School of Law in 2008 and his Ph.D. in mathematics from The Ohio State University in 1996.

Calfee, Halter & Griswold LLP is pleased to announce that **Matthew Parrish** joins Calfee’s legal team as its newest partner in the Cincinnati office. Parrish has many years of experience in domestic and international business transactions, with a focus on mergers and acquisitions, reorganizations and business and capital markets. A particular area of focus of his practice has been working with manufacturers and marketers of consumer products, both domestically and internationally. Parrish also serves as counsel to a number of clients in the entertainment industry. In 2012, he was recognized as one of the country’s leading entertainment lawyers by Newsweek magazine.

**IN THE NEWS**

McBryar, McGinnis, Leslie & Kirkland, PLLC is pleased to announce that **W. Brent Rice**, member of the firm’s Lexington office, has been elected as chairman of the Lexington Center Corporation. Lexington Center Corporation (LCC) is a not-for profit 501c4 corporate agency of the Lexington Fayette Urban County Government (LFUCG) created to manage and maintain the following facilities: Rupp Arena, The Lexington Opera, Lexington Convention Center, The Shops at Lexington Center and Triangle Park. Rice succeeds **Cecil F. Dunn**, of counsel in the firm’s Lexington office, where he served as chairman of LCC for 20 years of his 26 years of board service.

Wyatt, Tarrant & Combs, LLP, is pleased to announce that **Lisa C. DeJaco** has been selected to participate in the Bingham Fellows Class of 2013. The Bingham Fellows is the leadership-in-action arm of the Leadership Louisville Center. For over 20 years, the program has provided experienced leaders with the opportunity to develop solutions for our community’s most pressing problems. DeJaco is an alumni of the Leadership Louisville program, and a partner in the Firm. She concentrates her practice in the area of intellectual property litigation, where she has prosecuted and defended unfair competition claims, trade secret disputes, and infringement actions over copyrights, trademarks and patents.

Robert M. Hoffer has been named “The 2012 Distinguished Lawyer of the Year” by the Northern Kentucky Bar Association (NKBA). Hoffer has been a member of NKBA since 1985. He heads Dressman Benzing LaVelle, psc’s employment law division and represents employers of all sizes, including some of the largest throughout the Kentucky and Greater Cincinnati area. He has also represented hospitals and physicians for over 30 years on employment and medical negligence issues and has successfully litigated numerous employment cases in federal and state courts. He is the current past-president of the Kentucky Defense Counsel, chair of the Northern Kentucky Chamber’s Labor and Employment committee and a member of the Northern Kentucky Human Resource Association. He has practiced law with Dressman Benzing LaVelle, psc, since he earned his J.D. in 1980.

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Peter Perlman of Lexington, has been named the 2013 president of the Litigation Counsel of America. Perlman is the principal of Peter Perlman Law Offices, P.S.C., where he specializes in product liability and crash-worthiness litigation. During nearly 50 years of practicing law, Perlman has won more than 50 multi-million dollar verdicts and settlements on behalf of his clients. In addition to being a fellow of the Litigation Counsel of America, he is a member of both the Inner Circle of Advocates and International Society of Barristers, a fellow of the International Academy of Trial Lawyers, served on the Board of Trustees of the National Judicial College, and is a founding member and past president of the Trial Lawyers for Public Justice. He is also past president of the Association of Trial Lawyers of America, the Civil Justice Foundation, and the Kentucky Academy of Trial Attorneys. Perlman was also the recipient of the Compassionate Gladiator Award from the Florida Justice Association and the Leonard M Ring Champion of Justice Award from A AJ. This is award is given for outstanding contributions to the civil justice system, overall character and integrity as well as his contributions to the public good and welfare. This award is also based on contributions to trial advocacy and the legal profession generally.

Brian T. Goettl has been elected as the president of the Jessamine County Chamber of Commerce for the 2013-2014 term. Goettl has served on the board of directors for three years and previously served as treasurer of the organization. He is the first county wide elected official to have held the position. Goettl is a 1984 undergraduate of the University of Kentucky Business School and a 1995 graduate of the College of Law.

State Rep. Sannie Overly, who began representing the 72nd House District in 2008, will serve as the Kentucky House of Representatives’ Majority Caucus Chairwoman for the next two years, following an election by her fellow House Democrats. She is the first woman ever to be part of the House leadership team. Until the Jan. 8th election, Rep. Overly had served as chairwoman for the past four years of the House Budget Review Subcommittee on Transportation, an influential committee that puts together the state’s highway plan. Rep. Overly is a Bourbon County native who has practiced law for 20 years. Prior to that, she was a civil engineer with the Kentucky Transportation Cabinet.

Bubalo Goode Sales & Bliss PLC announced that Leslie M. Cronen has been named one of the “Top 40 Under 40” by The National Trial Lawyers. Cronen is an attorney in the Louisville office. She joined the firm in 2006 and concentrates her practice in the areas of wrongful death, medical malpractice, pharmaceutical liability and mass tort litigation on behalf of injured individuals. Cronen received her J.D., with honors, from the University of Louisville Louis D. Brandeis School of Law. There she was involved in the Law Review, Moot Court and honor council. She earned her undergraduate degree from the University of Louisville. Cronen is a member of the American Bar, Kentucky Bar, Indiana State Bar, Louisville Bar, Kentucky Justice and Indiana Trial Lawyers associations and the American Association for Justice. She is a Leadership Academy fellow and completed a two year term as an associate member of the Brandeis Inn of Court.

Felix Gora, a partner at Rendigs, Fry, Kiely & Dennis, has been certified by the Ohio State Bar Association as a specialist in Labor and Employment law. This certification makes Gora one of a small group of attorneys in Ohio to have earned this distinction. Gora’s practice is concentrated in the areas of employment, insurance, civil rights, personal injury appellate and aviation law. Gora’s court appellate background is a key factor in his selection to handle some of the most difficult procedural issues in litigation. Gora received his undergraduate degree at Miami University. He is a 1980 graduate of University of Cincinnati College of Law.

The law firm of Bubalo Rotman PLC changed its name to Bubalo Goode Sales & Bliss PLC. The new name represents continuing growth and new capabilities – it recognizes all the partners plus it includes a new attorney who is associating with the firm. The attorneys who comprise the firm name are Gregory J. Bubalo, Christopher W. Goode, Kenneth L. Sales and Paula S. Bliss. This transition also recognizes the exit of Steven B. Rotman to pursue other interests. Bubalo Goode Sales & Bliss PLC is a plaintiff litigation firm handling cases for individuals injured by prescription drug side effects, product defects, vehicle accidents and other types of catastrophic damage caused by the negligence of others. The firm handles individual cases in all parts of the country and also participates in multidistrict litigation of mass torts cases. Bubalo Goode Sales & Bliss has offices in Louisville, Lexington and Boston.
tute on issues facing the legal system and the impacts of the law on society. Selection as a fellow in the foundation is limited to one-third of one percent of the lawyers admitted to practice in each jurisdiction of the United States.

Hall, Render, Killian, Heath and Lyman, the largest health care focused law firm in the nation, has capped off a year of growth with the formation of a pharmacy practice area. Although this formal practice area is new, several attorneys in the firm have utilized their pharmacy-related knowledge and experience in serving clients for years. Attorneys who practice in Hall Render’s pharmacy practice area counsel clients, including retail pharmacies, mail-order pharmacies, hospitals and long-term care providers, regarding the full spectrum of pharmacy and drug-related matters. Services address provider and professional issues, including regulatory compliance and enforcement support, development and maintenance of compliance programs, Medicare and Medicaid reimbursement, private payor reimbursement, and fraud and abuse advice and litigation defense.

Bingham Greenebaum Doll LLP attorney Mark A. Melvin was recently elected to serve on the board of directors of the Tom Sawyer State Park Foundation for a three-year term. The board strives to build public support, awareness and utilization of the park, and they encourage state government support of Jefferson County’s representative in the Kentucky state park system. The Tom Sawyer State Park Foundation is a volunteer organization that contributes ideas and funds to benefit projects and activities at E. P. “Tom” Sawyer State Park. Melvin is an attorney in the firm’s Louisville office and a member of the Corporate and Transactional Practice Group. His practice focuses on mergers and acquisitions, securities, antitrust and a variety of matters in the distilled spirits industry. Melvin is a member of the Kentucky Bar Association, Louisville Bar Association and the 2013 graduating class of the Funds for the Arts’ NeXt! Leadership Development Program. He received his bachelor’s degree from the University of Richmond and his law degree from the University of Louisville Louis D. Brandeis School of Law.

Funded by a generous grant from the Kentucky Bar Foundation, “Kentucky Lawyers Speak does what any good book should—it makes you want to read on,” according to a review by Dr. James C. Klotter, the State Historian of Kentucky and a professor of history at Georgetown College. “The stories here tell of the human side of the law, of the joys and sorrows, of the hopes and despair of the humor and pathos. These interviews provide the raw material of history, from those who lived it, for those who enjoy it now. They make the law come alive and make history come alive.”

Copies of Kentucky Lawyers Speak are now available from the publisher, Butler Books. The book may be purchased online at www.butlerbooks.com or by faxing (502-897-9797) or mailing your order to Butler Books, P.O. Box 7311, Louisville, Kentucky 40207.
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McBrayer, McGinnis, Leslie & Kirkland, PLLC, is pleased to announce that Amy D. Cubbage, of counsel, has been elected to the KBA Board of Governors. She will serve a two-year representing the 4th Supreme Court District. The terms begins July 1, 2013. She will be eligible to run again for two more two year terms at the end of her first term.

Wyatt, Tarrant & Combs, LLP, is pleased to announce that Lisa E. Underwood, a partner in the Lexington office, has been appointed to the 2013 Commerce Lexington Board of Directors. Underwood is a partner and member of the firm’s Corporate and Securities Service Team. She concentrates her practice in the areas of equine law, business law, mergers and acquisitions, legislative and regulatory initiatives, racing, pari-mutuel and gaming law.

Dressman Benzinger LaVelle, psc (DBL) announced James A. Dressman, III, as the new managing partner at the firm. Dressman has over 35 years of experience representing commercial banks and other businesses in complex financial transactions. He joined the firm in 1977 and is currently the head of the commercial law and banking practice group. He succeeds the firm’s longstanding managing partner Gerald Benzinger. Dressman has extensive experience representing entities and individuals in business mergers, asset acquisitions and sales, real estate transactions and development. He provides guidance for entity structuring, reorganization, buy/sell arrangements, and business successions, focusing on business and tax matters. Benzinger, too, will remain active with the firm, supporting DBL Law’s extensive health care practice.

Frost Brown Todd associate, Carrie A. Pytynia, has recently been elected to the Special Olympics of Kentucky Board of Directors. The board of directors is made up of business and sports leaders, Special Olympics athletes, and athlete’s parents and sets policies for the organization as well as shapes the direction of the program. At Frost Brown Todd, Pytynia practices in the commercial real estate and lending areas. She received her J.D. from Vanderbilt University Law School in 2011. She also received her undergraduate degree, summa cum laude, from Vanderbilt in political science.

Steven D. Jaeger, Esq., is proud to announce that he was recently sworn in to his third consecutive term on Edgewood’s City Council, located in Kenton County. Jaeger is the founding member of The Jaeger Firm, PLLC, which handles cases in the area of personal injury, mediation, appeals, and domestic. Jaeger can be contacted at (859) 342-4500 or by email at sjaeger@thejaegerfirm.com.

RELOCATION

Christine Ward is pleased to announce the relocation of her law practice. Her new office is located in Springhurst Office Condominiums at 3801 Springhurst Blvd, Suite 107, Louisville, KY 40241. Her new phone number is (502) 709-3618. Ward serves clients needing legal counsel in family court matters.

Hughes & Coleman has moved their Lexington office to 2333 Alexandria Drive, Suite 119, Lexington, KY 40504.

Have an item for WHO, WHAT, WHEN & WHERE?
The Bench & Bar welcomes brief announcements about member placements, promotions, relocations and honors. Notices are printed at no cost and must be submitted in writing to: Managing Editor, Kentucky Bench & Bar, 514 West Main Street, Frankfort, KY 40601 or by email to sroberts@kybar.org.

Digital photos must be a minimum of 300 dpi and two (2) inches tall from top of head to shoulders. There is a $10 fee per photograph appearing with announcements. Paid professional announcements are also available. Please make checks payable to the Kentucky Bar Association.

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