KENTUCKY BAR ASSOCIATION

Bench & Bar

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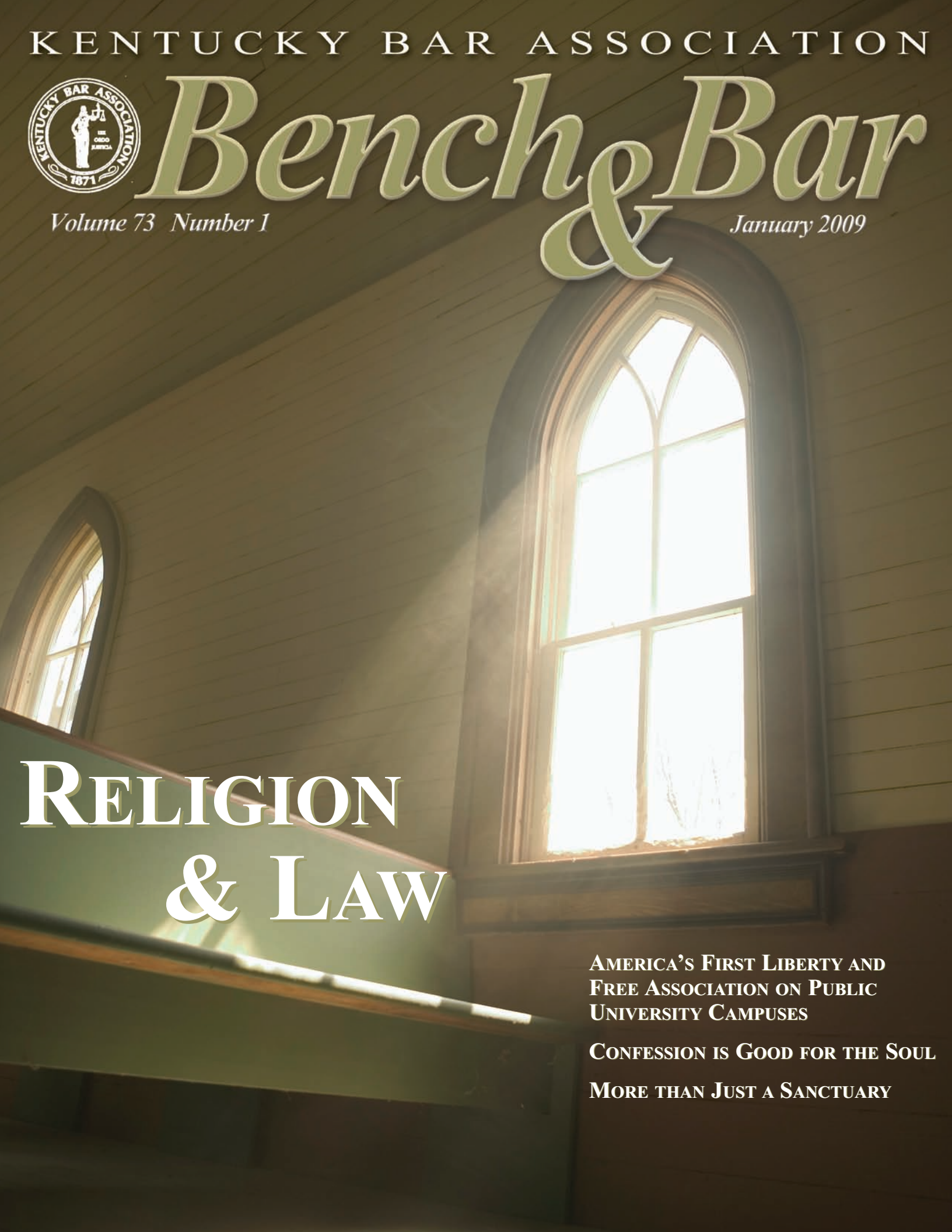

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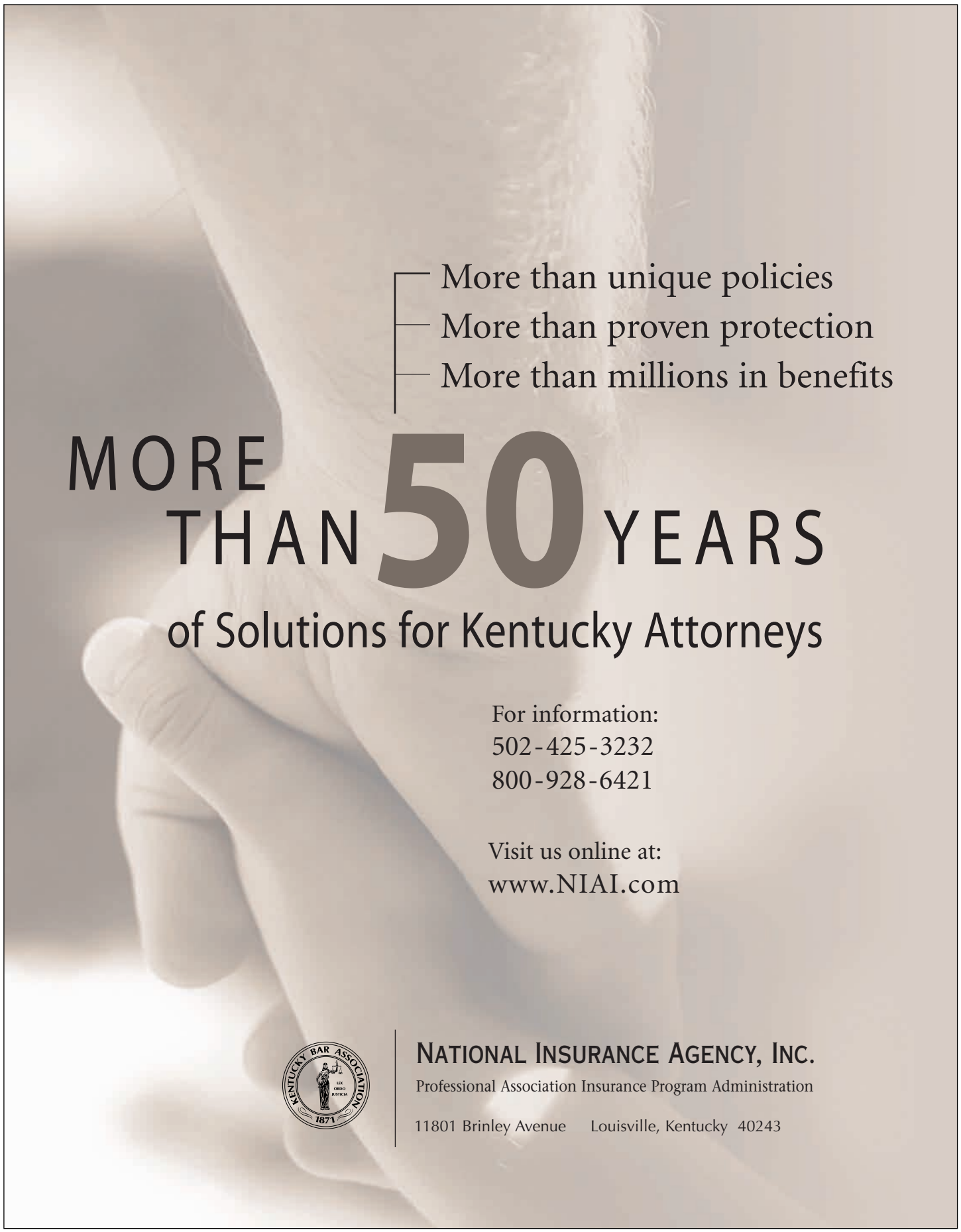
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Kentucky Bar Association Board of Governors announces conclusion of its inquiry into the removal of members from the Ethics Committee

In August 2008, the Kentucky Bar Association (KBA) Board of Governors became aware that President Barbara Bonar had removed several volunteers on the Ethics Committee from their positions before the expiration of their appointed terms. Although KBA staff had provided KBA President Barbara Bonar with information regarding the correct expiration dates of the affected members' current terms, she chose to inform these volunteers that their respective terms on the Ethics Committee had expired on June 30, 2008, and thanked them for their service to the KBA. Several of the volunteers complained or raised concerns about their removal to the KBA. Ms. Bonar offered to reinstate all of the Ethics Committee members she had attempted to remove. Most of these individuals have returned to their volunteer duties.

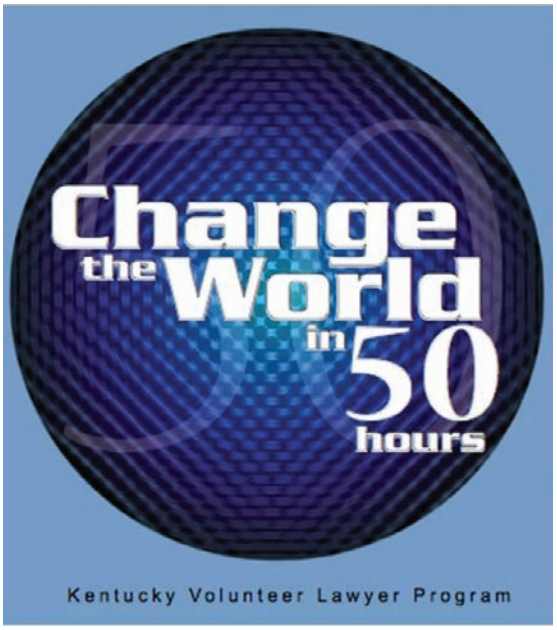
The Board of Governors initiated an inquiry into Ms. Bonar's removal of these Ethics Committee members. That inquiry was justified under the circumstances and was pursued by the Board of Governors in good faith.

At a specially called meeting of the Board of Governors on December 13, 2008, the Board found that Ms. Bonar's removal of the individuals was inappropriate. The Board also found that Ms. Bonar had not been forthcoming in her explanation of the reasons for her removal of these committee members. Ms. Bonar disputes the findings of the Board.

Ms. Bonar and the Board of Governors have agreed to resolve this inquiry. Ms. Bonar has agreed to accept several limitations on her authority as KBA President, including an agreement to seek consent and approval from the KBA Board of Governors or Executive Committee for any further appointments or removals of any committee members or chairs and continued non-participation in disciplinary matters pending before the KBA. This concludes the Board of Governors inquiry.

Congratulations!

As provided by SCR 3.130(6.1), the following lawyers reported fifty (50) hours of donated legal services on their 2008 KBA Annual Dues Statement.



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NOTICE OF PROPOSED REVISION TO LR 3.1, 5.4, 5.5, 7.1, and 83.6, PLUS NOTICE OF LCrR 49.3, 49.4, 18.1, 12.1 and 57.6 OF THE JOINT LOCAL RULES OF THE FEDERAL DISTRICT COURTS IN KENTUCKY

NOTICE is hereby given that the Joint Local Rules Commission has forwarded to the Judges of the United States District Courts for the Eastern and Western Districts of Kentucky a revised LR 3.1, 5.4, 5.5, 7.1, and 83.6 of the Joint Local Rules of Civil Practice and a revised LCrR 49.3, 49.4, 18.1, 12.1 and 57.6 of the Local Rules of Criminal Practice for the federal courts in Kentucky. The Judges of the United States District Courts in Kentucky will be considering the following proposed Joint General Order for adoption after publication of this Notice in the *Kentucky Bench & Bar*. On or before March 15, 2009, the bar and public are invited to submit comments and/or suggestions, in writing, with respect to the proposed revision of the Joint Local Rules to either of the United States District Court Clerk's Offices or to Douglas L. McSwain, Chair of the Joint Local Rules Commission, at the law firm of Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1400, Lexington, KY 40507.

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN AND WESTERN DISTRICTS OF KENTUCKY
JOINT GENERAL ORDER NO. _____ - E.D. Ky.
JOINT GENERAL ORDER NO. _____ - W.D. Ky.

* * * * *

Pursuant to LR 83.14 of the Joint Local Rules of the Eastern and Western Districts of Kentucky, and pursuant to the authority granted by Rule 83, F.R.Civ.P., and upon recommendation of the Joint Local Rules Commission, the Judges of the Eastern and Western Districts hereby ORDER that the following amendments be made to the Joint Local Rule:
(changes are noted in bold and underline)

1. In LR 5.4, the word "may" changes to "shall" to read as follows:

   Documents **shall** be filed, signed and verified by electronic means to the extent and in the manner authorized by General Order **05-03** of the Court. A document filed by electronic means in compliance with this Local Rule constitutes a written document for the purposes of applying these Local Rules and the Federal Rules of Civil Procedure. The General Orders of the Court referenced herein may be obtained from the Clerk's office on the following websites:

   WDKY - http://www.kywd.uscourts.gov/;
   EDKY - http://www.kyed.uscourts.gov/;

2. In LR 5.5, the word "may" changes to "shall" to read as follows:

   Documents **shall** be served through the court's transmission facilities by electronic means to the extent and in the manner authorized by General Order **05-03** of the Court. Transmission of the Notice of Electronic Filing (NEF) constitutes service of the filed document upon each party in the case who is registered as an electronic case filing user with the Clerk. Any other party or parties shall be served documents according to these Local Rules and the Federal Rules of Civil Procedure.

3. In LCrR 49.3, the word "may" changes to "shall" to read as follows:

   Documents **shall** be filed, signed and verified by electronic means to the extent and in the manner authorized by General Order **05-03** of the Court. A document filed by electronic means in compliance with this Local Rule constitutes a written document for the purposes of applying these Local Rules and the Federal Rules of Criminal Procedure. The General Orders of the Court referenced herein may be obtained from the Clerk's office on the following websites:

   WDKY - http://www.kywd.uscourts.gov/;
   EDKY - http://www.kyed.uscourts.gov/;

4. In LCrR 49.4, the word "may" changes to "shall" to read as follows:

   Documents **shall** be served through the court's transmission facilities by electronic means to the extent and in the manner authorized by General Order **05-03** of the Court. Transmission of the Notice of Electronic Filing (NEF) constitutes service of the filed document upon each party in the case who is registered as an electronic case filing user with the Clerk. Any other party or parties shall be served documents according to these Local Rules and the Federal Rules of Criminal Procedure.

5. In LR 3.1, Jury Divisions is changed to read as follows:

(a) **United States District Court for the Eastern District of Kentucky.** The United States District Court for the Eastern District of Kentucky is divided into the following jury divisions **with juries drawn from the counties within each docket**:

(1) **Northern**. **The Northern Division is divided into two dockets:**

(A) **Ashland**. The following counties are in the Ashland **Docket**: Boyd, Carter, Elliott, Greenup, Lawrence, Lewis, Morgan, and Rowan.

(B) **Covington**. The following counties are in the Covington **Docket**: Boone, Bracken, Campbell, Gallatin, Grant, Kenton, Mason, Pendleton, and Robertson.

(2) **Central**. **The Central Division is divided into two dockets:**

(A) **Frankfort**. The following counties are in the Frankfort **Docket**: Anderson, Carroll, Franklin, Henry, Owen, Shelby and Trimble.

(B) **Lexington**. The following counties are in the Lexington **Docket**: Bath, Bourbon, Boyle, Breathitt, Clark, Estill, Fayette, Fleming, Garrard, Harrison, Jessamine, Lee, Lincoln, Madison, Menifee, Mercer, Montgomery, Nicholas, Powell, Scott, Wolfe, and Woodford.

(3) **Southern**. **The Southern Division is divided into two dockets:**

(A) **London**. The following counties are in the London **Docket**: Bell, Clay, Harlan, Jackson, Knox, Laurel, Leslie, McCreary, Owsley, Perry, Pulaski, Rockcastle, Wayne, and Whitley.

(B) **Pikeville**. The following counties are in the Pikeville **Docket**: Floyd, Johnson, Knott, Letcher, Magoffin, Martin, and Pike.

6. In LCrR 18.1, Jury Divisions is changed to read as follows:

(b) **United States District Court for the Eastern District of Kentucky.** The United States District Court for the Eastern District of Kentucky is divided into the following jury divisions **with juries drawn from the counties within each docket**:

(1) **Northern**. **The Northern Division is divided into two dockets:**

(A) **Ashland**. The following counties are in the Ashland **Docket**: Boyd, Carter, Elliott, Greenup, Lawrence, Lewis, Morgan, and Rowan.

(B) **Covington**. The following counties are in the Covington **Docket**: Boone, Bracken, Campbell, Gallatin, Grant, Kenton, Mason, Pendleton, and Robertson.

(2) **Central**. **The Central Division is divided into two dockets:**

(A) **Frankfort**. The following counties are in the Frankfort **Docket**: Anderson, Carroll, Franklin, Henry, Owen, Shelby and Trimble.

(B) **Lexington**. The following counties are in the Lexington **Docket**: Bath, Bourbon, Boyle, Breathitt, Clark, Estill, Fayette, Fleming, Garrard, Harrison, Jessamine, Lee, Lincoln, Madison, Menifee, Mercer, Montgomery, Nicholas, Powell, Scott, Wolfe, and Woodford.

(3) **Southern**. **The Southern Division is divided into two dockets:**

(A) **London**. The following counties are in the London **Docket**: Bell, Clay, Harlan, Jackson, Knox, Laurel, Leslie, McCreary, Owsley, Perry, Pulaski, Rockcastle, Wayne, and Whitley.

(B) **Pikeville**. The following counties are in the Pikeville **Docket**: Floyd, Johnson, Knott, Letcher, Magoffin, Martin, and Pike.

7. In LR 7.1, subsection (c) is changed to read as follows:

(c) **Time for Filing Memoranda in Response and Reply**. A party opposing a motion must file a response memorandum within fifteen (15) days of service of the motion. **Failure to timely respond to a motion may be grounds for granting the motion.** A party may file a reply memorandum within eleven (11) days of service of the response. When you request an extension of time to file a memorandum, please do so by agreed order or state whether other parties consent.

8. In LCrR 12.1, subsection (d) is changed to read as follows:

(d) **Time for Filing Memoranda in Response and Reply** A party opposing a motion must file a response memorandum within eleven (11) days of service of the motion. **Failure to timely respond to a motion may be grounds for granting the motion**. A party may file a reply memorandum within eleven (11) days of service of the response.

9. In LR 83.6, the word "Substitution" is inserted and a new subsection (c) is added to read as follows:

SUBSTITUTION OR WITHDRAWAL OF ATTORNEY OF RECORD

Unless a compelling reason exists, an attorney of record is not permitted to withdraw within twenty-one (21) days of trial or a hearing on any motion for judgment or dismissal. At any other time, an attorney of record may withdraw from a case only under the following circumstances:

a) The attorney files a motion, his or her client consents in writing, and another attorney enters his or her appearance; or

b) The attorney files a motion, certifies the motion was served on the client, makes a showing of good cause, and the Court consents to the withdrawal on whatever terms the Court chooses to impose.

c) In cases where an attorney seeks to be substituted for another as attorney of record, and both attorneys are within the same partnership or other legal professional association, a notice of substitution must be filed signed by the withdrawing attorney and the substitute attorney with an affirmative representation stating that the substitution is made with the client's consent; the notice may, but need not be, signed by the client."

10. In LCrR 57.6, the word "Substitution" is inserted and a new subsection (c) is added to read as follows:

SUBSTITUTION OR WITHDRAWAL OF ATTORNEY OF RECORD

Unless a compelling reason exists, an attorney of record is not permitted to withdraw within twenty-one (21) days of trial or a hearing on any motion for judgment or dismissal. At any other time, an attorney of record may withdraw from a case only under the following circumstances:

a) The attorney files a motion, his or her client consents in writing, and another attorney enters his or her appearance; or

b) The attorney files a motion, certifies the motion was served on the client, makes a showing of good cause, and the Court consents to the withdrawal on whatever terms the Court chooses to impose.

c) In cases where an attorney seeks to be substituted for another as attorney of record, and both attorneys are within the same partnership or other legal professional association, a notice of substitution must be filed signed by the withdrawing attorney and the substitute attorney with an affirmative representation stating that the substitution is made with the client's consent; the notice may, but need not be, signed by the client."

The changes reflected in this Joint General Order shall be incorporated into the Courts' Joint Local Rules published on the Courts' respective websites. Copies of this Order shall be made available to the various publishing companies that publish the Joint Local Rules of the Eastern and Western Districts of Kentucky and to the public upon request. The changes noted in this Order shall take effect upon entry of this Order.

IT IS SO ORDERED:

Hon. Jennifer B. Coffman, Chief Judge
U.S. District Court
Eastern District of Kentucky

Hon. Karen K. Caldwell, Judge

Hon. Danny C. Reeves, Judge

Hon. David L. Bunning, Judge

Hon. Gregory F. Van Tatenhove, Judge

Hon. Amul R. Thapar, Judge

Hon. Thomas B. Russell, Chief Judge
U.S. District Court
Western District of Kentucky

Hon. John G. Heyburn, II, Judge

Hon. Charles R. Simpson, III, Judge

Hon. Joseph H. McKinley, Jr., Judge

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YOUNG LAWYERS SECTION

KENTUCKY BAR ASSOCIATION

By Stephanie Renner

I have the pleasure of writing to you as the Chair of the Young Lawyers Section's first Diversity Committee. Diversity in the legal profession has been receiving the attention of national and state bar associations for some time now and its importance cannot be overstated. From the corporate executive to the criminal defendant, clients desire attorneys that can relate to them and the people they serve. Diversity promotes creativity, innovation and unique problem solving, and it makes the profession, and individual work places, more attractive. Furthermore, corporate clients are demanding it and have made it clear that there will be financial consequences to law firms who do not embrace it.[1] The Young Lawyers Section is committed to the task of changing the face of the Bar in Kentucky and the Diversity Committee is charged with helping the Section achieve that goal.

One of the major issues on the diversity front is that while the number of women and minorities entering the practice of law has increased significantly over the past several years, the number of those individuals who go on to be partners in law firms and leaders in bar associations and similar professional organizations is still abysmally low.[2] Believing that effective mentoring is key to addressing this problem, one of the exciting projects on which the Committee is currently working is a comprehensive mentoring program to supplement the Kentucky Legal Education Opportunity (KLEO) program.

Every year, KLEO offers up to 15 minority, low income or educationally disadvantaged Kentuckians a $5,000 grant to be used at one of Kentucky's state-supported law schools for each year of law school that they are eligible to participate in the program. Currently, KLEO fellows are matched up with mentors, but the mentors are almost all based in Lexington and there is no formal program for the mentors and mentees to follow. The Diversity Committee hopes to design a tangible and effective mentoring program that will increase the chances of each student's success both during school and in the work force by supporting them in areas such as study habits, writing skills, job search efforts, marketing and practical legal skills.

In addition to the mentoring program, the Committee has plans for a number of other initiatives, including reaching out to secondary schools and colleges to educate students about their options for a legal career, finding ways to recognize individuals and organizations that promote diversity in the legal profession, and developing resources such as model diversity plans, alternative work schedules and recruiting initiatives for KBA members to use in their diversity efforts.

I personally consider my work on the Diversity Committee the most important contribution I am making to the legal profession right now. If you would like to join our efforts, we welcome new members to the Committee. Please feel free to contact me at srenner@stites.com to express your interest in joining the Committee or to share your ideas about changing the face of the Bar in Kentucky.

ENDNOTES

1. *See A Call to Action: Diversity in the Legal Profession*, available at http://www.clocalltoaction.com.
2. *See* The National Association of Women Lawyers and the NAWL Foundation, *Report of the Third Annual Survey on Retention and Promotion of Women in Law Firms,* November 2008, available at http://amlawdaily.typepad.com/NAWLSurvey.pdf; *see also The Greenling Institute's Second Annual Report on Diversity in the Legal Profession*, July 2008, available at http://www.abanet.org/diversity/Docs/Greenlining_report08.pdf.

Confession is Good for the Soul

Confidentiality, Privilege, and Clergy Liability Issues

By David E. Davidson

GOVERNMENT AND THE "Church"[1] can come into conflict in a variety of ways. Conflict often arises in the context of litigation or criminal prosecutions, when testimony is sought regarding confidential information originally communicated for religious reasons to clergy or religious counselors during a religious event or rite. In these situations, the free exercise of religion and the need to gather trial evidence can be at odds. Society has recognized the problem and developed an evidentiary religious privilege[2] to provide a system to fairly protect the interests of all parties.

The issue of the religious privilege arises most often in situations where a criminal confession has been made or where private information is shared with a clergy. It is important for clergy to know that the scope of the privilege is limited and effective training for clergy is essential to avoiding unintended consequences. Improper disclosures by clergy may expose the Church and the clergy to civil suit, disrupt confidence in the Church, and have other unintended repercussions.

THE CHURCH'S TRADITION OF CONFIDENTIALITY

Religious explication is not the purpose of this article, but many faith traditions consider their first priority to be the salvation of souls. The Christian Church has traditionally considered confession of sin a critical and fundamental part of a person's salvation. Protestants and Roman Catholics alike consider confession crucial to their mission but approach that goal differently. For Roman Catholics, confession is made with the aid of a priest as an intermediary. For many Protestants, a priest is not essential. Confession is also an element of other diverse religious faiths. Yom Kippur is the Jewish Day of Atonement where the focus is on confession of sin. Even outside of confession there can be sensitive and religiously motivated communications that are intended to further spiritual guidance. While the concept of sin and atonement are different in the Islamic tradition, which also has a different understanding of its clergy's role, the evidentiary religious privilege will nonetheless provide protections. In fact, the privilege protects all confidential communications between an individual and a clergyperson when made in pursuit of spiritual guidance.[3]

The Church has traditionally kept the confidences of its members and it has done so to encourage candid and honest confessions. For Roman Catholics, the sacrament of penance is something only possible between a priest and the penitent. The Roman Catholic catechism specifies that,

> This secret, which admits of no exceptions, is called the "sacramental seal," because what the penitent has made known to the priest remains "sealed" by the sacrament.[4]

For Episcopalians, the confidence is similar, "The secrecy of a confession is morally absolute for the confessor, and must under no circumstances be broken."[5] Different traditions view the process and its importance differently, but all tend to share the common aim of making the shared confidences confidential. Although United Methodists do not view confession as a sacrament, they also instruct that, "Ministers . . . are charged to maintain all confidences inviolate, including confessional confidences."[6]

THE RELIGIOUS PRIVILEGE AND THE DEVELOPING BOUNDARY

Over time the law has responded to the Church's concerns and the result is that Rule 505 of the Kentucky Rules of Evidence creates a specific "religious privilege." This rule replaced an older statute, repealed in 1992, that had created a "minister-penitent" privilege. The earlier statute had history dating all the way back to 1898, just seven years after the adoption of the present Kentucky Constitution in 1891. In its modern form, the Kentucky Rules of Evidence create similar privileges such as attorney-client, husband-wife, counselor-client, and psychotherapist-patient. Commensurate with each privilege is a traditional and independent duty to keep the information confidential.

Each of the evidentiary privileges exists to advance the public policy of encouraging the free flow of information in specific kinds of relationships that society considers worthy of protection.[7] The religious privilege codified in KRE 505 recognizes the need to disclose to a spiritual counselor in confidence in order to receive spiritual guidance.[8] The gist of the rule is in KRE 505 (b):

> A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between the person and a clergyman in his professional character as spiritual adviser.

The privilege belongs not to the clergyperson, but to the person who makes the statement to a clergyperson. Therefore, the person communicating the information is the one with the right to refuse to disclose what was said and to prevent the clergyperson from disclosing what was said.

THE ELEMENTS OF THE RELIGIOUS PRIVILEGE

The case law is littered with situations where a person mistakenly thinks that any statement made to a clergyperson is protected by the privilege. The reality is that the privilege is much narrower.[9] KRE 505 (a)(2) defines communication as follows:

A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

The statement must be in confidence and must have been meant to be in confidence. A casual comment in a church hallway or at a party is unlikely to be a protected communication. The proverbial statement in a confession booth to a parish priest in a local parish church is undoubtedly exactly the kind of communication that is intended to be protected. Yet, different denominations and faiths have different processes for confession and different training for their clergy which leads to a wide variation of fact patterns where the privilege may apply. The successful application of the Religious Privilege requires not just looking at the identities of the persons involved, but also examining the context and circumstances under which the communication is made.

A protected communication must have been made to a "legitimate" clergyperson, not someone who got a diploma off the internet or a non-ordained lay person who is not responsible for the spiritual life of the Church and its members.[10] The purpose of the relevant conversation is crucial to determining if a privilege exists. The privilege inquiry does not stop once it is discovered a clergyperson has participated. For a communication to be covered by the religious privilege, it must be communicated to a clergyperson who is clearly acting as a spiritual advisor when the communication is made.[11] It must also be clear that it was intended that the information be held in confidence and not disclosed to any other.[12]

From these cases, it can be seen that the courts will narrowly construe the "religious privilege" and that the conversation must be for purposes of seeking spiritual guidance. For some faith traditions that is easy to establish, but for others it can be more difficult.

In *Sanborn v. Commonwealth*,[13] the Kentucky Supreme Court considered a death penalty case where a minister was asked by the defense team to testify about the theological perspective of the death penalty. In that context, the minister spoke to Sanborn who told the minister that the victim was alive when he raped her. The minister was subsequently compelled to reveal Sanborn's statements as the religious privilege did not apply because the communication was not made to the minister "as a spiritual advisor."[14] The Court distinguished these facts because the minister was hired to be an expert for the defense and not to provide spiritual advice.

In another case, *Commonwealth v. Buford*,[15] the Supreme Court of Kentucky was presented with facts where a minister was a friend of the defendant, but serving

at another church, and confronted the defendant about allegations of sexual abuse. In this case, Buford did not talk to the minister, but his refusal to talk to his minister friend was later used as evidence at trial. The Court determined that this evidence was admissible at trial because Buford was confronted by "a friend and colleague" over the allegations of sexual abuse and his refusal to talk to the minister did not invoke the privilege.[16] Buford sought no guidance and the mere fact that the friend was a minister gave no protection in and of itself.

Similarly, in a case under the old statutory privilege, *Wainscott v. Commonwealth*,[17] the defendant knew the minister and spoke to him as a friend but not for spiritual guidance. Wainscott told the minister where the murder weapon was and authorized the minister to show the police where to find it. When the privilege was raised it was held that his statements were not considered privileged because it was not Wainscott's intention to seek spiritual guidance.[18]

From these cases, it can be seen that the courts will narrowly construe the "religious privilege" and that the conversation must be for purposes of seeking spiritual guidance. For some faith traditions that is easy to establish, but for others it can be more difficult. If clergy are not trained to define and distinguish the circumstances under which they have conversations with their parishioners, confusion results and unexpected outcomes like those in the cases above can occur.

David E. Davidson graduated from the University of Louisville with a B.A. in 1976 and earned his J.D. from the University of Cincinnati in 1980. He has practiced law in Covington, Kentucky since 1980 and currently practices at his firm, Davidson Law Office. Mr. Davidson was the Chancellor of the Episcopal Diocese of Lexington for six years. He is also a past-president of the Northern Kentucky Bar Association. Mr. Davidson is a trial lawyer focusing his practice on individuals who have been charged with crimes, who have personal injuries, or who have family and domestic legal matters.

INTERPLAY BETWEEN RELIGIOUS PRIVILEGE AND MANDATORY REPORTING OF CHILD SEXUAL ABUSE

Reconciling the religious privilege with the legal duty to report child sex abuse is an area fraught with danger. The danger for clergy comes when they do not understand the limited nature of what is protected by the religious privilege. The privilege protects only confidential *communications* made in seeking spiritual guidance. This limited scope means that observations that are made are not protected[19] and that casual conversations in the presence of others occurring in the hallway at church or at a picnic are not covered.[20]

> "Clergy malpractice" for wrongful disclosure of confidential information is an area of law that is in the midst of expansion and development.[22]

KRS 620.030 requires that "any person" who knows or has reasonable cause to believe that child abuse or neglect is occurring must report it. This article is not intended to fully discuss that statute, but it is important to note that there is an exemption from that reporting requirement only for "attorney-client" and "clergy-penitent" privilege.[21] The statute was first enacted in 1988 before KRE 505 was adopted, and used the old statutory language rather than the KRE 505 language of "religious privilege." But, by the statute's terms, it is clear that everyone in the world owes an obligation to report suspected abuse except for those two very narrow exceptions.

Any attorney who advises churches should be working with the clergy on all sorts of liability issues, but this is an important and difficult one. Sexual abuse of all sorts has been a problem for the Church and churches are subject to civil suit on a variety of fronts. Clergy need to be very careful when they have conversations with parishioners to define those that are for "spiritual advice" and those that are not. The training should also make clear to all clergypersons the rather limited scope of both the religious privilege and the exemption under the abuse statute. The duty exists for clergy to report child sexual abuse that they observe or come to know about except when protected by the narrow exception of the religious privilege.

CIVIL LIABILITY FOR CLERGY DISCLOSURES

"Clergy malpractice" for wrongful disclosure of confidential information is an area of law that is in the midst of expansion and development.[22] There are examples throughout the country that are leading to suits and development of the law.

One of the more infamous cases involving clergy disclosure of confidential communications involved the former governor of the State of Mississippi in *Protestant Episcopal Church in the Diocese of Mississippi v. Mabus*.[23] In that case Governor Mabus and an Episcopal priest spoke with Mabus' wife while surreptitiously recording the conversation. The priest elicited from the wife an admission of infidelity and the taped recording was used in the domestic case to take custody of the children from the wife. Mrs. Mabus sued the priest and the Diocese for clergy malpractice, fraud, and negligence. Mrs. Mabus argued that priests should be treated like other professionals. The Supreme Court of Mississippi decided that the cause of action should go to trial.

In contrast, the New York Court of Appeals decided that the Religious Privilege does not create a cause of action. In *Lightman v. Flaum*,[24] a wife, who was in the midst of a divorce, made statements to her rabbi about the religious education of her children. The rabbi then disclosed those statements and the wife sued. The New York Court determined that the evidentiary rule on religious privilege did not, itself, create a cause of action. In that case, the New York Court of Appeals decided that it was improper to compare the clergy to other professions in their duties. It remains to be seen whether Kentucky Courts will agree with the New York Court or the broader ruling of the Mississippi Court.

CONCLUSION

The boundaries of the "religious privilege" are sometimes misunderstood, but in general only apply to confidential communications made during the process of seeking spiritual guidance. It is a narrow privilege and its full scope and application continues to evolve both in the criminal and civil context. Improper disclosures by a clergyperson of information that was intended to be confidential can expose the Church and the clergyperson to civil suit, disrupt confidence in the Church, and have other unintended repercussions. Both attorneys and clergy should be properly trained in the scope of the privilege and exercise practical skills to set the expectations of confidants and recognize and avoid the potential pitfalls associated with the religious privilege.

ENDNOTES

1. For the purpose of this article, the "Church" is used as a general term for organized religious bodies of all faiths and denominations. As will be seen in this article, religious privilege includes all manner of religious institutions, including the Christian, Jewish, and Islamic faiths, and other faith traditions.
2. *See* KRE 505(b).
3. *Id*.
4. *Catechism of the Catholic Church*, 2d Edition, 1467.
5. *Book of Common Prayer*, p. 446 (Rite of Reconciliation).
6. *The Book of Discipline*, §34.1.5 (2004).
7. Lawson, *Kentucky Evidence Law Handbook*, §5.00 (4th Edition, 2003).
8. 3 McLaughlin, *Weinstein's Federal Evidence*, § 506.03[2] (2d Edition, 2002).
9. *See Commonwealth v. Buford*, 197 S.W. 3d Edition, 66, 72 (Ky. 2006).
10. *In re Murtha*, 115 N.J.Super 380, 297 A.2d 889 (1971) (communications to nun not protected); *Ruetkemeier v. Nolte*, 179 Iowa 342, 161 N.W. 290 (1917)(Presbyterian lay minister responsible for spiritual duties of church entitled to protection).
11. *Buford*, 197 S.W.3d at 72.
12. *Id*. at *Sanborn*, 892 S.W.2d at 550.
13. *Sanborn v. Commonwealth*, 892 S.W. 2d 542, 550 (Ky. 1994).
14. *Id*. at 550 (Ky. 1994).
15. 197 S.W. 3d 66 (Ky. 2006).
16. *Id*. at 72.
17. 5625 S.W. 2d 628 (Ky. 1978).
18. *Id*.
19. *See*, *Commonwealth v. Byrd*, 689 S.W.2d 618 (Ky.App. 1985)(spouse was required to testify about her observations of her husband robbing another person but prevented from testifying about what he said about the robbery); *Stegman v. Miller*, 515 S.W.2d 244 (Ky. 1974)(attorney permitted to testify about competence of testator because the testimony was based on observation).
20. KRE 505 (a)(2).
21. KRS 620.030(3).
22. In *Osborne v. Payne and the Roman Catholic Diocese of Owensboro*, 31 S.W.3d 911 (Ky. 2000). a man sued a priest and the Diocese because of an affair between the priest and the man's wife. The Supreme Court of Kentucky determined that a claim for the tort of outrage could continue against the priest, but not a claim for negligence against the Diocese. The relationship of priest and parishioner was sufficient to establish a relationship that could support the outrage claim. The Court declined to recognize a negligence claim against the Diocese in that situation. However, in *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286 (Ky. 1998)
23. The Supreme Court did recognize that a negligence action could go forward against the Church when there was evidence that the clergyperson in question had a history of misconduct and might engage in such behavior in the future.
24. *Protestant Episcopal Church in the Diocese of Mississippi v. Mabus*, 884 So.2d 747 (Miss. 2004).
25. *Lightman v. Flaum*, 97 N.Y.2d 128, 135-136, 736 N.Y.S. 300, 304-305 (2001).

By Rena G. Wiseman &
David T. Royse

More than Just a Sanctuary:

The Impact of RLUIPA on Megachurches in the United States

THE RELIGIOUS LAND USE and Institutionalized Persons Act ("RLUIPA")[1] was passed by the United States Congress in 2000 in response to the decision of the U.S. Supreme Court which held the Religious Freedom Restoration Act ("RFRA") to be unconstitutional. The purpose of RLUIPA is to ensure that local governments do not discriminate against religious institutions under the guise of land use regulations by excluding or unduly restricting the location or expansion of churches in a community. RLUIPA creates a tension between a community's legitimate right to regulate land use and the right of citizens to the free exercise of their religious faith unfettered by government interference. Adding to the complexity of this equation is the evolution of the modern church and the variety of services and activities it offers. Perhaps nowhere is this tension more acute than when a local government attempts to regulate "megachurches" without running afoul of RLUIPA.

The proliferation of "megachurches" is such that the term seems to have achieved a common understanding. The Hartford Institution for Religious Research has defined a "megachurch" as "any Protestant congregation with a sustained average weekly attendance of 2000 persons or more in its worship services."[2] While the size of the church is pertinent, the number of extended ancillary uses is a key component that distinguishes megachurches from other churches that are merely "large." For example, Catholic churches in many instances have large congregations but are not deemed megachurches because of the relatively small number of staff members, and the number, nature and scope of outreach programs. The Hartford Institute noted that attendance figures alone do not determine when to deem a congregation as "mega." It stated:

> [R]ather it is a host of characteristics that create a distinctive worship style and congregational dynamic. Our studies and readings of worship and the congregational life of Catholic Churches has not convinced us that most very large catholic churches really function like the Protestant megachurches. There are a few that we have come across that do, but most don't have strong charismatic senior ministers, many associate pastors, large staff, robust congregational identity that empowers 100s to 1000s of weekly volunteers, an identity that draws people from a very large area (sometimes an hour or more) and across parish boundaries, a multitude of programs and ministries organized and maintained by members, high levels of commitment and giving by members, seven-day-a-week activities at the church, contemporary worship, state of the art sound and projection systems, auxiliary support systems such as bookstores, coffee shops, etc. huge campuses of 30-100 acres, and other common megachurch characteristics.[3]

The issue, then, is to what extent megachurches, as that term has come to be understood, can be regulated by a local community through the exercise of its zoning power.

RLUIPA[4] provides, in pertinent part, that:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that the imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.[5]

Land use regulation includes "any zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land" in which the claimant religious institution has a present or future property interest.[6]

The legislative history of RLUIPA makes it clear that the law "does not provide religious institutions with immunity from land use regulations, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay."[7] However, the statute does protect religious institutions from land use regulations that impose a "substantial burden" on "religious exercise."

The statute defines religious exercise as "any exercise of religion, whether or not compelled by or central to, a system of religious belief."[8] Houses of worship have been viewed as religious uses covered by RLUIPA,[9] as have been schools and other facilities for religious education, day cares, and gymnasiums.[10] A faith-based drug and alcohol rehabilitation center has been held to be a religious exercise under RLUIPA,[11] as has a hospital.[12]

On the other hand, courts have determined that uses such as apartments,[13] theaters[14] and office buildings[15] are not a "religious exercise" under RLUIPA simply because they are owned and operated by religious institutions.[16]

Prior to RLUIPA, the courts used the

"centrality of belief" standard as a threshold determination of whether one's free exercise was affected.[17] The statutory definition of religious exercise is broad by design so as to limit a court's ability to inquire into whether the particular land use is "central" to one's religious beliefs. The current trend is that courts consider whether the land use regulation substantially burdens a "sincerely held religious belief."[18]

It is inevitable that the "sincerity of belief" standard will be tested in the context of the ancillary uses that are associated with megachurches. As a recent *New York Times* article documents, megachurches are proposing a variety of ancillary uses including a Sysco warehouse, a sports arena, basketball schools, credit unions, residential developments, and shopping centers.[19] As one pastor stated, we do not "look at this as economics; we look at it as our mission."[20] In that light, courts will face difficult questions applying the "religious exercise" definition – given the shift from centrality of belief test – to such uses and determining whether RLUIPA protects ancillary uses of churches.

The other component of RLUIPA that is problematic as applied to megachurches is the "substantial burden" element. The statute does not define "substantial burden," and, therefore, courts which have addressed RLUIPA have developed different tests. For example, the Seventh Circuit has held that a "land use regulation that imposes a substantial burden . . . is one that necessarily bears direct primary, fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impractical."[21] The Ninth Circuit held a substantial burden must impose a "significantly great restriction or onus" upon such exercise.[22] The Eleventh Circuit stated:

> A "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.[23]

Thus, the tests for substantial burden range from a land use regulation which makes religious exercise "impractical" to one which forces adherents to "forgo religious precepts."

A recent Sixth Circuit case, *Living Water Church of God v. Charter Township of Meridian*,[24] addressed the issue of substantial burden and formulated yet another test. At issue was the denial of a special use permit that would have allowed the church to build a 34,989 square foot church and school facility. Under the ordinance, any facility over 25,000 square feet required a special use permit. A separate special use permit was also required for educational or religious institutions in a residential

zone.[25] The town approved the "non-residential use of an appropriately-sized school," but denied the special use permit for buildings exceeding 25,000 square feet. However, the church was permitted to build an additional 14,075 square feet which, along with its existing space, would be within the 25,000 square feet permitted without a special use permit. The church appealed and the Sixth Circuit upheld the actions of the Township.

The court reviewed the various substantial burden definitions adopted by other circuits, noting that in prior RLUIPA cases it had not expressly defined "substantial burden." Instead, the Sixth Circuit had assessed the impact of the regulation under the specific circumstances of each case.[26] In this case, the church had argued that the denial of the additional square footage prevented it from fulfilling its ministries. The Sixth Circuit declined to adopt any of the other circuits' definitions or to set a "bright line test" to measure substantial burden, instead suggesting a "framework" to apply to the particular facts:[27]

> "To that end, we find the following consideration helpful: Though the government action may make religious exercise more expensive or difficult, does the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar a religious institution from using its property in the exercise of its religion? With that framework in mind, we now turn to the facts before us."[28]

The court found that the denial of the additional space did not preclude using the approved space for a school, from offering religious programs, from accepting new members or from building an additional 14,000 square feet at the existing location, or from building additional facilities at another location, and thus, did not impose a substantial burden. The church had argued that the denial forced it to choose between two or more of its ministries, because it could not have a gym and classrooms within the 25,000 square foot limit. In a comment relevant to the size issue often presented by megachurches, the court rejected the church's position, stating that "we cannot conclude that RLUIPA guarantees Living Water the 34,989 square foot facility. ..."[29]

The church sought a writ of certiorari which was denied. Consequently, the U.S. Supreme Court has not reconciled the various "substantial burden" definitions applied by the circuit courts.

Other RLUIPA cases have addressed church expansions with varied results based on the particular facts: the denial of a new parking lot was upheld where the existing parking was adequate for the size of the congregation;[30] the denial of expansion of a religious school was upheld where the school had reasonable alternatives;[31] in contrast, the denial of expansion was found to be a substantial burden where renting additional facilities for a religious school was cost prohibitive.[32]

CONCLUSION

The body of jurisprudence regarding RLUIPA is still in its infancy. At this point, it appears that the Sixth Circuit is not willing to find that a "substantial burden" is placed on a religious organization simply because it is not permitted to build as large a facility as it desires. Further, the U.S. Supreme Court declined to hear *Living Water*, thereby leaving it to the lower federal courts and state courts to develop their own tests. Thus, the determination of substantial burden will be very fact-specific, thereby giving little guidance to zoning authorities or churches. Moreover, looming questions remain to be definitively addressed regarding the "ancillary" uses that may appear very secular on their face, but that have their roots in a religious mission. The question of how an activity implicates the "free exercise" of religion, and whether the regulation of that activity improperly impedes such exercise, will not be easily answered as megachurches expand their activities even more broadly into historically controversial zoning areas such as crisis centers, group homes, and retail food services.

ENDNOTES

1. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2006).
2. http://hirr.hartsem.edu/megachurch/definition.html.
3. *Id.*
4. RLUIPA is also designed to protect incarcerated individuals from discrimination for their exercise of religion, but that element of the statute will not be addressed by this article.
5. 42 U.S.C. § 2000cc(a)(1) (2006).
6. 42 U.S.C. § 2000cc-5(5) (2006).
7. 146 CONG REC S7774-01, S7776 (daily ed. July 27, 2000) (statement of Sens. Hatch and Kennedy), *see also City of Hope v. Sadsbury Township Zoning Hearing Board*, 890 A.2d 1137, 1149 (Pa. Comm. Ct. 2006).
8. 42 U.S.C. § 2000cc-5(7)(A) (Supp. 2003).
9. *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp.2d 309 (D.Mass. 2006).
10. *Living Water Church of God v. Charter Township of Meridian,* 258 Fed.Appx. 729, 2007 WL 4322157 (C.A.6 Mich.); *Westchester Day School v. Vill. of Mamaroneck*, 504 F.3d 338 (2nd Cir. 2007).
11. *Men of Destiny Ministries, Inc. v. Osceola County*, 2006 U.S. Dist. LEXIS 80908, 7-6 (M.D. Fla. Nov. 6, 2006).
12. *Sisters of St. Francis Health Servs. v. Morgan County*, 397 F.Supp.2d 1032 (S.D. Ind. 2005).
13. *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734 (Mich. 2007).
14. *Scottish Rite Cathedral Ass'n of Los Angeles v. City of Los Angeles,* 156 Cal.App. 4th 108 (Cal.App. 2d Dist. 2007).
15. *Conference Ass'n v. Clark County*, 74 P.3d 140 (Wash. Ct. App. 2003).
16. Many RLUIPA cases are heard in state court in the context of appellate review of a local zoning decision.
17. *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983).
18. Sara C. Galvan, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 Yale L. Rev. 205, 223 (2006). (Quoting *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp*., 675 N.W.2d 271, 281 (Mich. App. 2003)).
19. Diana B. Henriques and Andrew W. Lehren, "In God's Name: Mega Churches Add Local Economy to their Mission," *New York Times*, November 23, 2007.
20. *Id.*
21. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).
22. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004).
23. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).
24. *Living Water Church of God v. Charter Township of Meridian*, 258 Fed.Appx. 729 (6th Cir. 2007).
25. The church occupied a 10,925 square foot sanctuary with a day care.
26. 258 Fed.Appx. at 736.
27. *Id*. at p. 737.
28. *Id*.
29. *Id*. at p. 741.
30. *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 U.S. Dist. LEXIS 4669.
31. *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007).
32. *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.,* 739 N.W.2d 664 (Mich. Ct. App. 2007).

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America's First Liberty and Free Association on Public University Campuses

"…[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools…. The college classroom, with its surrounding environs, is peculiarly the "marketplace of ideas,'".[1]

By Mark A. Wohlander

FOR YEARS, administrators at public universities took pride in proclaiming their individual institutions as being places where freedom of speech both flourished and contributed to the free marketplace of ideas. Today, because of the diversity of our public universities, administrators at many of those same institutions have now found themselves pressured to adopt policies which prohibit any speech which might be deemed offensive.

Unfortunately, while many speech codes and restrictions at public universities were likely adopted and intended for a good purpose, an unintended consequence has been to literally confuse the boundaries of what is and is not acceptable speech on public university campuses. Another unfortunate result is that these policies have also placed many college administrators in the unenviable position of being named as defendants for violating the free speech rights of the very students they had intended to protect.

The crossroad where speech codes and restrictions often clash with free speech is when the restrictions infringe on the religious liberty and free association rights of university students The policies most often found to be unconstitutional, especially in cases involving the religious liberty of university students, usually fall within five separate categories, including 1) university nondiscrimination statements, 2) university policies regarding student speech, 3) university policies regarding the use of speech zones on campus, 4) university policies regarding mandatory diversity training for students, and 5) university policies restricting the use of mandatory student fees.

NONDISCRIMINATION STATEMENTS

Standing alone, it would seem that university nondiscrimination statements would be exempt from challenge. This is especially true in view of nondiscrimination statements mandated in the areas of employment and benefits available at the public university. However, in many other areas of university life, nondiscrimination statements are relied upon by university administrators to justify unconstitutional restrictions on the free speech rights of university students.

At first glance, as written, most nondiscrimination statements appear relatively harmless. One such example is the 2005 nondiscrimination policy at the Southern Illinois University (SIU) and its school of law which stated the university would "provide equal employment and education opportunities for all qualified persons without regard to race, color, religion, sex, national origin, age, disability, status as a disabled veteran of the Vietnam era, sexual orientation, or marital status."[2] As a result of the employment nondiscrimination policy adopted by the university, the Board of Trustees established a second policy which provided that "[n]o student constituency body or recognized student organization shall be authorized unless it adheres to all appropriate federal or state laws concerning nondiscrimination and equal opportunity." Relying on SIU's nondiscrimination statement, someone filed a complaint against the Christian Legal Society (CLS) alleging the membership and leadership policies of the society preclude active homosexuals from becoming voting members or officers which resulted in a violation of the nondiscrimination statement and policies of the university.[3]

In response to the complaint, the dean of the law school reviewed CLS's statement of faith which specifies, among other things, a belief in the sinfulness of "all acts of sexual conduct outside of God's design for marriage between one man and one woman, which acts include fornication, adultery, and homosexual conduct." The dean found the statement of faith to be in violation of SIU's nondiscrimination policies. As a result, the dean revoked CLS's status as a student organization. Revocation of its status as a student organization resulted in CLS's loss of numerous benefits including "access to the law school ListServe (the law school's database of e-mail addresses), permission to post information on law school bulletin boards, an appearance on lists of official student organizations in law school publications and on its website, the ability to reserve conference rooms and meeting and storage space, a faculty advisor, and law school money."[4]

In challenging SIU's revocation of its status as a student organization, members of CLS filed suit and argued, among other things, that the university's nondiscrimination policies violated their *First Amendment* right to expressive association. Although the district court denied CLS's motion for a preliminary injunction, the Court of Appeals reversed and found that enforcement of SIU's nondiscrimination policies which resulted in the revocation of CLS's status as a student organization "violated its *First Amendment* freedoms."[5]

An earlier and similar challenge to a nondiscrimination statement involved the State College Area School District.[6] Although the case involved a school

district, the Third Circuit Court of Appeals provided an excellent discussion on the scope of a student's right to freedom of expression while in school in light of the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*.[7] In *Tinker*, the Supreme Court held that before the regulation of student speech was permissible only "when the speech would substantially disrupt or interfere with the work of the school or the rights of other students. As subsequent federal cases have made clear, *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance."[8]

In *Saxe v. State College Area School District*, the school board implemented an anti-harassment policy which stated, "[h]arassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."[9] The policy provided that any "harassment" would be a violation and could result in punishment "including but not limited to warning, exclusion, suspension, expulsion, transfer, termination, discharge…, training, education, or counseling."[10]

> ... if there ever was a bright line rule regulating free speech zones on university campuses, that bright line has been forever blurred as university administrators have struggled to promulgate time, place, and manner regulations which will pass constitutional scrutiny.

In their complaint challenging the school district policy, two students argued that they "openly and sincerely identify themselves as Christians. They believe, and their religion teaches, that homosexuality is a sin. Plaintiffs further believe that they have a right to speak out about the sinful nature and harmful effects of homosexuality. Plaintiffs also feel compelled by their religion to speak out on other topics, especially moral issues."[11] The district court dismissed the free speech claims of the plaintiffs and held, "Harassment has never been considered to be protected activity under the *First Amendment*. In fact, the harassment prohibited under the Policy already is unlawful. The Policy is a tool which gives SCASD the ability to take action itself against harassment which may subject it to civil liability."

In reversing the district court, the Third Circuit explicitly rejected the district court's holding and held that the policy "appears to cover substantially more speech than could be prohibited under *Tinker's* substantial disruption test. Accordingly, we hold that the Policy is unconstitutionally overbroad."[12]

It would appear that for the most part, unless a university nondiscrimination policy is narrowly drafted to meet

Tinker's "substantial disruption" test, the policy will be subject to court challenge and will be found to be unconstitutional.

SPEECH ZONES

Many universities began establishing so-called "free speech zones" in response to campus protests in the 60's and 70's against the Vietnam War. Since then, University administrators have faced the troubling question of how to find a suitable balance between ensuring the rights of students to engage in free speech, yet provide students with a safe university environment. It has become even more challenging since the Supreme Court's decision in *Widmar v. Vincent*,[13] which involved a challenge to the policies of the University of Missouri at Kansas which infringed on the free exercise of the religious rights of members of a religious student group.

From 1973 until 1977, Cornerstone, a registered religious group at the University of Missouri at Kansas, had received permission to conduct its meetings in University facilities. However, in 1997, the group was informed that it could no longer meet in University buildings as a result of an apparently overlooked 1972 policy adopted by the University Board of Curators which prohibited the use of University buildings or grounds "for purposes of religious worship or religious teaching."[14] As a result of the prohibition, eleven student members of Cornerstone filed suit alleging the policy was discriminatory and violated their rights to the free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

In *Widmar*, the Supreme Court rejected the University's policy and stated that while "[t]he University's institutional mission, which it describes as providing a "secular education" to its students, the policy does not exempt its actions from constitutional scrutiny. With respect to persons entitled to be there, our cases leave no doubt that the *First Amendment* rights of speech and association extend to the campuses of state universities." Although it would appear that the Supreme Court had established an unqualified right to free speech on university campuses, in the same decision the Court went on to affirm the right of the University to establish reasonable time, place and manner regulations. The Supreme Court specifically affirmed the validity of cases which "recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education."

At first blush, it would appear the Supreme Court's decision in *Widmar* had provided university administrators with a bright line rule for them to follow when promulgating rules regarding free speech zones and the protection of the religious liberty of university students. However, if there ever was a bright line rule regulating free speech zones on university campuses, that bright line has been forever blurred as university administrators have struggled to promulgate time, place, and manner regulations which will pass constitutional scrutiny.

Traditionally, time, place, and manner regulations which restrict free speech "on governmental property that has been traditionally open to the public for expressive activity or has been expressly dedicated by the government to speech activity is subject to strict scrutiny."[15] As the Supreme Court has stated, the "campus of the public university, at least for its students, possesses many characteristics of a public forum."[16] Therefore, when university administrators attempt to restrict free speech to so-called free speech zones, university regulations must be carefully drafted and will only be upheld if they "are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[17]

In a post *Widmar* decision,[18] a pro-life student organization at the University of Houston requested permission to display their "Justice for All Exhibit," an outdoor photographic educational exhibit which was intended to "promote 'justice and the right to life for the unborn, the disabled, the infirm, the aged, and all vulnerable people; [to] help women and men in crisis pregnancies find support services for themselves and for their unborn children; [to promote] programs designed to assist in abortion recovery needs; [and to promote] discussion of related bio-ethical issues like stem cell research, in vitro-fertilization, RU 486, and 'emergency contraception.'"[19] University administrators reviewed the application and deemed the exhibit to be potentially disruptive. As a result the university's dean determined the exhibit had to be relegated to one of two more remote sites that he suggested for "potentially disruptive" events.[20]

In striking down the policy, the district court district court relied upon the Supreme Court's decision in *Forsyth County* which held that, "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so."[21]

Another speech zone case which bears watching involves a lawsuit filed on September 29, 2008, against Yuba Community College District officials. The lawsuit was filed on behalf of a Christian student who was attempting to "share a Christian message with fellow students, engaging them through tracts, signs, and conversation."[22] The student was threatened with arrest and expulsion if he did not obtain permission in advance and comply with university policy which limited speech to two hours per week and required students to obtain written permission two weeks in advance.

SPEECH CODES

University speech codes are often as problematic as university nondiscrimination statements. This is especially true when university speech codes are accompanied by policies that punish speech which is held to be in violation of the university code.

It appears the courts will review speech codes under the same analysis applied to university nondiscrimination policies. Recently, in *DeJohn v. Temple University*,[23] a Christian university student challenged Temple's speech code which stated in pertinent part, "all forms of sexual harassment are prohibited, including . . . expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment."

"the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so."[21]

At the time DeJohn challenged Temple's speech code, he was involved in writing his master's thesis which concerned women in combat and women in the military. Because of Temple's speech code, Dejohn was "concerned that discussing his social, cultural, political, and/or religious views regarding these issues might be sanctionable by the University. Thus, DeJohn contends that the policy had a chilling effect on his ability to exercise his constitutionally protected rights."[24]

In upholding the district court's grant of partial summary judgment on DeJohn's challenge to the university speech code, the Third Circuit again relied on the Supreme Court's decision in *Tinker,* and its earlier decision in *Saxe*. In its decision, the Dejohn court evaluated Temple's policy and concluded "that the Policy is facially overbroad" and affirmed the district court's injunctive relief in favor of DeJohn.[25]

Although the *DeJohn* decision is limited to public universities in Delaware, Pennsylvania and New Jersey, the decision is clearly an affirmation of Supreme Court jurisprudence and should provide both a roadmap, and a warning to other public university administrators inclined to defend clearly unconstitutional speech codes.

STUDENT FEES

Another controversial free speech concern involves the distribution of student fees to religious campus groups. Most universities have adopted policies which restrict the distribution of funds from student fees to only those campus groups which agree to affirm university nondiscrimination policies. More often than not, student religious groups are either denied recognition as a student group, or the religious group is denied funds from mandatory student fees because the religious group is unable to accept certain aspects of the university nondiscrimination statement.

The Supreme Court has finally resolved the issue in its decision in *Rosenberger v. University of Virginia.*[26] In *Rosenberger*, Wide Awake Publications, a religious student group, was formed "to publish a magazine of philosophical and religious expression, to facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints," and "to provide a unifying focus for Christians of multicultural backgrounds."[27]

In 1990, Wide Awake Publications (WAP), a registered religious student group at the University of Virginia, applied for payment of printing costs for its publication. Although University of Virginia policy authorized the payment of outside contractors for the printing costs of a variety of student publications, it withheld any authorization for payments on behalf of petitioners for the sole reason that their student paper "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."[28]

The University of Virginia attempted to justify its denial of funds to Wide Awake Publications based on the First Amendment's prohibition against the state establishment of religion. The

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Supreme Court struck down the policy and held that notwithstanding the *Establishment Clause* "it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the *First Amendment* was compromised by the University's course of action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the *Establishment Clause* requires. There is no *Establishment Clause* violation in the University's honoring its duties under the Free Speech Clause."

After *Rosenberger*, the distribution of mandatory student fees continues to be scrutinized by the courts, especially when a university policy fails to allocate mandatory student fees in a viewpoint-neutral manner. When university policies provide unchecked discretion to student government committees to make unbridled decisions regarding the distribution of mandatory student fees, the policies will almost always be held to be unconstitutional.[29]

MANDATORY DIVERSITY TRAINING

Recently, mandatory diversity training has become a topic of concern for incoming freshman at a handful of universities. Although the courts have not yet provided guidance regarding the constitutionality of mandatory diversity training at public universities, it is hard to imagine that the courts would uphold mandatory diversity training, unless the university could show a compelling governmental interest in requiring mandatory diversity training as a requirement to attend a public university.

CONCLUSION

For the most part, the prevailing case law provides substantial guidance for university administrators interested in ensuring that university speech policies are constitutional. As the courts have consistently held, university policies which implicate the *First Amendment* free speech rights of its students to be found constitutional, a university policy must be both narrowly drawn and viewpoint neutral.

Although it is clear that not all speech codes at public universities will be found to violate the free speech, religious liberty and free association rights of its students, it would be wise for university administrators to conduct an inventory of those speech policies already implemented on their campuses to ensure that the policies will sustain a constitutional challenge.[30]

ENDNOTES

1. *Healy v. James,* 408 U.S. 169, 180 (1972).
2. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, (7th Cir. 2006).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Saxe v. State College Area School District*, 240 F.3d. 200 (3rd Cir. 2001).
7. *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969).
8. *Saxe* at 204.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 217.
13. *Widmar v. Vincent*, 454 U.S. 263 (1981).
14. *Id.*
15. *United States v. Kokinda,* 497 U.S. 720 (1990).
16. *Widmar*, 454 U.S. at 267 n. 5.
17. *Perry Educ. Ass'n v. Perry Local Educators Ass'n,* 460 U.S. 37, 45 (1983).
18. *Pro-Life Cougars v. University of Houston,* 259 F. Supp. 2d 575 (S.D. Tx. March 2003).
19. *Id.* at
20. *Id.* at 578.
21. *Forsyth County v. Nationalist Movement,* 505 U.S. 123,(1992); *see also Southeastern Promotions, LTD v. Conrad,* 420 U.S. 546, (1975) (noting that "the danger of censorship and of abridgment of our precious *First Amendment* freedoms is too great where officials have unbridled discretion over a forum's use").
22. *"Free Speech on Tuesday and Thursday"* – California Catholic Daily, September 30, 2008.
23. *Dejohn v. Temple University*, 537 f.3d 301 (3rd Cir. 2008).
24. *Id*. at 305.
25. *Id.* at 320.
26. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).
27. *Id.*
28. *Id*. at 822, 823.
29. *Southworth v. Board of Regents of the University of Wisconsin System*, 376 F.3d 757 (7th Cir. 2004).
30. For additional cases and guidance visit the Alliance Defense Fund's (ADF) Center for Academic Freedom website at www.centerforacademicfreedom.org, or The Foundation for Individual Rights in Education (FIRE) website at http://www.thefire.org.

Hard Economic Times Mean More Malpractice Claims

Assessing the Increased Risk and Coping with a Claim

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

Last September the ABA held a conference on "Lawyer Risk in a Struggling Economy."[1] The program covered an economic perspective on the risks of practicing law in hard times, the elevated risk associated with insolvent clients, the mortgage crisis and real estate lawyer liability, and preparing a lawyer to survive being a defendant. The purpose of this article is twofold. First, to succinctly report the major points made at the conference on the heightened malpractice risks during these difficult times. Second, to provide an analytical approach to managing a malpractice claim from the time of its inception through adjudication.

ABA Conference on "Lawyer Risk in a Struggling Economy"

Hard Times

The panelists[2] who provided an economic perspective on the increased risks during hard times began by observing that large law firms have suffered a significant fall off in profitability in 2008. One example of this is that equity partners in large firms have experienced a 9.1% decrease in profits in 2008 as compared with a 9.3% increase in 2007. Smaller firm profitability is flat to declining revenues. This comes at a time when client resistance to fees is growing while the costs of practice are going up. This environment leads to lawyers fighting over a static supply of business. The risks are that economic pressure will cause lawyers to take matters beyond their competence, accept clients that would normally be screened out, accept matters with little or no merit, and resort to aggressive billing that can lead to allegations of fraud and fee disputes leading to malpractice claims.

Another major area of risk discussed was that the hard economic environment has caused a dramatic increase in lawyers changing firms. Receiving firms are not vetting new hires as well as they should. Some firms have later learned to their regret that the new hire was not admitted to the bar, had a history of bar discipline, or faced potential large malpractice claims. It is equally important to thoroughly integrate a new hire into the firm's policies and management system – especially with regard to control of funds.

Mortgage Crisis Risks

The theme of this topic was that all professionals involved in a mortgage deal that has gone bad are targets. As one panelist[3] put it "Every lawyer in the room at the time of closing will be sued by a bank stuck holding the bag." While it is too soon to tell how big this crisis will be for lawyers, the expectation is that malpractice claims will mushroom for real estate lawyers.

It was noted that claims stemming from the mortgage crisis so far are primarily against solo practitioners and small firms. Typically the buyer alleges the lawyer gave insufficient legal advice. These claims usually involve situations when the lawyer works for a small fee, has no written retainer agreement with a particular client, and the mortgage involves abusive lending practices. Abusive practices include:

- Liar loans – the borrower has no income and no assets;
- Adjustable mortgages with unrealistically high interest adjustments;
- High cost predatory loans that include huge balloon payments;
- Negative amortization loans;
- Home saviors – distressed home loan advisors pay off first loan and then saddle the borrower with a high cost worse loan or take title to the home with a promise to return often dishonored; and
- Flip cases – when a home is sold back and forth between related parties inflating the price of the home until the last seller skips town.

Adding to these risks for real estate lawyers are that:

- Many courts are relaxing privity malpractice requirements making it easier for third parties to make a claim against lawyers no matter how innocently involved in an allegation of abusive lending practices;
- Fraud claims are now easier to assert; and
- Judges are much less sympathetic to lawyers as shown by the difficulty that defense counsel are having in obtaining dismissal from a suit on the basis that the lawyer was an innocent participant in a closing.

On a final grim note it was observed that many claims include both a negligence and fraud allegation. If the lawyer successfully gets the negligence claim dismissed, this still leaves the fraud claim which is not covered by a lawyers liability insurance policy other than a possible duty to defend.

The Elevated Risks Associated with Insolvent Clients

The first elevated risk stressed in this topic was that lawyers in these times regardless of the nature of a representation must be sensitive to the financial status of all clients – not just in terms of whether fees will be paid or when the matter con-

cerns financial problems. For example, lawyers routinely advise businesses in the regular course of business, represent corporations and their subsidiaries, and are often asked by clients to advise on estate plans that shield assets. These ordinary lawyer activities can incur substantial new risks if the client's financial status is problematic. For example:

- The business client suddenly facing insolvency greatly increases a lawyer's duties to competently advise on financial issues over and above the regular course of business. If the lawyer lacks expertise in insolvency and bankruptcy law, the risk of malpractice is substantial.
- When a subsidiary of a corporate client turns insolvent, a lawyer representing the entire corporation may have a conflict of interest. Failure to resolve the conflict can lead to allegations of malpractice and bar complaints.
- Estate planning lawyers must be cautious with clients asking for what is cynically called a "felicitously timed estate plan." If insolvency is imminent or litigation in the offing, an unsuspecting lawyer risks becoming embroiled in allegations of fraud and violation of bankruptcy law.

The panelists[4] then highlighted "The Unique Perils of Representing Parties in Bankruptcy." What follows is an outline of the major risks covered in the hope this is useful in identifying issues for further research.

- Certification by attorney – the signature of a debtor's lawyer certifies that a bankruptcy filing is not an abuse.
- Mandatory advice – bankruptcy law requires that a client be given certain advice.
- Major bankruptcy deadlines in unlikely places – *e.g.*, filing proof of claims; real estate lease assumptions; deadlines for filing Plans of Reorganization.
- Risks of collusion with other bidders in bankruptcy auctions.
- Jurisdictional risks – filing proof of a claim may give unwanted jurisdiction to the bankruptcy court over counterclaims brought by the debtor.
- Violations of Automatic Stay.
- Transfers and Consequences – voidable preferences; fraudulent transfers; fees paid by the wrong entity; "asset planning"; attorney holding funds; and violation of security agreements.
- Potential plaintiffs are increasing in number:
    1. Debtor in-Possession – 11U.S.C. §1107
    2. Chapter 7 Trustee – 11 U.S.C. §§701-2
    3. Chapter 11 Trustee – 11U.S.C. §1104
    4. Creditors' Committee
    5. Chapter 11 Plan Trustee or Administrator – 11U.S.C. §1123(b)(3)
    6. Individual creditors
    7. State Receivers

Space limitations do not permit more detail, but the ABA kindly granted permission to post the materials the panelists prepared for this program on Lawyers Mutual's Website. It is an outstanding review of the malpractice risks of practicing bankruptcy law and highly recommended professional reading for all lawyers. Go to www.lmick.com, click on Risk Management, Subject Index, and look for the article *The Elevated Risks Associated with Insolvent Clients* under Bankruptcy.

One of the first risks emphasized at the conference was that hard economic times tempt lawyers to accept matters outside their competence. With more clients and potential clients facing insolvency there is a temptation to dabble in bankruptcy. If you are not a well-qualified bankruptcy lawyer, do not give in to this temptation unless you are prepared to make the intense effort required to competently represent your client. If a current client needs advice on insolvency, do not hesitate to associate with a lawyer with bankruptcy law experience. Overcome your fear that you will lose the client. The pitfalls of bankruptcy law are just too great for on-the-job training.

Coping with a Claim

The conference topic "Preparing a Lawyer to Survive Being a Defendant"[5] began by emphasizing that the role reversal of a lawyer being a defendant instead of the lawyer in-charge is emotionally destabilizing leading to what is called "Litigation Stress Syndrome." Dr. Ronald Hofeldt explained this syndrome as follows:

"A suit, which is a source of stress unlike any other, has far-reaching ramifications. The allegations often generate feelings of outrage and embarrassment. The time-line for the litigation process is unpredictable and the outcome uncertain. A wide range of symptoms is commonly seen in litigants. These include self-doubt, anxiety, depression, anger, withdrawal and loss of confidence. This reaction is called Litigation Stress Syndrome. If unrecognized or unaddressed, the defendant's inability to manage the demands of litigation may adversely impact the outcome of the case and leave a permanent professional scar."[6]

In conjunction with the discussion of how to deal with the stress a lawyer encounters when sued for malpractice, panelist Robert Baker offered this advice when defending the lawyer:

- Meet personally with your lawyer client and ask the client to bring the underlying file.
- Impress upon the lawyer client that this litigation must be taken seriously as it can have ramifications beyond the lawsuit, *i.e.*, insurance, state bar, etc.
- The lawyer client must study the file, not just read it. Encourage the lawyer client to make notes when studying the file, *i.e.*, why certain decisions were made, was a mistake made? If so, was the lawyer's client informed of the mistake?
- Think about what went wrong – what could have been done to alleviate the error, if there was an error or mistake.
- What was the lawyer's relationship with the client? Did it go sour? When and why did it go sour?
- Is a billing issue involved? What, if anything, was done

to correct it?
- Standard of care issues. Discuss with the lawyer client. In four of five legal malpractice cases, the standard of care is the main issue. Was it met? If not, why not?
- Causation. Was the lawyer's client harmed by the act or omission? The client must show that the loss suffered was in fact caused by the alleged attorney malpractice.[7]

This program brought to mind an article I wrote several years ago "So, You've Been Accused Of Legal Malpractice? – *Well, Don't Just Do Something – Sit There!"*[8] The purpose of the article was to provide a calm and cool systematic method of managing a malpractice claim as it develops. The point of the article was not to let Litigation Stress Syndrome undermine a professional response to the problem. Instinctively, the first reaction of many lawyers accused of malpractice is to do something – anything – fast. Following an instinct for self-preservation by moving fast could be exactly what not to do. The best practice is to proceed with all due deliberate speed to meet professional responsibilities and protect your own interest when facing a malpractice claim. What follows is an update of that article's analysis of how to manage a malpractice claim.

The Four Phases of Risk Managing a Malpractice Claim

While the development of a malpractice claim follows no set sequence, the process is divisible into four phases:

- Discovery of the malpractice;
- Notification to client and insurance company;
- Claims repair; and
- Adjudication.

The risk management considerations of each phase are:

Phase 1: Discovery of the Malpractice

When a lawyer is served with a complaint claiming malpractice or receives a demand letter for money because of malpractice, it is obvious that prompt action is required concerning the matter, the client, and the firm's professional liability insurance company. Less obvious is what to do when a lawyer learns that something may have gone wrong in a representation that has the potential to become a malpractice claim (usually referred to as an "incident"), but either has not been discovered by the client or has not yet resulted in damage to the client. At this discovery phase of the development of a malpractice claim these risk management considerations apply:

1. Formal written instructions concerning incidents and claims and how to report them internally should be part of every firm's standing operating procedure. Lawyers and staff must be thoroughly trained to be on the alert for potential malpractice and how and to whom to report malpractice issues of any kind.

2. There is a strong tendency for an accused lawyer to overreact upon first learning of an incident or claim. It is critical to appreciate that while malpractice is an urgent matter, there is virtually always reasonable time available to carefully and deliberately assess the situation before taking any action at all. The accused lawyer should immediately discuss the merits of the matter with another lawyer in the firm (*e.g.*, designated loss prevention partner) or, if a sole practitioner, informally with a trusted lawyer friend as a matter of professional courtesy. The matter must be addressed objectively with a realistic assessment of the malpractice exposure without making premature admissions or retaining defense counsel without coordinating with the firm's malpractice insurance company.[9] This assessment should cover:

- Is it is clear that negligence occurred?
- Can the problem be repaired or minimized?
- What is the maximum liability exposure?
- What caused the problem?
- Is a tolling agreement appropriate to allow more time to properly evaluate and resolve the situation?

3. Simple cases of misunderstanding when, in fact, no malpractice is involved are usually resolved by consultation between the lawyer and the client. If, however, more is involved, the accused lawyer should proceed according to the considerations discussed in the following Notification Phase.

4. It is important to appreciate that from the moment a malpractice claim arises until it is resolved, enormous stress is placed on a firm or sole practitioner. Administrative steps must be taken to preserve the client file in its current posture and to separately maintain records concerning the malpractice issue. The accused attorney is mentally distracted from normal work as well as deeply involved in time-consuming work on the malpractice claim. In partnerships other lawyers use considerable time in working with the problem. Contemplation of cost in terms of lost time, defense cost, insurance deductible amounts, and indemnity all in the context of the uncertainty of the litigation process is demoralizing for a protracted period of time. Sole practitioners and firm partners must make an extraordinary effort from the outset to control the human cost of a malpractice claim as well as the economic cost if the law practice is to come out of this crisis in a healthy state.

Phase II: Notification to Client and Insurance Company

Once satisfied a matter involves a genuine issue of malpractice, consideration must be given to the professional responsibility of the lawyer to notify the client and the procedure for invoking the firm's professional liability insurance coverage. Key considerations are:

1. Under the Kentucky Rules of Professional Conduct a lawyer is required to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."[10] Patently, a question of malpractice is a matter that must be promptly brought to a client's attention. This may be done by telephone or letter,

but the preferred procedure is a personal meeting with the client followed with a letter. Two complete files should be made – one for the firm and one for the client at the appropriate time. It may be prudent to have another lawyer from the firm along with the errant lawyer when the client is advised of the problem. It is imperative that no representation be made to the client that the firm's malpractice insurance will cover the claim. While candor is required when first notifying a client of an apparent error, admissions against interest concerning details of the error or value of the claim should not be made. It is best not to apologize when informing a client about a malpractice issue beyond saying "I'm sorry this happened." An apology that overtly or indirectly concedes error will be introduced at trial if the situation goes that far. There usually should be no attempt at this juncture to settle the claim.

2. Although there is no requirement to notify the insurance company before notifying the client, it is best to do so. Using the insurance company's claims counsel as a resource in analyzing the merits of suspected malpractice and how best to inform the client is highly beneficial. Bar-related companies like Lawyers Mutual uniformly encourage early reporting by insured lawyers for the very purpose of helping in assessing the merits of a claim, assisting in notifying the client, and having the earliest possible opportunity to conduct claims repair.

3. Too many lawyers delay too long in reporting claims or incidents to their insurance company for fear of increased insurance cost or from simple denial of the problem. To appreciate the danger in delayed reporting it is crucial to understand that the standard lawyers professional liability policy is a one-year in duration, "claims made" policy. Claims made means that the policy in effect at the time the malpractice claim against the lawyer is first made and reported covers that claim. If a lawyer fails to report the claim to the insurance company while that policy is still in effect, insurance coverage for that claim is lost at policy expiration even if the policy is renewed. For example, one firm failed to report during the one-year period of their policy a claim even though three lawyers in the firm had received early in the policy year "Notice of Claim" letters for malpractice from the Federal Deposit Insurance Corporation (FDIC). This claim was not reported until the following year after the policy had expired and been renewed without the firm risking an increase in premium for the claim on the renewal policy. This was held to be a violation of the claims made policy terms and the firm thereby lost their insurance coverage for the FDIC claim.[11] The only way to assure compliance with the claims made feature of legal malpractice insurance policies and invoke coverage is to report claims and incidents promptly and always be mindful of when a current policy is due to expire.

4. All lawyers liability insurance policies contain provisions on when and how to report a claim or incident. While telephonic reports are useful for immediate assistance, claims typically must be reported in writing to invoke coverage. The Internet offers an expeditious vehicle for prompt reporting. Usual requirements for written reports are:

- Names of claimants,
- Date the alleged error was discovered,
- Summary of the circumstances,
- Estimate of the potential liability,
- Copies of relevant documents, and
- The insured lawyer's views on defenses or claims repair that may be available.

A big advantage of this procedure for accused lawyers is that it requires them to carefully think through the problem at the outset of the claim that results in a rapid appreciation of the risk for lawyer and insurance company.

5. Insurance policies contain provisions requiring the cooperation of the insured lawyer and specific guidance on appointment of defense counsel. Insured lawyers should not retain defense counsel without prior coordination with their insurance company. Even if the insurance company denies coverage or issues a reservation of rights letter concerning some aspect of the claim, the insurance company may still have a duty to defend the claim. Independent counsel at the insured lawyer's own expense may be necessary to resolve reservation of rights and duty to defend issues if contested.

Phase III: Claims Repair

After a thorough assessment of the malpractice and proper notifications, every effort then should be made to cure the error, mitigate its effects or at least keep the problem from becoming larger. Specific claims repair actions are determined on a case-by-case basis, usually through the cooperative efforts of the accused lawyer, defense counsel, insurance company claims counsel and other interested parties. Some examples of effective claims repair are timely appeals, requests for reconsideration, alternative legal remedies for the client, discovery of the availability of other applicable insurance, negotiated cooperation of other parties mitigating the error and, on occasion, by condonation by loyal clients who have been otherwise treated professionally in the matter or over a period of many years.

Phase IV: Adjudication

The adjudication of a malpractice claim involves the same legal method as any other civil legal dispute. Claims are denied, negotiated settlements are reached, and contested lawsuits are conducted. As in other civil cases, alternative dispute resolution is an increasing method of adjudication. It is beyond the scope of this article to delve into the special considerations of malpractice claim adjudication such as use of expert testimony to establish the standard of care, the "case within the case" aspect of claims involving litigation errors, defenses such as the lawyer malpractice statute of limitations, and the unique tripartite relationship of insured lawyer, insurance company and defense counsel. Mallen and Smith's *Legal Malpractice* (2008 Ed.) includes Chapter 30, "Insurance Counsel" and Chapter 34,

"Litigation of the Legal Malpractice Action" that are highly recommended. What is important to appreciate is that in the adjudication phase of a malpractice claim the accused lawyer is a defendant and should behave as such. With professional reputation and pride at stake, along with a potentially large monetary loss, being a defendant in a malpractice action is easily the most difficult thing a lawyer faces in a legal career. These circumstances require strong support from the lawyer's firm, family, defense lawyer, and insurance company.

Conclusion

The message of the ABA's program *Lawyer Risk in a Struggling Economy* is that we are entering a time of enhanced risk for lawyers that threatens a substantial increase in malpractice claims. Risk managing your practice, to include a thorough understanding of your malpractice insurance claims reporting requirements, has never been more important. You may never face a claim, but if you do, spend some time when the unexpected happens to "just sit there" and carefully think through how to deal with one of the most difficult experiences you can have as a lawyer. I hope the systematic approach recommended in this article for managing the risk will aid you in that deliberation.

ENDNOTES

1. ABA Fall 2008 National Legal Malpractice Conference, September 3-5, 2008 The Palace Hotel, San Francisco, CA.
2. Ward Bower, Altman Weil, Inc.; Anthony Davis, Hinshaw & Culbertson, New York, NY; William D. Henderson, Associate Professor of Law, Indiana University School of Law.
3. Panelists were Richard D. Hoffman, Nixon Peabody, San Francisco, CA; Colleen McNicholas, Zurich North America, New York, NY; Lisa L. Shrewsberry, Traub, Lieberman Straus & Shrewsberry LLP, Hawthorne, NY.
4. William C. Saturley, Nelson, Kinder, Mosseau & Saturley, PC, Manchester, NH; Jo Beth Earl, Hanover Professionals; Richard Levine, Nelson, Kinder, Mosseau & Saturley, PC, Boston, MA.
5. Panelists were Robert C. Baker, Baker, Keener & Nahra LLP, Los Angeles, CA; Ronald L. Hofeldt, M.D., Psychiatrist Specializing in Litigation Support, Salem, OR; Bruce Lee Schafer, Oregon Professional Liability Fund, Lake Oswego, OR.
6. Conference Materials, *Litigation Support: Helping the Defendant Attorney Survive a Lawsui*t, page 43.
7. Conference Materials, *Steps in Preparing Your Attorney Client,* page 66.
8. Kentucky *Bench & Bar*, Vol. 58 No. 1, Winter 1994.
9. It is not unusual for a lawyer in an emotional state to erroneously notify a client of malpractice when, in fact, none had occurred. Sometimes the promise is made that insurance will cover any problem without the lawyer's prior coordination with the firm's insurance company. Promises like this usually impress the insurance company as a disingenuous ploy by the lawyer to save fees at the insurance company's expense – a particularly bad way to start off a sensitive relationship. At the other end of the spectrum is the lawyer who casually gave the complaining client his insurance company's 800 number. That's asking for it from all sides!
10. Kentucky Supreme Court Rule 3.130; Kentucky Rule of Professional Conduct 1.4, Communication.
11. *National Union Fire Insurance Co. of Pittsburgh v. Baker & McKenzie*, 997 F.2d 305 (7th Cir. 1993). This case includes an analysis of the Claims Made feature of malpractice insurance policies. If you are unclear on how it applies, read this decision.

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

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Joshua Crabtree • (859) 431-3313

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

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

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

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

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

CLEvents

Following is a list of TENTATIVE upcoming CLE programs. REMEMBER circumstances may arise which result in program changes or cancellations. **You must contact the listed program sponsor** if you have questions regarding specific CLE programs and/or registration. ETHICS credits are included in many of these programs. Some programs may not yet be accredited for CLE credits - please check with the program sponsor or the KBA CLE office for details.

FEBRUARY

4	First Amendment Issues in the Electronic World *Cincinnati Bar Association*
5-6	12th Biennial Business Associations Law Institute *UK CLE*
18	Juvenile Diversion Programs *Cincinnati Bar Association*
20	Domestic Relations Update *Louisville Bar Association*
25	Litigation Brown Bag CLE *Louisville Bar Association*
26	Social Security Brown Bag CLE *Louisville Bar Association*
27	Advanced Estate Planning Institute *Cincinnati Bar Association*
27	Taxation Law Brown Bag CLE *Louisville Bar Association*

MARCH

4	Living Wills, POA's, DNR's & Medicaid Planning *Cincinnati Bar Association*
10	Intellectual Property Law Brown Bag CLE *Louisville Bar Association*
11	Environmental Law Brown Bag CLE *Louisville Bar Association*
13	Labor & Employment Brown Bag CLE *Louisville Bar Association*
18	Immigration Law *Cincinnati Bar Association*
20	Litigating the Commercial Trucking Case *UK CLE*
20	Basic Juvenile Law *Cincinnati Bar Association*
27	Advocacy Series: Pre-Trial Practice *Cincinnati Bar Association*

Building a Rock Foundation: Using Cases to Support Arguments

Jennifer Jolly-Ryan, Professor of Legal Writing, Northern Kentucky University's Chase College of Law

A legal argument without the foundation of good legal authority is like a house built on sand. It collapses under the reader's scrutiny. Cases support legal arguments in two ways. First, they provide authority for common law rules or statutory interpretations. Second, they show how courts apply common law or statutory rules in analogous cases. Below are some considerations for effectively using cases to support arguments.[1]

Using Cases as Authority for Common Law or Statutory Rules

If your only goal is to provide authority for a rule, cite to one or more cases if the issue is governed by common law, and to the statute, if the issue is governed by statutory law. If there is only one case that sets out the rule, cite it as authority. However, if a number of cases set out the same rules, select the one to three "best" cases.[2] To select a "best" case, ask yourself these questions:

1. **Where was the case decided?** An on-point case in the controlling jurisdiction, preferably decided by the highest court in the jurisdiction, is almost always the best authority. On-point cases from other jurisdictions are second best. Evaluate whether a court within your jurisdiction would likely rely upon the case. For example, is the case from another state, but within the circuit?[3]

2. **When was the case decided?** A recent case from a higher court is usually most authoritative. But, citing an older case from a higher court, followed by more recent, lower court decisions following the rule, can show that the rule is well established and that it is still good law.[4]

3. **Who wrote the decision or opinion?** A decision or opinion written by a well-known and well-respected judge is often more persuasive than a lesser known or less respected judge.

4. **What was the composition of the court?** For example, an *en banc* decision usually has greater authoritative value than a case decided by a panel of judges. Unlike a panel of judges, all members of an *en banc* court participate in the decision to "maintain uniformity" or to decide "questions of exceptional importance." [5]

Using Cases to Show How the Courts Apply a Common Law or Statutory Rule

Courts often want to know how other courts apply a rule in similar fact situations. For example, if meeting elements is central to the outcome of your client's case, a court will want to see examples of when courts have determined that the elements were met and not met.[6] Here are a few ideas about how to provide a foundation for an argument that your client's facts are similar to the facts in a favorable case:

1. **Explicitly state that the analogous case you cite is binding authority and the key facts are similar.** Some writers make the reader guess about the authoritative value of a case, putting all the vital information in a citation at the end of a sentence. This is a mistake. The legal reader's eye is trained to skip over the information in the citation. Therefore, immediately include a phrase that shows the reader that what follows is binding law. In addition, provide enough of the court's reasoning so that the reader knows that the facts being compared are key facts.

Examples:

Worst: The *Doe* court held that defendant's intent was willful.
Comment: In the above example, the reader must wait for the citation to determine whether the court's decision in *Doe* is binding authority. Moreover, the reader does not know why the court reached its decision, because the writer did not include any key facts.

Better: Under Arizona arson law, for intent to be willful, the fire must be set knowingly, as distinguished from accidentally or involuntarily. For example, the Arizona Supreme Court in *Doe*, held that the defendant had a willful intent when he lit a cardboard box on fire and the box lit the house on fire, even though he did not want the house to burn. (*Doe* cited here.) The court reasoned that the juvenile acted willfully because he stacked the cardboard against the nearby house, and admitted that he knew that setting

the cardboard on fire would most likely cause the house to burn.
Comment: Here, we know that *Doe* is an Arizona Supreme Court case about arson law. We know that the defendant did not need to intend to burn the house down, but that intent to burn the house is unnecessary to satisfy the statutory element of willfulness.

2. **Explicitly make the analogy.** Legal writers often leave it to their readers to figure out the significance of the cases they cite. However, effective writers explicitly state the significance and make all necessary jumps in logic for the reader.

Examples:

Worst: Here, A knew that striking a match and lighting the trash pile would cause his neighbor's house to catch on fire.
Comment: In the above example, A's knowledge is not analogized to anything.

Better: Like the juvenile in *Doe*, A knew that striking a match and lighting the trash pile would cause his neighbor's house to catch on fire.
Comment: In the above example, all we know is that A is similar in some way to the juvenile in *Doe*.

Best: Like the juvenile in *Doe*, who knew that stacking papers against a house and lighting them would likely cause the house to burn, A knew that striking a match and lighting the trash pile would cause his neighbor's house to catch on fire.
Comment: In this final example, we know that A's knowledge is equal to the defendant's knowledge in *Doe* because they both knew that lighting a fire near a house would likely cause it to burn.

3. **Give the court enough information about your client's case and a favorable analogous case so that it can reach the same result.**
Example: Like the juvenile in *Doe*, A knew that striking a match and lighting the trash pile would cause a fire. He went to the garage to find matches to light a fire, and moved the trash to the side of the house for fear that his tent would catch fire. After several tries, he was able to start the trash pile on fire. The houses were close together, so A should have predicted the danger. Therefore, he acted knowingly and thus "willfully."

Once the best cases are chosen, their significance is made explicit, and enough key facts are provided, you have built a firm foundation for persuasive arguments. Using cases effectively in legal writing is like building a house on a rock, rather than upon sand.[7]

ENDNOTES

1. Thank you to the NKU-Chase college of Law first year law students in my legal writing class this fall, who worked with the arson fact pattern for their first memorandum of law assignment and gave me the ideas for this article for the Kentucky *Bench & Bar*.
2. Laurel Currie Oates, Anne Enquist, *Just Memos* 68-69 (Aspen 2007).
3. Mary Dunnewold, *How Many Cases Do I Need?* 10 Perspectives: Teaching Legal Research and Writing 10 (Fall 2001).
4. Oates and Enquist, *supra* note 1, at 70.
5. Fed. R. App. P. (a).
6. Oates and Enquist, *supra* note 1, at 71.
7. Matthew 7:24-27 (New International Version).

More Electronic Filing for Kentucky Lawyers: Electronic Case Filing (ECF) and the United States Court of Appeals for the Sixth Circuit

Part I

Michael Losavio

Electronic filing opened for business this summer in the U.S. Court of Appeals for the Sixth Circuit. As detailed in the *Sixth Circuit Guide to Electronic Filing* (Guide) (http://www.ca6.uscourts.gov/internet/rules_and_procedures/ecfDocs/Guide.pdf), Kentucky lawyers taking their federal appeals to the Sixth Circuit must now file via the Electronic Case Filing (ECF) system. Only in special or extraordinary matters is paper filing still permitted (special writs, filing under seal) or where a party is proceeding without counsel. Guide, p. 4.

This is good news for several reasons. **First**, use of the ECF system is easy and requires only:

1. a web browser and access,
2. an e-mail account,
3. registration with ECF,
4. a .PDF Reader, and
5. a PDF writer program.

Registration is a straightforward process where you agree to the terms for ECF use, including accepting electronic service via email.

The Portable Document Format (PDF) has been adopted by the Court for documents filed with it. A PDF reader program, such as the Adobe Acrobat Reader program, is needed to read documents filed with the Court. Current versions of the Acrobat Reader may also be used to complete a variety of forms to be filed with the Court and then save those forms, with the data entered in them, for later review and use.

As a document must be in PDF format to be filed with the Court, a program that can do that conversion from the original word processing document is needed. The conversion must conform to Court standards. How such conversions may be done is discussed on the Court's support website for ECF.

The ease of use is built around the stylizations of appellate practice. In comparison to the diverse potential chaos of trial work, appeals follow a more discrete set of steps and activities. The appellate ECF system reflects these and walks a filer through those steps as needed. To start to file a document, you first enter your case number and choose one of 11 categories of activity which, in turn, pulls up a list of events you select. The system will prompt you with the rest of the information needed to complete a filing as well as warn you of possible pitfalls.

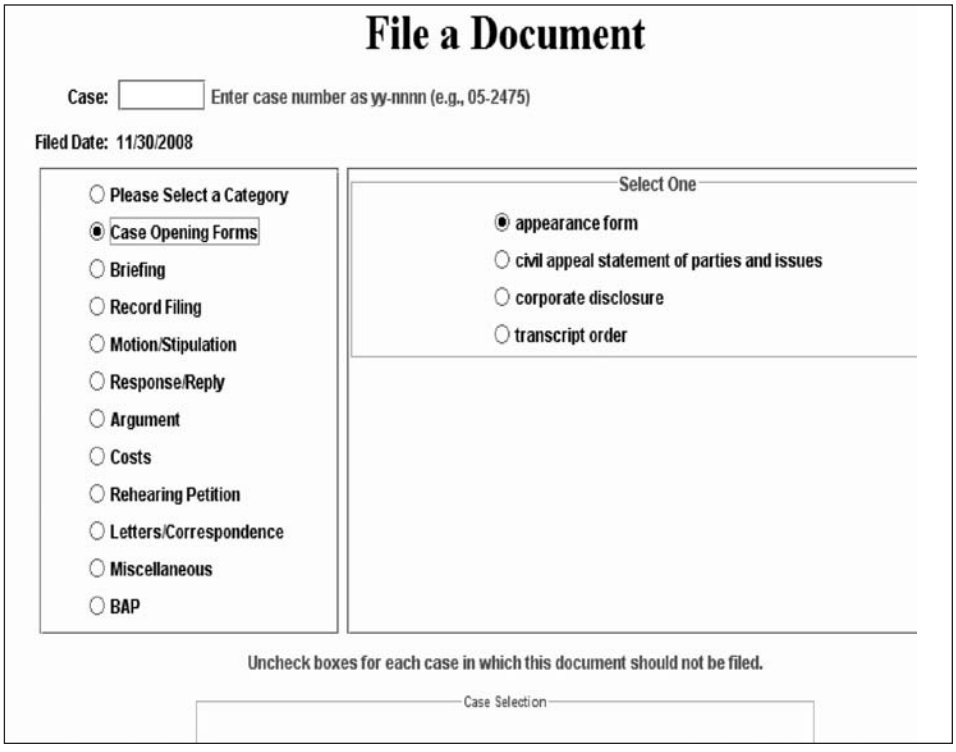
For example, choosing the category "Case Opening Forms" pulls up the four initial documents for appeals, including the appearance form and transcript order.

The system guides you through to filing; in Part II of this series we'll go into further detail.

The Forms collection for the Sixth Circuit has these forms in an interactive format that allows you to fill in the needed information and save the forms with that information, to be filed electronically with the Court. And these completed forms can be used for other cases, simply changing the case number, name and manager to fit a particular case.

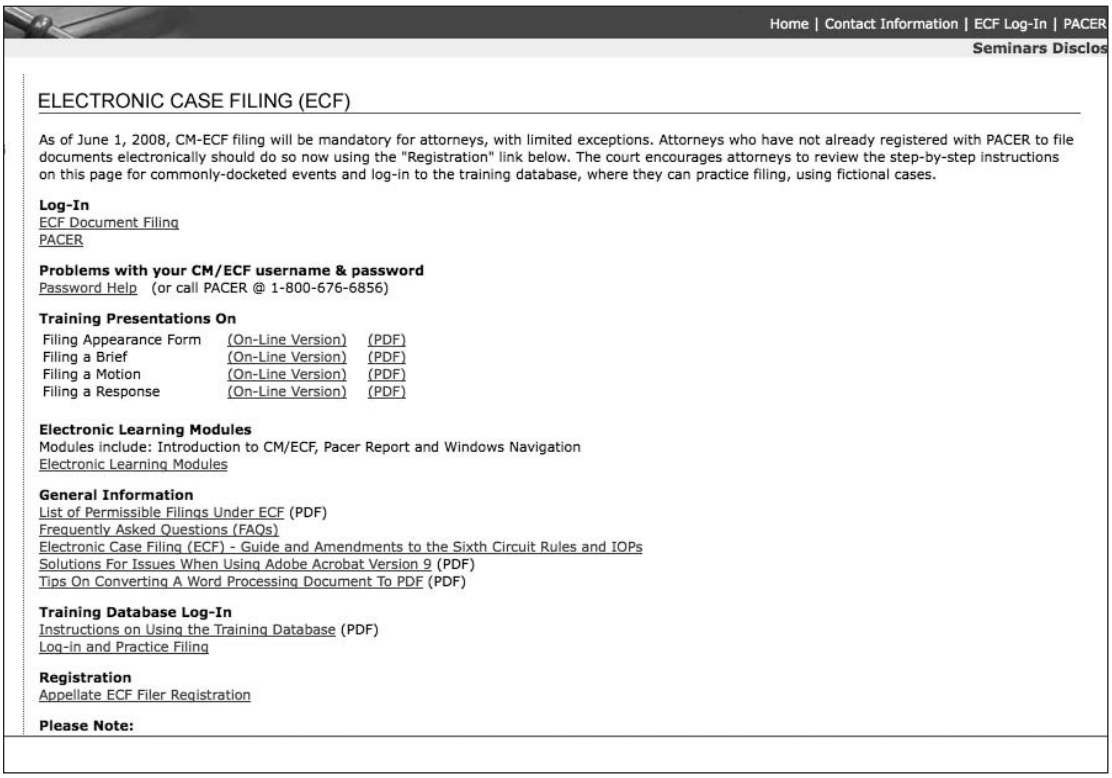
The signature requirement is met by a simple electronic signature:

> "s/[attorney's name]" block showing the attorney's name, followed by the attorney's business address, telephone number, and e-mail address.



Guide, p. 6. The authentication feature is an attorney's login and password, so those must be given special attention as to security; digital signatures and graphical signature representations are "discouraged."

The Court has a detailed set of training features and options to walk new registrants through the process: http://www.ca6.uscourts.gov/internet/cm_ecf/cm_ecf.htm. These include a live training site where a lawyer can practice using the features for filing



without the risk from making a mistake.

Second, the briefing process is simplified; the "Joint Appendix" and proof brief are abolished, except in special circumstances. Only a final brief citing to the record is to be filed. And e-mail service becomes the rule absent special circumstances.

Leveraging the electronic filing in the district courts, the Record on Appeal (ROA), consisting of all the items filed in a case, is combined into a single PDF file with serially numbered pages. With a few exceptions, such as federal review of administrative or state court actions, this replaces the Joint Appendix, the volumes of document and transcript that consumed the weekends of many a paralegal.

With this rapid completion of a serially paginated ROA, counsel need only file a final brief. That final brief cites to both the original document with its docket number and the page numbers in the conjoined file of all filed documents. The Guide example: "Record Entry No. 15, defendant's motion for summary judgment, pp. 2-3; ROA pp. 61-62."

The electronic filing of a document with the Court also automatically serves other counsel in the case via the e-mail address given in their ECF registration. The noticing e-mail permits the recipient one free access to the filed documents, which can be saved to a local computer. If other counsel have not yet registered or if an unrepresented person is a party, paper service is still required. A certificate of service is also still required, as ECF allows you to opt out of email notification.

But special care is needed. Again, as username and password serve as the authenticators of a filing, these must be carefully protected and shared only in a highly trusted relationship. Privacy protection and redaction rules apply for identifying information and it is counsel's duty to do such redaction. Because of metadata issues in word processing and PDF documents, extra care is required for an effective and secure redaction.

Filing deadlines are not changed by the use of the system, so waiting until 11:59:59 p.m. to file may not be a good practice. The document is not considered "filed" until the Court's system itself sends out the Notice of Docket Activity (NDA) acknowledgment to the filing party. There is a provision for technical failure by the court's system, but it is limited in application. While the Court is usually generous with its practitioners, early filing will be preferable to the extra administrative overhead of requesting an extension of time.

This is a useful system for appellate practitioners that should save time and money with appeals, once the initial "shock of the new" has abated! We'll look further at some of these issues in the next installment on ECF.

KENTUCKY BAR ASSOCIATION

FINANCIAL STATEMENTS AND
SUPPLEMENTARY INFORMATION

Year Ended June 30, 2008

KENTUCKY BAR ASSOCIATION
TABLE OF CONTENTS

Anneken & Moser PSC
Certified Public Accountants
Engaged. Responsive. Future-focused.

INDEPENDENT AUDITOR'S REPORT

THE BOARD OF GOVERNORS
KENTUCKY BAR ASSOCIATION
Frankfort, Kentucky 40601

We have audited the accompanying statement of financial position of Kentucky Bar Association (a nonprofit organization) as of June 30, 2008, and the related statement of activities and cash flows for the year then ended. These financial statements are the responsibility of the Association's management. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and the significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Kentucky Bar Association as of June 30, 2008 and the changes in its net assets and its cash flows for the year then ended in conformity with accounting principles generally accepted in the United States of America.

Our audit was conducted for the purpose of forming an opinion on the basic financial statements taken as a whole. The supplemental information on pages 13 through 16 is presented for purposes of additional analysis and is not a required part of the basic financial statements. Such information has been subjected to the auditing procedures applied in the audit of the basic financial statements and, in our opinion, is fairly stated in all material respects in relation to the basic financial statements taken as a whole.

Anneken & Moser, PSC

September 12, 2008

| 157 Barnwood Drive | Suite 101 | Edgewood, KY 41017-2588 | 859.331.5622 | ◄► | 20 North Grand Avenue | Suite 5 | Fort Thomas, KY 41075-1755 | 859.441.2020 |

KENTUCKY BAR ASSOCIATION
STATEMENT OF FINANCIAL POSITION
June 30, 2008

ASSETS	
CURRENT ASSETS	
Cash and cash equivalents	$ 233,016
Cash - bond sinking fund	3,855
Investments	5,751,569
Accounts receivable	48,238
Interfund receivable	65,955
Due from affiliate	50,108
Interest receivable	10,398
Prepaid expenses	104,680
TOTAL CURRENT ASSETS	6,267,819
Property, building and equipment, net	3,504,212
TOTAL ASSETS	$ 9,772,031
LIABILITIES AND NET ASSETS	
CURRENTS LIABILITIES	
Accounts payable	$ 343,149
Interfund payable	65,955
Accrued expenses	215,185
Current portion of bonds payable	95,000
TOTAL CURRENT LIABILITIES	719,289
LONG-TERM LIABILITIES	
Deferred revenue	31,501
Long-term portion of bonds payable	1,865,000
TOTAL LONG-TERM LIABILITIES	1,896,501
TOTAL LIABILITIES	2,615,790
NET ASSETS	
Unrestricted:	
Board designated	848,741
Undesignated	6,307,500
TOTAL NET ASSETS	7,156,241
TOTAL LIABILITIES AND NET ASSETS	$ 9,772,031

See accompanying notes to financial statements.

KENTUCKY BAR ASSOCIATION
STATEMENT OF ACTIVITIES
Year Ended June 30, 2008

CHANGES IN UNRESTRICTED NET ASSETS	
REVENUES AND SUPPORT	
Membership dues	$ 3,639,558
Investment income	389,966
Other dues and contributions	152,474
Sections income	163,042
Reimbursement costs	12,194
Attorney advertising	61,125
Advertising - Bench and Bar	97,478
Conventions	437,519
Rent of building	9,600
Net change in the fair value of investments	(469,636)
Other revenue and support	691,740
TOTAL REVENUES AND SUPPORT	5,185,060
FUNCTIONAL EXPENSES	
Program services	
Sections	139,817
Board of Governors and Presidents	129,521
Disciplinary	1,316,431
Publications	221,005
Conventions	407,879
Advertising commissions	106,568
Kentucky Lawyers Assistance Program	159,190
Continuing legal education	932,369
Client security	93,905
Bar center	353,638
Capital construction	2,374
Pro bono	1,204
Supporting services:	
Management and general	1,057,136
TOTAL EXPENSES	4,921,037
INCREASE IN UNRESTRICTED NET ASSETS	264,023
NET ASSETS, beginning of year	6,892,218
NET ASSETS, end of year	$ 7,156,241

See accompanying notes to financial statements.

KENTUCKY BAR ASSOCIATION
STATEMENT OF CASH FLOWS
Year Ended June 30, 2008

CASH FLOWS FROM OPERATING ACTIVITIES		
Increase (decrease) in net assets	$	264,023
Adjustments to reconcile increase		
(decrease) in net assets to net		
cash flows from operating activities:		
Depreciation		148,383
Net increase in the fair value of investments		80,842
Realized gains on sales of investments		(23,244)
(Increase) decrease in:		
Accounts receivable		7,670
Interfund receivable		(65,955)
Due from affiliate		(2,936)
Interest receivable		2,730
Prepaid expenses		(75,693)
Increase (decrease) in:		
Accounts payable		178,627
Interfund payable		65,955
Accrued expenses		43,075
Deferred revenue		(7,132)
NET CASH PROVIDED BY OPERATING ACTIVITIES		616,345
CASH FLOWS FROM INVESTING ACTIVITIES		
Purchases of property and equipment		(19,373)
Proceeds from sale of investments		5,071,802
Purchases of investments		(5,539,205)
NET CASH (USED) BY INVESTING ACTIVITIES		(486,776)
CASH FLOWS FROM FINANCING ACTIVITIES		
Payments of long-term debt		(90,000)
NET CASH (USED) BY INVESTING ACTIVITIES		(90,000)
NET INCREASE IN CASH AND CASH EQUIVALENTS		39,569
CASH AND CASH EQUIVALENTS, beginning of year		197,302
CASH AND CASH EQUIVALENTS, end of year	$	236,871

See accompanying notes to financial statements.

NOTE A - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

The statements presented are those of Kentucky Bar Association (KBA). This is an agency of the judicial branch of the Commonwealth of Kentucky. The KBA implements, administers and enforces Kentucky Supreme Court Rules regarding the discipline and education of the lawyers of Kentucky and is the professional association for the practice of law in Kentucky.

KBA is an agency that provides various services which are maintained in accounts in accordance with the principles and practices of "fund accounting." Fund accounting is the procedure by which resources for various purposes are classified for accounting purposes in accordance with activities or objectives as specified by donors, in accordance with regulations, restrictions, or limitations imposed by sources outside the organization, or in accordance with directions issued by the governing board. The assets, liabilities, and net assets of the Association are reported in seven self-balancing fund groups, a description of which is as follows:

General Fund The General Fund is engaged in the administrative, general and disciplinary functions of the Association, primarily dealing with Kentucky attorneys and the practice of law within the State of Kentucky.

Continuing Legal Education Fund The Continuing Legal Education Fund administers the continuing legal education rule of the Supreme Court, which includes mandatory continuing legal education attorney records, District Bar Education Programs and New Lawyers' Skills Programs.

Client Security Fund The Client Security Fund provides assistance to individuals who have suffered financial loss due to misappropriation of clients' funds by members of the Association. During the 2007 – 2008 fiscal year 47 new claims were received alleging losses totaling approximately $739,437. Pursuant to Supreme Court Rule 3.820(13)(a) the Board of Governors has established Fund claim limits of $65,000 per claim and $200,000 aggregate claims against one attorney; accordingly, the total exposure is approximately $680,437.

Bar Center Headquarters Trustees Fund The Bar Center Headquarters Trustees Fund acts for the Association in all matters incidental to the ownership, management, and control of the Bar Center building.

Bar Center Fund The Bar Center Fund is to be used for the furnishing and maintenance of the Bar Center building located in Frankfort, Kentucky.

Capital Construction Fund The Capital Construction Fund is a segregation of membership dues and annual General Fund surplus to be used exclusively for financing the expansion and maintenance of the Bar Center building and property.

Pro Bono Fund The Pro Bono Fund accounts for revenues and expenses associated with statewide Pro Bono efforts.

NOTE A - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (continued)

Basis of Financial Statements

The Association prepares its financial statements on the accrual basis of accounting. The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates. The following accounting policies are presented to facilitate the understanding of information presented in the financial statements.

Presentation

The financial statements are presented in accordance with the Statement of Financial Accounting Standards No. 117, Financial Statements of Not-for-Profit Organizations, which requires the Association to report information regarding its financial position and activities according to three classes of net assets: unrestricted net assets, temporarily restricted net assets, and permanently restricted net assets. Unrestricted net assets are not subject to donor-imposed restrictions and may be designated for specific purposes by action of the Board of Directors. Temporarily restricted net assets are subject to donor-imposed restrictions that can be fulfilled by actions of the agency pursuant to those restrictions or that expire by the passage of time. Permanently restricted net assets are subject to donor-imposed restrictions that they be maintained permanently. The Association has no temporarily or permanently restricted net assets as of June 30, 2008.

Cash and Cash Equivalents

The Association considers cash in operating bank accounts to be cash and cash equivalents.

Supplemental Disclosure of Cash Flow information:	
Cash paid during the year for interest	$ 95,000

Investments

Investments are stated at fair value in the statement of financial position. Unrealized gains and losses are included in the statement of activities.

Fixed Assets

Fixed assets are stated at cost. Major renewals and improvements are charged to the fixed asset accounts. Expenditures, which increase values or extend useful lives of the respective assets, are capitalized, whereas expenditures for maintenance and repairs are charged to expense as incurred. At the time fixed assets are retired or otherwise disposed of, the asset and related accumulated depreciation accounts are relieved of the applicable amounts. Gains or losses from retirements or sales are credited or charged to income.

Revenue

The major sources of revenue are membership dues. All members are required to pay dues to KBA. Dues are determined annually and are recognized as revenues when assessed because they are measurable and are collectible within the current period.

NOTE A - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (continued)

Depreciation

Depreciation and amortization are provided on a straight-line basis over the estimated useful lives of the assets. Depreciation expense was $148,383 for the year ended June 30, 2008. Estimated useful lives for purposes of depreciation are as follows:

Bar Center building	50 years
Furniture, fixtures and equipment	5 - 10 years
Equipment under capital leases	5 years

Pension Plan

The Association participates as members of the Kentucky Employee Retirement System (KERS), a cost sharing, multiple-employer, public employee retirement system. KERS provides retirement benefits based on an employee's final average salary and number of years of service. Benefits are subject to certain reductions if the employee retires before reaching age sixty-five, or after less than twenty-seven years of service. The plan also provides for disability retirement, death and survivor benefits and medical insurance.

The Kentucky Employee Retirement System issues a publicly available financial report that includes financial statements and required supplementary information. That report may be obtained by writing to Kentucky Employees Retirement System, 1260 Louisville Road, Perimeter Park West, Frankfort, Kentucky 40601 or by calling (502) 564-4646.

Funding for the plan is provided by eligible employees who contribute 5.00% of their salary through payroll deductions and the Association, which contributes 8.5% of current eligible employee's salary to the KERS. The Association's contribution rates are determined by Kentucky Revised Statute and the Board of Trustees of the Kentucky Retirement Systems each biennium. The Association's contributions for 2008 totaled $183,152.

NOTE B - CONCENTRATION OF CREDIT RISK

As of June 30, 2008, the Association had FDIC insured bank cash balances of $100,000 and uninsured bank cash balances of $270,681 which are invested in a cash sweep program investing in Federal obligations.

NOTE C – INVESTMENTS

Investments are administered utilizing the services of the trust department of a bank. These investments are Category 2 investments, which include investments that are uninsured and unregistered held by the counterparty's trust department or agent in the Association's name. Investment service fees of approximately $20,569 have been included in bank and investment fees in the statement of activities for the year ended June 30, 2008. All investments have been classified as current assets in the accompanying statement of financial position since proceeds would be available to the Association upon request to the trust department of the bank.

NOTE C – INVESTMENTS (continued)

A summary of investments at June 30, 2008 is as follows:

	Cost	Fair Market Value	Unrealized Gains/Losses
General Fund -			
Money market funds	$ 718,006	$ 718,006	$ -
Corporate bonds	772,682	742,532	(30,150)
Common stocks	762,967	758,915	(4,052)
Mutual equity funds	515,238	471,230	(44,008)
	2,768,893	2,690,683	(78,210)
Continuing Legal Education Fund -			
Money market funds	611,592	611,592	-
Corporate bonds	143,559	136,318	(7,241)
Common stocks	126,147	137,333	11,186
Mutual equity funds	112,683	109,589	(3,094)
	993,981	994,832	851
Client Security Fund -			
Money market funds	28,825	28,825	-
Corporate bonds	463,811	441,023	(22,788)
Common stocks	383,042	417,852	34,810
Mutual equity funds	369,557	354,452	(15,105)
	1,245,235	1,242,152	(3,083)
Bar Center Headquarters Trustees Fund -			
Money market funds	220,310	220,310	-
	220,310	220,310	-
Bar Center Fund -			
Money market funds	60,229	60,229	-
	60,229	60,229	-

NOTE C – INVESTMENTS (continued)

	Cost	Fair Market Value	Unrealized Gains/Losses
Capital Construction Fund -			
Money market funds	158,838	158,838	-
Corporate bonds	302,965	302,566	(399)
	461,803	461,404	(399)
Pro Bono Fund			
Money market funds	81,959	81,959	-
	81,959	81,959	-
	$ 5,832,410	$ 5,751,569	$ (80,841)

Investment return is summarized as follows:

Interest and dividend income	$ 366,722
Realized gains	23,244
Change in fair value	(469,636)
	$ (79,670)

NOTE D – INCOME TAX STATUS

The Association is not a private foundation and is exempt from federal income tax under section 501(c)(6) of the Internal Revenue Code of 1954, except on certain unrelated business income, which is not material; accordingly, the accompanying financial statements include no provision or credit for such taxes.

NOTE E – LEASES

The Association leases office equipment under non-cancelable operating leases expiring in various years through the year 2012. The association incurred approximately $35,855 of lease-related expense in the year ended June 30, 2008. These leases are classified as operating with minimum rental commitments as follows:

Year Ending June 30,	
2009	$ 26,666
2010	24,846
2011	22,605
2012	13,162
	$ 87,279

NOTE F - LONG-TERM DEBT

Long-term debt is comprised of the following as of June 30, 2008:

2.0% - 5.0% Kentucky Bar Center Headquarters Project Bonds, Series 2003, payable with semi-annual interest payments and annual principal payments, with the final payment due April 1, 2023	$ 1,960,000
Less current portion	(95,000)
	$ 1,865,000

During October 2002, the Association issued $2,390,000 in City of Frankfort, Kentucky Governmental Project Revenue Obligation Bonds with rates of 2.0% - 5.0%. In order to retire the revenue bonds, the Association is required to make deposits to sinking funds in amounts sufficient to meet the principal and interest payments due for the required semi-annual installments. The bonds are secured by membership dues revenue. In compliance with bond requirements the Association maintains a separate bond sinking fund cash account included in cash and cash equivalents on the statement of financial position.

NOTE F - LONG-TERM DEBT (continued)

The principal and interest repayment requirements relating to the above long-term debt at June 30, 2008 are as follows:

Year Ending June 30,	Principal	Interest	Total
2009	$ 95,000	$ 92,650	$ 187,650
2010	100,000	88,850	188,850
2011	100,000	84,850	184,850
2012	105,000	80,850	185,850
2013	110,000	76,650	186,650
Thereafter	1,450,000	426,750	1,876,750
	$ 1,960,000	$ 850,600	$ 2,810,600

Interest expense for the year ended June 30, 2008 was $95,600.

NOTE G – RELATED PARTY

The Kentucky Bar Foundation, Inc. (the Foundation) is a related party to the Kentucky Bar Association in that both organizations share common facilities and that the Association provides payroll services for the Foundation.

The following summarizes significant transactions and balances between the two at June 30, 2008, and for the year then ended.

Accounts receivable from Foundation	$ 50,108
Rent paid by Foundation to Association	$ 9,600

NOTE H – COMPENSATED ABSENCES

In prior years the Association allowed a carryover of a maximum of forty-five unused vacation days accumulated through year-end. For June 30, 2008 the Association allowed employees to have over forty-five unused vacation days until September 30, 2008. Accordingly, the Association has in accrued expenses a liability of $91,720 and $33,238 in the general and continuing legal education funds, respectively, at June 30, 2008, for these future compensated absences.

NOTE I – DESIGNATED FUND BALANCE

By Board resolution, Surplus Section, Mock Trial, Just Solutions, Oral History Project and Lawyer's Assistance Program funds are allowed to be carried over to the next ensuing budget year and have been designated as such. Any current year excess support and revenue over expenses of the General Fund excluding the current effects of the aforementioned carryforward funds less transfers made to other funds may be considered by the Board for transfer of all, part, or none to the Capital Construction Fund for future expansion and maintenance of the Bar Center building and property.

For the year ended June 30, 2008, there was $74,498 of support and revenue over expenses available for transfer from the General Fund to the Construction Fund under the above criteria. The accumulated amount from prior years and including the current year amount of General Fund excess available for transfer at June 30, 2008 is $2,150,148.

NOTE J - COMMITMENTS

The Association is subject to certain legal proceedings arising from normal business activities. Administrative officials believe that these actions are without merit or that the ultimate liability, if any, resulting from them will not materiality affect the accompanying financial statements.

SUPPLEMENTARY INFORMATION

KENTUCKY BAR ASSOCIATION
COMBINING STATEMENT OF FINANCIAL POSITION
June 30, 2008

	General Fund	Continuing Legal Education Fund	Client Security Fund
ASSETS			
CURRENT ASSETS			
Cash and cash equivalents	$ 187,757	$ 30,781	$ 3,727
Cash - bond sinking fund	-	-	-
Investments	2,690,683	994,832	1,242,152
Accounts receivable	33,338	14,900	-
Interfund receivable	-	-	-
Due from affiliate	47,708	-	-
Interest receivable	2,736	1,408	429
Prepaid expenses	72,931	30,531	-
TOTAL CURRENT ASSETS	3,035,153	1,072,452	1,246,308
Property, building and equipment, net	484	23,425	-
TOTAL ASSETS	$ 3,035,637	$ 1,095,877	$ 1,246,308
LIABILITIES AND NET ASSETS			
CURRENTS LIABILITIES			
Accounts payable	$ 310,671	$ 22,351	$ 167
Interfund payable	6,569	-	-
Accrued expenses	167,576	47,609	-
Current portion of bonds payable	-	-	-
TOTAL CURRENT LIABILITIES	484,816	69,960	167
LONG-TERM LIABILITIES			
Deferred revenue	19,658	11,843	-
Long-term portion of bonds payable	-	-	-
TOTAL LONG-TERM LIABILITIES	19,658	11,843	-
TOTAL LIABILITIES	504,474	81,803	167
NET ASSETS			
Unrestricted:			
Board designated	381,015	-	-
Undesignated	2,150,148	1,014,074	1,246,141
TOTAL NET ASSETS	2,531,163	1,014,074	1,246,141
TOTAL LIABILITIES AND NET ASSETS	$ 3,035,637	$ 1,095,877	$ 1,246,308

Bar Center Headquarters Trustees Fund	Bar Center Fund	Capital Construction Fund	Pro Bono Fund	Total
$ 684	$ 1,615	$ 1,140	$ 7,312	$ 233,016
3,855	-	-	-	3,855
220,310	60,229	461,404	81,959	5,751,569
-	-	-	-	48,238
65,955	-	-	-	65,955
2,400	-	-	-	50,108
343	127	5,182	173	10,398
1,218	-	-	-	104,680
294,765	61,971	467,726	89,444	6,267,819
3,480,303	-	-	-	3,504,212
$ 3,775,068	$ 61,971	$ 467,726	$ 89,444	$9,772,031
$ 9,960	$ -	$ -	$ -	$ 343,149
-	59,386	-	-	65,955
-	-	-	-	215,185
95,000	-	-	-	95,000
104,960	59,386	-	-	719,289
-	-	-	-	31,501
1,865,000	-	-	-	1,865,000
1,865,000	-	-	-	1,896,501
1,969,960	59,386	-	-	2,615,790
-	-	467,726	-	848,741
1,805,108	2,585	-	89,444	6,307,500
1,805,108	2,585	467,726	89,444	7,156,241
$ 3,775,068	$ 61,971	$ 467,726	$ 89,444	$9,772,031

KENTUCKY BAR ASSOCIATION
STATEMENT OF ACTIVITIES
Year Ended June 30, 2008

	General Fund	Continuing Legal Education Fund	Client Security Fund
CHANGES IN UNRESTRICTED NET ASSETS			
REVENUES AND SUPPORT			
Membership dues	$ 2,554,420	$ 676,264	$ 102,927
Investment income	193,311	55,668	106,788
Other dues and contributions	152,474	-	-
Sections income	163,042	-	-
Reimbursement costs	12,194	-	-
Attorney advertising	61,125	-	-
Advertising - Bench and Bar	97,478	-	-
Conventions	437,519	-	-
Rent of building	-	-	-
Net change in the fair value of investments	(234,376)	(57,019)	(180,972)
Other revenue and support	264,670	423,390	3,680
TOTAL REVENUES AND SUPPORT	3,701,857	1,098,303	32,423
FUNCTIONAL EXPENSES			
Program services			
Sections	139,817	-	-
Board of Governors and Presidents	129,521	-	-
Disciplinary	1,316,431	-	-
Publications	221,005	-	-
Conventions	407,879	-	-
Advertising commissions	106,568	-	-
Kentucky Lawyers Assistance Program	159,190	-	-
Continuing legal education	-	932,369	-
Client security	-	-	93,905
Bar center	-	-	-
Capital construction	-	-	-
Pro bono	-	-	-
Supporting services:			
Management and general	1,057,136	-	-
TOTAL EXPENSES	3,537,547	932,369	93,905
INCREASE IN UNRESTRICTED NET ASSETS	164,310	165,934	(61,482)
NET ASSETS, beginning of year	2,456,666	852,111	1,307,623
TRANSFERS IN (OUT)	(89,813)	(3,971)	-
NET ASSETS, end of year	$ 2,531,163	$ 1,014,074	$ 1,246,141

Bar Center Headquarters Trustee Fund	Bar Center Fund	Capital Construction Fund	Pro Bono Fund	Total
$ -	$ 65,385	$ 216,963	$ 23,599	$ 3,639,558
6,796	2,586	21,679	3,138	389,966
-	-	-	-	152,474
-	-	-	-	163,042
-	-	-	-	12,194
-	-	-	-	61,125
-	-	-	-	97,478
-	-	-	-	437,519
9,600	-		-	9,600
-	-	2,731	-	(469,636)
-	-	-	-	691,740
16,396	67,971	241,373	26,737	5,185,060
-	-	-	-	139,817
-	-	-	-	129,521
-	-	-	-	1,316,431
-	-	-	-	221,005
-	-	-	-	407,879
-	-	-	-	106,568
-	-	-	-	159,190
-	-	-	-	932,369
-	-	-	-	93,905
347,638	6,000	-	-	353,638
-	-	2,374	-	2,374
-	-	-	1,204	1,204
-	-	-	-	1,057,136
347,638	6,000	2,374	1,204	4,921,037
(331,242)	61,971	238,999	25,533	264,023
1,772,580	-	439,327	63,911	6,892,218
363,770	(59,386)	(210,600)	-	-
$ 1,805,108	$ 2,585	$ 467,726	$ 89,444	$ 7,156,241

KENTUCKY BAR ASSOCIATION
STATEMENT OF FUNCTIONAL EXPENSES
Year Ended June 30, 2008

	Sections	Board of Governors and Presidents	Disciplinary and Unauthorized Practices	Publications	Conventions	Advertising Commission	Kentucky Lawyers Assistance Program	Continuing Legal Education
Salaries	$ -	$ -	$ 958,430	$ 57,826	$ -	$ 71,788	$ 104,778	$ 424,409
Payroll taxes	-	-	73,441	4,444	-	5,547	7,755	31,925
Contract labor	-	-	-	-	2,567	-	-	-
Postage	2,721	5,617	18,534	31,977	21,799	714	452	19,817
Printing	7,249	3,097	2,796	109,379	74,883	285	329	57,562
Bank and investment fees	-	-	-	-	5,670	-	-	3,374
Travel and lodging	26,441	73,141	19,453	3,422	38,962	6,297	15,888	40,072
Telephone	221	643	461	92	171	34	785	547
Utilities	-	-	-	-	-	-	-	-
Professional services	30,967	4,054	40,865	3,839	1,850	3,899	3,126	6,266
Library	-	-	28	-	-	-	-	226
Meals and entertainment	28,173	36,224	3,631	293	117,875	2,191	5,882	17,725
Miscellaneous	2,344	1,973	2,022	1,323	6,773	524	290	4,648
Grants	2,000	-	-	-	-	-	-	-
Insurance	-	-	101,160	3,310	-	8,325	10,370	59,803
Equipment expense	-	-	-	-	-	-	-	6,145
Supplies	1,481	4,772	14,456	202	5,188	757	847	6,454
Other expenses	33,273	-	-	-	8,471	-	-	2,581
Stipends	-	-	-	-	-	-	-	-
Speakers	-	-	-		54,170	-	-	500
Contribution in lieu of taxes	-	-	-	-	-	-	-	-
Unrelated business tax	-	-	-	-	-	-	-	-
Audio visual expense	2,986	-	-	-	35,126	-	-	98,319
Teleseminars and special programs	-	-	-	-	-	-	-	42,773
Janitorial and lawn maintenance	-	-	-	-	-	-	-	-
Maintenance and repairs	-	-	-	-	-	-	-	-
Meeting expense	1,961	-	-	-	34,374	150	-	63,136
Payment on claims	-	-	-	-	-	-	-	-
Pension	-	-	81,154	4,898	-	6,057	8,688	35,266
Depreciation	-	-	-	-	-	-	-	10,821
Interest	-	-	-	-	-	-	-	-
	$ 139,817	$ 129,521	$ 1,316,431	$ 221,005	$ 407,879	$ 106,568	$ 159,190	$ 932,369

KENTUCKY BAR ASSOCIATION
STATEMENT OF FUNCTIONAL EXPENSES
Year Ended June 30, 2008

	Client Security Fund	Bar Center Headquarters Trustee Fund	Bar Center Fund	Capital Construction Fund	Pro Bono	General and Administrative	Total
Salaries	$ -	$ -	$ -	$ -	$ -	571,146	$ 2,188,377
Payroll taxes	-	-	-	-	-	41,765	164,877
Contract labor	-	-	-	-	-	-	2,567
Postage	645	-	-	-	-	11,984	114,260
Printing	241	-	-	-	-	866	256,687
Bank and investment fees	2,550	-	-	2,374	-	14,984	28,952
Travel and lodging	1,788	-	-	-	853	13,063	239,380
Telephone	-	-	-	-	-	13,219	16,173
Utilities	-	34,804	-	-	-	-	34,804
Professional services	882	-	-	-	-	22,068	117,816
Library	-	-	-	-	-	34,930	35,184
Meals and entertainment	343	79	-	-	351	8,756	221,523
Miscellaneous	-	221	-	-	-	2,264	22,382
Grants	-	-	-	-	-	-	2,000
Insurance	-	10,982	-	-	-	56,107	250,057
Equipment expense	-	1,736	-	-	-	148,821	156,702
Supplies	276	4,103	-	-	-	33,514	72,050
Other expenses	31,350	-	-	-	-	24,432	100,107
Stipends	-	-	-	-	-	8,000	8,000
Speakers	-	-	-	-	-	-	54,670
Contribution in lieu of taxes	-	-	6,000	-	-	-	6,000
Unrelated business tax	-	-	-	-	-	1,000	1,000
Audio visual expense	-	-	-	-	-	-	136,431
Teleseminars and special programs	-	-	-	-	-	-	42,773
Janitorial and lawn maintenance	-	36,863	-	-	-	-	36,863
Maintenance and repairs	-	26,425	-	-	-	2,391	28,816
Meeting expense	-	-	-	-	-	-	99,621
Payment on claims	55,830	-	-	-	-	-	55,830
Pension	-	-	-	-	-	47,089	183,152
Depreciation	-	136,825	-	-	-	737	148,383
Interest	-	95,600	-	-	-	-	95,600
	$ 93,905	$ 347,638	$ 6,000	$ 2,374	$ 1,204	$ 1,057,136	$ 4,921,037

Salmon P. Chase College of Law

By Dennis Honabach, Dean

NKU Chase Trial Team Members Take Top Honors

The NKU Chase College of Law National Trial Team had multiple successes recently in the Kentucky Mock Trial Competition, hosted by the University of Kentucky. Chase, UK, and the University of Louisville submitted two teams of four students each to the competition, which was held November 14-16, 2008.

NKU Chase Trial Advocacy Team

Both Chase teams advanced to the final round, where they competed against each other for top honors. In the end, Tyler Fields, Joel King, Meagan Lorenzen, and Michele Rigdon edged out Josh Brown, Brian Hoesl, Danielle Ravencraft and Krista Ray. In addition to winning first and second place overall, Chase second-year student Meagan Lorenzen tied with two other competitors for the Best Advocate Award.

"It's such a thrill to not only win the Kentucky Mock Trial Competition, but to sweep first and second place,' said third-year student Tyler Fields, a Best Advocate nominee. "It's a true testament to how hard the team worked this semester, and how great our faculty and adjunct professors were at preparing us for competition." Fields said it was particularly gratifying to argue before Assistant U.S. Attorney Ken Taylor in the final round. "To have Mr. Taylor praise us for our hard work and abilities, as well as offer tips for the future, was a great thrill," said Fields.

The two Chase teams that competed in the Kentucky Mock Trial Competition are part of the Chase National Trial Team, which also competed in the Ohio Mock Trial Competition in November. The full team consists of 16 students who are coached by Chase Professor Kathleen Johnson and attorneys Ray Atkinson, Lorelei Bolohan, Luke Busam, John Dunn, Jennifer Lawrence, Carrie Masters, Tifanie McMillan, Bob Sanders, and Richard Smith-Monahan. The team is financially supported by the Lawrence Firm, PSC and Reminger Co., L.P.A. Sharif Abdrabbo, Mia Conner, Kelly Gindele, and Judge Fanon Rucker served as guest judges during practice rounds.

Chase team members will compete in the American College of Trial Lawyers National Trial Competition, the American Association for Justice Student Trial Advocacy Competition and the invitational American Bar Association National Criminal Justice Trial Advocacy Competition during the spring semester.

NKU Chase Hosts ABA Arbitration Competition and Advances to Nationals

The Chase Center for Excellence in Advocacy and the Student Advocacy Society hosted the American Bar Association Law Student Division Regional Arbitration Competition on November 14-16, 2008. Eight law schools, including NKU Chase, competed in the competition. The Chase team of Robert Altman, Stephanie Brunemann, Elle Peck, and Grant Schwartzentruber placed third and will advance to the national competition in January in San Antonio, Texas.

Third year Chase student Adam Towe is the National Student Director of the ABA Arbitration Competition. "It was an honor to host the competition and advance to the nationals for the second consecutive year," Towe said. "The Chase Arbitration Team's continued success is a prime example of the practical skills law students learn through the Advocacy Center." Towe will host the competition in San Antonio as part of his student director position with the ABA. The teams were coached by Professor Henry "Steve" Stephens, Director of the NKU Chase Center for Excellence in Advocacy.

University of Kentucky College of Law

By Louise E. Graham, Interim Dean

The current economic downturn has affected the entire Commonwealth. The University of Kentucky College of Law is no exception.

Budget cuts affect every aspect of legal education. However, our greatest concern at the College of Law is the effect these cuts will have on our students. It is no secret that students have been paying higher tuition each year. Last year, our entering students carried a tuition burden of some $14,395 per year. In addition, the cost of textbooks has risen significantly over the years. When we combine these costs with the actual cost of living for three years of law school, we see a substantial aggregate effect on accessibility for a growing number of students.

Accessibility has two prongs. First, many students do not come from families who can give up $30,000 a year to put a child through law school. Student loans have always covered the gap for some students, but even if those loans remain accessible, a $100,000 debt is not a good graduation present. When we couple that debt with the burden carried by students who borrowed to achieve an undergraduate education, we see an even bleaker picture. The second aspect of the lowered accessibility plays out in the market place. Students with such high debt burdens cannot afford to be attracted to public interest jobs that do not pay high salaries, even if the benefits bestowed on the public from that work are significant.

Our ability to cushion the effect of these reversals of fortune through scholarships is also not immune to current economic conditions. The *New York Times* announced on December 3 that Harvard's endowment had lost some twenty-two percent of its value. We can expect similar news to come from the endowment funds of all of our state universities. Our alumni have made generous donations to help us in this area and we hope they will continue to

do so. But those gifts alone may not be the answer to every problem.

One particular group of scholarships should be the responsibility of the entire Bar in Kentucky. The KLEO scholarships provided for by the Kentucky Supreme Court fund an enrichment program for economically disadvantaged, diverse students who might not otherwise have access to law school. All three law schools participate in this program. All KLEO scholars are required to attend a two week Summer Institute to engage in an intensive preparation for the first year. Their successes demonstrate the value of this program and its contribution to the diversification of the Kentucky Bar Association. We hope that all members of the KBA will work together to find a way to continue this program. Its loss would be a step back in an era in which we need to move forward together.

We hope that all members of the bar, but especially our graduates, will work through the Kentucky Bar Association to preserve this critical step forward for Kentucky legal education. We have an opportunity to set a leadership example for our students. Let's hope that we take that opportunity.

University of Louisville School of Law

By Jim Chen
Dean and Professor of Law

October 2008 marked the fiftieth anniversary of the night that immortalized the name of Oliver R. Smoot. In 1958, Smoot was a freshman at M.I.T. and a pledge in the Lambda Chi Alpha fraternity. On the evening of October 4, Smoot's fraternity brothers decided that he had the right height (5 feet, 7 inches) and the right name to serve as a human yardstick for measuring the Massachusetts Avenue Bridge between Cambridge and Boston. Over and over the brothers of LXA tumbled Oliver Smoot. When the night was over, Lambda Chi Alpha triumphantly declared that the Mass. Ave. Bridge spanned 364.4 Smoots, plus or minus one ear.

After graduating from M.I.T., Smoot literally set high standards. He earned a law degree at Georgetown. Smoot went on to serve not only as president of the International Organization for Standardization (ISO), but also as chairman of the American National Standards Institute (ANSI).

The Smoot is now a unit of measurement corresponding to 67 inches, or 170.18 centimeters *au système métrique décimal*. Google Calculator and Google Earth offer the option of calculating distances in Smoots. Just remember that 10 feet equals 1.79104478 Smoots.

Oliver Smoot's long, restless night in October 1958 made his name synonymous with the student as a unit of measurement. His fraternity brothers envisioned the measurement in question solely in terms of length. They can be forgiven for their shortsightedness; they were merely engineers, after all, not lawyers, let alone full-time educators or

academic administrators. A little bit of visionary academic leadership readily transforms the Smoot into a unit of financial measurement.

The Massachusetts Institute of Technology has never confirmed or denied my suspicion, but I imagine that young Oliver Smoot paid full fare to attend M.I.T. In financial rather than spatial terms, a year's tuition equals one Smoot. To be sure, the precise measure of a Smoot varies locally – public in-state tuition, public out-of-state tuition, and private tuition notoriously and dramatically vary. But from the student's perspective, a Smoot is a Smoot. One Smoot represents the amount, net of grant-based financial aid but not of student debt, that a student must pay her or his school for one year's instruction.

It turns out that the Smoot is an extraordinarily powerful measure of academic finance. Schools can best honor their obligation to their true constituents – the people who pay for the entire educational apparatus and experience – by measuring, and (ideally) justifying, their expenditures according to how many students must pay full tuition in order to finance a particular item of spending. At our Law School, for instance, a single in-state Smoot can fund the nonsalary portion of the budget of the career services office. If supplemented by a student technology fee and a modest budgetary allocation from the University of Louisville's central budget, two Smoots will cover the Law School's ordinary technology needs for a year. Three Smoots will give every willing student at the Law School the chance to take part in an intercollegiate moot court competition. A full year's expert instruction, in the form of a tenure-track or tenured professor, costs at least half a dozen Smoots. And so on.

Despite their legendary competitiveness, law students rarely if ever flip their junior counterparts end over end simply to make an intellectual point. But like their counterparts in engineering, nursing, medicine, dentistry, education, business, music, social work, public health, and the liberal arts, law students do pay tuition. Our Law School manages its financial resources according to the same benchmark by which our students pay for their education: One Smoot at a time.

In Memoriam

J. Carleton Bowling	Bakersfield, CA
Daniel Thomas Burns	Hopkinsville
George F. Charles, Jr.	Ashland
James L. Gay	Frankfort
Dennis Louis Nagle	Barbourville
Charles G. Wylie	Lexington

To KBA Members

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

March 20-21, 2009
May 15-16, 2009

To schedule a time on the Board's agenda at one of these meetings, please contact Jim Deckard or Melissa Blackwell at (502) 564-3795.

SUMMARY OF MINUTES
KBA BOARD OF GOVERNORS
MEETING
JULY 18-19, 2008

The Board of Governors met on Friday and Saturday, July 18-19, 2008. Officers and Bar Governors in attendance were, *President* B. Bonar, *President-Elect* C. English, Jr., *Vice President* B. Davis, *Immediate Past President* J. Dyche, *Young Lawyers Section Chair* S. Laufenberg, *Bar Governors 1st District* – D. Myers, J. Freed; *Bar Governors 2nd District* – J. Harris, Jr.; *3rd District* – R. Hay, D. Venters; *4th District* – D. Ballantine; *5th District* – A. Britton; *6th District* – D. Kramer, T. Rouse and *7th District* – B. Rowe, W. Wilhoit. *Bar Governors absent were*: D. Farnsley, F. Fugazzi, Jr. and R. Sullivan.

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

- Heard a status report from the Board Conflicts Committee, Attorneys' Advertising Commission, KYLAP, Long Range Planning Committee, Mentor Committee Pilot Program and Office of Bar Counsel.
- Director of CLE John Meyers reported that plans are being made to have six (6) hours of CLE credits for the Fall Getaway scheduled for October 23-25 at West Baden, Indiana. In an effort to encourage young lawyers to attend, there will be some emphasis on developing law management practice programming.
- President-Elect Buzz English reviewed with the Board the possibility of a 2010 Midwinter CLE program trip jointly sponsored between the KBA and the Louisville Bar Association (LBA). The Board approved the formation of a committee of several Board members and the LBA to research the possibilities of such a trip, determine a location and time frame. Other local bars would be asked to join in at some point during the planning process.
- Affirmed the CLE Commission denial of the application for accreditation for a Bank Audit Committee Conference program entitled "Insight on Oversight" based on failure of the program to conform to the primary purpose guidelines, pursuant to SCR 3.662(1)(d) and SCR 3.662 (2)(a).
- Young Lawyers Section Chair Scott D. Laufenberg reported that the section reformed its committee structure and there are approximately 45 members on the Executive Committee and an additional 30 members expressing a desire to be involved with the committee structure this coming year. Mr. Laufenberg reviewed the ongoing discussions with the Rules Committee to include YLS in the discipline process. Mr. Laufenberg discussed the sections projects for the upcoming year: Brief Insights, an on-line mentoring program project of 10-minute internet based video clips about such topics as ethics, law practice management and other substantive areas; U@18, a project for education of high school students about adult responsibilities, including distribution of booklets that have been prepared by YLS and the development of a curriculum for teachers; and the Wills for Heroes, a program to assist emergency responders with basic preparation of estate planning documents.
- President-Elect English discussed the possibility of a group health insurance plan being offered to the members. This matter was referred to the Member Services Committee to study the possibilities of the KBA participating in existing health insurance programs.
- President Bonar reported that she appointed Marshall Eldred, Jr. of Louisville as the President's designee on the IOLTA Board of Trustees for a one year term ending on June 30, 2009.
- Approved the recommendations to the following Supreme Court Committees: Criminal Rules Committee – Fred E. "Bo" Fugazzi, Jr. and Civil Rules Committee – Barbara D. Bonar. Consideration of the Supreme Court Rules Committee was passed until the September meeting.
- President Bonar reported that she made the following Chair appointments to KBA Committees: 2009 Annual Convention Planning Committee Harry Rankin; 2009 Annual Convention CLE Planning Committee Gabrielle Summe and Michael M. Sketch; Budget Committee Charles E. English, Jr.; Ethics Committee Linda Ewald; KYLAP Commission Chair Cathy Jackson; Publications Committee Frances Catron; and Rules Committee Douglas Farnsley.
- Approved to change the name of the Publications Committee to the Communications and Publications

Committee.
- President Bonar reported that a Director of Communications Search Committee has been appointed to review the resumes for the Director of Communications position. The committee will consist of the following members: Bruce K. Davis, Frances Catron, Jane Winkler Dyche, James L. Deckard and herself.
- Approved implementation of two ad hoc committees recommended by President Bonar: Professionalism Committee and a Women's Leadership Academy.
- President Bonar reported that the KBA will host a Rule of Law Symposium, an outgrowth of the World Justice Project, and the event will be held on February 6, 2009 in Frankfort, a week before the celebration of Lincoln's 200th birthday. Other disciplines will be invited to participate in an engaging examination of the Rule of Law.
- Approved the Executive Committee working with the Office of Bar Counsel regarding pending litigation and to reactivate the Litigation Committee if necessary.
- Executive Director James L. Deckard reported that 1,411 members, with an additional 400 new lawyers for the New Lawyers Program, attended the 2008 Annual Convention in Lexington, and that the Convention was a financial success.
- Approved the total reserve/surplus carry forward of 23 section funds for the fiscal year ending on June 30, 2008.
- Approved the total reserve/surplus carry forward of the computer/scanning funds for the fiscal year ending on June 30, 2008.
- Approved the election of officers for the Workers' Compensation Section.
- Approved the updates to the following section bylaws, subject to review by the Executive Director and the Section Liaison Coordinator for compliance with KBA Bylaws Section 11, including the use of gender neutral language: Labor and Employment Law, Probate & Trust Law, Taxation Law and Senior Lawyers.
- Discussed the donated legal services fund and the receipt of the 2008 Annual Report, in accord with the initial program grant.

SUMMARY OF MINUTES
KBA BOARD OF GOVERNORS MEETING
SEPTEMBER 12, 2008

The Board of Governors met on Friday, September 12, 2008. Officers and Bar Governors in attendance were, *President* B. Bonar, *President-Elect* C. English, Jr., *Vice President* B. Davis, *Immediate Past President* J. Dyche*, Young Lawyers Section Chair* S. Laufenberg*, Bar Governors 1st District* – D. Myers, J. Freed; *Bar Governors 2nd District* – J. Harris, Jr., R. Sullivan; *3rd District* – None; *4th District* – D. Ballantine, D. Farnsley*; 5th District* – F. Fugazzi, Jr.*; 6th District* – D. Kramer, T. Rouse and *7th District* – B. Rowe, W. Wilhoit. *Bar Governors absent were*: A. Britton and R. Hay.

In Executive Session, the Board considered one (1) discipline case; nine (9) default discipline cases involving five attorneys and two (2) restoration cases. Malcolm Bryant of Owensboro and Steve Langford of Louisville, non-lawyer members serving on the Board pursuant to SCR 3.375, participated in the deliberations.

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

- Heard status reports from Board Conflicts Committee, 2009-2010 Budget & Finance Committee, KYLAP, Long Range Planning Committee, Office of Bar Counsel and Rules Committee.
- YLS Chair Scott Laufenberg reviewed the progress of the U@18 project. He also discussed the success of the New Lawyers Program. Through discussions with the KBA staff, CLE

Commission Chair and the YLS Executive Committee, it has been determined that the New Lawyers Program would strive toward more law practice management topics and attempt to develop a program for recently admitted Kentucky attorneys from other jurisdictions.

- President-Elect English reviewed certain provisions relating to the establishment of or participation in a professional service insurance trust, which allows professional organizations to form from several groups that can approach carriers about insurance for their collective members. The Board approved the Member Services Committee's recommendation to conduct a membership survey and authorizing National Insurance Agency as the KBA agent for purposes of researching membership health insurance coverage, with the understanding that approval of the authorization on this request will not commit the KBA at this time. The membership survey will be conducted and paid for by National Insurance Agency.
- Approved the contract with the Embassy Suites in Lexington as the location for the hotel accommodations by the Board of Governors for fiscal years 2009 through 2010 and 2010 through 2011.
- President Bonar reviewed with the following Chair appointments she has made to the KBA Committees: Ethics Committee Linda Ewald; Member Services Committee Sheryl Heeter; Mentoring Committee R. Kent Westberry; Publications Committee Frances Catron; Rules Committee Douglas Farnsley; and Unauthorized Practice of Law Committee Jerry Cox.
- Approved the appointment of M. Gail Wilson of Jamestown to fill the vacancy as Bar Governor in the 3rd Supreme Court District on the Board of Governors.
- Approved the appointment of the following three individuals to serve on the Judicial Council, in accordance with KRS 27A.100, for a term of four years: James D. Harris, Jr. of Bowling Green, Kimberly McCann of Ashland and Olu Stevens of Louisville.
- Approved the appointment of Thomas L. Rouse of Covington to serve on the Supreme Court Rules Committee.
- President Bonar reported that 65 resumes had been received for the Director of Communications position. The Director of Communications Search Committee narrowed the resumes down to 28 and there would be another committee meeting in the upcoming week to select finalists for interviews.
- President Bonar extended an invitation to the Board to participate in the Rule of Law Symposium and asked for their recommendations on other disciplines who would be interested in participating. The Planning Committee has submitted a grant application to the Kentucky Bar Foundation to help funding for the event.
- President Bonar reported on registrations for the Fall Getaway scheduled for October 23-25 at West Baden. The deadline for hotel reservations is September 28, 2008.
- President Bonar discussed correspondence from Bob Ewald, Chair of the Task Force on Attorney Advertising wherein the Task Force wants the language "This is an Advertisement" to be optional in the rules. Following discussion, the Board approved to refer this issue to the Attorneys' Advertising Commission for consideration.
- President Bonar reported that the 2009 Annual Convention Planning Committee had its first organizational meeting on August 28, 2008. Harry Rankin will serve as Planning Committee Chair and Gabrielle Summe and Michael Sketch will serve as Co-Chairs of the CLE Planning Committee. The Annual Convention is scheduled for June 10-12, 2009 in Covington.
- Executive Director James L. Deckard reviewed that KBA Bylaws regarding elections to the Board of Governors wherein petitions signed by 20 members in good standing in the appropriate Supreme Court Districts must be filed by October 31st by 5:00 p.m.

Understanding Proposed Revisions to IOLTA

KENTUCKY IOLTA FUND
KENTUCKY BAR CENTER
514 WEST MAIN STREET
FRANKFORT, KY 40601-1812
(502) 564-3795 or
(800) 874-6582
Fax (502) 564-3225
www.kybar.org

The Supreme Court of Kentucky is currently reviewing proposed amendments to Supreme Court Rule 3.830 in order to create a comprehensive IOLTA program. A comprehensive IOLTA program will require all non-exempt attorneys and law firms to participate in the Kentucky IOLTA program. The Kentucky IOLTA Fund, which administers the IOLTA program, has been created under the provisions of Supreme Court Rule 3.830. The proposed amended rule is set out on pages 64 through 66 of this issue of the *Bench & Bar*. Under the present rule, Kentucky lawyers participate in an opt-out program that requires all attorneys to participate in the Kentucky IOLTA program unless otherwise exempt or unless they have opted out under the provisions of the rule. Under the new comprehensive program, all attorneys will be required to participate unless they fall under one of the following exemptions set out in paragraph 14 of the new rule:

(14) The lawyer is exempt from this rule if:
- (A) not engaged in the private practice of law;
- (B) does not have a trust account in a financial institution within the Commonwealth of Kentucky;
- (C) serves full time as a judge, attorney general, public defender, U.S. attorney, Commonwealth attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law;
- (D) is a corporate counsel or teacher of law and is not otherwise engaged in the private practice of law;
- (E) has been exempted by an order of general or special application of this Court which is cited in the certification;
- (F) compliance with Rule 3.830 would work an undue hardship on the lawyer or would be extremely impractical, based on the geographic distance between the lawyer's principal office and the closest participating financial institution, or on other compelling and necessary factors; or
- (G) does not manage or handle client trust funds.

The list of exemptions is designed to cover all instances where an attorney would not participate based upon the employment circumstances or nature of the attorney's practice.

It is clear from the exemptions that if an attorney presently has not established a "pooled client" escrow account, he or she is not required to do so under the amendments to the rule. However, if such an escrow account is later established, then the account must be designated as an IOLTA account and enrolled into the Kentucky IOLTA program as provided in the rule. To convert a client escrow account from a non-interest-bearing account to an interest-bearing IOLTA account, the completion of an *Authorization for Kentucky IOLTA Account* form is required. The participating bank will then designate the account as one of its IOLTA accounts using the Taxpayer Identification Number of The Kentucky Bar Foundation, Inc. The bank will pay any interest earned to the Kentucky IOLTA program. The general operation of the account remains the same and causes no additional time or effort upon the part of the participating attorney or law firm.

Under the amended rule, all attorneys and law firms that are participating in the Kentucky IOLTA program must have their IOLTA accounts with a

"participating financial institution" as described in paragraphs 4 and 5 of the rule. To qualify as a participating financial institution, a bank must agree to "pay on the accounts the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance and other account eligibility qualifications." If a bank refuses to comply with this requirement, then the attorney must move his or her IOLTA escrow account to an institution that does meet this requirement. Only IOLTA escrow accounts are affected by Supreme Court Rule 3.830.

There are presently 38 states which have established a comprehensive (mandatory) IOLTA program under the rules of their respective Supreme Courts or through a legislative act. Kentucky is one of the 12 remaining states to operate an opt-out program. Where established, comprehensive programs have greatly increased IOLTA revenues as compared to the revenues received under the prior program. This is especially important during this time of severe budgetary cuts to the legal services programs both on the state and federal level.

The following are frequently asked questions & answers regarding the IOLTA comprehensive program that will help clarify many of the details pertaining to the IOLTA program as it would be administered under the new rule:

Q: Is the IOLTA program unique to Kentucky?

A: No. IOLTA has been adopted in all 50 states. Kentucky has had an opt-out program but under the proposed new rule will follow a comprehensive program. As a result of the 2003 United States Supreme Court decision upholding comprehensive (mandatory) IOLTA programs, 38 other states have converted their programs from opt-out to comprehensive (mandatory) programs.

Q: How does Kentucky's program work?

A: The program requires lawyers who hold Kentucky client funds in escrow accounts to convert their "pooled" non-interest-bearing client escrow accounts into interest-bearing IOLTA accounts unless said accounts can earn interest for the client in excess of the costs incurred to secure such interest income. Under a comprehensive program, lawyers are unable to "opt out," or formally decline to do this, as they are able to do under the present Supreme Court Rule. The proposed new rule requires that client funds held in trust by lawyers must earn interest for either the client if it is possible for the funds to earn income net of the fees and expenses associated with the account, or alternatively, the funds must be placed into an IOLTA account to earn interest for the IOLTA program.

Q: Specifically, what must lawyers do to comply with the IOLTA program?

A: Each July, an attorney will receive his or her annual certification form from the Kentucky IOLTA Fund at the time the annual bar association dues statement is received. The attorney must fully complete this form to indicate whether he or she has an active IOLTA account, or is exempt from participating.

For law firms with more than one (1) attorney participating in IOLTA, a separate sheet may be attached to the firm's certification form indicating the name(s) of the bank(s) holding the firm's IOLTA account(s) and the names of the attorneys, instead of providing this information on each individual certification form.

Lawyers who enroll in the program need only complete an *Authorization for Kentucky IOLTA Account* form. This form is available from IOLTA upon request, or at the web site (www.kybar.org). Upon completion of the form, attorneys should send the form to IOLTA, rather than directly to the bank. IOLTA will forward the completed form to a designated individual at the attorney's bank. Provisions are made either to open a new IOLTA account or convert an existing non-interest-bearing escrow account to an IOLTA account.

Q: What happens if an attorney refuses to comply with the program?

A: The Kentucky IOLTA Fund will confirm that each attorney has correctly completed his or her annual certification form and is either matched with an existing IOLTA account or is exempt from participating in the IOLTA program. IOLTA has been directed to provide the Kentucky Supreme Court with the names of those attorneys who do not fall into one of those two categories.

Q: What if I do not have a commingled non-interest-bearing client escrow account?

A: Lawyers who do not hold client funds in trust are exempt from the provisions of this rule. Those lawyers simply signify this on their annual certification forms by checking the appropriate box(es).

Q: Will it take much lawyer time and money to be involved in participating in IOLTA?

A: Minimal administrative time and no money. The mechanics of converting to an IOLTA account are simple. All the attorney or law firm must do is complete an *Authorization for Kentucky IOLTA Account* form and forward the form to IOLTA. There is no change to the operation of the escrow account.

Q: Who notifies the banks?

A: The Kentucky IOLTA Fund notifies the lawyer's bank of the lawyer's intent to participate in IOLTA. In order to estab-

lish an IOLTA account, a lawyer or law firm should forward a copy of the *Authorization for Kentucky IOLTA Account* form to IOLTA, which will, in turn, forward a copy to the appropriate financial institution. This form specifically authorizes the financial institution to disclose to IOLTA information necessary for the IOLTA account to be established, including, but not limited to, information designated by Supreme Court Rule 3.830.

Q: How will my local bank learn about IOLTA?

A: At this point in time, almost all banks throughout Kentucky are familiar with IOLTA. The Kentucky IOLTA Fund will encourage banks not currently participating in the program to participate, especially if IOLTA has on hand completed *Authorization for Kentucky IOLTA Account* forms to forward to the bank upon the bank's agreement to participate. IOLTA will distribute materials to these banking centers so that lawyers and law firms who ask questions can be assisted. These financial institutions will also be encouraged to designate one IOLTA contact person who will serve as the liaison between that financial institution and the Kentucky IOLTA Fund.

Q: It is extremely impractical for me to establish an IOLTA account. What should I do?

A: Describe your situation to the Kentucky IOLTA Fund in writing. Exemptions from participation as provided in the rule may be granted under certain circumstances, depending on the situation.

Q: Who pays the service charges or fees if charged to the IOLTA account?

A: Monthly bank service charges, if any, are paid from the interest earned by the IOLTA account, ordinarily up to the amount of interest earned on that account. The majority of banks currently waive service charges and, if charged, waive all fees in excess of interest earned. In the event that the banks bill IOLTA for fees in excess of interest earned on an account, IOLTA may affirmatively exempt that account from participating. Under no circumstances should the account principal be changed by IOLTA involvement, nor should the lawyer be billed for regular IOLTA-produced expenses. The attorney will still be responsible for any wire transfer or other transactional fees associated with their IOLTA account.

Q: Must attorneys have new checks printed for IOLTA accounts?

A: No. Attorneys may continue to use their checks as they did prior to converting the account to an IOLTA account.

Q: Which banks may lawyers use?

A: Any bank that voluntarily participates in the IOLTA program and meets the requirements set out in Supreme Court Rule 3.830 may be used. Eligible financial institutions must meet various requirements described in the rule. All banks with at least one IOLTA account are approved for trust account overdraft reporting. Contact the Kentucky IOLTA Fund if you are unsure as to whether or not your bank qualifies.

Q: How does a financial institution comply with the Supreme Court's IOLTA Rule that they treat IOLTA accounts similar to non-IOLTA accounts regarding the amount of interest they pay?

A: Rule 3.830(4) simply means that IOLTA accounts must earn the same rates as other customers when they meet the same eligibility requirements. For example, if the financial institution only offers one type of interest-bearing checking account, then that is the rate that should be applied to IOLTA accounts. However, if the institution offers multiple types of interest-bearing checking accounts, the highest yielding product that an IOLTA account would meet the qualifications for should be applied to that IOLTA account.

Q: Which tax identification number is used?

A: Since the Kentucky IOLTA Fund is a fund of The Kentucky Bar Foundation, Inc., the financial institution is instructed to use the tax identification number of The Kentucky Bar Foundation, Inc., not the tax identification number of the lawyer or law firm. As such, the lawyer or law firm should never receive a 1099 form for IOLTA interest. This method of account identification will allow the earned interest to be recorded annually in the name of the Kentucky IOLTA Fund and not in the name of the lawyer/law firm. The name on the account, however, is to remain that of the lawyer or law firm.

Q: Will data on individual IOLTA accounts be made public?

A: No. The information contained in financial statements to lawyers and IOLTA shall under Rule 3.830 remain strictly **confidential**. The Kentucky IOLTA Fund may release only a compilation of data from such statements, which does not include any identifying information of the lawyer, law firm or clients.

It is the interest and intention of the Supreme Court to help IOLTA conduct a financially successful program under these difficult economic times, especially as they affect the legal services and pro bono programs throughout the state. The participation and cooperation among the members of the bar will ensure that this success can be accomplished to the fullest extent possible.

Supreme Court of Kentucky

PROPOSED AMENDMENTS TO SUPREME COURT RULE 3.830

Rule 3.830 Kentucky IOLTA Fund

The Kentucky Bar Foundation, Inc., a nonprofit corporation, shall maintain a special fund for the purpose of depositing interest from Kentucky Bar Association members' trust accounts, as hereinafter provided, and the name of the fund shall be the Kentucky IOLTA Fund ("IOLTA"). Except as set forth in paragraph (14) of this rule, a lawyer or law firm shall create and maintain in a participating financial institution as defined in paragraph (4) below an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time so that they could not earn interest income for the client in excess of the costs incurred to secure such income (hereinafter sometimes referred to as an "IOLTA account") in compliance with the following provisions:

(1) No funds may be deposited in any IOLTA account when either the amount or the period of time that the funds are held would earn for the client interest above the costs that would otherwise be incurred to generate such interest.

(2) No earnings from an IOLTA account shall be made available to a lawyer or law firm.

(3) An IOLTA account shall be established with a participating financial institution (i) authorized by federal or state law to do business in Kentucky, and (ii) insured by the Federal Deposit Insurance Corporation or its equivalent. Funds in each IOLTA account shall be subject to withdrawal upon request and without delay and without risk to principal by reason of said withdrawal.

(4) Participating financial institutions that maintain IOLTA accounts shall pay on the accounts the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility qualifications. In determining the highest interest rate or dividend generally available from the institution, participating financial institutions may consider factors, in addition to the IOLTA account balance, that are customarily considered by the institution when setting interest rates or dividends for its non-IOLTA customers. Such factors should not discriminate between IOLTA accounts and accounts of non-IOLTA customers. All interest earned net of fees or charges shall be remitted to IOLTA, which is designated in paragraph (16) of this rule to organize and administer the IOLTA program, and the depository participating institution shall submit reports thereon as set forth below.

(5) A participating financial institution may satisfy the comparability requirements set forth in paragraph (4) above by electing one of the following options: (i) Pay an amount on funds that would otherwise qualify for the investment options equal to 70% of the federal funds targeted rate as of the first business day of the month or other IOLTA remitting period, which is deemed to be already net of allowable reasonable service charges or fees. (ii) Pay a yield rate specified by IOLTA, if IOLTA so chooses, which is agreed to by the participating financial institution. The rate would be deemed to be already net of allowable reasonable fees and would be in effect for and remain unchanged during a period of no more than twelve months from the inception of the agreement between the financial institution and IOLTA.

(6) IOLTA accounts may be established as: (i) An interest-bearing checking account such as a negotiable order of withdrawal account; (ii) a checking account with an automated investment feature, such as an overnight and investment in repurchase agreements or money market funds invested solely in or fully collateralized by U.S. Government Securities, including U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrument thereof; (iii) a checking account paying preferred interest rates, such as money market or indexed rates; (iv) any other suitable interest-bearing deposit account offered by the institution to its non-IOLTA customers.

(7) A daily financial institution repurchase agreement shall be fully collateralized by United States Government Securities and may be established only with an eligible institution that is "well capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities, shall hold itself out as a "money market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940 and, at the time of the investment, the money market fund shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(A) Nothing in this rule shall preclude a participating financial institution from paying a higher interest or dividend than described above or electing to waive

any service charges or fees on IOLTA accounts.

(B) Interest and dividends shall be calculated in accordance with the participating financial institution's standard practice for non-IOLTA customers.

(C) Allowable reasonable service charges or fees may be deducted from interest or dividends on an IOLTA account only at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on an IOLTA account.

(D) Any IOLTA account which has or may have the net effect of costing IOLTA more in fees than earned in interest over a period of any time, may, at the discretion of IOLTA, be exempted from and removed from the IOLTA program. Exemption of an IOLTA account from the IOLTA program revokes the permission to use IOLTA's tax identification number for that account. Exemption of such account from the IOLTA program shall not relieve the lawyer and/or law firm from the obligation to maintain the property of client funds separately, as required above, in a trust account and also will not relieve the lawyer of the annual IOLTA certification.

(8) Lawyers or law firms depositing client funds in an IOLTA account established pursuant to this rule shall, on forms approved by IOLTA, direct the depository institution:

(A) to remit all interest or dividends, net of reasonable service charges or fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, solely to IOLTA. The depository institution may remit the interest or dividends on all of its IOLTA accounts in a lump sum; however, the depository institution must provide, for each individual IOLTA account, the information to the lawyer or law firm and to IOLTA required by subparagraphs (8)(B) and (8)(C) of this rule;

(B) to transmit with each remittance to IOLTA a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, average daily balance, service charges, if any, and such other information as is reasonably required by IOLTA;

(C) to transmit to the depositing lawyer or law firm a periodic account statement for the IOLTA account reflecting the amount of interest paid to IOLTA, the rate of interest applied, the average account balance for the period for which the interest was earned, and such other information as is reasonably required by IOLTA; and

(D) to waive any reasonable service charge that exceeds the interest earned on any IOLTA account during a reporting period ("excess charge").

(9) The IOLTA program will issue refunds when interest has been remitted in error, whether the error is the bank's or the lawyer's. Requests for refunds must be submitted in writing by the bank, the lawyer, or the law firm on a timely basis, accompanied by documentation that confirms the amount of interest paid to the IOLTA program. As needed for auditing purposes, the IOLTA program may request additional documentation to support the request. The refund will be remitted to the appropriate financial institution for transmittal at the lawyer's direction after appropriate accounting and reporting. In no event will the refund exceed the amount of interest actually received by the IOLTA program.

(10) All interest transmitted to IOLTA shall be held, invested and distributed periodically in accordance with a plan of distribution which shall be prepared by IOLTA and approved at least annually by the Supreme Court of Kentucky, for the following purposes:

(A) to pay or provide for all costs, expenses and fees associated with the administration of the IOLTA program;

(B) to establish appropriate reserves;

(C) to assist or help establish approved legal services and pro bono programs;

(D) for such other law-related programs for the benefit of the public as are specifically approved by the Supreme Court from time to time.

(11) The information contained in the statements forwarded to IOLTA under paragraph (8)(B) of this rule shall remain confidential, and the provisions of any other Supreme Court Rules providing for confidentiality are not hereby abrogated; therefore, IOLTA shall not release any information contained in any such statement other than as a compilation of data from such statements, except as directed in writing by the Supreme Court.

(12) IOLTA shall have full authority to and shall, from time to time, prepare and submit to the Supreme Court for approval, forms, procedures, instructions and guidelines necessary and appropriate to implement the provisions set forth in this rule and, after approval thereof by the Court, shall promulgate same.

(13) On or before September 1 of each year, every lawyer admitted to practice in Kentucky shall certify to IOLTA, in such form as IOLTA shall provide ("IOLTA Certification Form"), that the member is in compliance with, or is exempt from, the provisions of this rule. The IOLTA Certification Form shall include the participating financial institution, account numbers, name of law firm or lawyer accounts and such other information as IOLTA shall require. If the lawyer is exempt from the IOLTA program, the lawyer must still submit an IOLTA Certification Form annually to certify to IOLTA that the lawyer is exempt from the provisions in this rule. Each lawyer shall keep and maintain records supporting the information submitted in the IOLTA Certification Form. The lawyer shall maintain these records for a period of three years from the end of the period for which the IOLTA Certification Form is filed, and these records shall be submitted to IOLTA upon written request.

(14) The lawyer is exempt from this rule if:

(A) not engaged in the private practice of law;

(B) does not have a trust account in a financial institution within the Commonwealth of Kentucky;

(C) serving full time as a judge, attorney general, public defender, U.S. attorney, Commonwealth attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law;

(D) is a corporate counsel or teacher of law and is not oth-

erwise engaged in the private practice of law;

(E) has been exempted by an order of general or special application of this Court which is cited in the certification;

(F) compliance with Rule 3.830 would work an undue hardship on the lawyer or would be extremely impractical, based on the geographic distance between the lawyer's principal office and the closest participating financial institution, or on other compelling and necessary factors; or

(G) does not manage or handle client trust funds.

(15) The determination of whether a client's funds are nominal or short-term so that they could not earn income in excess of costs shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

(16) IOLTA is hereby designated as the entity to organize and administer the program established by this rule in accordance with the following provisions:

(A) The determination of whether or not a financial institution is a participating institution as defined in paragraph (4) above, and whether it is meeting the requirements of this rule shall be made by IOLTA. IOLTA shall maintain a list of participating financial institutions, and shall provide a copy of the list to any Kentucky lawyer upon request.

(B) Lawyers may only maintain IOLTA accounts in participating financial institutions. Participating financial institutions are those that voluntarily offer IOLTA accounts and comply with the requirements of this rule. If a financial institution becomes non-participatory, the lawyer or law firm must move its IOLTA account to a participating financial institution as described in paragraph (4) above, upon ninety (90) days written notice by IOLTA, and recertify to IOLTA the transfer.

(17) If the IOLTA Certification Form is timely filed, indicating compliance, there will be no acknowledgment. Should an IOLTA Certification Form not be filed by a lawyer or if filed, fail to evidence compliance, IOLTA shall contact the lawyer and attempt to resolve the non-compliance administratively.

(18) Lawyers licensed in Kentucky must notify IOLTA in writing within thirty (30) days of any change in IOLTA status, including the opening or closing of any IOLTA accounts, except as provided in paragraph (16)(B) above.

(19) For the purpose of administering the funds deposited in the Kentucky IOLTA Fund, the Kentucky Bar Foundation is authorized to create a separate Board of Trustees to administer this fund, which shall consist of ten (10) members of the Association. One (1) member will be from each of the seven (7) Supreme Court Districts of the Commonwealth. The remaining three (3) members will be the Chief Justice of the Supreme Court of Kentucky, the President of the Kentucky Bar Association and the Chair of the Kentucky Bar Foundation, or a member of the Association appointed by each of such persons. These three (3) persons will serve year to year at the pleasure of the appointing person.

(A) Members of the Board of Trustees from the Supreme Court Districts shall be appointed by the Board of Governors of the Kentucky Bar Association and approved by the Supreme Court. Appointments shall be made for a three-year term. Members may be reappointed, but no member shall serve more than two (2) successive three-year terms. Each member shall serve until a successor is appointed and qualified. Vacancies occurring through death, disability, inability, or disqualification to serve, or by resignation, shall be filled for the remainder of the vacant term in the same manner as the initial appointments are made by the Court. The members of the Board of Trustees of the Kentucky IOLTA Fund shall serve without compensation, but shall be paid their reasonable and necessary expenses incurred in the performance of their duties. The staff support for the Board of Trustees shall be paid by IOLTA.

(B) The IOLTA Board of Trustees (the "Trustees") shall have general supervisory authority over the administration of the IOLTA program, subject to the continuing jurisdiction of the Supreme Court.

(C) The Trustees shall receive the net earnings from IOLTA accounts established in accordance with this rule and shall make appropriate temporary investments of IOLTA program funds pending disbursement of such funds.

(D) The Trustees shall, by grants, appropriations and other appropriate measures, make disbursements from the IOLTA program funds, including current and accumulated net earnings, in accordance with the plan of distribution approved by the Supreme Court on at least an annual basis.

(E) The Trustees shall maintain proper records of all IOLTA program receipts and disbursements, which records shall be audited or reviewed annually by a certified public accountant approved by the Supreme Court.

(F) The Trustees shall be indemnified by IOLTA against any liability or expense arising directly or indirectly out of the good faith performance of their duties.

(G) The Trustees shall present an annual administrative budget request to the Board of Governors for their approval, after which the budget shall be forwarded to the Supreme Court for approval. Staff for the operation of IOLTA shall be under the supervision and responsible to the Executive Director of the Bar Association.

(H) The Trustees shall monitor attorney compliance with the provisions of this rule and will report to the Supreme Court those attorneys not in compliance.

(I) In the event the IOLTA program or its administration by IOLTA is terminated, all assets of the IOLTA program, including any program funds then on hand, shall be transferred in accordance with the Order of the Supreme Court terminating the IOLTA program or its administration by IOLTA; provided, such transfer shall be to an entity which will not violate the requirements IOLTA must observe regarding transfer of its assets in order to retain its tax-exempt status under the Internal Revenue Code of 1986, as amended, or similar future provisions of law.

ON THE MOVE


Sara Clark Davis

Gwin Steinmetz Miller & Baird PLLC is pleased to announce that **Sara Clark Davis** has joined the firm as an associate. Davis obtained her J.D. from the NKU Chase College of Law, graduating *cum laude* in 2003. She will be concentrating her practice in the areas of civil litigation defense, medical negligence and long-term care defense, premises liability, product liability, professional liability defense, and insurance coverage disputes.


Carrie Bauer

Adams Law Group, of Louisville, has promoted **Carrie Bauer** to partner. Bauer's areas of practice include Chapter 11 bankruptcy and workouts, real estate, business law, start-ups, and affordable housing.


Brent L. Caldwell

Boehl Stopher & Graves, LLP is pleased to announce that **Brent L. Caldwell** is Of Counsel to the firm and that **Pamela A. Chesnut** and **J. Matthew Tatman** have joined the firm as associates in the Lexington office. Caldwell will continue his practice which encompasses civil and criminal litigation including civil rights and governmental liability. Chesnut will continue her practice in insurance defense including injury litigation, coverage litigation, and extra contractual liability. Tatman will primarily focus on insurance defense. He earned his undergraduate degree from Centre College and is a graduate of the University of Kentucky College of Law.


Pamela A. Chesnut


J. Matthew Tatman

The Lexington law firm of **Wise DelCotto PLLC** is pleased to announce that **T. Kent Barber** has joined its debt restructuring law practice. Barber, a 2000 Morehead State University graduate, received his law degree from the University of Kentucky College of Law in 2008.


Ross C. Lovely


Jeffrey R. Soukup

Ross C. Lovely and **Jeffrey R. Soukup** have recently joined **Bowles Rice** as associates and will work in the firm's Lexington office. Lovely, a 2008 graduate of the University of Kentucky College of Law, is practicing in the areas of commercial and financial services, energy and environmental law, and intellectual property. He obtained his master's degree from UK and received his bachelor's degree from Centre College. Soukup, a 2007 graduate of the University of Kentucky College of Law, served one year as a judicial clerk to the Honorable Karen K. Caldwell before joining Bowles Rice's litigation practice group.


Sharon S. Elliston

Ziegler & Schneider, PSC is pleased to announce that **Sharon Schneider Elliston** has been named a partner in the firm. Elliston practices in the area of business and real estate law. She earned her law degree from the University of Kentucky College of Law and received her B.A. from Thomas More College.

Napier Gault, PLC is pleased to announce that **Nicholas K. Haynes** has joined the firm as an associate. Haynes, a 2005 graduate of the University of Dayton School of Law, will concentrate his practice in the areas of medical negligence and insurance defense.


Nicholas K. Haynes


Ryan A. Schwartz

Ryan A. Schwartz has joined **Jackson Kelly PLLC** as an associate in the Lexington office. Schwartz graduated, *cum laude*, from Eastern Kentucky University in 2004 and earned his J.D. from the University of Kentucky College of Law in 2008.


Mauritia Kamer


Greg Ehrhard


Jennifer Elliott

Stites & Harbison, PLLC has announced that **Mauritia Kamer**, **Greg Ehrhard**, and **Jennifer Elliott** have been elected to membership in the law firm's Kentucky offices. Kamer, a graduate of Virginia Tech University and the University of Kentucky College of Law, is admitted to practice in both Kentucky and Ohio. She works out of the Lexington office and focuses her practice in employment litigation, immigration, and preventative counseling for management clients. Ehrhard and Elliott are based in Louisville. Ehrhard advises clients in a variety of real estate matters, including loan, lease, and sale transactions. Elliott, an author and lecturer on health care topics for both national and local organizations, focuses her practice on regulatory and transactional health care law.

WHO, WHAT, WHEN & WHERE


Katherine A. Bell


Thomas P. Claycomb


Michael Denbow


Eleanor S. Stepusin


Lindsay Yeakel Capps


Kristen K. Orr

Stites & Harbison has also announced the addition of seven new associates: **Katherine A. Bell**, **Thomas P. Claycomb**, **Michael Denbow**, **Eleanor S. Stepusin**, **Lindsay Yeakel Capps**, **Kristen K. Orr**, and **R. Kelley Rosenbaum**. Bell, Claycomb, Denbow, Stepusin and Capps were assigned to the Louisville office. Orr and Rosenbaum were assigned to the Lexington office. Bell, a member of the capital markets service group, is a 2008 graduate of the University of Louisville School of Law, *magna cum laude*. She served as an intern for the Honorable Karen A. Conrad. Claycomb, a member of the business litigation service group, is a 2008 graduate of Vanderbilt University Law School. Denbow, a member of the business litigation service group, is a 2008 graduate of the University of Louisville School of Law. Stepusin, a member of the capital markets service group, is a 2008 graduate of Loyola University Chicago School of Law. Capps, a member of the intellectual property and technology service group, is a 2008 graduate of the University of Kentucky College of Law. She clerked for the Honorable Karen K. Caldwell. Orr, a member of the torts and insurance practice service group, graduated from the University of Kentucky College of Law, *summa cum laude,* Order of the Coif, in 2007. She served as a law clerk to the Honorable Jennifer B. Coffman from 2007 to 2008. Rosenbaum, a member of the business and finance service group, graduated from the University of Kentucky College of Law, *magna cum laude*, Order of the Coif, in 2008. In the summer of 2006, she served as a judicial intern for the Honorable Karen K. Caldwell.


R. Kelley Rosenbaum


Scott W. Higdon

Middleton Reutlinger is pleased to announce that **Scott W. Higdon** has joined its Louisville law firm. He practices in the firm's intellectual property practice area, where he primarily focuses on patent law. Higdon received a B.S., *cum laude*, from the University of Louisville and graduated, *cum laude*, from the U of L School of Law.


Hollan T. Holm

The law firm of **Dilbeck, Myers & Harris, PLLC** is pleased to announce that **Hollan T. Holm** has become an associate with the firm. Holm, a 2000 graduate of the University of Louisville School of Law, will practice law in the areas of general civil and insurance related litigation.


Jason L. Lee

Wyatt, Tarrant & Combs, LLP is pleased to announce that **Jason L. Lee**, **Justin W. Ross**, and **Daniel I. Waxman** will join the firm's Lexington office. Lee, a licensed certified public accountant, received his B.S. in 1997 from California State University and earned his J.D. from the University of Kentucky College of Law in 2008. Ross received his B.A. from Wake Forest University and earned his J.D. from the University of Kentucky College of Law in 2008. He also holds a M.A. from Savannah College of Art & Design. Waxman received his B.A. from McMaster University in Ontario, Canada and earned his J.D., *magna cum laude*, from the University of Kentucky College of Law in 2008. He was a summer clerk for the Honorable Joseph Scott.


Justin W. Ross


Daniel I. Waxman


J. Clark Baird

Hoge & Associates Law Office is pleased to announce that **J. Clark Baird** has been named an associate in the firm's Louisville office. He will concentrate his practice in domestic law, with an emphasis on fathers' rights, as well as doing criminal defense and civil litigation. A long-time Louisville resident, Baird earned his B.A. from Indiana University Southeast and attended law school at the University of Kentucky. Before joining the firm, Baird was in the graduate fellowship program at the Legislative Research Commission.


Patrick Shane O'Bryan

Woodward, Hobson & Fulton, LLP has announced that **Patrick Shane O'Bryan**, **Anthony Sammons**, and **Kara M. Stewart** have been named partners in the firm. O'Bryan's practice is primarily


Anthony Sammons


Kara M. Stewart

in litigation with an emphasis on product liability, insurance defense and commercial litigation. He graduated from the University of Kentucky in 1995 and earned his J.D., *cum laude*, from the University of Louisville School of Law in 2000. Sammons concentrates his practice in the areas of product liability, complex litigation, insurance defense, and appellate advocacy. He graduated from the University of Kentucky in 1990 and earned his J.D., *cum laude*, from the University of Louisville School of Law in 1995. In 2002, he received his LL.M., with distinction, from the Georgetown University Law Center. Stewart graduated from the University of Kentucky College of Law in 1999. Since joining the firm in 1999, the focus of her practice has primarily been product liability defense but also includes commercial litigation, personal injury defense, and employment law.


MacKenzie Mayes Walter


Drew Millar

MacKenzie Mayes Walter and **Drew Millar** have joined the Lexington office of **Dinsmore & Shohl LLP** as associates and will practice in the firm's litigation department. In addition, four associates have joined the firm's Louisville office: **James Martin**, **Stephen Thompson**, **Emily Wang Zahn**, and **Anthony Zelli**. Prior to joining the firm, Walter served as a law clerk for the Honorable Amul Thapar. She received her B.A. from Indiana University in 2002 and earned her J.D. from the University of Kentucky College of Law in 2007. Millar received his B.A. from Brigham Young University in 2005 and earned his J.D. from the University of Kentucky College of Law in 2008. Martin and Zahn will practice in the firm's corporate department. Martin received his B.S. from the University of Louisville in 2005 and earned his J.D. from the UL School of Law in 2008. Thompson and Zelli will practice in the firm's litigation department. Thompson received his B.A. from Western Kentucky University in 1994 and earned his J.D. from Georgetown University Law Center in 2008. Zahn received her B.A. from Princeton University in 1995 and earned her J.D. from the University of Louisville School of Law in 2008. Zelli received his B.S. from Ball State University in 2002 and earned his J.D. from the University of Louisville School of Law in 2008.


James Martin


Stephen Thompson


Emily Wang Zahn


Anthony Zelli


James M. Bricken, IV

James M. Bricken, IV, **Ashley Brown**, and **Ian M. Godfrey** have joined **Ward, Hocker & Thornton, PLLC**. Bricken joined the firm in May of 2006 as a law clerk and has remained with the firm taking a position as a litigation associate in the Lexington office. He graduated from the University of Kentucky College of Law in 2008 and concentrates his practice in civil litigation defense, including personal injury defense, premises liability, products liability, and insurance coverage disputes. Brown joined the firm's Lexington office as a law clerk during her third year at the University of Kentucky College of Law and became an associate attorney upon passing the bar exam. She works primarily in civil litigation defense with an emphasis in products liability, premises liability, personal injury, and insurance defense. Godfrey began working in the firm's Louisville office as a law clerk in January of 2007. He earned his J.D. from University of Louisville School of Law in 2008 and took an associate position with the firm, practicing in the areas of insurance defense and workers' compensation.


Ashley Brown


Ian M. Godfrey


Candace Klein


Ivana B. Shallcross


Jennifer Y. Barber

Greenebaum Doll & McDonald PLLC is pleased to welcome eight new associates. **Candace Klein** will practice in the firm's Cincinnati office. **Ivana B. Shallcross**, **Jennifer Y. Barber**, **Brian W. Chellgren**, and **Robert Rohla** will practice in the firm's Louisville office. **Timothy W. Dunn**, **Alexis B. Kasacavage**, and **Jeremy J. Sylvester** will practice in the firm's Lexington office. Klein, an associate in the corporate and commercial practice group, received a bachelor's degree, *summa cum laude*, from Northern Kentucky University and earned her J.D. from the NKU Chase College of Law. Shallcross and Barber

Have an item for

WHO, WHAT, WHEN & WHERE?

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Brian W. Chellgren


Robert Rohla


Timothy W. Dunn


Alexis B. Kasacavage


Jeremy J. Sylvester

practice in the tax and finance practice group. Shallcross received a bachelor's degree from Centre College and earned her J.D. from Vanderbilt University Law School. Barber received a bachelor's degree from the University of Kentucky and earned her J.D. from the UK College of Law. Chellgren, an associate in the regulatory and administrative practice group, received his bachelor's degree, *cum laude,* from Vanderbilt University, obtained a Ph.D. from the UK College of Medicine, and earned his J.D. from the UK College of Law. Rohla, an associate in the corporate and commercial practice group, received a bachelor's degree from Northeastern University and earned his J.D. from Indiana University School of Law – Bloomington. Dunn, an associate in the estate planning, health, and insurance practice group, received a bachelor's degree, *summa cum laude*, from Eastern Kentucky University and earned his J.D., *cum laude*, from the UK College of Law. Kasacavage, an associate in the labor and employment practice group, received a bachelor's degree, *cum laude*, from the University of Kentucky and earned her J.D., *cum laude*, from the University of Louisville School of Law. Sylvester, an associate in the litigation and dispute resolution practice group, received a bachelor's degree, *magna cum laude*, from the University of Kentucky and earned his J.D., *magna cum laude*, from the UK College of Law.


Lloyd R. Cress

Greenebaum Doll & McDonald PLLC is also pleased to announce that **Lloyd R. Cress** has returned to the firm after leaving in 2003 to accept a state government position. He will reside in Greenebaum's Lexington office as Of Counsel and will be a member of the firm's environmental and natural resources team. Cress received his bachelor's degree from the University of Kentucky and earned his LL.B. from UK's College of Law in 1962.


M. Jake Bliss

Lawson & Rager, PSC, of Lexington, is pleased to announce that **M. Jake Bliss** has joined the firm. He will practice in the areas of civil litigation, criminal defense, and real estate.

The Danville law firm of **Sheehan, Barnett, Dean & Pennington, PSC**, is proud to announce that **Ramona C. (Rami) Little** and **Stephen A. Dexter** have joined the firm as associates. Little received her B.A. at Furman University and earned her J.D. at Stetson University College of Law.


Ramona C. Little


Stephen A. Dexter

She is fluent in Spanish and will focus on criminal defense, domestic law, and adoptions. For five years, Little served as an Assistant Commonwealth's Attorney in Fayette County. Dexter, a Danville native, is a 2004 graduate of Centre College and a 2008 graduate of the University of Louisville School of Law. He will practice in the areas of estate planning, wills, trusts, probate, business planning, and real estate.

The Law Office of Jennifer McVay Martin is pleased to announce that associate **Crystal McVay Shepard** has joined the Lexington firm. Shepard received her B.A. from the University of Kentucky, obtained her M.S. from Eastern Kentucky University, and earned her J.D. from the University of Louisville School of Law. She will practice in the areas of domestic law, estate planning, real estate law, and general civil litigation.

Travis & Herbert Attorneys are pleased to announce that **Charlton C. Hundley** and **Stephen R. Custer** have become associated with the Louisville firm. Hundley, a graduate of the University of Kentucky College of Law, previously served as general counsel for ThermoView Industries, Inc. and as a partner of Hundley & Hundley Attorneys at Law in Tompkinsville. His areas of practice now include business law, employment

law, and elder law. Custer, a graduate of the University of Louisville School of Law, is a certified public accountant. He has worked for Ernst & Young in Louisville and New York City. Custer concentrates his practice in the areas of estate planning, probate, taxation, and business law.


Jeremy J. Nelson

Jeremy J. Nelson has joined the Louisville law firm of **Sampson & Slechter, PLLC**. Nelson graduated, *cum laude*, from the University of Louisville School of Law in 2006. His practice will focus in the areas of workers' compensation and plaintiff's personal injury with particular emphasis in the area of nursing home neglect.


John W. Gragg

Urban Active, which owns and operates Urban Active Health and Fitness Clubs, has announced the appointment of **John W. Gragg** to the post of general counsel/ chief legal officer. Gragg previously was with Stites & Harbison in Louisville. He holds a B.A from Transylvania University and a J.D. from the University of Dayton School of Law.

Frost Brown Todd LLC is pleased to announce that **Mark David Goss** joined the Lexington office of the firm as a member on December 1, 2008. Goss practices corporate and administrative law, concentrating on regulatory and business issues affecting electric, natural gas, and water utilities. He practiced law in association with Goss & Goss Attorneys in Harlan for more than 19 years. Goss received his B.A. from Transylvania University and earned his J.D. from the University of Tennessee College of Law.

The law firm of **King & Schickli, PLLC** is pleased to announce that **Trevor T. Graves** has been admitted to practice before the U.S. Patent and Trademark Office. Graves received his chemical engineering and law degrees from the University of Kentucky. The firm is also pleased to announce that **Rebecca A. Krefft** has joined the firm as an associate. Krefft is a registered patent attorney and a recent graduate of Duke University School of Law. She received her mechanical engineering degree from Vanderbilt University. Graves and Krefft will be concentrating in patent, trademark, and copyright law.


Trevor T. Graves


Rebecca A. Krefft

Mark E. Nichols and **Dean T. Wellman** are pleased to announce the opening of **Wellman & Nichols, PLLC** located in Lexington at 444 Lewis Hargett Circle, Suite 170. The firm is also pleased to announce that **Carl W. Walter II** has become associated with the firm. Walter is a graduate of the University of Kentucky College of Law and will primarily focus his practice on insurance and medical malpractice defense. Wellman & Nichols, PLLC may be reached by telephone at (859) 368-8116.


Nicholas A. Zingarelli

Nicholas A. Zingarelli is pleased to announce the opening of his new firm, **The Zingarelli Law Office**, located in downtown Cincinnati at 810 Sycamore Street. Zingarelli, a 2005 graduate of NKU Chase College of Law, is now accepting new clients in the areas of bankruptcy, personal injury, and contract disputes. He is licensed in Ohio and Kentucky and may be reached at (513) 338-1910.


Robert DeWees

The Louisville law firm of **Goldberg Simpson** is pleased to announce the addition of **Robert DeWees** as an associate in the business litigation area. DeWees obtained his undergraduate degree from the University of Louisville and earned his M.B.A. from DePaul University. He is a recent graduate of the U of L School of Law.

Ryan C. Daugherty

Benjamin Fiechter

The law firm of **McBrayer, McGinnis, Leslie & Kirkland, PLLC** is pleased to announce that **Ryan C. Daugherty** and **Benjamin Fiechter** have been hired as associates and will practice in the firm's Lexington office. Daugherty received her undergraduate degree from the University of Georgia and earned her J.D. from the University of Kentucky. She focuses her practice on zoning and planning. Fiechter received his undergraduate degree from Samford University and earned his J.D. from the University of Kentucky. He focuses his practice in the areas of corporate law and estate planning.

Ogletree, Deakins, Nash, Smoak & Stewart, PC is pleased to announce that **Peter K. Newman** joined the firm's Indianapolis office. Newman will be a shareholder with the firm serving clients in Indiana, Ohio, Kentucky, and Illinois. He has over 25 years of experience representing employers in all areas of labor and employment law, with an emphasis on traditional labor and collective bargaining. Newman is a graduate of Miami University and earned his law degree from Georgetown University Law Center.

Peter K. Newman

Mark R. Bush

Reminger Co., LPA has elected **Mark R. Bush** to partner and has relocated its office in Florence to Fort Mitchell. The full service law firm has moved to the Park 75 (Hemmer) Building located at 250 Grandview Drive in Fort Mitchell. Bush practices in the firm's Fort Mitchell and Lexington offices. He defends a wide array of matters in the areas of professional liability, medical malpractice, construction liability, workers' compensation and general insurance.

Before You Move...

Over 15,000 attorneys are licensed to practice in the state of Kentucky. It is vitally important that you keep the Kentucky Bar Association (KBA) informed of your correct mailing address. Pursuant to rule SCR 3.175, all KBA members must maintain a current address at which he or she may be communicated, as well as a physical address if your mailing address is a Post Office address. If you move, you must notify the Executive Director of the KBA ***within 30 days.*** All roster changes must be in writing and must include your 5-digit KBA member identification number. There are several ways to do this for your convenience.

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

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

FAX the Address Change/Update Form obtained from our website or other written notification to:
Executive Director/Membership Department (502) 564-3225

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

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

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

IN THE NEWS

Michael Davidson

Michael Davidson, of Davidson and Oeltgen, PLLC, has been appointed by the American Bar Association's Family Law Section as Domestic Violence Committee Chair for 2008-2009.

Laurel S. Doheny

The American Academy of Matrimonial Lawyers (AAML) is pleased to announce that **Laurel S. Doheny**, with Greenebaum Doll & McDonald in Louisville, has been elected an AAML Fellow.

Elisabeth S. Gray

Greenebaum Doll & McDonald PLLC is pleased to announce that **Elisabeth S. Gray**, a member in the firm's Louisville office, has been re-elected mayor of Crossgate, a sixth-class city in eastern Jefferson County.

John W. Ames

Greenebaum Doll & McDonald PLLC is also pleased to announce that two of its Louisville attorneys, **John W. Ames** and **Claude R. "Chip" Bowles, Jr.**, have been elected to the board of the American Board of Certification, a national nonprofit organization that certifies attorneys in business bankruptcy, consumer bankruptcy and creditors' rights law.

Claude R. "Chip" Bowles, Jr.

WHO, WHAT, WHEN & WHERE

Frost Brown Todd is pleased to announce that **Edward M. (Ted) King**, of Louisville**,** has been elected to the American Board of Certification of Bankruptcy and Creditors' Rights Attorneys.

Richard L. Robinson

Graydon Head & Ritchey LLP partner, **Richard L. Robinson**, was among seven community leaders honored as HealthPoint Heroes at HealthPoint Family Care's annual "Community Check-Up" luncheon. Robinson was recognized for contributing his time, talent and effort in service to the nonprofit organization, which provides primary health care to low-income, uninsured residents of Northern Kentucky.

Mark Guilfoyle

Mark Guilfoyle, a partner with Dressman Benzinger LaVelle PSC in Crestview Hills, was recently appointed to the Board of Directors of Legacy, an organization affiliated with the Northern Kentucky Chamber of Commerce that works closely with Vision 2015. Guilfoyle also currently serves as the Northern Kentucky Serra Club President and as chairman of the board of the Alliance for Catholic Urban Education Consortium.

Brian F. Haara

The Louisville law firm of Tachau Meek PLC is proud to announce that **Brian F. Haara** has been re-elected Zoom Group Vice Chair. Zoom Group, a Metro United Way agency, is a non-profit provider of employment services for people with intellectual and developmental disabilities.

Gregg Y. Neal, of Neal & Davis, PLLC in Shelbyville, recently attended the Annual Dispute Resolution Conference in Orlando, Florida to complete his continuing mediator credits as a certified circuit mediator in Florida. Neal has also been recertified by the National Board of Trial Advocacy through 2013.

Joseph L. Fink III, professor of pharmacy law and policy at the University of Kentucky College of Pharmacy, has been elected as a public member of the National Board on Certification and Recertification of Nurse Anesthetists (NBCRNA).

RELOCATIONS

John M. Vickerstaff

Vickerstaff Law Office, PSC is pleased to announce the relocation of its offices in Louisville to 4109 Bardstown Road, Suite 106. Attorney **John M. Vickerstaff** will continue to focus on serving the needs of immigrants in Kentucky and Indiana. The firm's primary practice areas will continue to be immigration law, family law, criminal law, and estate planning.

Joseph R. Flaherty and **Patrick T. Flaherty** are pleased to announce that the Owensboro law firm of **Flaherty & Flaherty** has relocated its offices in Owensboro to 608 Frederica Street, 2nd Floor. The firm's contact information, including its telephone and facsimile numbers, remain the same.

AT THE KBA

Kristine Brower

Kristine Brower joined the Office of Bar Counsel at the Kentucky Bar Association as Deputy Bar Counsel in January 2008. Brower received a B.A., with distinction, from the University of Kentucky and earned her J.D. from the UK College of Law in 1985. She practiced law with the firms of Rosenbaum & Rosenbaum and Landrum & Shouse, where she concentrated on fire and property loss, medical malpractice, personal injury, and products liability actions. Brower also served as a mediator, with the Mediation Center of Central Kentucky, Inc., and assisted in training other mediators.

Mary E. Cutter

Mary E. Cutter has been named Assistant Director for Continuing Legal Education (CLE). Cutter received her B.A., with distinction, from Centre College in 1994 and earned her J.D. from the University of Kentucky College of Law in 1997. Following her admission to the Kentucky Bar, she was engaged in private practice in Lexington. In 1999, Cutter served on the Lexington-Fayette Urban County Council Special Ethics Ordinance Review Committee. She later joined the firm now known as Johnson, True & Guarnieri, LLP, in Frankfort, and expanded her practice to include general civil litigation, including employment, real estate, and domestic law.

Jane H. Herrick

Jane H. Herrick returned to the Office of Bar Counsel in November 2008 as Deputy Bar Counsel/ Administrative Manager. Herrick served as Assistant CLE Director for the KBA from 2004-2008 and as Deputy Bar Counsel from 1996-2004. She received her B.A., *cum laude*, from Centre College in 1990. Herrick received her J.D., with distinction, in 1993 from the University of Kentucky College of Law, where she served as a staff member of the *Kentucky Law Journal* from 1991-1993.

SPOTLIGHT ADS

Classified Advertising

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Employment

MEDICAL MALPRACTICE DEFENSE FIRM seeks Litigation Attorney with 2-3 years experience for Louisville office. Position includes: travel, jury trials and complex factual issues. Submit resume and salary requirements to: Office Manager, 3104 Dellbrooke Avenue, Louisville, Kentucky 40220.

LOUISVILLE LAW FIRM seeks litigation/defense attorney with 2 to 3 years experience. Excellent academic credentials required. Fax resume, with cover letter, to (502) 805-0434.

WANTED - experienced lawyer to assist overworked solo practitioner. Salary w/bonus based on productivity. Partnership opportunity. Send resume to Bruce E. Smith, 201 S. Main, Nicholasville, KY 40356.

Recreational Rentals

KY & BARKLEY LAKES: Green Turtle Bay Resort. Seventy-five luxury rental condos, 1-4 BR, new Health Club with indoor pool, Conference Center, 2 outdoor pools, Yacht Club, Dockers Bayside Grille, tennis, beach, water sports and golf nearby. The perfect spot for a family vacation or a company retreat. In historic Grand Rivers "The Village Between the Lakes."
Call 800-498-0428 or visit us at www.greenturtlebay.com.

LUXURIOUS GULF-FRONT CONDO, Sanibel Island, Fl. Limited rentals of "second home" in small development, convenient to local shopping. 2 BR, 2 bath, pool, on Gulf. Rental rates below market at $2,400/week in-season and $1,300/wk off-season. Call Ann Oldfather (502) 637-7200.

JENSEN BEACH, FL: Great ocean-front condo 2 BR, 2 bath, pool, tennis, fully furnished. Monthly rentals only. Jan $1,900, Feb. $2,500, Mar. $2,500. Off season $1,200. Yearly available. No Pets. Elaine & Steve Gold (270) 826-8109.

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Login Instructions for KBA members:

- Go to the Kentucky Bar Association website
  http://www.kybar.org
- Click on the "Login" button on the far left of the menu bar
- Enter your KBA Attorney Number in the first field (Username)
- Enter your Password in the second field
  (Your password will either be your date of birth in the form 01/01/19xx or the password you have assigned yourself.)
- Click on the "Log In" button
  After you have logged in, you will notice that the button to the far left on the menu bar now says "Logout" and your name will be on the menu bar to the right
- Casemaker® is the first item on the "Resources" menu
  You will be asked to read and agree to the End User License Agreement
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If you need assistance with logging on to Casemaker®, contact the Kentucky Bar Association at (502) 564-3795 or send an email to cjones@kybar.org.

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

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