

KENTUCKY BAR ASSOCIATION



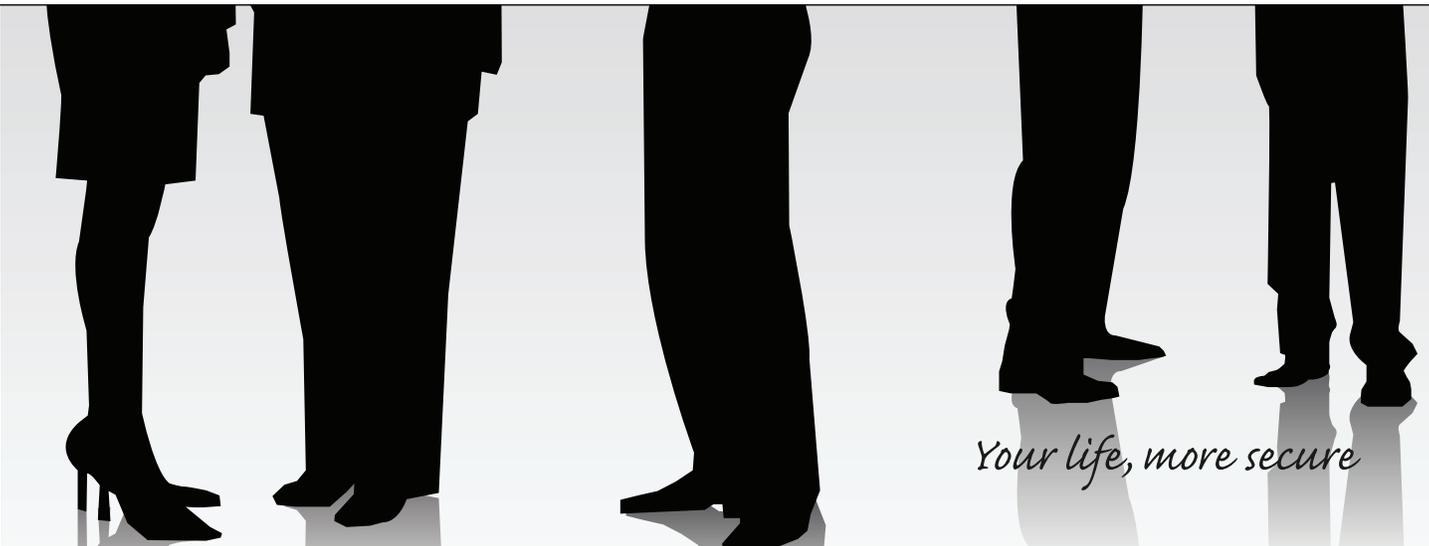
Bench & Bar

Volume 73 Number 4

July 2009



**KBA President Charles E. English, Jr.
with his wife, Nancy, and Family**



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*On the cover: KBA President Charles E. English, Jr. with his wife, Nancy, and Family.
Cover photo by Alan Davis.*

Kentucky Bar Association

From truth



2009 Annual Convention

to Justice

BRIDGING THE SPAN



Chief Justice
John D. Minton, Jr.
Administering
the Oath
to the
2009-2010
Kentucky Bar
Association
Board
of
Governors.

Left to right above: President Charles E. English, Jr., President-Elect Bruce K. Davis, Vice President Margaret E. Keane, Young Lawyers' Section Chair Jennifer H. Moore, 1st Supreme Court District Bar Governor W. Douglas Myers, 2nd Supreme Court District Bar Governor R. Michael Sullivan, 3rd Supreme Court District Bar Governor Richard W. Hay, 4th Supreme Court District Bar Governor Douglass Farnsley, 6th Supreme Court District Bar Governor Thomas L. Rouse, 7th Supreme Court District Bar Governor William H. Wilhoit, and Past President Barbara D. Bonar.

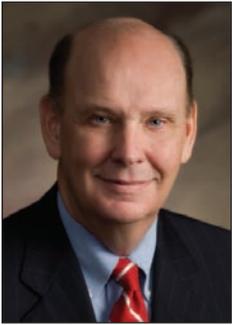


2009-2010 KBA President
Charles E. English, Jr. accepting
gavel from 2008-2009
KBA President Barbara D. Bonar.



Past Presidents (left to right):
Jane Winkler Dyche, Robert C.
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T. (Bill) Robinson III, Ben L.
Kessinger, Jr., Frank V. Benton III,
and R. Kent Westberry.

Past Presidents of the Kentucky Bar Association



Charles E. English, Jr.

KLEO: It's a Step in the Right Direction

New York-based attorney Kenneth Nolan recently wrote an article entitled "Kentucky" in the journal *Litigation*, which is published by the American Bar Association (ABA). In this article, Nolan describes his experience as one of the attorneys representing families of the victims of the Comair tragedy in the litigation that was pending in the United States District Court in Lexington. Nolan is managing partner of the New York office of Speiser Krause, and he handles many aviation-related cases. If you would like to read his article, it is available to ABA Litigation Section members online on the ABA site, www.abanet.org under Litigation.

Nolan, a native New Yorker, talks about some of the "southern amenities" that he found different from practicing law and living in New York. People on the streets in Lexington actually spoke to him and exchanged pleasantries. Suspicious and apprehensive at first, Nolan came to appreciate and even enjoy these everyday exchanges. He remarked how simply saying please and thank you, being respectful, being nice, and wishing people well were more than a ritual of good manners. People actually wanted you to have a good day.

What was most remarkable about Nolan's article was his description of the Kentucky lawyers who worked on his team and the lawyers who were his adversaries. In describing these attorneys, Nolan states, "What I learned was not only were they superb, diligent lawyers, but they were also better than most of us. . . . Even our adversaries were palatable, played fewer games, were more open,

credible. . . . Senior Judge Karl Forester was as good as it gets. Intelligent and fair-minded, he managed this case with dignity and soft-spoken steel."

The names of the lawyers mentioned in the article include a former president of the Kentucky Bar Association, a current member of the Board of Governors, and a former president of the American Trial Lawyers Association. Not only are these outstanding practitioners, but these are lawyers who have given their time, talent, and money to improving our profession.

Every lawyer in Kentucky does not practice with the professionalism of Atticus Finch. We get in arguments. At times, we can become acrimonious, difficult to deal with and downright rude. In the words of one federal judge, "Some of us did not learn to play well together in preschool."

Nonetheless, we have an outstanding bar in Kentucky, and we should be proud. We do not realize how good we have it until we experience practicing in another jurisdiction or a lawyer from someplace else tells us that the grass is not greener on the other side.

This does not mean that we should rest on our laurels. Many significant issues face the KBA. The economy is slow. Client demands increase. The cost of litigation rises faster than anyone can afford and cases drag on forever. The need for legal services increases exponentially but the ability and willingness of clients to pay for those services does not keep pace. The demands on our attorney discipline system continue to increase with more complicated cases. The public may not understand or appreciate concepts like

the Rule of Law or how our legal system works. But, lawyers can and should address some of the important issues facing our profession.

Almost every KBA President for their first president's page in the past few years has mentioned the need to diversify our profession. Almost 16,000 attorneys are members of the KBA. Of that number, many have estimated that as few as 400 are members of a minority or lawyers of color.

We have not done a good job of conveying to minority students that opportunities exist for them in the practice of law. Former Chief Justice Joseph Lambert and State Representative Jesse Crenshaw established the Kentucky Legal Education Opportunity ("KLEO") Program in the spring of 2002 specifically to address the low number of minority students attending law school. This program provides \$5,000 scholarships to 15 first-year law students enrolled in Kentucky's three public law schools. A total stipend of \$15,000 is awarded to the KLEO scholars during the three years of law school as long as the students remain eligible.

Additionally and most importantly, incoming KLEO scholars in the past have attended a two-week summer residential program. The Summer Institute was designed as a pre-law preparatory program to prepare students from low income, minority and educationally disadvantaged backgrounds for the rigors of law school. The program is administered by Allison Connelly at the University of Kentucky. Many former scholars have

remarked that the Summer Institute was just as important in determining their success in the first year of law school as the money they received from the scholarship.

In the past, the Summer Institute has been funded by the Kentucky Administrative Office of the Courts and subsequently by a grant from the



Kentucky Bar Foundation. Because of tight budgetary concerns and other pressing needs, neither of these sources of funds is available.

The bottom line is that we need to raise \$35,000 for the 2009 Summer Institute. We do not have much time. The Kentucky Bar Foundation has agreed to accept donations for the specific benefit

of the KLEO Summer Institute, making any donation tax-deductible. These students need your help.

If we are truly going to address the issue of diversity in our profession, the lawyers of Kentucky must financially support the KLEO Program. If we do not support it, the 2009 Summer Institute will not be held.

Will the Summer Institute solve all of the diversity issues in our profession? No. It will, however, be a small step in the right direction. The Bar will be able to say that it is doing something more than simply talking about the need to diversify.

The only way that we can increase the number of minority and lawyers of

color in our profession is by providing education and opportunity. We will all be better for it.

Please join all of us in helping to insure that the KLEO Program continues into the future by sending a tax-deductible contribution to the Kentucky Bar Foundation. The address is 514 West Main Street, Frankfort, Kentucky 40601.

My hope is that our continued efforts to change the face of justice in Kentucky will some day draw as much attention to us nationally as the good manners and professionalism we offer to our colleagues from afar. ☺

The KLEO Summer Institute Needs our Help

On Tuesday, July 28, 2009, a Reception and Fundraiser for the KLEO Summer Institute will be held in downtown Lexington from 5:00 p.m. to 7:00 p.m. The event will take place at the Lexington History Museum/Old Fayette County Courthouse at 215 West Main Street. Join your colleagues for a delightful evening in downtown Lexington to benefit the KLEO Summer Institute. For more information or to make a donation, please contact Valorie D. Smith at VASmith@sites.com or (859) 226-2263.

To ensure the KLEO Summer Institute's operation in 2009 and beyond, representatives from several of Kentucky's law firms are also encouraging attorneys throughout the state to consider donations to the Kentucky Bar Foundation, recognized by the IRS as a Section 501(c)(3) nonprofit corporation. Contributions are appreciated and are tax-deductible to the full extent of the law.

For further information about KLEO gift opportunities or tax-deductible contributions to the 2009 KLEO Summer Institute, please contact the Kentucky Bar Foundation or send your gift directly to the Foundation at the address below.

Kentucky Bar Foundation
514 West Main Street
Frankfort, Kentucky 40601

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(800) 874-6582
Fax (502) 564-3225
www.kybar.org

Terms Expire on the KBA Board of Governors

On June 30 of each year, the terms expire of seven of the fourteen Bar Governors on the KBA Board of Governors. SCR 3.080 provides that notice of the expiration of the terms of the Bar Governors shall be carried in the *Bench & Bar*. SCR 3.080 also provides that a Board member may serve three consecutive two-year terms. Requirements for being nominated to run for the Board of Governors are contained in Section 4 of the KBA By-Laws and the requirements include filing a written petition signed by not less than twenty (20) KBA members in good standing who are residents of the candidate's Supreme Court District. Board policy provides that "No member of the Board of Governors or Inquiry Commission, nor their respective firms, shall represent an attorney in a disciplinary matter." Any such petition must be received by the KBA Executive Director at the Kentucky Bar Center in Frankfort prior to close of business on the last business day in October. The current terms of the following Board members will expire on June 30, 2010:

Jonathan Freed 1 st District	M. Gail Wilson 3 rd District	David V. Kramer 6 th District
James D. Harris, Jr. 2 nd District	Douglas C. Ballantine 4 th District	Bobby Rowe 7 th District
	Anita M. Britton 5 th District	

KENTUCKY BAR ASSOCIATION PRESENTED ANNUAL AWARDS DURING 2009 CONVENTION

The Kentucky Bar Association drew 1,633 attorneys from across the Commonwealth and 20 additional states to its 2009 Annual Convention in Covington, June 10-12, making the event the largest ever held by the association in the Northern Kentucky region and one of the top KBA conventions ever. And while those in attendance had many CLE opportunities and social activities competing for their attention, the presentation of annual awards honoring members of Kentucky's legal community continued to be a convention highlight.

Following attorney and best-selling author Scott Turow's featured presentation on June 10, the opening day of the convention, Gabrielle Summe, a Covington attorney and co-chair of Annual Convention CLE Planning Committee, presented Jeffrey E. Sherr, manager of the Education and Strategic Planning Branch of the Kentucky Department of Public Advocacy in Frankfort, with the **Justice Thomas B. Spain Award** for his work with the Continuing Legal Education

Commission. Sherr served as a member of the 2008 Annual Convention CLE Planning Committee and was the 2008-09 chair of the Criminal Law Section. Summe credited Sherr with providing "invaluable assistance" in securing speakers for the 2008 Annual Convention and the Kentucky Law Update programs. Sherr also serves as a faculty member for the National Criminal Defense College, the Missouri Trial Institutes, Southern Public Defender Training Center, and the Georgia Public Defender Standard Council Honors Program.

During the Annual Gala on June 11, outgoing KBA President Barbara D. Bonar presented Kenton County Chief Circuit Judge Patricia M. Summe and Judge J. Gregory Wehrman of Covington, a United States Magistrate Judge for the Eastern District of Kentucky, with **Outstanding Judge Awards**, honoring their

dedication to the legal profession with a special emphasis on community, civic and charitable service.

Judge Summe, who serves as the Chief Circuit Judge for Kenton County, was recognized by Bonar for her "excellent" service on the bench and her "tireless" volunteer work in Northern Kentucky, including her service on behalf of the Women's Crisis Center, the Redwood School and Rehabilitation Center, the Notre Dame School Board, the Foster Care Review Board, Split Rock Conservation Park, and the Saint Agnes Parish Council and its Youth Group. Summe has received the Martin Luther King Award from the local chapter of the NAACP for her work in keeping racial bias out of criminal sentencing. She also mentors at career days and law school competitions and co-founded

"Survive and Thrive," a summer camp for at-risk children that incorporates daily counseling with fun,

healthy activities. "We thank you for your determination and your vigor in clarifying and expanding your vision for being the quintessential circuit judge," Bonar said in honoring Judge Summe.

In recognizing Judge Wehrman, Bonar noted that in June 2006, he provided an "extraordinary sacrifice" by



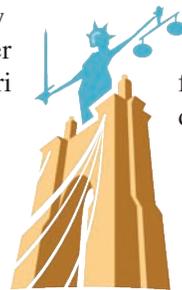
Gabrielle A. Summe presented the Justice Thomas B. Spain Award to Jeffrey E. Sherr.



KBA President Barbara D. Bonar presented an Outstanding Judge Award to Kenton Circuit Court Judge Patricia M. Summe (right).



KBA President Barbara D. Bonar presented an Outstanding Judge Award to U.S. Magistrate Judge J. Gregory Wehrman.



BRIDGING THE SPAN

FROM TRUTH TO JUSTICE

2009

Kentucky Bar Association Convention

donating one of his kidneys to E.J. Walbourn, a prosecutor who had appeared before him in court “so many times before” and who now serves as a Managing Assistant U.S. Attorney. “But the real reason we are giving this award ... (is) what J.W. does every day, day in and day out, for the members of our bar – his reputation as a settling magistrate



Cathy M. Jackson (left) accepted an Outstanding Lawyer Award from KBA President Barbara D. Bonar.

Engineering & Manufacturing North America, Inc., and state Rep. Arnold R. Simpson, D-Covington, received **Outstanding Lawyer Awards** for outstanding service to the



State Representative Arnold R. Simpson accepted an Outstanding Lawyer Award from KBA President Barbara D. Bonar.

legal community and sustained involvement in their communities which brings honor to their profession. Jackson is an active donor for the Hoxworth Blood Center at the University of Cincinnati and serves as a board member for the Children’s Law Center and Kids Change for Kentucky. She also volunteers for the Garrard Convalescent Center and is a former chair and current volunteer for the Kentucky Lawyers Assistance Program, an organization that offers help to members of the Kentucky legal community that are struggling with mental health and addiction issues. “Cathy is always one who – despite her tremendous volunteer activities and work commitments – balances her life, genuinely valuing her personal relationships with friends and colleagues, whether it is keeping her circle of col-

(and) his advocacy for use of many dispute resolution cases that pass through federal courts.” In the past 12 months, Bonar said, Wehrman conducted 47 settlement conferences, more than any other federal judge in the Eastern District of Kentucky. “Of those,” she said, “he settled the vast majority.”

Cathy M. Jackson, senior counsel for Toyota Motor

and state Rep. Arnold R. Simpson, D-Covington, received **Outstanding Lawyer Awards** for outstanding service to the legal community and sustained involvement in their communities which brings honor to their profession.

Jackson is an active donor for the Hoxworth Blood Center at the University of Cincinnati and serves as a board member for the Children’s Law Center and Kids Change for Kentucky. She also volunteers for the Garrard Convalescent Center and is a

leagues connected or designing outings or tending to those in her circle that need her, she is the epitome of a female attorney who embraces her love of the law and keeps it balanced in life,” Bonar said.

Rep. Simpson served four years as city manager for the City of Covington before his eventual election to state representative from the 65th legislative district in Kenton County in 1993. In addition to his law practice and his legislative duties, including membership on the prestigious Appropriations & Revenue Committee, Rep. Simpson serves on the Advisory Board for Northern Kentucky University’s Newman Club and the Kentucky Local Correctional Facilities Construction Authority & Citizens Advisory Committee for the Campbell Regional Juvenile Detention Center. During his career in public service, Rep. Simpson has also served on more than 20 additional advisory boards for community organizations “touching all aspects of community life, including the arts, education, public safety, business development, civil service, legal services for the poor, child protection, the YMCA and Boys & Girls Clubs,” Bonar said. “Arnold, we are so proud that you represent not only our community, but our Kentucky Bar by the great examples you have set in leadership.”

The **Chief Justice’s Special Service Award** was presented by Chief Justice John D. Minton, Jr., to Professor William H. Fortune of Lexington, a long-time professor of law at the University of Kentucky, for his distinguished service to the Commonwealth as a legal educator, his dedicated assistance to the KBA and the



Chief Justice John D. Minton, Jr., Supreme Court of Kentucky, presented the Chief Justice’s Special Service Award to Professor William H. Fortune (left).

Court in drafting significant revisions to the Rules of Professional Conduct, and his ongoing efforts to promote and improve ethical practices among Kentucky’s bench and bar. “Throughout the state of Kentucky, there is no person who has given more to the improvement of law that I know of than Bill Fortune,” Chief Justice Minton said, adding that Fortune gave “absolutely selflessly of his time” during the Court’s recent discussions regarding changes to the rules of professional conduct.

Professor Fortune “patiently dealt with us, counseled us, urged us from time to time,” Chief Justice Minton



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FROM TRUTH TO JUSTICE

2009

Kentucky Bar Association Convention

said, while crediting Fortune for giving “extraordinary services on behalf of the Court of Justice, on behalf of the Bar,



Todd S. Horstmeyer accepted the Bruce K. Davis Bar Service Award from KBA President Barbara D. Bonar.

on behalf of the citizens of Kentucky.”

During the Membership Luncheon on June 12, Todd S. Horstmeyer, executive director of the Kentucky IOLTA Program and the Kentucky Bar Foundation, received the **Bruce K. Davis Bar Service Award** in recognition of his

determined management and fundraising efforts since assuming leadership of the two organizations nine years ago. “Todd’s efforts have helped build the foundation’s endowment to \$3 million which has led the foundation to double the amount of grants over the last five years,” Bonar said. Horstmeyer was also credited with leading the efforts by the IOLTA board to seek amendments to the Supreme Court rules on lawyer trust accounts “which, if implemented, will increase revenue and, in turn, provide greater support for legal service providers throughout the Commonwealth,” she said. “Ask any member of either the IOLTA Board of the Bar Foundation what single factor is responsible for the tremendous success of both programs over the last nine years, their answer would be Todd Horstmeyer.”

Kentucky Court of Appeals Judge Michelle M. Keller received the **Donated Legal Services Award** for her efforts to promote the availability of legal services to all



Michelle M. Keller (right) accepted the Donated Legal Services Award from KBA President Barbara D. Bonar.

Kentuckians. She is currently serving as chair of the statewide Committee on *Pro Se* Litigants by appointment of former Chief Justice Joseph Lambert. Judge Keller’s expansive work on behalf of *pro se* litigants culminated recently in the opening of a court-based *pro se* service center

in Jefferson County, the first of its kind in Kentucky. “The amount of time that Judge Keller has committed to this pro-

ject on *pro se* litigants is phenomenal and those who know what she has done for *pro se* litigants across the Commonwealth are amazed that she has brought our Commonwealth from almost last in *pro se* support to the top of the ladder,” Bonar said.

Outgoing KBA President Barbara D. Bonar presented the **President’s Special Service Awards** to Norman E. Harned, a partner in the Bowling Green law firm of Harned, Bachert & Denton LLP; Charles E. Ricketts, Jr., a founding member of the Louisville law firm Ricketts Law Offices PLLC; and Robert G. “Bobby” Clark, founder and CEO of The Clark Group. These individuals were recognized for their dedicated service in planning and executing “Kentucky Rule of Law Symposium” in February 2009, at Kentucky State University in Frankfort.

“I had three giants that supported me this year,” Bonar said. “When I chose as my presidential initiative to put together a Rule of Law conference, and to hold a multi-disciplinary forum to do so, many said it just couldn’t be done in the short time that it did. So I did one of the smartest things I have ever done in my whole life – I picked three wonderful people to carry that forward. I thank all of you!”



KBA President Barbara D. Bonar presented Norman E. Harned with a President’s Special Service Award.



Charles E. Ricketts, Jr. accepted a President’s Special Service Award from KBA President Barbara D. Bonar.



KBA President Barbara D. Bonar presented Robert G. “Bobby” Clark with a President’s Special Service Award.



2009
 Outstanding
 Young Lawyer
 Angela L.
 Edwards

Angela L. Edwards (right) accepted 2009 Outstanding Young Lawyer Award from Jackie S. Wright at the YLS Luncheon.



2008-2009 YLS Chair Scott D. Laufenberg passed gavel to 2009-2010 YLS Chair Jennifer H. Moore.



Judge Jerry J. Bowles addressed Young Lawyers Section at the YLS Luncheon.



2009-2010 YLS Chair Jennifer H. Moore presented plaque to 2008-2009 YLS Chair Scott D. Laufenberg.



Stephanie Renner presented Nathaniel R. Harper Award to Joe Gutman (left), Law & Government Magnet Program Coordinator at Central High School Magnet Career Academy, with Spencer McKiness (center), a graduate of the Law & Government Magnet Program.



2009-2010 Young Lawyers Section Executive Committee



A Brilliant Start to Empower Your Future.

YOUNG LAWYERS SECTION

KENTUCKY BAR ASSOCIATION

By Jennifer H. Moore • Chair, KBA Young Lawyers Section

The Young Lawyers Section advocates issues of importance to newer attorneys to the Board of Governors, assists young lawyers in the practice of law, and conducts programs of interest and value to young lawyers, all while striving to enhance the image of the legal profession. As the Executive Committee members plan for 2009-2010, we keep this in mind. While the YLS has too many initiatives to mention them all in this short article, below are a few highlights.

First, the YLS will continue its long tradition of public service. This year, the YLS will advance its youth outreach program, u@18. The goal of u@18 is to prepare Kentucky's 18-year-olds for adulthood. High schools across the Commonwealth have expressed overwhelming interest with over 5000 students being reached last year. The YLS invites young lawyers to volunteer

a few hours of time to visit a high school and make a u@18 presentation. It only takes two hours to prepare and present, and presenters receive up to two hours of CLE credit for their participation. The YLS will also launch a new service project, Voices Against Violence, aimed at educating young lawyers about domestic violence issues and prevention. It is a call to action for young lawyers to get involved in raising awareness about domestic violence issues while addressing the unmet legal needs of victims. The YLS will host free CLE trainings in October to train young lawyers about representing domestic violence victims in DVO/EPO hearings and other common legal issues victims experience.

Second, the YLS will focus on member service. You should receive a quarterly electronic newsletter featuring legal topics of interest to young lawyers

and upcoming events. The YLS welcomes contributions to the newsletter from its members. Another YLS member service project, launched last year in conjunction with the KBA, is Brief Insights, consisting of short presentations, approximately ten minutes in length, filmed by Kentucky lawyers on substantive, ethical, and law-practice management topics. A few are available at www.briefinsights.com, and the YLS expects to add many more presentations this year. The YLS is also planning a spring CLE for its members and will continue the YLS Conference as an integral component the KBA Annual Convention.

Third, the YLS will continue its dedication to increasing diversity in the legal profession. The YLS presented its first Nathaniel R. Harper Award at the 2009 KBA Annual Convention the Central High School Law Magnet Program for its work in increasing diversity within the profession. This year, the YLS will launch a mentoring program and create a repository of resources for firms that wish to increase diversity. The YLS is also partnering with other programs to increase interest in the legal profession among diverse groups. One of those partner groups is the KLEO Program. As KBA President Charles E. English, Jr. explains in his article, the KLEO Program is in danger of being cancelled due to a loss of funding. I encourage you to consider a donation to the KLEO Program to insure that it continues in the future.

The YLS has many other exciting projects in the works and is always looking for volunteers to assist in its planning and implementation. If you are interested in any of these projects or in serving on a YLS committee, please visit our website at www.kbayls.com or contact me at Jennifer_H_Moore@kyed.uscourts.gov.

2009-10 YLS EXECUTIVE COMMITTEE

Chair: Jennifer H. Moore, Lexington

Chair-Elect: Nathan Billings, Lexington

Vice-Chair: Clint Quarles, Frankfort

Secretary/Treasurer: Rebekkah Rechter, Louisville

District Representatives

First: Jackie M. "Jay" Matheny, Jr., Paducah **Fifth:** Shawn D. Chapman, Lexington
Second: Jennifer L. Brinkley, Bowling Green **Sixth:** Jacqueline S. Wright, Maysville
Third: Helena Racin Smith, London
Fourth: Patrick Shane O'Bryan, Louisville

At-Large Representatives

Roula Allouch, Covington
Charnel M. Burton, Booneville
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Carl Frazier, Lexington
Kristin Logan, Louisville
Spencer McKiness, Lexington
Mary Ann Miranda, Lexington

Susan C. Montalvo-Gesser, Owensboro
Stephanie Renner, Lexington
Jesse Robbins, Frankfort
Rebecca Schafer, Louisville
Stacy Hege Tapke, Covington
Christina L. Vessels, Lexington

Affiliated Local Young Lawyer Organization Representatives

Bowling Green/Warren County Bar Association: Aaron D. Smith, Bowling Green
Fayette County Bar Association: Amy Collier-Eason, Lexington
Louisville Bar Association: Mark Farmer, Louisville
Northern Kentucky Bar Association: Matthew B. DeMarcus, Covington

FEATURING . . .

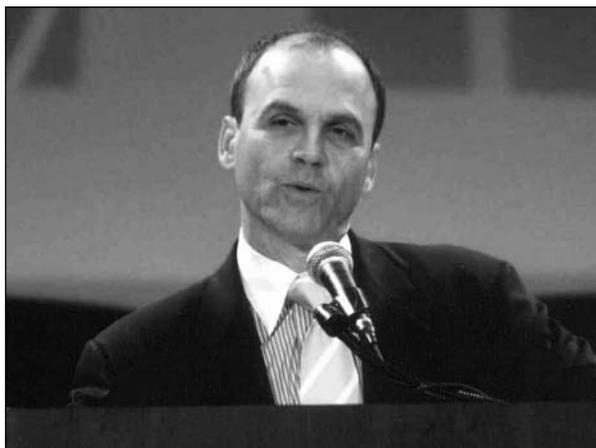
A lighter take on the 2009 Convention Featured CLE

By Mary Beth Cutter

At the 2009 KBA Annual Convention, a colleague of mine declared, “I have experienced the most surreal moment of my life . . . just now. While standing at the Convention Registration Desk, I was approached by Abraham Lincoln, who asked me, ‘has Thomas Jefferson checked in yet? I would really like to meet him.’” My colleague was not alone. While the vast majority of CLE programs offered at the 2009 KBA Annual Convention in Covington, Kentucky were grounded firmly in the undeniably practical, e.g., property, tax, immigration, health care, cybercrimes, bankruptcy, etc., the three feature CLE programs uncharacteristically dipped into the more philosophical and theoretical side of law. I must admit, as a philosophy and English double major, with a minor in history, this appealed to me. The feature programs, which consisted of presentations by author and attorney Scott Turow, former Supreme Court Correspondent and attorney Tim O’Brien, and former United States President and attorney Thomas Jefferson, were rather surreal, yet quite poignant and enlightening in this time of change and uncertainty.

The Truth Finding Process – What Gets Left Out in Court

Like many attorneys, I have been a fan of Scott Turow’s novels for years. In fact, many of us could credit Mr. Turow, at least in part, with our initial interest in the legal profession. In his novels, he explores the complexities of truth and balance in life and law, and as a practicing attorney he lives them. Proving himself to be a skilled orator as well as author, Mr. Turow shared with us his views on the honesty of attorneys from our own perspective as well as from that of the average layperson. Perhaps not surprisingly, the latter has a less positive opinion of the honesty of lawyers than do we. In his presentation Mr. Turow explored this sometimes



Noted Author Scott Turow presented the Truth Finding Process – What Gets Left Out in Court.

uncomfortable subject, recognizing that in our pursuit of justice, there are unavoidable inconsistencies. Further muddying the waters of an ultimate truth, Mr. Turow addressed an undeniable, yet often denied truth: that no attorney or decision-maker is capable of absolute objectivity. In theory, we aspire to and declare objectivity in the law, yet in reality we often appeal to subjectivity in the name of truth. Legal writing itself is supposed to be objective. Is that intrinsically misleading given that legal writing is obviously written by a subjective person intending to persuade? In fact, rhetoric is considered to be a highly thought of skill in the legal profession, and yet is rhetoric not commonly used to circumvent truth? There are no ultimate answers here. The function of truth in the law is a rich and complex issue and one that we must continue to explore. As we strive to practice with integrity and honesty, Scott Turow’s presentation was an enlightening and healthy mental exercise challenging us to be

ever diligent in maintaining truth and justice as the aims of law, while recognizing our own imperfection. ©

U.S. Supreme Court: The Stories Behind the Stories

Former United States Supreme Court correspondent for ABC World News, Tim O’Brien, a natural storyteller himself, gave an insightful view of the Supreme Court and how it has developed over the last twenty-five years. As attorneys, the balance of the Supreme Court is intriguing

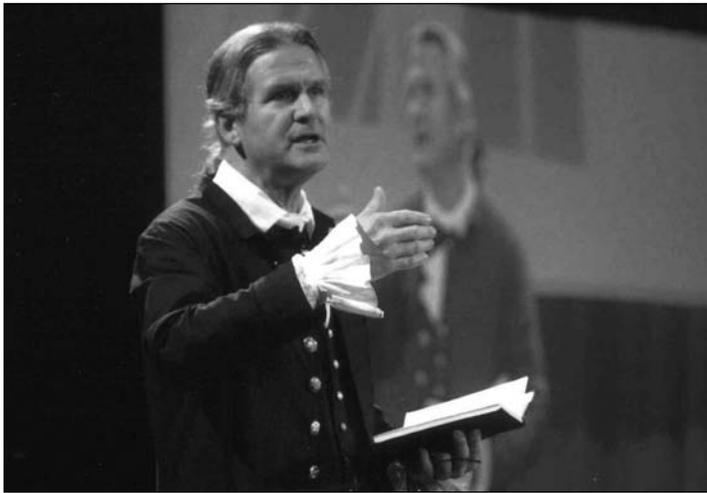
on both a philosophical and practical level. Mr. O’Brien described the process by which Presidential judicial nominations evolved from being treated with respect and deference, to a confirmation process that can best be described as “trial by ordeal.” He also delved into how the makeup of the Supreme Court has affected our laws and policies. To look back at the appointments made over the last few decades, how and why those Justices were nominated and confirmed, and whether those Justices later acted as predicted, provides an invaluable perspective to us as attorneys and citizens. ©



Former Supreme Court Correspondent for ABC World News, Tim O’Brien, presented U.S. Supreme Court: The Stories Behind the Stories.

*Thomas Jefferson, Lawyer:
A Presidential Perspective*

Cloaked in the role of Thomas Jefferson, third president of the United States, actor and historian Patrick Lee provided us with an entertaining and



Actor and Historian Patrick Lee, as Thomas Jefferson, presented *Thomas Jefferson, Lawyer: A Presidential Perspective*.

enlightening view of how the profession of law has changed and how it has remained constant since the time of our Founding Fathers. With humor and gravitas, President Jefferson explained his views on the role of the Constitution and how it should be construed, the balance of power among the three branches of government, as well as the proper role of the federal government. During a lively question and answer session that followed his initial presentation, President Jefferson addressed such issues as slavery (an issue brought up by President Abraham Lincoln, who had spoken earlier that day), the questionable constitutionality of the Louisiana Purchase, and *Marbury vs. Madison*, among other things. We in the audience experienced our own surreal moment as President Jefferson was personally and aggressively challenged by Aaron Burr (a KBA audience member unexpectedly taking on the persona of Aaron Burr), to whom President Jefferson responded with sharp wit and quick facts.

After reading the above, synopsis of the Feature Programming from the 2009 KBA Annual Convention, one might justifiably wonder how an author primarily known for his works of fiction, a reporter known for his past coverage of

the U.S. Supreme Court, and an actor portraying a man who lived in the 18th and 19th Centuries could possibly provide useful, educational information for modern day, practical-minded working attorneys. It is entertaining, but is it edu-

educational? What do fiction and history have to do with practicing law? I would answer that I found these programs to be both educational and timely. As justification for this assertion, I offer that fiction is a function of the time in which it is written, and that our history should serve as a guide to our future. Put succinctly, fiction

reflects reality and the future will reflect our history. There is much to be gained from exploring both. ☺

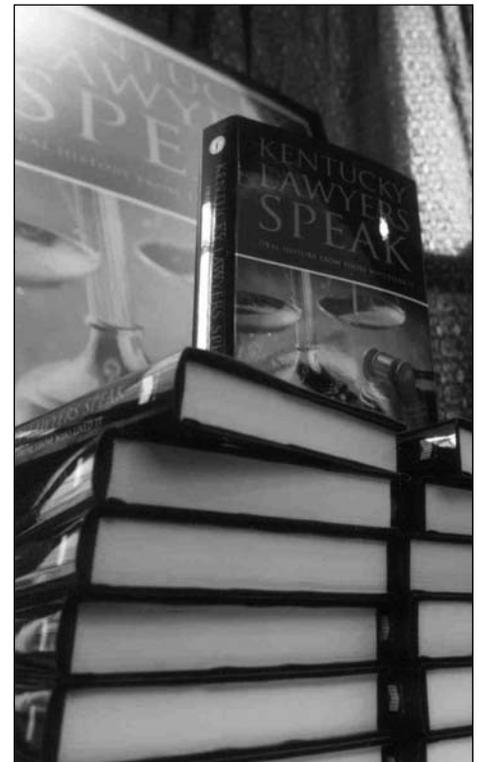
*Kentucky Lawyers Speak:
Oral History from Those Who Lived It*

During much of the KBA Convention in Covington I was stationed behind either the Registration desk or the CLE desk. Also kept in this general location were copies of the publication *Kentucky Lawyers Speak: Oral History from those Who Lived It*, which was being provided to those members who pre-purchased the book when registering for Convention, or sold to those who wished to buy it on site. While making myself generally available to answer questions and concerns regarding CLE issues, a member approached my desk and reading the title of the book, declared, "Kentucky Lawyers Speak, Kentucky lawyers speak alright and it's a good thing . . . 'cause they sure don't listen!"

Well, Kentucky lawyers do speak and it is a good thing. It is also a wonderful thing for us that someone was listening to them and recording it for us and for future generations of Kentuckians. This book, which was twenty years in the making, was a labor of love funded by

the Kentucky Bar Foundation and the Kentucky Bar Association. On the first day of Convention, Editor and Professor Les Abramson, Oral History Chair Gerald R. Toner, and Communications & Publications Committee Chair Frances Catron lead a program describing the project, from carrying video and audio equipment to the far reaches of the state to conduct interviews with seventy-four Kentucky attorneys, to the grueling editing/compiling process. Also on this panel (and in the book) sharing their experiences were KBA members Jack Ballantine, Norma Adams, and Retired Chief Justice John Palmore.

All of the attorneys interviewed for this book were born between 1903 and 1933. Some of these attorneys are gone now, but they are not lost to us because of the hard work and dedication that saw this project to its conclusion. You may still purchase its conclusion, i.e., the book, from its publisher, Butler Books, by visiting their website at www.butlerbooks.com or by mailing or faxing your order to Butler Books, P.O. Box 7311, Louisville, Kentucky 40207, fax: (502) 897-9797. ☺



Kentucky Lawyers Speak: Oral History from Those Who Lived It was presented for the first time at the 2009 Convention in Covington.

2009 Law Day Awards

The 2009 KBA Law Day Committee Chair, Gailen W. Bridges, Jr., recognized outstanding Law Day programs from bar associations across the Commonwealth at the Membership Awards Luncheon which was held in Covington during the Annual Convention. Mr. Bridges presented awards to the winners of this year's KBA Law Day Competition.

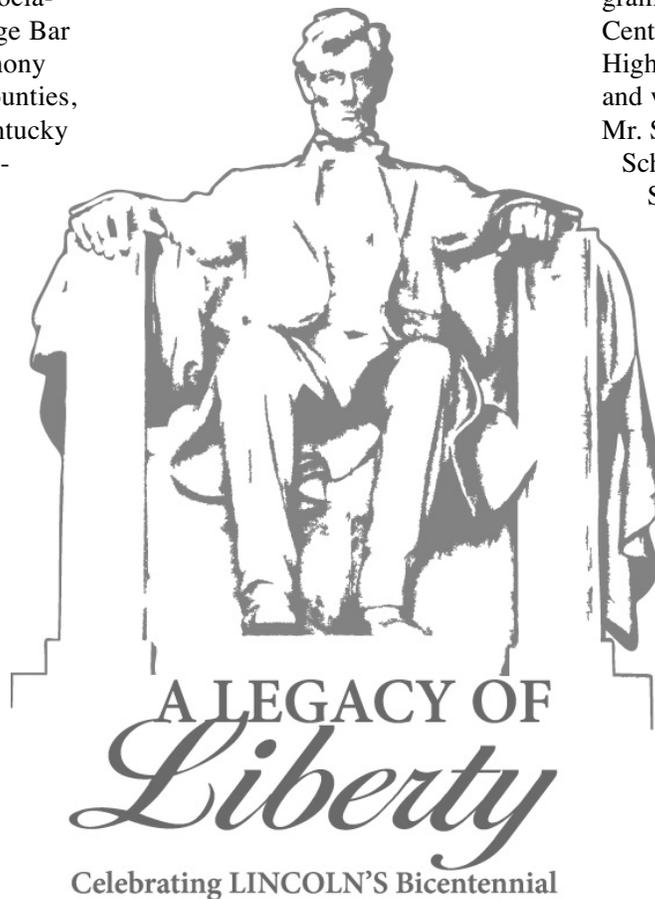
The Northern Kentucky Bar Association was the recipient of the Large Bar Award. Chief Circuit Judge Anthony Frohlich, Boone and Gallatin Counties, and Julie L. Jones, Northern Kentucky Bar Association Executive Director, accepted the award. The Association held three activities to celebrate Law Day. Kentucky Supreme Court Justice Wil Schroder and Kentucky Secretary of State Trey Grayson were the guest speakers for the Association's Annual CLE Day. Another activity involved fourteen attorneys and judges speaking to students at ten area schools about the meaning of Law Day and focusing on this year's theme, "A Legacy of Liberty: Celebrating Lincoln's Bicentennial." Judge Frohlich made an informative presentation entitled "Our First Trial Lawyers – Five Legendary Lawyers of Northern Kentucky" at the NKBA Members Reception, the concluding Law

Day activity which coincided with the 25th Anniversary of the Association's founding.

The Medium Bar Award was presented to the Madison County Bar Association. Meena Mohanty, Madison County Bar Association Vice President, accepted the award. Law Day activities in Madison County included a Kentucky Bar Foundation Speaker Project, a Credit

Abuse Resistance Education (CARE) Program, and a Law Day Banquet. The banquet speaker was Charles Bracelen Flood, a Richmond resident and a nationally renowned author, who talked about his latest book, *1864: Lincoln at the Gates of History*. During the banquet, special recognition was given to Judge William Clouse, Madison Circuit Court, and to Thomas J. Smith, III for their work with the mock trial programs. Judge Clouse's team, Madison Central High School, won the Kentucky High School Mock Trial Competition and went on to place 12th nationally. Mr. Smith's team, Foley Middle School, won the Kentucky Middle School Mock Trial Competition.

Brian N. Thomas, Clark County Attorney, accepted the Small Bar Award for the Clark County Bar Association. Several activities were held in Clark County to commemorate Law Day 2009. Clark County Bar Association members made presentations to all local elementary schools, conducted art and essay contests related to the Law Day theme, and held a Law Day ceremony in a local courtroom which was televised. Association members also presented the "Credit Abuse Resistance Education (CARE) Program" to students who were soon to graduate from high school. ☺



Chief Circuit Judge Anthony Frohlich and Julie L. Jones accepted the Large Bar Award for the Northern Kentucky Bar Association from Gailen W. Bridges, Jr.



Meena Mohanty accepted the Medium Bar Award for the Madison County Bar Association from Gailen W. Bridges, Jr.



Brian N. Thomas accepted the Small Bar Award for the Clark County Bar Association from Gailen W. Bridges, Jr.

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KBA BOARD OF GOVERNORS ADOPTS NEW POLICIES ADDRESSING RECUSAL ISSUES OF OFFICERS OR BOARD MEMBERS

The Kentucky Bar Association's Board of Governors has established a uniform method for addressing the possible recusal of a KBA board member or officer in situations that member is or has been the subject of disciplinary situations involving SCR 3.370(4).

During its June 9, 2009 meeting, the board unanimously approved four new policies setting guidelines regarding disciplinary matters, pending charges, pending complaints and past discipline. Additionally, a fifth approved policy creates the framework for a Special Conflicts Committee to be appointed to make decisions regarding participation of an officer or board member in disciplinary or related matters where that member is the subject of a pending complaint or past discipline.

"The policies grew out of a need for guidance to board members and officers in determining when and whether recusal is appropriate," said Doug Farnsley, chair of the Board's Rules Committee. "The Board's Rules Committee drafted the policies, building on the work of an ad hoc committee that had been appointed by Past KBA President Jane Dyche. The policies will enhance the ability of the KBA to maintain the confidence of its members and the public at large."

Rules Committee member W. Douglas Myers of Hopkinsville said the new recusal policy "gives a clear-cut path for board members to follow when confronted with awkward situations."

The new policies are as follows:

Policy Number 1 – In the event of recusal from a disciplinary matter, or matters, a Member shall not:

(a) Review any materials regarding any disciplinary, reinstatement, or restoration matter (inadvertently received materials shall be promptly returned);

(b) Be present during any reporting, oral arguments, or deliberations concerning any disciplinary, reinstatement, or restoration matter;

(c) Engage in any discussion, whether in a meeting or otherwise, with any other member or with any KBA employees (other than to inform them of the Member's recusal) concerning any disciplinary, reinstatement, or restora-

tion matter from which the Member has recused. Any such communication may be considered an improper *ex parte* communication and may be a violation of SCR 3.130-3.5; or

(d) Vote in the disciplinary, reinstatement, or restoration matter.

If a Member is recused by virtue of the application of Policy 2, the Member shall not vote, or be present during discussions leading to a vote, concerning the rules, policies, funding, staffing, or operation of the Office of Bar Counsel or the Inquiry Commission.

In addition, the Member should not engage in any discussion, whether in a meeting or otherwise, with any other Member or with any KBA employees (other than to inform them of the Member's recusal) concerning the rules, policies, funding, staffing, or operation of the Office of Bar Counsel or the Inquiry Commission. This subpart (e) shall also apply to a Member disqualified by virtue of Policies 3 or 4, unless the Committee established in Policy 5 determines that the Member may participate in the matters set forth in this subpart (e).

If a Member is recused from participating in a particular matter pursuant to SCR 3.370 (4), the Member shall not engage in any of the activities set forth in subparts (a) through (d) above with regard to that disciplinary matter.

Members will be deemed to have waived the confidentiality provisions of SCR 3.150 to the extent of permitting the Office of Bar Counsel, the Inquiry Commission, and the Member to make the limited disclosure contemplated by these policies.

Notwithstanding any language herein to the contrary, a Member shall, at each step of the process contemplated by these policies, have the option of avoiding disclosure by electing to recuse himself or herself from participating in the activities set forth in subparts (a) through (e) of this Policy Number 1. Further, should the Special Conflicts Committee established in Policy 5 determine that a Member should disclose disciplinary proceedings of which that Member is or has been the subject, the Member shall have the option of preventing disclosure by electing to recuse himself or herself from partici-

pating in those activities that the Special Committee may have determined warranted disclosure.

In order to effectuate this policy, the KBA Executive Director shall advise any KBA Member who indicates that he or she is considering seeking or plans to seek election to the Board of Governors or to a position as an Officer of the KBA that the Member will, if elected, be required to sign a limited waiver of confidentiality regarding any private discipline he or she may have received.

These policies are not intended to limit the ability of a Member to participate in the defense of a Complaint or Charge in which the Member is the Respondent.

Policy Number 2 – Pending

Charge: Any Member who is the subject of a pending Inquiry Commission Charge shall not participate in disciplinary matters.

Policy Number 3 – Pending

Complaint: Any Member who is the subject of a pending Inquiry Commission complaint, sworn Bar complaint with the exception of a complaint considered under SCR 3.160 (3)(c), or investigation opened by the Inquiry Commission about which the Member is aware, must either:

a. Recuse himself or herself from participating in disciplinary matters,

OR

b. Should the Member choose not to recuse himself or herself pursuant to subpart (a) above, the Member shall notify the Disciplinary Clerk that there is a pending Inquiry Commission complaint, sworn bar complaint with the exception of complaints being handled under SCR 3.160 (3)(c), or an Inquiry Commission investigation. The Disciplinary Clerk shall notify the Special Conflicts Committee as set forth in Policy Number 5.

Policy Number 4 – Past Discipline:

Any Member who has been the subject of any discipline by the Kentucky Supreme Court, public or private, or by the Inquiry Commission, within the previous two years of the current date, must either:

a. Recuse himself or herself from participating in disciplinary matters,

OR

b. Should the Member choose not to

recuse himself or herself pursuant to subpart (a) above, the Member shall notify the Disciplinary Clerk of the past discipline. The Disciplinary Clerk shall notify the Special Conflicts Committee as set forth in Policy Number 5.

Policy Number 5 – Special Conflicts Committee: A Special Conflicts Committee (“Committee”) shall be appointed to make decisions regarding participation of a Member in disciplinary matters where that Member is affected by Policies 3 or 4 herein.

The Committee shall consist of three KBA Past Presidents, who would not be disqualified under these policies or otherwise and excluding the immediate Past President, chosen by the Executive Committee at the beginning of each fiscal year. Members may serve more than one year. Any Past Presidents involved in pending discipline, either as a Respondent or representing a Respondent, shall be ineligible for service. The Committee shall choose a Chair.

Upon the notification by the Member as contemplated in Policies 3 and 4, the Disciplinary Clerk shall notify the

Office of Bar Counsel and the Committee, and shall provide to Bar Counsel and the Committee a copy of the complaint or investigative letter and any response thereto, or as applicable, the Order of the Court or the Inquiry Commission private admonition. In making its decision, the Committee will consider the items provided by the Disciplinary Clerk and will also consider, but will not be limited to considering, the following:

(a) Guidelines for judicial recusal set forth at SCR 4.300 and KRS 26A.015, *et seq.*;

(b) Any previously demonstrated bias of the Member with regard to the disciplinary system;

(c) The nature of the misconduct or the alleged misconduct; and

(d) One page statements which the Member and Office of Bar Counsel are allowed to submit, which shall be served upon the other party.

The Committee may also designate one or more of its members to consult with both the Member and Bar Counsel; provided, however, that such consultation shall not occur *ex parte*.

The Committee shall determine whether the Member’s misconduct or alleged misconduct would reasonably be expected to create a bias on the part of the Member so as to warrant recusal.

The Committee shall make a recommendation to the Member as to whether the Member may participate in a disciplinary matter with or without disclosure, or whether the matter is such that recusal is required on all or only as to certain disciplinary matters.

If the Committee determines that a Member should be recused from participating in some but not all discipline matters pursuant to these policies, the Member shall not engage in any of the activities set forth in subparts (a) through (d) in Policy 1 with regard to those discipline matters. The Committee shall also determine whether, and to what extent, the Member may participate in the activities set forth in subpart (e) in Policy 1.

A copy of the recommendation of the Committee shall be provided to the Disciplinary Clerk and the Office of Bar Counsel, and the Member shall follow such recommendation. Ⓢ

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(Left to right) Pete Gullett, Jane Long, Del O'Roark, Bob Breetz

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Human Trafficking: A Primer for Kentucky Lawyers

By Gretchen M. Hunt

Consider the following scenario: a client comes to you for a consultation about her work situation. She is hesitant and timid and the neighbor who has accompanied her does most of the talking. The client explains that she is working for a couple that she met in her home country, the Philippines. They promised her good work and pay as a domestic in their home in the United States and she signed a contract for work. When she arrived in the U.S., however, everything was different. She was working almost a hundred hours a week and wasn't being paid what she was promised. When she complained, they threatened to send her back home. She paid a recruiter in the Philippines to find her an employer, and still owes this debt, so going home is not an option. The couple berates her, does not allow her a day off, and monitors her phone calls. The one place she is allowed to go, church, is where she met a friend. When he began calling her, the couple blocked his number. She feels afraid, hopeless and depressed. When the woman asked her employers for a raise, they tried to force her on a plane back home, pulling her by her hair and shoving her into their car on the way to the airport.¹

Is this slavery? How do our laws define this crime and what can you, as her lawyer, do about it?

Modern Day Slavery

Human trafficking has captured the attention of international and national advocates, yet only recently has it been a topic of concern for Kentucky. At its core, human trafficking refers to the exploitation of an individual for labor or commercial sex, through the use of force, fraud or coercion. Lawyers are



Corbis

most likely to encounter victims either as criminal defendants charged with prostitution or document fraud, as minors, or as victims of other crimes, including domestic violence or rape. Imprisoned in massage parlors, factories, agricultural work, domestic servitude and servile marriages, victims may be held captive through threats, confiscation of their documents and even forced drug addiction. Victims may be men, women, or children, foreign born or United States citizens. Their traffickers may be members of organized crime, small business owners, or private citizens who lack a criminal history.² Signs of trafficking may include being monitored and accompanied, having limited freedom of movement, physical abuse, health problems, fear of speaking to outsiders, and lack of possession of identity documents. Victims may initially deny being trafficked, due to having been coached by the traffickers or out of fear that reporting to the authorities will result in retribution by the traffickers. This article lays out some of the basic

concepts of the law and offers considerations for practice for those who may encounter victims in the future.

Prevalence of Human Trafficking in Kentucky

An accurate number of trafficking victims in the United States does not exist, although the U.S. government estimates that between 14,000 and 17,000 men, women, and children are trafficked into the United States. Precise numbers are often elusive since victims often do not self-identify and agencies do not always accurately identify cases.³ At the same time, the severity and destructive nature of the crime cannot be adequately measured by numbers. Trafficking victims suffer repeated violations over weeks, months, and even years. Cases require complex and long investigation and prosecution, involving multiple agencies and are challenging due to the multiple needs and severe trauma of the victims. While the federal government has prosecuted primarily sex trafficking, many advocates suggest that labor trafficking, and not sex trafficking, comprises the bulk of the cases.⁴

A 2007 Kentucky study by the University of Kentucky showed 69 cases across the state, including sex trafficking and various types of forced labor in agriculture, domestic servitude, and other sectors.⁵ Catholic Charities of Louisville, awarded one of five federal grants to increase outreach to victims of trafficking, has documented 17 cases in Kentucky between June 2008 and January 2009.

Federal Law on Human Trafficking

Since the abolition of slavery in the United States, our laws have criminalized the treatment of human beings as property. The thirteenth amendment proved inadequate for addressing all

types of slavery, so Congress passed statutes on involuntary servitude.⁶ These statutes were interpreted in ways that did not address more subtle forms of psychological coercion. The Victims of Trafficking and Violence Protection Act of 2000 (“TVPA”) was passed to include an expanded definition of the control that traffickers use to ensnare and imprison their victims.⁷ More recently, Congress passed The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) to expand protections for, among others, U.S. citizen victims of trafficking, domestic workers and immigrant children.⁸

Trafficking is defined as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age”; or “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁹ Coercion is further defined as:

- (a) threats of serious harm to or physical restraint against any person;
- (b) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- (c) the abuse or threatened abuse of the legal process.¹⁰

Examples of coercion may include taking documents, threatening deportation, holding up a photo of a loved one as an implicit threat of harm to that individual, and holding a lock of the victim’s hair to exploit a religious superstition. Violations are punished with up to 20 years or a fine with an enhancement of a life sentence if the victim is killed, kidnapped, sexually assaulted or attempted to be killed during the trafficking.¹¹ If the victim is under 14 years old in the commission of sex trafficking, or force, fraud or coercion is used, the sentence can be up to life.¹² If the victim is between 14-18 years of age, the sentence can be up to 40 years.¹³ It is an additional offense if documents are

seized to force others to work.¹⁴ Federal law allows asset forfeiture in trafficking, mandates restitution to victims, and creates a civil cause of action for trafficking victims.¹⁵

Human Trafficking vs. Human Smuggling

It is important to distinguish the crime of trafficking from the crime of smuggling, though the terms are often used interchangeably in the media and even by law enforcement. To add to the confusion, many traffickers have been charged with smuggling, in part because it may be a more straightforward violation to prove. Human smuggling refers to the crime of violating the integrity of our nation’s borders.¹⁶ In smuggling, the individual pays a fee, willingly, and is transported illegally across the border. At the end of the transaction, the individual

Since the abolition of slavery in the United States, our laws have criminalized the treatment of human beings as property.

is free to go. Many immigrants do report threats, violence, and rape by smugglers, but these crimes are also separate from the crime of trafficking. In human trafficking, the individual has often not consented to the situation in which they find themselves. Their journey may have begun with being smuggled across a border, but does not end when they enter the United States. Rather than being free to go, they are held captive and forced to work or provide services to the trafficker. Unlike smuggling, trafficking does not require that the individual cross a border, or even that movement take place. For victims, the difference between trafficking and smuggling is more than just legal semantics. There are no “victims” of smuggling, while the crime of human trafficking always involves a victim, and as such, allows the individual to access key protections, including the right to be free from detention, whereas those who violate the smuggling statute can be prosecuted and removed from the United States.

Investigation and Prosecution

Federal agencies have primary responsibility for investigating and prosecuting trafficking violations. For cases that involve non-citizens, Immigration and Customs Enforcement is the primary agency, whereas cases that involve domestic victims fall under the purview of the Federal Bureau of Investigations. Department of Labor and other agencies may also be actively involved in investigations. Offices of the U.S. Attorney have jurisdiction to prosecute trafficking crimes, even when state lines are not crossed. In practice, however, most cases involve a combination of efforts of many federal, state, and local agencies. Since 2000, only a small number of convictions have been secured on trafficking charges nationwide. Kentucky has yet to see a federal prosecution under the trafficking statutes. Federal agencies may lack the resources and - in some instances - the will to bring trafficking charges. Lawyers should be prepared to advocate for their clients who wish for a criminal investigation of the trafficking to occur.

Kentucky Legislation to Combat Human Trafficking

To increase the chance of finding victims and bringing prosecutions, advocates pushed for state legislation on trafficking. As of the date of this article, thirty-nine states had passed laws to criminalize human trafficking in some form. Kentucky passed its state legislation to combat human trafficking in 2007. “Human trafficking” is defined as “criminal activity whereby one (1) or more persons are subjected to engaging in:

- (a) forced labor or services; or
- (b) commercial sexual activity through the use of force, fraud or coercion, except that if the trafficked person is under the age of eighteen (18), the commercial sexual activity need not involve force, fraud or coercion.”¹⁷

A person is guilty of the crime of “human trafficking” when he “intentionally subjects one (1) or more individuals to human trafficking.”¹⁸ The second crime, “promotion of human trafficking” captures one who:

- (a) intentionally benefits or receives

anything of value from knowing participation in human trafficking; or (b) recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person, knowing that the person will be subject to human trafficking.¹⁹

Human trafficking is a Class C felony, unless there is serious physical injury to the victim, in which case it is a Class B felony.²⁰ If the victim is under 18, the penalty will be one level higher.²¹ Promotion of human trafficking is a Class D felony, unless the victim is under 18, in which it is charged as a Class C felony.²²

Trafficking has also been incorporated into the following aspects of the Kentucky criminal code:

- The crime of engaging in organized crime, in which five (5) or more individuals collaborating to promote or engage in human trafficking or promoting human trafficking on an ongoing basis.²³
- Human trafficking involving commercial sexual activity with a minor has been added to the violent offender statute.²⁴
- The definition of “criminal offense against a victim who is a minor” for purposes of sex offender registration now includes human trafficking involving commercial sexual activity.²⁵
- Civil actions for redress of childhood sexual assault include the offense of human trafficking where the offense involves commercial sexual activity.²⁶
- Closed circuit or recorded testimony may be utilized in the prosecution of cases involving human trafficking, promoting human trafficking or promoting prostitution.²⁷
- The crime of unlawful use of electronic means to induce a minor to engage in sexual or other prohibited activities includes trafficking involving commercial sexual activity.²⁸
- Unlawful transaction with a minor in the first degree includes human trafficking cases except those involving commercial sexual activity.²⁹

- The presumption of minority includes the offenses of human trafficking and promoting prostitution where the offense involves commercial sexual activity and permits the defendant in these cases where the victim is a minor to prove in exculpation that he in good faith reasonably believed that the person involved was not a minor.³⁰
- The requirements for conditional discharge for certain felonies include the offense of human trafficking involving commercial sexual activity.³¹
- Persons convicted of human trafficking when the offense involves commercial sexual activity and those convicted of promoting prostitution are prohibited from probation or conditional discharge.³²

Victims of trafficking under Kentucky law have the right “not to be held in a detention center, jail or other secure facility pending trial for an offense arising from the human trafficking situation.”³³ The only exceptions are “where the incarceration is found to be the least restrictive alternative to securing the appearance of that person before the court or the release of the person under any other reasonable condition would be a clear threat to public safety.”³⁴ Communications between a victim and her “trafficking victim counselor,” are also privileged.³⁵ A trafficking victim counselor is defined by statute as an individual who has undergone training in human trafficking and works for an agency serving victims of trafficking.³⁶

State Prosecutions Lacking

State prosecutions remain nearly as elusive as federal prosecutions. States with prosecutions, some resulting in convictions, include Texas, California, Kansas, Iowa, New York, and Georgia. In Kentucky, the statute has been tested only once since its enactment, in a Fayette county prosecution in the fall of 2007. In that case, two women had been enticed to travel from their home in another state to work in Lexington.³⁷ When they arrived in Lexington, they were forced to strip and hand over their money. The alleged trafficker held them captive in a hotel room and was threat-

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ening to make them engage in prostitution. The two women escaped with the help of police. A grand jury indicted the suspect on human trafficking charges, but the case was eventually dismissed when one victim recanted and the other was not able to be located.

Rights of Trafficking Victims

Victims of trafficking are accorded certain rights under federal law to enable law enforcement to treat them as victim-witnesses rather than as criminals. If the trafficker has always threatened that the police will arrest the victim (for prostitution, false documents, etc.) rather than the trafficker, victims will be extremely hesitant to cooperate with law enforcement. Language barriers, fear of retribution, fear of deportation, and experience with corrupt police all weigh heavily against victims being willing to cooperate. Trying to discern whether trafficking has taken place may take multiple interviews over weeks or even months, and during that time, victims need assurances that they will not be criminalized or deported.

Language access and working with interpreters

One of the most important rights to safeguard for victims of trafficking is the right to services in their own language. Prosecutions and effective representation are impossible without competent interpretation. Foreign born trafficking victims have often been told by the traffickers that no one will understand them, and unfortunately this is often the case when victims seek help from health care, law enforcement and social services. Traffickers also try to sabotage attempts to communicate with victims by posing as interpreters, when in fact they are changing or intimidating the victim's own voice.

Not only is good interpretation essential for outreach, investigation and prosecution, it is often legally mandated. Agencies that receive federal funding are required to provide "meaningful access" to individual with limited English proficiency.³⁸ This means that courts, police, prosecutors' offices, domestic violence and rape crisis programs, hospitals and state protective services must have a plan

in place to provide free interpretation and equal access to those individuals. Services may not be delayed or lesser in kind. Children and other family members are not to be used as interpreters. Kentucky law also provides that interpreters must be provided in all civil and criminal proceedings.³⁹ Perhaps most important to attorneys is the ethical duty to communicate effectively with clients, which can be compromised without the use of a skilled interpreter.⁴⁰ Using an interpreter and ensuring that all documents signed by the trafficking victim helps build trust, particularly with those clients whose victimization involved being tricked into trafficking through a bogus employment contract.

Immigration Protections for Victims of Trafficking

To help law enforcement and provide safety to victims, there are certain immigration protections.⁴¹ Continued presence, T visas and U visas are vital to ensure that non-citizen victims are able to remain in the United States after coming forward to report the crime.⁴²

Continued Presence

Continued presence is an immigration remedy sought by federal agents on behalf of a victim of trafficking whose presence is necessary for a possible investigation or prosecution.⁴³ With continued presence comes a defense from being deported and temporary work authorization. This is a benefit that may be sought more quickly than a T visa, although it is temporary (up to one year) and does not lead to more permanent status. Only federal agencies, and not attorneys, can request this benefit. Under the most recent federal anti-trafficking legislation, federal agents are instructed to assist local law enforcement in requests for continued presence if the investigation has begun on a local level.⁴⁴

T Visa

Attorneys representing victims of trafficking should, after seeking continued presence, evaluate the client's eligibility for a T visa and begin preparing the application. This will secure the client's immigration status and facilitate

her access to key federal public benefits. Processing times for the visa may be up to one year. To obtain a T visa, the applicant must meet the following criteria:

- The person must be the victim of "severe trafficking" in persons;
- The person must be physically present in the United States;
- Unless the person is less than 18 years old, the Attorney General and the Secretary of State must agree the person complied with a reasonable request by law enforcement authorities to assist in the investigation or prosecution of such trafficking or in the investigation of crimes where acts of trafficking are at least one central reason for the crime; *and*
- The person would "suffer extreme hardship involving unusual and severe harm" if the person was sent back home.⁴⁵

A critical part of the T visa application is a certification by law enforcement (federal, state or local) that the person is a victim of trafficking and has assisted in the investigation of the trafficking. Family members may be included in the visa application. If the applicant is over 21 years of age, she may apply for her spouse and child. If she is under 21, she may apply for her spouse, child and parent. The visa is limited to three years, unless law enforcement seeks an extension.⁴⁶ Applicants may seek lawful permanent residence after three years of being in T visa status.⁴⁷

U Visa

In addition to the option of a T visa, attorneys should consider the U visa for victims of serious crimes. To obtain a U visa, the applicant must show:

- that she is the victim (or in the case of a child, the parent or next friend) of the crime;
- that the crime is one listed in the statute;
- that the crime occurred in the United States or violated U.S. law;
- that the individual (or in the case of a minor, the parent or next friend) possesses information about the qualifying crime or

criminal activity;

- that the individual has been helpful, is being helpful or is likely to be helpful in the investigation or prosecution of the crime;
- and that the crime resulted in substantial physical or emotional harm to the individual.⁴⁸

Crimes listed in the statute include domestic violence, sexual assault and human trafficking. The visa is valid for up to four years and family members may be included. Applicants may seek lawful permanent residence after three years of being in status if it is justified on humanitarian grounds, to ensure family unity or is in the public interest.⁴⁹ In order to receive permanent residency, victims must prove that they have not unreasonably refused to provide assistance to law enforcement in connection with the qualifying criminal activity.⁵⁰ Unlike T visa applicants, U visa applicants are not eligible for public benefits such as housing assistance, temporary assistance to needy families, Medicaid, food stamps, etc.

Pre-Certification and Certification

Victims also need basic services in order to become stable, avoid being re-trafficked and present as strong witnesses for the prosecution. A victim of trafficking may seek certification from the Office of Refugee Resettlement if she or he is willing to assist with the investigation and prosecution of a trafficking case and has continued presence or a bona fide T visa application. A certification letter entitles the individual to all services that are available to refugees, including case management (up to four months), ESL, job training and placement, and other public benefits (food stamps, housing assistance, Medicaid, temporary assistance for needy families, etc). Family members may be eligible for benefits if they have a derivative T visa. Children (under 18 years of age) who are victims of trafficking do not need to be certified to receive these benefits; a letter from the Office of Refugee Resettlement stating that the child is a victim of severe form of trafficking

will suffice as proof of their eligibility for benefits. Child victims may also be able to be enrolled in the Unaccompanied Minor Program, which provides linguistically and culturally appropriate foster care and resettlement services.

Prior to certification, victims may seek services and benefits such as housing assistance, counseling, and cash assistance from agencies that have contracts with the U.S. Council of Catholic Bishops.⁵¹

Services for Victims who Decline Prosecution

The downside to the benefits listed above is that victims must be willing and able to cooperate with law enforcement in order to receive them. Not all victims will face the risks that come with investigating and prosecuting the traffickers. Threats to family members in the home country are very real, and deter many from reporting to law enforcement. Shame and traumatic bonding with the traffickers or the chil-



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dren of the trafficker may also be barriers to reporting. On the other hand, victims may report only to find that law enforcement declines to investigate or prosecute. In these instances, it is important for attorneys to be familiar with the services that are available to all individuals, regardless of immigration status.

All individuals present in the United States, including undocumented immigrants, are guaranteed access to services "necessary to life and safety."⁵² Among those services are access to EMS, police, fire, child and adult protective services, domestic violence and rape crisis programs, short term emergency housing, emergency medical care and vaccinations and treatment for communicable diseases. Victims of trafficking who decline to participate in a prosecution and are not eligible for immigration benefits may find that these resources help them achieve some level of safety and security.

Conclusion: Considerations for Practice

Kentucky lawyers should prepare themselves for the possibility that they may encounter trafficking in their legal practice. Firms may consider devoting their *pro bono* hours to assisting a victim in a civil lawsuit.⁵³ Defense attorneys, not always in the position of adopting a "victim's rights" perspective should become familiar with such pro-

tections in order to free victims of trafficking from jail and immigration detention. Even those attorneys who do not represent victims of trafficking have a part to play by advising clients (e.g. factory owners, horse farm owners) on human trafficking laws in order to avoid exploitation of their workers.

Consider the following tips for cases of suspected human trafficking:

- **Look beneath the surface.**⁵⁴ Be aware of who your neighbors are. Ask questions if there is a child who does not attend school. Talk to the person who cleans your hotel room, mows your grass, or replaces the roof on your house.
- **Screen all clients for potential trafficking.** Include a simple question on your intake such as "are you free to leave your work?" and have a more detailed questionnaire ready in the case of a response that indicates possible trafficking. Ask the questions several times, since the client may not feel safe to disclose initially.
- **Use a competent interpreter and make sure that others do so as well.** Make sure that you are able to communicate effectively with your client.
- **Find support.** No one can handle a trafficking case independently. Partner with one of the five human trafficking task forces that exist in the state.⁵⁵ Task forces usually have strong contacts with federal law enforcement, local law enforcement, immigration attorneys and non-governmental agencies that serve victims of trafficking.
- **Ensure that your client's needs are met.** Lawyers are not always in the business of finding clients housing, counseling, job training, English as a second language, and other life skills. Connect with Catholic Charities of Louisville, which administers Kentucky's Rescue and Restore Grant and can provide comprehensive case management to trafficking victims.
- **Do no harm to your client's immigration case.** Immigration law is complex and ever-changing. Consult with an experienced

immigration practitioner if you are advocating on behalf of your client with Immigration and Customs Enforcement or considering filing a U or T visa application.

- **Consider further training.** Human trafficking training is often offered statewide at no or low cost, including for CLE credit.
- **Take care of yourself.** The trauma suffered by trafficking victims is severe, and secondary trauma (e.g. headaches, anxiety, nightmares) among those who assist is real. Lawyers are healers, and we deserve support from the stress of such cases.

Trafficking is a devastating violation of human rights and an exploitation of the very dream that our country represents. Being a part of helping to heal a victim or hold a trafficker accountable may be extremely challenging, but may well be one of the most rewarding experiences of your legal career. ☺

ENDNOTES

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6. 18 U.S.C. § 1581, 18 U.S.C. § 1584 (2000).
7. Trafficking Victims Protection Act of 2000, 18 U.S.C. §§ 1589-1594,



Gretchen Hunt is the staff attorney for the Division of Violence and Prevention Resources in the Kentucky Cabinet for Health and Family Services. She works under a Violence Against Women Act

Grant to provide training and technical assistance on issues of domestic violence, sexual assault, stalking and human trafficking. Prior to her work with state government, Ms. Hunt practiced immigration law on behalf of victims of domestic violence, rape and human trafficking. She has also served as an adjunct lecturer at the University of Louisville in the Gender and Women's Studies Department and the Louis D. Brandeis School of Law.

- 22 U.S.C. §§ 7101-7110 (2000).
8. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 106-386 (2008).
 9. 18 U.S.C. § 1589 - § 1591 (2000).
 10. *Id.*
 11. 18 U.S.C. § 1589 (2000).
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 13. *Id.*
 14. 8 U.S.C. § 1592 (2000).
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 17. KRS 529.010 (5)(a) & (b).
 18. KRS 529.100.
 19. KRS 529.110.
 20. KRS 529.100.
 21. *Id.*
 22. KRS 529.110.
 23. KRS 506.120.
 24. KRS 439.3401 (1)(h).
 25. KRS 17.500 to 17.580.
 26. KRS 413.249.
 27. KRS 421.350.
 28. KRS 510.155.
 29. KRS 530.064.
 30. KRS 531.330.
 31. KRS 532.043.
 32. KRS 532.045.
 33. KRS 431.063.
 34. *Id.*
 35. KRS 422.295.
 36. *Id.*
 37. *Grand Jury Indicts Human Trafficking Suspect*, wkyc.com (May 15, 2008)(<http://www.wkyc.com/news/headlines/18968409.html>).
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 39. KRS 30A.410.
 40. Kentucky Supreme Court Rule 3.130; Kentucky Rule of Professional Conduct 1.4, Communication.
 41. Trafficking Victims Protection Act of 2000, 18 U.S.C. §§ 1589-1594, 22 U.S.C. §§ 7101-7110 (2000), as amended by Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003), Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006), and William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 106-386 (2008).
 42. Although one might believe that the “T visa” is an abbreviation for “trafficking,” it is mere coincidence. Immigrant visas, like hurricanes, simply follow in alphabetical order.
 43. 28 C.F.R. § 1100.35 (2008).
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 45. INA §101(a)(15)(T)(i)(III)(bb); 8 CFR 103, 212, 214, 274a & 299.
 46. 8 CFR 214.11(p)(1).
 47. 8 CFR 245.23.
 48. 8 CFR 103, 212, 214, 274a & 299.
 49. 8 CFR 245.24(b).
 50. *Id.*
 51. Through a contract with the Office of Refugee Resettlement of the U.S. Department of Health and Human Services, the United States Council of Catholic Bishops (USCCB) provides services to foreign national survivors of trafficking in the U.S. and its territories. USCCB/MRS administers the program through partnerships with local social service organizations across the country by subcontracting with them to provide comprehensive case management services to survivors. USCCB/MRS provides coordination, training, per-capita funding, and monitoring to subcontractors, and partners with experts in the field to provide specialized assistance. For more information, see <http://www.usccb.org/mrs/trafficking/services.shtml>.
 52. See A.G. Order No. 2353-2001, Jan. 5, 2001 (published in the Federal Register on January 16 as “Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation”, 66 Fed. Reg. 3, 613-16 (Jan. 16, 2001)).
 53. For sample pleadings and technical assistance on civil lawsuits on behalf of trafficking victims, visit the Anti-trafficking Litigation Assistance Support Team at Loyola Law School website at <http://library.lls.edu/atlast/index.html>.
 54. For free outreach materials, posters, screening tools and fact sheets, visit the federal government’s Campaign to Rescue and Restore Victims of Trafficking website at <http://www.acf.hhs.gov/trafficking/>.
 55. For information about the human trafficking task force nearest you, contact Marissa Castellanos, Human Trafficking Project Manager, Catholic Charities of Louisville at (502) 636-9263.

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KRS 26A.140,

Its Plain Meaning, Current and Potential Application to Assist Children in Court Proceedings

By Rebecca Ballard DiLoreto

Our legal system provides attorneys for everyone involved in a criminal case, except the victim. If a defendant is unable to afford counsel, the state provides a public advocate to ensure that individual rights are protected. The state's interests are protected by the county attorney and/or commonwealth's attorney. Unfortunately, the state does not always provide representation for the most vulnerable person involved - the victim.¹

On July 14, 1992, the Kentucky Legislature promulgated KRS 26A.140, entitled *Accommodation of special needs of children*.² This article will address sections (1) (a)-(c) of the statute, including the plain language of the statute, its application, and what challenges exist with respect to its implementation.

A Basic Plain Language Review

The statute is contained in Chapter 26A, laws relating to the Court of Justice, with a number of other provisions grouped under the heading "Facilities and Services."³ It is the only provision in this section that addresses courtroom procedures. The statute contains mandatory language with respect to the first section of KRS 26A.140.

(1) Courts **shall** implement measures to accommodate the special needs of children which are not unduly burdensome to the rights of the defendant, including, but not limited to:

(a) Trained guardians *ad litem* or special advocates, if available, **shall** be appointed for all child victims and **shall** serve in Circuit and District Courts to offer consistency and support to the child and to represent the child's interests where needed.

(b) During trials involving child victims or child witnesses, the environment of the courtroom **shall** be modified to accommodate children through the use of small chairs, frequent breaks, and the use of age

appropriate language.

(c) Children expected to testify **shall** be prepared for the courtroom experience by the Commonwealth's or county attorney handling the case with the assistance of the guardian *ad litem* or special advocate.[emphasis added]⁴

The statute does not expressly limit appointment to criminal cases, though its reference to the rights of the "defendant" seems to contemplate that the statute is intended only to be used in the context of criminal trials. Originally, the bill at passage, House Bill 881, was entitled, "an act related to child sex abuse." The bill also amended KRS 431, Chapter 15,

Chapter 194, Chapter 314 and Chapter 21A.⁵ Each of these amendments provided more resources or protections to children who were victims of physical or sexual abuse. KRS 26A.140, itself, does not refer to any other provisions that may assist the court in implementing or interpreting the statute. By its terms, the mechanism for appointment can be used by any district or circuit court (family, civil or criminal dockets). And the court is only obligated to make the appointment if such guardians *ad litem* or special advocates are available. No further definition is given to "guardian *ad litem*" or "special advocate."

KRS 26A.140 may be used in conjunction with KRS 421.350. The latter statute provides for protective measures when a child age 12 or younger testifies in a prosecution or dependency action where the child was a victim or is a material witness.⁶ In contrast, the protections of KRS 26A.140 are available to all children, presumably under the age of 18. The other amendments contained in House Bill 881 were likewise applicable to all children.

Guardians *ad litem* are required to be attorneys in Kentucky. As counsel they can address any legal issues on behalf of the child arising from the litigation. Kentucky case law, dating back to 1953,



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indicates that at common law the guardian *ad litem* is to “stand in the infant's place and determine what his rights are and what his interests and defense demand. Although not having the powers of a regular guardian, he fully represents the infant and is endowed with similar powers for purposes of the litigation in hand. 43 C.J.S., Infants, § 111. He is, therefore, both a fiduciary and lawyer of the infant, and in a special sense the representative of the court to protect the minor.”⁷

Assuming that the legislature purposefully gave the court the alternative of appointing a “special advocate,” the individual serving that role must differ in some respect from a guardian *ad litem*. Some have surmised that the legislature intended for this person to be a Court Appointed Special Advocate (CASA), a specially trained lay person appointed by the court.⁸ However, the statutes defining CASA workers are contained within the dependency, neglect and abuse provisions of the Kentucky Juvenile Code, KRS Chapter 600, et. seq., more specifically KRS 620.500 – 620.990.⁹ No mention is made in those provisions to KRS 26A.140. Whoever is chosen by the court, must be *trained* prior to their appointment.

The Practical Application of the Statute

As previously indicated, the statute was passed in 1992. In 1997, the Northern Kentucky Advisory Committee for Child Witnesses, funded in part by a grant from the Kentucky Bar Foundation, prepared and published a manual to guide attorneys and judges in the implementation of KRS 26A.140, entitled, *Accommodating the Special Needs of Children in the Courtroom: A Guide for Attorneys and Judges on Implementation of KRS 26A.140*.¹⁰ The committee was comprised of professionals from all sides of the courtroom, mental health specialists, child development experts and representatives of law enforcement. Judge Douglas M. Stephens, chair of the committee, wrote the foreword to the manual and noted therein:

“It is equally important to note that this protocol is not meant to turn judges into advocates for

child witnesses or to align judges with a special interest group. This document is intended to provide recommendations to help create an environment that affords child witnesses the opportunity to provide credible evidence. While not all questions are answered, it is hoped that the protocol can act as a guide and raise awareness in working with child witnesses.”¹¹

KRS 26A.140 is used only sparsely across the Commonwealth as a whole. Advocates for domestic abuse victims have occasionally beseeched the court to make such appointments.

Probably as a direct result of the committee and the leadership of its members, judges routinely appoint counsel to represent children in criminal cases in Northern Kentucky. Likewise, counsel are appointed as GALs in custody cases in several counties in Northern Kentucky even where the Department of Community Based Services is not involved in the family’s case. Attorneys from the Children’s Law Center routinely serve to represent children in these circumstances. Other private attorneys are also willing to assist. The Kentucky Supreme Court recognized the 26A.140 manual as an authoritative source regarding the statute in *Jarvis v. Commonwealth*, 90 S.W. 2d 466, 468 (Ky. 1998).¹²

KRS 26A.140 is used only sparsely

across the Commonwealth as a whole. Advocates for domestic abuse victims have occasionally beseeched the court to make such appointments. MaryLee Underwood, staff attorney in Frankfort for the Kentucky Association of Sexual Assault Programs (KASAP), has often requested the court to rely upon the statute when a child is involved in a case as a necessary witness. She shared her experiences for this article:

“I have been involved in numerous actions to protect victims’ rights. In many cases, victims records are subpoenaed from a wide a variety of sources, regardless of whether they are relevant to the case at bar. As Staff Attorney for the Kentucky Association of Sexual Assault Programs, I work to quash subpoenas of rape crisis center records. However, other businesses do not routinely retain counsel to serve this role and often release subpoenaed records as a matter of course. While release of records may seem minimal to some, this is an invasion of privacy that can devastate a minor victim. Regardless of whether anything sensitive is included, the child often feels intimidated or further violated when s/he finds out that the defendant now has access to even more details about her/his life. In cases where I have successfully petitioned the court to appoint a GAL to represent the child’s interests related to other records, children and their non-offending parents

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have expressed extreme gratitude. Once an attorney has been appointed to represent the child's interests, the child and the family can worry less about where the next attack is coming from and begin to focus on healing.

Fortunately, we generally understand that children have very real interests at stake whenever they go to court. That is why GALs are appointed in child protection cases and in custody actions. As demonstrated by the enactment of KRS 26A.140, the General Assembly also recognizes that children have very important interests at stake when they have been victimized and serve as witnesses in criminal courts. Unfortunately, no specific funding stream was established to ensure that attorneys are paid to serve as GALs in these cases."¹³

MaryLee Underwood has argued that the legislature should establish a clear funding stream to pay GALs for their representation. She opines that "until such time as a dedicated funding stream can be enacted, expenses related to appointment of GALs in criminal cases may qualify as necessary governmental expenses. Since KRS 26A.140 states that trained guardians *ad litem shall* be appointed for all child victims (empha-

sis added), payment may be made by the Finance and Administrative Cabinet pursuant to the General Fund Surplus Expenditure Plan."¹⁴

Challenges to the Use of KRS 26A.140

Clearly then, one of the first challenges to full implementation of KRS 26A.140 is the lack of an expressly identified funding stream and determined rates to pay attorneys appointed by the court to represent these young people. In the meantime, there are counsel willing to volunteer their time in such cases. However, a second problem related to the funding issue is the requirement for these attorneys or special advocates to receive proper training before appointment. The specific training required is not identified by the statute. Nor is any funding for this training identified. The Children's Law Center, Inc. has made an effort to fill the void with some trainings that encompass both the role of the GAL in custody proceedings and her/his role when appointed explicitly under KRS 26A.140.

A third challenge to full implementation of the statute, which could be rectified in part by standardized training and definition of roles, rests with the attitudes of the parties to the litigation. If the case is a criminal matter, the prosecution and defense understand their roles, the constitutional rights of the defendant, the burden of proof carried, for the most part, by the prosecution. Each side has a measure of control over her/his witnesses. The intervention of a GAL whose only objective is to represent the interests of the child and offer consistency and support to the child throws an additional measure of uncertainty into the proceedings for either side. The judge must be careful to balance the statutory duty to accommodate the special needs of the child while preserving the defendant's constitutional right to present a defense and fully cross-examine any witnesses.

Counsel for the child in such circumstances has her/his own set of concerns. To what extent should counsel raise legal claims on behalf of the child rather than simply ensure the proceedings accommo-

date the child's timidity or difficulty in understanding the proceedings? What does the court expect of the appointed GAL? Are they to interview the child and his/her guardians prior to the hearing? Should they be present at all hearings regardless of whether or not the child will testify or be required to appear so that the GAL can assert the child's interests should an issue related to that child arise? If matters are being litigated impacting the child's guardian or the child's privacy rights, does the GAL have a right to intervene? Once appointed by the court, is the GAL entitled to notice by counsel for both sides of all pleadings, even those filed *ex parte*? To what degree should the GAL explain the proceedings and the evidence to a young child? Is the GAL entitled to secure funds for an expert to raise issues of concern only to the special accommodation needs of the child? Where a child objects to the direction of the prosecution, is the GAL obligated to ensure that the child's position is raised with the court and the parties to the litigation? Is the GAL under a duty of confidentiality regarding any information provided by one side of the litigation *vis a vis* the opposing counsel? Standards, training and a model for implementation of the statute would go a long way toward resolving many of these ambiguities. The manual prepared by the Northern Kentucky Advisory Committee for Child Witnesses is an excellent beginning. However, it was published in 1997 and the funds have not been present to update and re-publish. Two articles in the *Bench & Bar*, one published in 1996 and the second in 2003, also discussed how KRS 26A.140 can be useful to the trial court in providing protections to child witnesses.¹⁵

In the meantime, attorneys would do well to consider assisting the courts and children in need by volunteering *pro bono* services in such cases. Case law would indicate that a GAL is protected from legal liability for doing her/his best to represent the child in such circumstances. In *Briscoe v. LaHue*, the United States Supreme Court held that witnesses and other persons who are integral parts of the judicial process are entitled to absolute immunity.¹⁶ In 1984, the Sixth Circuit held that GALs were



Rebecca Ballard DiLoreto has been chair of the KBA Child Protection and Domestic Violence Committee since 2003. She is past president of the Kentucky Association of Criminal Defense Lawyers.

Ms. DiLoreto currently serves as Litigation Director for the Children's Law Center, Inc., a non-profit law firm dedicated to direct representation and policy work on behalf of children in the areas of child protection, education, and juvenile justice in Kentucky and Ohio. She graduated from the University of Kentucky College of Law in 1985 and from Amherst College, Amherst, Massachusetts in 1981, *magna cum laude*, majoring in American Studies. Ms. DiLoreto has educated nationally and across the Commonwealth on issues pertaining to juvenile justice and ethics.

entitled to absolute immunity because that position makes the GAL an integral part of the judicial process.¹⁷ The failure to grant immunity would unduly hamper the guardian *ad litem* in the full exercise of his/her duties.

Though the Kentucky Supreme Court has not expressly addressed the question of liability with reference to KRS 26A.140, some guidance can be found from our northern sisters in the law. The Connecticut Supreme Court has spoken to the related issue of GALs appointed in custody cases as recently as 2005. In *Carubba v. Moskowitz*, the Connecticut Supreme Court held that an attorney appointed by the court to represent the child in a divorce action is entitled to full quasi-judicial immunity.¹⁸ The court applied the three prong test developed by the United States Supreme Court in *Butz v. Economou*: 1) does the official perform duties comparable to other officials who have been granted absolute immunity; 2) is there is a likelihood of harassment or intimidation through personal liability that would interfere with the person performing his duties; and 3) are there procedural safeguards in the system that would protect against improper conduct by the official.¹⁹ The court noted that the role of a court-appointed attorney for the child varies substantially from that of a privately retained attorney or public defender because the functions they perform are integral to the judicial process by assisting the court in its obligation to determine and serve the best interests of the child.

Perhaps, in a few years, we will see both an increase in the appointment of GALs in such matters in controversy in Kentucky and an opportunity for the great legal minds of this Commonwealth to carefully parse out, both at trial and on appeal, the implications of full implementation of this relatively unused statutory aid to our courts and child victims. ☺

ENDNOTES

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12. *Jarvis v. Commonwealth*, 90 S.W.2d 466, 468 (1998) (the Court noted that questions the prosecutor asked a child witness to determine competency were similar to those listed in the manual.)
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16. *Briscoe v. LaHue*, 460 U.S. 325 (1983).
17. *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984).
18. *Carrubba v. Moskowitz*, 877 A.2d 773 (Conn. 2005).
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UNHEARD VOICES: ADDRESSING THE UNMET LEGAL NEEDS OF IMMIGRANT CHILDREN IN KENTUCKY AND BEYOND

By Cori Hash

When twelve year-old Juan sat across my desk asking for legal help, I struggled to understand how this small child had made it to my office. Juan had left his native Guatemala and traveled thousands of miles alone to Kentucky in search of a safer, more secure life. Juan was not the youngest of my clients, nor was his journey the longest. Juan was, however, the latest in a growing list of immigrant children in Kentucky in dire need of legal representation.

Many children arrive in the United States unaccompanied by parents every year. More are separated from their parents after arrival as a result of abuse, exploitation or abandonment. Regardless of how they got here, these children have one thing in common – they're alone. Without a parent to guide them, they must struggle through the maze of immigration law without any adult assistance. This article identifies specific gaps in our current system of assuring legal representation for immigrant children and looks at ways to address those deficiencies.

UNACCOMPANIED IMMIGRANT CHILDREN

An 18-month-old baby was found abandoned in the Miami airport. Believed to have been left there by a smuggling ring, Baby Jane Doe was placed in a youth detention center operated by the federal government. She became the subject of immigration court proceedings and appeared without representation at her initial hearing before an immigration judge. Unable to

appoint a lawyer or a guardian ad litem to represent her, the immigration judge was not sure how to proceed. The judge asked the attorney representing the government (whose job it is to argue for the child's deportation) to represent the child, an obvious conflict of interest.¹

In 2006, nearly 102,000 juveniles were discovered entering or attempting to enter the United States.² Approximately twenty percent (20%) of these children were under fifteen years of age;³ many were traveling without a parent or legal guardian. It is estimated that thousands of such children enter the United States alone.⁴

Most unaccompanied children must tackle this system alone, for it is impossible for them to gain access to legal representation; almost ninety percent (90%) lack legal representation before the immigration courts.

It is difficult to fathom why children would leave their homes, traveling alone across treacherous oceans or borders, to come to a country they do not know. Children leave their home countries for a variety of reasons. Many are fleeing violent and abusive homes in countries where there are few, if any, laws or resources to protect victims of family violence. Some are potential victims of human trafficking or exploitation, having been sent by their families to the U.S. in order to work. Still others are fleeing war, conflict or persecution in their countries of origin.

Upon their arrival in the United

States, these children must navigate through the complex, and often inhumane, immigration legal system. If a child is determined to be an "unaccompanied alien child"⁵ by the Department of Homeland Security when entering the U.S., that child will be placed at a youth detention center or shelter operated by the Office of Refugee Resettlement.⁶ These children also face administrative proceedings before the immigration court to determine if they will be removed (commonly known as deported) from the United States.⁷ The proceedings are adversarial in nature, without regard to age or disability. Moreover, there is no distinction between adults and children in the immigration law system. In proceedings before an immigration judge or administrative adjudicator, children must meet the same legal standards and carry the same burdens of proof as adults. In the "deportation" determination, held before an immigration judge, the child is prosecuted by a highly-trained attorney representing the Department of Homeland Security.

Most unaccompanied children must tackle this system alone, for it is impossible for them to gain access to legal representation; almost ninety percent (90%) lack legal representation before the immigration courts.⁸ This is due, in part, to the fact that there are no court-appointed attorneys or guardians in immigration court. While the children, and their adult counterparts, have the right to legal representation, it must be at their own expense.⁹ Access to legal resources is impossible for those children held in youth detention centers and shelters, which are often geographically isolated, far from law firms and non-profit agency offices. Many of the children have no family in the U.S. to help them contact or pay for the services of an attorney. Language and cultural barriers may also make it difficult for children to find legal assistance.

Efforts have been made on the national level to address the legal needs of this extremely vulnerable group. On December 23, 2008, former President George W. Bush signed into law the

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”).¹⁰ This law provides, among other things, clear guidance on the treatment of unaccompanied immigrant children in our immigration system. It also addresses the lack of access to legal representation by requiring that unaccompanied immigrant children have legal representation “to the greatest extent possible,” and that every effort should be made to utilize the services of *pro bono* counsel.¹¹

The TVPRA’s provisions went into effect on March 23, 2009. It is yet to be seen what impact, if any, the law will have on access to counsel for unaccompanied immigrant children, for there is no provision for funding counsel. Moreover, the law retained the previous language that any expense for legal counsel will not be borne by the government.¹²

In the meantime, non-profit legal agencies around the country have been working to fill the gap in some measure. Kids In Need of Defense, a new initiative funded by Angelina Jolie and Microsoft Corporation, brings together law firms, corporate law departments and non-profit entities pledged to provide legal counsel to unaccompanied immigrant children. Until Congress chooses to address this issue again, the future of these children will depend wholly on the goodwill of attorneys and others who donate their resources, time and talent.

ABUSED, NEGLECTED & ABANDONED IN KENTUCKY

Maria was brought to the United States from Mexico when she was only seven years old. After suffering years of abuse, Maria was removed from her parents’ home and placed in the custody of Kentucky’s Cabinet for Health & Family Services. She was placed with a loving foster family with whom she lived until she turned eighteen and aged out of the foster care system. It was only then that Maria and her foster family realized that Maria was undocumented. She was unable to work or to receive financial aid for college. Worst of all Maria was at risk of being apprehended by immigration authorities and returned to a country she barely remembers.

Maria is like many immigrant children who find themselves part of Kentucky’s family justice system due to abuse, neglect, abandonment or dependency. Despite state efforts to intervene and remove these children from harmful

Immigrant children who are under the age of twenty-one and unmarried and who meet these requirements are eligible to apply to U.S. Citizenship & Immigration Services for the special immigrant juvenile status, and subsequently, for permanent residence.

environments, their situation remains unstable due to their immigration status. Congress attempted to remedy this situation through the passage of the Immigration Act of 1990 (“1990 Act”).¹³ The 1990 Act created a special

immigrant juvenile status for undocumented immigrant children like Maria.

In order for an immigrant child to be eligible for special immigrant juvenile status, a juvenile court¹⁴ must:

1. declare the child to be a court dependent or must legally commit the child to a state department or agency;¹⁵
2. retain jurisdiction over the child for the duration of the immigration case;¹⁶
3. find that reunification with one or both parents is not viable due to abuse, neglect or abandonment;¹⁷ and
4. find that it is not in the child’s best interest to return to his or her home country.¹⁸

Immigrant children who are under the age of twenty-one and unmarried and who meet these requirements are eligible to apply to U.S. Citizenship & Immigration Services¹⁹ for the special immigrant juvenile status, and subsequently, for permanent residence.²⁰

The number of children who benefit from this status remains remarkably low. In 2008, only 989 children were granted special immigrant juvenile sta-

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tus nationally.²¹ The low number is not a result of a difficult application process, but rather the underutilization of the law to benefit these children. There is no data available on the number of immigrant children in Kentucky who are eligible for or who apply for the status. Based on anecdotal evidence, it is safe to assume that very few of the eligible children in Kentucky are identified and referred for legal help with immigration status or other matters. Most immigrant children, like Maria, move through and out of the juvenile court system before anyone realizes what could or should have been done. And then it may be too late to apply for special immigrant juvenile status.

In order to provide a more secure and stable future for immigrant children who have suffered abuse, neglect or abandonment, those in foster care or otherwise under the jurisdiction of the juvenile court should be assessed for eligibility for special immigrant juvenile status. All of the actors in the legal system – social workers, attorneys, judges –

should work together to identify eligible children and refer them to an immigration attorney for assistance in applying for the status as soon as possible. ☺

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3. *Id.*
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7. The immigration courts are part of

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Cori Hash is an attorney with the Kentucky Equal Justice Center. She directs the Maxwell Street Legal Clinic in Lexington, offering legal assistance to low-income immigrants, refugees, and their

families. Ms. Hash represents clients in family-based immigration, citizenship, asylum, removal, and other immigration legal matters. She has served as adjunct faculty in immigration law at the University of Kentucky College of Law. Ms. Hash, a graduate of the University of Texas School of Law, is also a member of the Texas Bar Association and the American Immigration Lawyers Association.



The Impact of the Credit Crunch on Lawyer Risk Management

It's Time to Review, Update, and Strengthen Your Risk Management Procedures

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

Introduction

The worldwide economic decline has gone on long enough to require no description. Its effect on the practice of law is starting to hit home and is only beginning. In these troubled times lawyers need to anticipate the risks this creates for both the practice of law and the business considerations of operating a law firm.

The purpose of this article is to provide an overview of recent developments in malpractice claims driven by the economic downturn. This includes an evaluation of the enhanced risk for lawyers created by the credit crunch and identifies the practice areas most exposed. Next is an analysis of the risk management considerations most relevant to these developments. The article concludes with a recommended approach for reviewing and strengthening your risk management program.

The 2009 Legal Malpractice Environment

Background

Recent studies of legal malpractice and reports from insurers show that legal malpractice claims are significantly increasing. The consensus of opinion is well expressed by the ABA comment: "Attorney malpractice claims are escalating in numbers and intensity, making us wonder if clients [are] anxiously looking to recoup the hefty sums of money lost because of a struggling economy."¹ A malpractice plaintiff's attorney got to the core of what is happening when he stated, "Malpractice is a money driven area of law – more so than other areas. It has a very strong connection to the economic situation. In a downturn, you will see more people suing their attorneys over things like estates and divorces. Now, \$200,000 is life or death."²

If the foregoing analysis of the increased risk of a malpractice claim seems outside of what you are seeing in your practice, it is important to appreciate that legal malpractice claims are known as 'long tail' claims. There is often a significant lag in time between when an incident occurs and when a client discovers that something may have gone wrong. In the current economy some clients are searching for any basis to collect from deep pocket sources and especially lawyers. Now is the quiet before the storm for many lawyers not already facing a claim. Do not let a false sense of security lull you into letting your risk management guard down.

Practice Areas With Increased Risk

In singling out practice areas with increased risk I do not want to lose sight of the fact that malpractice claims over all practice areas increase during a downturn. Even if you are not exposed to a more vulnerable practice area, this is no reason to conclude your risk of a claim has not increased.

What follows are the practice areas most frequently mentioned with enhanced malpractice exposure because of the economy:

- ***Real Estate:*** Claims include negligent advice in closings, negligent title searches, botched foreclosure actions, missed Master Commissioner sales, fraud, and third party claims that a lawyer was representing more than one party at a closing — not just a single client.
- ***Debt Collection:*** Debt collection actions are increasing exponentially. Lawyers failing to observe the requirements of state and federal laws governing fair debt collection to the letter are lucrative targets for debtors looking for easy money. Recognize that collection actions will be scrutinized more than ever for a potential claim against the collecting lawyer.
- ***Bankruptcy:*** Claims by clients, creditors, and bankruptcy trustees are often based on negligent advice, conflicts of interest, fraud, and any number of errors concerning the intricacies of bankruptcy law.
- ***Business and Commercial Transactions:*** Lawyers involved in any aspect of a business or commercial transaction gone bad are vulnerable to claims of negligent advice, conflicts of interest, failure to perform due diligence, breach of fiduciary duty, and fraud.
- ***Family Law – Divorce:*** Once again it is all about the money. Claims are often for failure to either identify all marital assets or failure to obtain a fair division of assets.
- ***Estate and Probate:*** Financially distressed people can be expected to attack wills and estate plans, often regardless of merit, on the off chance of recovering from the responsible lawyer.

Aggressive Claimants

From the foregoing list of vulnerable practice areas it is clear that there are a wide range of potential claimants. Of special concern are money-motivated claimants that are indifferent to the strength of their claim. These claimants, often desperate, insolvent, or angry, will have no trouble finding representation and will pursue a claim with a vengeance. Your risk management program must be geared to place you in the best possible position to fend off this kind of claim.

Risk Management in a Credit Crunch

Practicing law in hard economic times requires emphasizing these risk management considerations:

Problem Reporting: Time after time at the 2009 Legal Malpractice Risk Management (LMRM) Conference panelists stressed the need for every practice to have well established, non-threatening procedures for internal reporting of potential malpractice issues. At a minimum solo practitioners should informally stress to their staff to report problems to them. Preferably, do this with written instructions that are reviewed periodically with the staff. Larger firms should have a written policy designating a lawyer as the person to receive problem reports. The idea is to educate everyone in the firm, lawyers and staff, about the importance of reporting trouble by creating a firm culture of confidence and consultation.

Fee Disputes: In Lawyers Mutual's Spring 2009 newsletter we covered in detail how fee collection actions often lead to malpractice counterclaims. The following extract from that newsletter illustrates the problem and provides a checklist for evaluating whether bringing a collection action against a client is prudent:

[M]alpractice claims are [frequently] in the form of counterclaims that started out as a simple collection action by a law firm. Most often these counterclaims involve small law firms that can least afford a cash flow interruption and, therefore, are motivated to sue for fees. Given the difficult economic times we are in, it is expected that more firms than ever of all sizes will be motivated to begin collection actions against non-paying clients.

....

Malpractice counterclaims, while often lacking merit, are onerous to defend, can be expensive, and hurt firm morale. Typically, individuals and small businesses bring them. Motivation for the claim often is that the client cannot pay fees, is seeking leverage for a fee adjustment; or may be able to pay fees, but was surprised or disappointed in the outcome of the matter.

A good policy is to avoid suing clients for fees, but when seriously considering bringing a collection action, use the following checklist to evaluate how counterclaim proof you are:

- Was a good result obtained in the underlying case?
- Is the size of the fee sufficient to warrant the risk of a malpractice counterclaim?
- Has a disinterested lawyer of experience reviewed the file for malpractice?
- How reasonable were your fees?
- Will work on the matter as reflected on billing withstand cross-examination?
 - Does billing indicate over-practicing?
 - Too many meetings, telephone calls, and research hours.
 - Billing for several lawyers reviewing or preparing to discuss the file.
 - Over-qualified personnel for the work.
 - Are entries vague?
 - No names and no billing rates for the work done.
 - Itemized bills use generic terms such as "phone call" or "meeting" with no substantive information.
 - Subject to being misconstrued?
 - Billing for "soft costs" (copying, fax) and general overhead (heat, air conditioning).
 - All telephone calls take .3 hours; all dollar amounts are nice round numbers or end in five; and inserted along with all the routine itemized expenses is a charge for expert witness fees of several thousand dollars.
- How much non-billable time will be spent defending any malpractice counterclaim?
- Will any judgment obtained be collectible?
- Will you recover more than you spend?

Prospective Client Screening: Another theme of the 2009 LMRM Conference was the need to strengthen client intake procedures to avoid problem clients. The standard screening criteria for prospective clients are:

- Has the prospective client changed lawyers or been rejected by other lawyers?
- Is the prospective client difficult about reaching agreement on fees? Does he appear to be price shopping? Does he refuse to give an adequate retainer?
- Does the prospective client have unrealistic expectations for the matter?
- Does the prospective client have an unreasonable sense of urgency over the matter?
- Has the prospective client done considerable personal legal research?
- Does the prospective client want to proceed as a matter of principle regardless of cost?

Added to these considerations risk managers recommend in these times that you learn everything you can about the quality of a prospective client before you take the matter – not just verification of the facts of the case. Do a background search to determine whether the prospective client has:

- Good credit and is financially solvent.

- A criminal record.
- Frequently filed claims for injuries.
- Retained numerous lawyers in the past.
- Ever sued a lawyer for malpractice or filed a bar complaint.

As an aid in making a background check do a Google search on the prospective client. Look for Websites, blogs, and participation on sites such as FaceBook, and MySpace. A surprising amount of information is readily available with a click of a mouse.

Finally, be especially careful to verify the identity of non-face-to-face prospective clients — those that contact you by phone, mail, or over the Internet. Scams targeting lawyers are everyday occurrences.

Current Client Screening: Screening of prospective clients is a well-known risk management procedure. What many lawyers fail to do, however, is screen current clients for problems that can develop during a representation. Current client screening should include:

- Conducting Interim Conflict of Interest Checks: During the course of a representation a conflict check should be made anytime a new party is named, a new entity becomes involved, new witnesses are identified, or any other development that triggers conflict issues. This is especially important in business and commercial transactions. When the deal goes bad or the business fails, lawyers involved with any whiff of a conflict are sued either for malpractice or breach of fiduciary duty. These are difficult claims to defend and juries have little sympathy for lawyers perceived as disloyal or devious.
- Monitoring for Good Clients Gone Bad: Enron's fall from grace is a good example of a good client gone bad resulting in its lawyers being accused of breaching fiduciary duties owed to third parties and aiding and abetting the client in fraud. Business and commercial transaction lawyers are at greatest risk for such a claim. To risk manage this exposure, establish policies that screen for red flags signaling that something is amiss with a client or that a client is engaged in questionable transactions.

The following is a list of some of the factors to consider in evaluating whether a current client poses unexpected risks:

- Change in control — Has there been a sudden change of management or has management gone into weaker hands? Are the client's employees leaving the client or being laid off?
- Change in ownership — Has the client been acquired by a conglomerate or gone into bankruptcy? Successors, receivers, regulators, and trustees are not your friend, even if the client was.

- Unusual transactions — Does the client want to do a transaction with no apparent business purpose?
- Nature of client's business — Does the client owe fiduciary duties to customers and is the client dealing with other people's money?
- Change in relationship with the client — Has the client's behavior changed as reflected in sudden urgent requests for legal advice giving little time for response? Is the client tense, erratic? Does the client want to micromanage the matter? Does the client want a reduction in fees? In bad economic times clients can become desperate.
- Character change — Does the client expect you to bend rules, endorse a questionable scheme, cover up, or stretch the truth? Is the client uncertain of the source of funds for a deal? Is the client now willing to commit fraud?
- Change in fee payments — A change in payment habits is a frequent sign of trouble in a client. Accounts receivable building up could be a signal that the client is in financial difficulties. Do a solvency check before the amount of arrearages becomes significant. If you are about to enter a period of intense work for the client that will involve substantial billing, get a retainer supplement and make sure the client knows what is coming. If you cannot readily work out fee payments, consider withdrawing.

Do not rely on a client's continued good will. Clients change. There are changes in ownership, control, and circumstances. Educate firm lawyers and staff to be alert to these developments. If you become concerned that a good client is going or has gone bad, withdrawal is often the best risk management. If you continue the representation, be sure that the letter of engagement accurately defines the scope of representation and any changes in scope. Carefully document the file to record significant developments and the advice given. In delicate situations it is especially important that the advice given be reflected in a letter to the client. Do not expose yourself to a claim of fiduciary breach by third parties or of aiding and abetting your client in fraud.

New Matter Screening: In difficult economic times with new business dwindling it is tempting to accept new matters outside a firm's regular practice areas. Do not do this unless you are prepared to spend the time and resources necessary to develop the required competence to practice the matter. For example, if you have little experience with financial matters such as collections, wills and probate, real estate transactions, franchising, business startups, or bankruptcy law, now is not the time to dabble. Do a cost-benefit analysis before accepting new matters that involve considerable preparation time and expense. Consider whether the prospective client can afford all this extra cost.

Always consider whether there are short time limitations that apply to a new matter. A plaintiff's attorney at the 2009 LMRM Conference recommended that a new case not be accepted if it is within three months of the statute of limitations. His view was that this was just too short a time to identify and name all the parties. Accepting unrealistic time pressure to represent a client is an invitation to commit malpractice.

Business and Commercial Transactions: In addition to suggestions for transactions lawyers covered above, two considerations merit special emphasis.

- Make sure everyone (including you) knows whom your client is. In any ambiguous situation clarify your role early. If necessary to make your position perfectly clear, advise nonclients to get counsel. Make sure that officers and employees of business entity clients, no matter how high ranking, understand you represent the business — not them. It is critical to avoid any basis for someone involved in a financial transaction gone bad to accuse you of a conflict of interest.
- Thoroughly documenting the file has never been more important in financial matters. It begins with a detailed letter of engagement that specifies the scope of the engagement, what is not being done for the client, and what constitutes completion of the matter. The letter of engagement should be updated with any change in scope. Oral advice should be followed up in writing or at least documented in a memorandum for file. Document significant events occurring during the course of a representation. Be sure that e-mail concerning the representation is preserved for the file. If you do not have procedures in effect to organize and file or destroy firm e-mail, establish them now. Use letters of disengagement when the matter is completed unless the relationship is intended to be continuous. Continuous representations should be affirmatively established in writing so both the client and the firm know that it exists. Lawyers are often accused of malpractice by persons they considered former clients or long dormant clients for whom they had done no work for an appreciable period of time. Letters of disengagement avoid this problem in most cases.

Internal Controls: In these difficult times it is necessary to consider that firm members as well as clients can get desperate. Review firm internal controls for cash management and bookkeeping practices. A fundamental rule is that two people should be involved in a transaction. If one person receives funds another person should deposit them. Other control procedures to consider are:

- Have cancelled checks delivered to you unopened.
- Examine all cancelled checks as soon as the statement arrives. Watch for authorized signatures, endorsements, and payees.

- Require two signatures on large checks.
- Do not allow checks payable to "cash."
- Require supporting documentation for all checks.
- Approve all client billings and reconcile receipts.
- Control access to checkbooks.
- Divide bookkeeping responsibilities. The person paying the bills should not be the person who reconciles the account.
- Give receipts when accepting cash and keep duplicates. If possible, have cash payments witnessed.

Some Suggestions for Reviewing Your Risk Management Program

As an aid to risk management analysis the firm of Legal Risk LLP Solicitors has helpfully categorized the risks that lawyers face as follows:

- **Professional risks** (i.e. the risks posed by uncertainties in, ignorance of and noncompliance with, the law and legal procedures, such as the risk of missing a deadline);
- **Client risks** (e.g. the risks posed by uncertainties associated with clients, dependence on a small number of fickle institutional clients, exposure to conflicts of interest, risk of failing to comply with client care requirements,...);
- **Financial risks** (e.g. uncertainty as to whether the firm will make a profit, exposure to theft, uncertainties as to financial control of budgets, expenditure and cash flow, pressure on [fee] structure, ... and client credit risks);
- **Regulatory risks** (e.g. the possibility of failing to comply with key regulatory requirements including [professional responsibility disciplinary rules]...);
- **Strategic risks** (e.g. uncertainties as to the firm's ability to compete successfully in the market for legal services, including changes in the marketplace...);
- **Operational risks** (the risks associated with the firm's back-office operational and administrative processes, confidentiality, document retention, IT, data protection, business continuity);
- **People risks** (the risk posed by uncertainties relating to the firm's human resources, principals and staff, including supervision, levels of competence and training, loss of key personnel, staff turnover, risks associated with lateral hires);
- **Physical risks** (e.g. injury to people including stress and disease, damage to premises, files, IT system and data);
- **Reputational risks** (arguably the sum of the above).³

Use the foregoing list to identify your firm's significant risks. Legal Risk then recommends they be addressed by establishing the following risk management policies and procedures:

- A **framework** for risk management (possibly involving a risk manager who may be a partner, the head of a department and managing partner and/or a risk management committee);

- A **culture** of risk management;
- A **process** of risk management to be applied. The process should include the following steps:
 - **Identify** the risks to which the firm is exposed;
 - **Assess** each risk, making an assessment of:
 - The likelihood and consequences of an adverse outcome;
 - What appetite the firm has for the risk;
 - **Respond** to the risk whether by:
 - Avoiding it (by turning away the activity that gives rise to the risk);
 - Limiting it (e.g. by restricting scope of retainer, limitation of liability);
 - Designing and implementing defenses to reduce or minimize the risk (e.g. by supervision, diary system, monthly file reviews, annual appraisals);
 - Transferring or sharing it (e.g. by insurance....);
 - Retaining it (or retaining a residual element of the risk);
 - **Report** on the management of the risk to the [designated person] in a prescribed form);
 - **Monitor** the process.⁴

Lawyers Mutual's Website has the following risk management information that should be helpful in conducting your risk management review. Start with the *Risk Management & Professional Responsibility Law Practice Assessment*. To access it go to lmick.com — click on Risk Management ⇒ Subject Index and go to Checklists in the index.

In addition to the Assessment the following articles contain risk management information on particular subjects. They may be accessed by going to lmick.com — click on Risk Management ⇒ Bench and Bar Articles and select the desired article.

Risk Management for Firm Leaders And Managers:

- ✓ May 2007 — Boss Professional Responsibility
- ✓ July 2006 — The Ethical and Malpractice Risks of Impaired Lawyers and Their Unimpaired Associates.

Disaster Planning:

- ✓ May 2004 — Getting Physical – *Are You Ready for an Office Catastrophe?*
- ✓ September 2004 — What Happens To Your Clients If Something Happens To You?

Files:

- ✓ January 2003 — The Secret Life of Client Files
- ✓ September 2002 — Shredded Any Good Documents Lately?

Office Sharing:

- ✓ May 2002 — Sharing Offices — *The Ethical, Risk Management and Practical Considerations*

Internet Risk Management:

- ✓ May 2008 – The Impact of the Internet on a Lawyer's Standard of Care & Professional Responsibility — Part I
- ✓ September 2008 – The Impact of the Internet on a Lawyer's Standard of Care And Professional Responsibility — Part II
- ✓ January 2006 — Lawyer Website Disclaimers — *Fact or Fiction?*

Of Counsel and Contract Lawyers:

- ✓ January 1999 – Of Counsel
- ✓ Spring 1997 – Barrister In A Box – *An Overview Of How Contract Lawyers Fit Into The System.*

Business Transactions with Clients:

- ✓ September 2000 — Investing In Client.Com — *The New Economy or the Same Old Moral Hazard?*

Third Party Claims:

- ✓ Fall 1995 — Negligence Liability to Nonclients — *The Bermuda Triangle Of Lawyer – Client – Nonclient*

Risk Managing Malpractice Claims:

- ✓ January 2009 — Hard Economic Times Mean More Malpractice Claims
- ✓ January 2005 — Dodging a Blank! *Avoiding a Frivolous Malpractice Claim*

Summing Up

I urge you to take the time to make the risk management review that this article is intended to facilitate. The economic situation demands it. Additionally, there has never been a more important time to carry malpractice liability insurance. Currently there is a competitive insurance market in Kentucky that provides Kentucky lawyers with numerous choices. You know where my heart is, but whatever you do, do not go bare, *i.e.*, have no insurance. At Lawyers Mutual we have never been able to determine what percentage of Kentucky lawyers do not carry liability insurance, but we think many do not. This number could increase if legal business decreases, tempting insured lawyers to drop their coverage. In the current malpractice environment that is counter-intuitive and not prudent. Protect your clients and yourself. ⓘ

ENDNOTES

1. ABA Journal, posted 2/17/2009.
2. Andrew L. Bluestone quoted in the article *Legal malpractice suits may surge*, Karen Sloan, National Law Journal, p. 4, 2/23/2009.
3. Legal Risk LLP Solicitors, *A practical guide to rule 5 of the Solicitors Code of Conduct 2007*, pages 21 and 22. The firm's Website address is www.legalrisk.co.uk.
4. Ibid.

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.

JULY

21 Video Replay: Professionalism, Ethics and Substance Abuse Instruction
Cincinnati Bar Association

22 Zoning and Land Use
Cincinnati Bar Association

AUGUST

4 Video Replay: DUI Law; Drug Defense/Search & Seizure; Top Tips for Taking a Deposition
Cincinnati Bar Association

5 Social Security Disability
Cincinnati Bar Association

19 Workers' Compensation
Cincinnati Bar Association

20-21 Midwest Regional Bankruptcy Seminar
Cincinnati Bar Association

25 Video Replay: Professionalism, Ethics and Substance Abuse Instruction

SEPTEMBER

2-3 Kentucky Law Update – Covington
Kentucky Bar Association

9 Adoption Law
Cincinnati Bar Association

9-11 Annual Convention
Kentucky Justice Association

10-11 Kentucky Law Update – Lexington
Kentucky Bar Association

15 All Ohio Annual Institute on Intellectual Property (Cleveland)
Cincinnati Bar Association

16 All Ohio Annual Institute on Intellectual Property (Cincinnati)
Cincinnati Bar Association

18 Winning Trial Strategies: Advanced Litigation Techniques
Cincinnati Bar Association

22 ADR Seminar
Cincinnati Bar Association

22-23 Kentucky Law Update – London
Kentucky Bar Association

23 Wills, Trust & Probate Administration
Cincinnati Bar Association

25 Labor & Employment Law Seminar
Cincinnati Bar Association

2009 KENTUCKY LAW UPDATE

Dates and Locations

September 2-3 (W/TH) Covington
Northern Kentucky Convention Center

September 10-11 (TH/F) Lexington
Lexington Convention Center

September 22-23 (T/W) London
London Community Center

October 1-2 (TH/F) Owensboro
RiverPark Center

October 6-7 (T/W) Ashland
Ashland Plaza Hotel

October 20-21 (T/W) Prestonsburg
Jenny Wiley State Resort Park

October 29-30 (TH/F) Paducah
(Gilbertsville)
Kentucky Dam Village State Resort Park

November 4-5 (W/Th) *Bowling Green**
Holiday Inn & Sloan Convention Center

December 3-4 (TH/F) Louisville
KY International Convention Center

***The Bowling Green KLU date has been changed since the dates were first announced. Please check your calendars and mark the new dates.

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Because Ky. Supreme Court rules mandate the confidentiality of KBA CLE records, please email us a brief note at cle_reg@kybar.org indicating “I grant the KBA permission to email my CLE records to me.” If you are not sure of the email address on record with the KBA, or if you would like to change it, please log-in the KBA website and look yourself up in the Lawyer Locator, listed under the membership menu, where you’ll see your information. The email address listed will be the one used for your CLE records.

If you would like to change your e-mail address on record, please fill out the online address change form by clicking the box marked “Request for Address Change.”

Thanks in advance for making this step forward with us!

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Bonnie Osborne • osborne1@nku.edu

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John Hays has been mediating cases for over 10 years and has extensive experience with mediating construction, employment, commercial, and personal injury disputes. He has served as a mediator for cases from all parts of the Commonwealth and several surrounding states. Mr. Hays is currently on the Board of Directors for the Mediation Center of Kentucky and is a past president of the Mediation Association of Kentucky. He is a mediator and arbitrator for AAA and is on the CPR panel of distinguished neutrals for Kentucky.

Robert F. Duncan

Since 1995 Mr. Duncan has successfully mediated civil matters involving issues pertaining to personal injury, professional liability, construction, health care, insurance coverage/bad faith, as well as hospital and nursing home liability. Mr. Duncan is the Chair of the Mediation Section of the Fayette County Bar Association. Mr. Duncan received his undergraduate degree in Civil Engineering from the University of Kentucky and is a graduate of the University of Kentucky School of Law.

Daniel G. Grove

Daniel G. Grove joined Jackson Kelly PLLC in 2003. Prior to joining the Firm, Mr. Grove was in private practice for over 30 years, concentrating in the areas of civil and criminal litigation, domestic relations, fraud, business disputes and negligence. He is a Fellow of the American College of Trial Lawyers and a permanent member of the Fourth Circuit Judicial Conference. Mr. Grove has experience mediating civil disputes in Maryland, Virginia, and Washington, DC; and is now qualified to mediate disputes in Kentucky.

John W. Hays (859) 255-9500
jwhays@jacksonkelly.com

Robert F. Duncan (859) 288-2827
rduncan@jacksonkelly.com

Daniel G. Grove (859) 255-9500
dggrove@jacksonkelly.com



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The Rules of the Kentucky Supreme Court require the following statement: This is an advertisement.

JUDICIAL ETHICS OPINION

FORMAL

JUDICIAL ETHICS OPINION JE-117

April 4, 2009

WITHDRAWAL OF JUDICIAL ETHICS OPINION (“JE”) 64

In the course of its ongoing review of existing Judicial Ethics Opinions, the Ethics Committee of the Kentucky Judiciary (“Committee”) considered, and received an inquiry regarding, the continued viability of JE-64. In JE-64, the Committee addressed the following inquiry:

MAY A KENTUCKY JUDGE OR JUSTICE, CONSISTENT WITH THE CODE OF JUDICIAL CONDUCT, SERVE AS A MEMBER OF THE BOARD OF TRUSTEES OF A PUBLIC UNIVERSITY?

The Committee answered with a “Qualified Yes,” for the reasons expressed in the Opinion. The Committee has concluded that the current answer to the question is “No,” and hereby withdraws JE-64 accordingly, and substitutes this opinion.

JE-64 was issued under the prior version of the Code of Judicial Conduct (“Code”). As indicated in JE-64, the Committee at that time wrestled with the apparent conflict between Canon 5B of the Code (permitting service as trustee of an educational organization) and 5G (prohibiting service on a governmental committee). The Committee at that time opted in favor of the conclusion that service as a trustee of a public university was permitted, and several Kentucky judges and justices have since that time served as such. As an aside, any service of federal judges on public university boards is not implicated by the Code, since they are not governed by the rules of the Kentucky Supreme Court. Furthermore, any service by Kentucky judges or justices on private university boards is clearly permitted by current Canon 4C(3), and is not complicated by Canon 4C(2).

When the current Code was adopted by the Kentucky Supreme Court, effective January 1, 1999, Canons 4C(2) and 4C(3) contained provisions identical to the current verbiage:

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may accept appointment to a governmental committee or commission where a judicial appointment is authorized or required by law. A judge may represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

At the time the present Code was adopted, the Commentary to Section 4C(2) contained the following paragraph:

Section 4C(2) does not govern a judge’s service in a nongovernmental position. See Section 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. **For example, service on the board of a public educational institution, unless it were a law school, would be prohibited under Section 4C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Section 4C(3).**

(Emphasis added.)

The Committee believes the change in this version of the model Code was adopted to clear up the apparent contradiction in the previous version of the Code, which was addressed in JE-64. Furthermore, the existing Commentary to Section 4C(3) states “Section 4C(3) does not apply to a judge’s service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Section 4C(2).” Our conclusion is that service on a public university board is “service in a governmental position.”

In 2004, the Kentucky Supreme Court deleted the emphasized sentence in the Commentary to Section 4C(2). The Commentary to Section 4C(3) was not amended. The Committee believes that the Kentucky Supreme Court was attempting to clarify the section by amending the Commentary to Canon 4C(2) to delete the sentence which explained that service on public university boards was prohibited. However, the Code itself was unaffected, which is significant, because the preamble to the Code states:

The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules.

The Supreme Court did not amend the text of the rule to permit service; it merely deleted a sentence that provided guidance, albeit one which as Commentary was not authoritative. The consensus of the Committee is that current Canons, and existing Commentary, support the conclusion that Kentucky judges and justices may not serve on public university boards.

The Committee believes this opinion should have prospective application only. In 2003, a judge was nominated for appointment to a public university board, and, the Committee advised the judge that service was not prohibited, relying solely on JE-64 and the provisions of Section 4C(3). In 2006, another judge was similarly nominated. In accepting his appointment, the second judge was aware of and relied upon the advice given the first judge. Since those two judges accepted appointments to their current terms in reliance upon JE 64, the Committee does not believe this Opinion should operate retroactively. Finally, as the Committee's conclusion rests solely on the provisions of the Code, the Committee considers it unnecessary to consider other sources which may bear on the issue, such as KY. CONST. §28; KRS 164.150; *Commonwealth, ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610 (Ky. 1992); or Ky. OAG 94-5.

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

Very truly yours,

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

cc: Donald H. Combs, Esq.
The Honorable Laurance B. VanMeter, Judge
The Honorable Jean Chenault Logue, Judge
The Honorable Jeffrey Scott Lawless, Judge
Jean Collier, Esq.

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B.B.I.L.D. for DIVERSITY

By Amy Carman

The Board of Governors has recently formed the Kentucky Bar Association's Task Force on Building Blocks in Leadership Diversity (BBILD).

KBA Past President and BBILD Chairwoman **Barbara D. Bonar** called the first meeting of BBILD, which began its work to identify the road-blocks in attaining diversity and equity in the legal profession and the Kentucky Bar Association, and providing outreach

for diversity to the three branches of government. "Our hope is to change the viewpoint and eventually the landscape of Bar Leadership when it comes to diversity. There no longer exists valid reasons not to accomplish this goal," Bonar said.

In an introductory meeting held Friday, May 29, at the Kentucky Bar Center in Frankfort, the Task Force sought to identify key goals for its two Committees dedicated to gender and minority concerns. At the meeting,

Bonar named **Rebecca Leslie Knight** of Covington and **M. Gail Wilson** of Jamestown to serve as Co-Chairs of the Task Force's Gender Committee. **Dean Jim Chen** of the University of Louisville's Brandeis School of Law and **Joshua E. Santana** of Lexington were chosen to serve as Co-Chairs for the Minority Committee.

"Even in the initial selection of our Committee members, we sought to achieve ethnic, racial, gender, religious and challenge diversity, and we are still identifying additional members to join us in this important effort," Bonar said. "We are also selecting members to reflect geographic and practice diversity, including both large and small practices, government, academia, corporate, and the judiciary, so that we know we are doing our very best to ensure every voice is heard. We are making this special effort in Committee formulation so as to reflect the sometimes challenging but rewarding end results of diversity itself."

The BBILD Task Force's first meeting concentrated on the individual interests and concerns of its members before dividing into its Committees to outline its long term goals. Bonar said the purpose of the Task Force's first meeting was to establish working goals for each Committee and set a timeline to address the topics identified for discussion and action.

"We want to create an aggressive agenda that is focused on pursuing and achieving real-life, tangible goals," Bonar said. "Along the way, we also want to evoke a sense of urgency for producing a more diversified legal community in Kentucky."

Other BBILD Task Force members present at the meeting included Norman Harned of Bowling Green, Candace J. Smith of Covington, Susan C. Montalvo-Gesser of Owensboro, Judge Joan Byer of Louisville, Zackary M. Kafoglis of Bowling Green, Gail M. Langendorf of Florence, Robert C. Ewald of Louisville, Bruce K. Davis of Lexington, Susan Stokley Clary of Frankfort, Elizabeth S. Feamster of Lexington, Anita Britton of Lexington, Lisa Moore of Highland Heights, Samuel Carlos Wood of Louisville, Margaret E. Keane of Louisville, and David B. Sloan of Covington.

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NKU Salmon P. Chase NORTHERN KENTUCKY UNIVERSITY College of Law

By Wendy Lane
Communications Coordinator

NKU Chase Alumni Admissions Ceremony at U.S. Supreme Court

Eighteen Chase alumni traveled to Washington, D.C. to be sworn in as members of the bar of the Supreme Court of the United States on Monday, May 18, 2009. This trip marked the fifth annual Chase Alumni Association Group Admission Ceremony at the Supreme Court.

The Chase alumni, their family members and guests, and representatives from the College of Law gathered at a reception the evening prior to the group admission ceremony. The reception was held in the Thornton Room at the Hyatt Regency on Capitol Hill, which offers a spectacular view of the lighted Capitol dome.

A reception followed the swearing-in ceremony at the Court the next day and was held in the East Conference Room where the portrait of U.S. Supreme Court Chief Justice Salmon P. Chase is displayed. A luncheon was held at the historic Willard Intercontinental Hotel to conclude the day's activities.

Newly admitted members of the Supreme Court Bar include: Richard Albert Brueggemann '04, Timothy James Byland '98, Daniel Eric Cohen '85, Kenneth Scifres Dean '80, Richard

J. Gangwish II '77, Daniel Wayne Gehr '98, Jennifer Thompson Harley '04, Catherine E. Howard '03, Matthew Rich, Bryan V. Reed '92, Norton Brooke Roberts '93, Julie Ann Schoepf '05, Gregory Lee Sizemore '92, Meridith Oberklein Spille '05, Timothy Bernard Spille '05, William Kash Stilz, Jr. '02, Howard Litton Tankersley '93, Christine Marion Vissman '85, and Charlton Hubert Young '92.

Chase College of Law representatives participating in the event were Dean Dennis Honabach, Associate Dean David MacKnight, Associate Dean Karen Ogburn and Advancement Specialist Shelley Menninger. Chase Alumni Association President Stephen J. Schuh '78 made the Motion for Admission before the Court. ☺

UK University of Kentucky College of Law

By Louise E. Graham, Interim Dean

This will be my last column as Interim Dean, so I want to begin by thanking the UK faculty, staff, and alumni for the wonderful support that they have given me this year. I am especially indebted to Mary Davis and Doug Michael, who have done so much of the real work this year while serving as Associate Deans. The welcome that I received this year from our alumni across the state was very important both

to me and to the school.

We traveled quite a bit this year



Louise E. Graham

because we want our alumni to know how important their continued connection with the school and support of the school are to all of us. In Prestonsburg we had a lunch at Jenny Wiley with over forty alums

who attended the District Bar meeting. We had an after-work cocktail party in Louisville that drew around ninety alums. In Bowling Green, Owensboro, and Paducah, we met with our western Kentucky alums at a variety of lunches, dinners, and other occasions.

I have to admit that this was my favorite part of the job. Seeing the success of former students makes thirty-one years of work worthwhile, particularly given the warmth shown to us everywhere.

One example of that warmth occurred at the KBA Convention in Covington on June 10th, where the College of Law and the UK Law Alumni Association hosted our annual Hall of Fame and Alumni Awards ceremony. Alumni from across the state gathered to honor Marilyn Daniels and Harry Miller, Jr., our Hall of Fame inductees, as well as the winners of our annual Alumni awards.

While this has been a difficult year in many respects, we know that budgetary woes are something that we do not suffer alone. The College of Law should be proud that budget cuts this year did not affect the academic program provided to our students. We are committed to preserving that program, especially those activities such as trial teams, moot court teams and writing experiences that enhance our students' readiness to join the profession. We have also added several new externships to our curriculum. Our students will be working with the UK Hospital's Office of Risk Management and Assessment and also with the Secretary of Energy's office.

Our faculty continues to work dili-



Chief Justice John Roberts poses with the Chase alumni group.

gently as well. Several faculty members, including Jonathan Cardi, Mary Davis, and Sarah Welling attended the ALI's annual meeting in Washington, D.C. in May. Bob Schwemm's KLJ article, *Strader v. Graham: Kentucky's Contribution to National Slavery Litigation*, focusing on an important precursor of the Dred Scott decision, has received national attention. Bob Lawson's continued work on prison reform is an important service to the state. Rick Underwood and Bill Fortune each spoke on ethics at the KBA. Rick continues to delight and entertain us with his work on historic murder ballads and infamous cases.

We look forward to a robust and exciting entering class this fall. After all, these students are really what our work is all about. ☺



University of
Louisville
School of Law

By Jim Chen
Dean and Professor of Law

Rebooting Legal Education

Lawyers are among the slowest professionals in an information-driven society to adopt new forms of technology.* To the extent that lawyers have welcomed electronic means of communication, they cling to established news websites, e-mail, and even listservs. Lawyers' enthusiasm for blogs, RSS feeds, Twitter, and the rest of Web 2.0 lags for their embrace of the Blackberry.

Ours is a temperamentally conservative profession. And a bar magazine column with the appropriate degree of appreciation for the native cautiousness of lawyers might content itself to praise new technologies. There is value, to be sure, in pointing out that lawyers who fail to learn electronic discovery are as endangered as analog television, wireline telephony, and the compact disc. But the University of Louisville has never thrived by looking backward, and its dean cannot be accused of excessive caution.

What I propose instead is this: Time has come to reexamine the operating software of the profession as a whole. In the midst of an economic crisis that has spared no industry and no region, we lawyers should reconsider the very bases by which we train our colleagues and earn our living. In the language of personal computing, we need to reboot legal education.

Law schools are by no means immune to the forces of change sweeping the profession as a whole. What many clients now ask of the billable hour – *Must it be?* – applies with equal force to every aspect of legal education. If we hope to survive the current crisis,

much less thrive in a dawn that seems more distant than rosy, law schools must subject every practice, procedure, and policy to the closest scrutiny. For years we have granted putative pedagogical primacy to the Socratic Method. We have not only acquiesced in the oldest, largest firms' propensity to interview only the "top ten percent" of our students; legal educators have fostered, even encouraged, an approach to identifying and recruiting talent that has exposed some of these very firms to grave economic vulnerability.

The entire profession could stand to reboot itself. Rahm Emanuel, the White House Chief of Staff, reminds us to

The Andrew Franklin Young Memorial Fund and Writing Award

Andrew Franklin Young* died tragically on March 19, 2009. In the weeks that followed, his classmates, friends, and family members contributed money to the University of Louisville School of Law to honor his memory. The class of 2009 dedicated the traditional class gift to Andrew's memory.

The Law School will maintain the Andrew Franklin Young Memorial Fund in honor of our friend and classmate. We will use money donated in Andrew's memory for the benefit of students of the Law School.

The annual award for best paper by a graduating senior will be named the Andrew Franklin Young Memorial Writing Award. While he was still alive, Andrew was selected the writer of the best paper by a member of the class of 2009. In future years, the winner of the Andrew Franklin Young Memorial Writing Award will be awarded prize money, as financial circumstances permit, from the Andrew Franklin Young Memorial Fund.

Additional proceeds from the Andrew Franklin Young Memorial Fund will benefit students at the School of Law. Andrew derived great joy from Law School intramurals and the *University of Louisville Law Review*. To the extent that there are annual disbursements available beyond prize money given to the winner of the

Andrew Franklin Young Memorial Writing Award, the Law School intends to divide those amounts between Law School intramurals and the *Law Review*.

The Law School encourages additional contributions to the Andrew Young Fund. Donors may make contributions in either of the following ways:

1. Online at
<http://www.law.louisville.edu/alums-visitors/giving> or
<http://www.louisville.edu/giving/giveonline>
2. By mail:
Development Office
Attn: Robert F. Micou or
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Andrew Young, beloved member of the class of 2009, will be remembered through the memorial fund and the writing prize that will bear his name. We encourage his family, his friends, his classmates, and members of the University of Louisville community to join us in celebrating his life and honoring his memory.

**The Elegy for Andrew Franklin Young was published on pages 76 and 77 of the May 2009 Bench & Bar.*

“[n]ever let a serious crisis go to waste.” In law as in politics and war, crisis is “an opportunity to do things you couldn’t do before.” When America, the legal profession, and the academy emerge from the current crisis (as we assuredly will), individuals and institutions will prevail according to their willingness to discard, as needed, their commitments to traditions and expectations that have been as debilitating as they have been entrenched. What we all recognize as “Law School 1.0” proceeded on a primitive assumption that thinking is the primary, or even exclusive, activity of lawyers. As the fictional Professor Kingsfield told his students in *The Paper Chase*, “You come in here with a skull full of mush, and if you survive, you’ll leave thinking like a lawyer.”

This narrow vision of legal education disserves law students, and it disserves the profession. Students attend law school not merely to master an abstract body of knowledge or even a systematic

way of thinking, but rather to learn a broad battery of skills – intellectual, social, and practical – for helping real people with real problems find real answers and get real results.

Professor Kingsfield, if he were not only real but also alive, would scarcely recognize legal education at the University of Louisville. UofL Law places very heavy emphasis on skills such as clear writing, effective oral advocacy, efficient research, and interpersonal savvy. These are skills best learned through hands-on experience, whether in Law School-sponsored settings such as the Law Clinic, a public service project, or a moot court competition, or at some sort of law-related job. Properly configured, legal education integrates the analytical core of traditional classroom instruction with a host of wider skills that are best learned and mastered by doing.

In this season of ongoing economic upheaval, I invite the entire bar to rethink its priorities. This is what it

means to reboot legal education and the profession it serves. Not long ago we privileged the drone like billing of hours assembling financial instruments based at best (if at all) on phantom assessments of unrealized wealth. As antidote and as redemption, we should commit ourselves not merely to shifting wealth, but to creating it.

An economy based on value rather than speculation offers no shortage of work for professionals who advise clients, forge alliances, complete deals, resolve conflicts, and uphold the public trust. We call those professionals lawyers. They have valuable contributions to make, and the University of Louisville will always be here to train the best among them. 

ENDNOTE

* Edward A. Adams, *Web 2.0 Still a No-Go*, **ABA Journal**, Sept. 2008 (available online at http://www.abajournal.com/magazine/web_20_still_a_no_go).

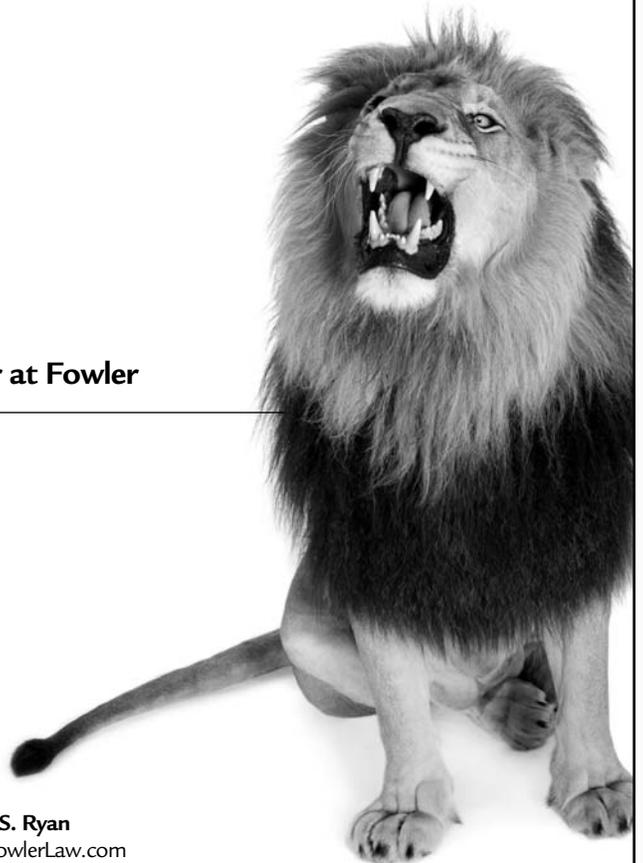
“Let us never negotiate out of fear.
But let us never fear to negotiate.”

John F. Kennedy

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Kentucky Bar Foundation Welcomes New Fellows

*Our deepest
appreciation goes to
these distinguished
members of the
Kentucky Bar for
their financial
support of the
Foundation's
charitable efforts.*



Keith M. Carwell practices law in Bowling Green with the law firm of English, Lucas, Priest & Owsley. A graduate of Western Kentucky University and The George Washington University Law School, he was admitted to the Kentucky Bar in 1974. Mr. Carwell currently serves as a member of the Kentucky Bar Foundation Board of Directors.

Diana K. Douglas of Belknap, Illinois most recently practiced law in Paducah with the law firm of Boehl Stopher & Graves. A graduate of Southern Illinois University and Southern Illinois University School of Law, she was admitted to the Kentucky Bar in 2002 and is also a member of the Illinois Bar. She currently serves as a member of the Kentucky Bar Foundation Board of Directors. Ms. Douglas is a Life Fellow.

Jacqueline S. Duncan of Lexington currently serves as Director, Kentucky Volunteer Lawyer Program, a program administered by the Access to Justice Foundation. A graduate of Murray State University and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 1987. Ms. Duncan is a Life Fellow.

Joe A. Evans, III practices law in Madisonville with the law firm of Frymire, Evans, Peyton, Teague & Cartwright. A graduate of Western Kentucky University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1975. He previously served as a member of the Kentucky Bar Foundation Board of Directors. Mr. Evans is a Life Fellow.

W. Jeffery Foreman practices law in Owensboro with the law firm of Foreman Watson. A graduate of Kentucky Wesleyan College and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1986.

Steven J. Franzen practices law in Newport. A graduate of the University of Kentucky and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1982. Mr. Franzen is a Life Fellow.

Roger W. Hall practices law in Ashland with the law firm of Williams, Hall & Latherow. A graduate of The College of William & Mary and the University of North Carolina School of Law, he was admitted to the Kentucky Bar in 1976.

Albert C. Hawes, Jr., prior to his death in April 2008, practiced law in Covington. A graduate of the University of Cincinnati and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1968 and was also a member of the Ohio Bar. He was a Past President of the Kenton County Bar Association. Mr. Hawes has been enrolled *posthumously* as a Kentucky Bar Foundation Life Fellow.

Martin J. Horwitz, prior to his death in February 2009, practiced law in Crescent Springs. A graduate of the University of Cincinnati and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1986. Mr. Horwitz has been enrolled *posthumously* as a Kentucky Bar Foundation Life Fellow.

Catherine C. Hughes practices law in Ashland with the law firm of Williams, Hall & Latherow. A graduate of the University of Kentucky and the University of Louisville Brandeis School of Law, she was admitted to the Kentucky Bar in 1994. Ms. Hughes currently serves as a member of the Kentucky Bar Foundation Board of Directors.

David V. Kramer practices law in Crestview Hills with the law firm of Dressman, Benzinger & LaVelle. A graduate of Xavier University – Cincinnati and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1983. He currently serves as a member of the Kentucky Bar Association Board of Governors. Mr. Kramer is a Life Fellow.

Scott D. Laufenberg practices law in Bowling Green with the law firm of Kerrick, Stivers, Coyle & Van Zant. A graduate of the University of Wisconsin – Platteville and Drake University Law School, he was admitted to the Kentucky Bar in 2000. Mr. Laufenberg served during fiscal year 2008-2009 as Chair of the Young Lawyers Section of the Kentucky Bar Association and as an Ex-Officio Director of the Kentucky Bar Foundation.

John D. Minton, Jr. of Bowling Green currently serves as Chief Justice of the Kentucky Supreme Court. Previously, from 2003 to 2006 he served as a Judge on the Kentucky Court of Appeals, and from 1992 to 2003 he served as Warren Circuit Court Judge. In 2003, the Kentucky Bar Association honored him with its Outstanding Judge Award. A graduate of Western Kentucky University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1977. Chief Justice Minton is a Life Fellow.

Carol B. Paisley of Lexington currently serves as Mediation Division Manager for the Administrative Office of the Courts. A graduate of the University of Kentucky and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 1987. Ms. Paisley is a Life Fellow.

Emily Roark practices law in Paducah with the Bryant Law Center. A graduate of Centre College and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 2000. Ms. Roark is a Life Fellow.

Tasha K. Scott practices law in Florence. A graduate of the University of Akron and the Santa Clara University Law School, she was admitted to the Kentucky Bar in 2002 and is also a member of the California Bar. She currently serves as a member of the Kentucky Bar Foundation Board of Directors. Ms. Scott is a Life Fellow.

Steven O. Thornton practices law in Bowling Green. A graduate of Western Kentucky University and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1983. Mr. Thornton is a Life Fellow.

Dennis W. VanHouten, prior to his death in December 2008, practiced law in Cincinnati with the law firm of Montgomery, Rennie & Jonson. A graduate of Indiana University and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1978 and was also a member of the Ohio Bar. Mr. VanHouten has been enrolled *posthumously* as a Kentucky Bar Foundation Life Fellow.

Jane Adams Venters practices law in Somerset with the law firm of Adams and Venters. A graduate of the University of Kentucky and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 1985. She currently serves as a member of the Kentucky Bar Foundation Board of Directors. Ms. Venters is a Life Fellow.

Melissa D. Yates practices law in Paducah with the law firm of Denton & Keuler. A graduate of Southern Illinois University and Southern Illinois University School of Law, she was admitted to the Kentucky Bar in 2001. Ms. Yates is a Life Fellow.

Fayette County Bar Association Named Mindy G. Barfield Board President

The Fayette County Bar Association (FCBA) inducted **Mindy G. Barfield** as President at the annual Law Day Luncheon. Ms. Barfield practices with Dinsmore & Shohl LLP in Lexington where she is a partner in the Litigation Department. She received her B.A. from Transylvania University and obtained her M.A. in International Affairs from George Washington University. Ms. Barfield earned her law

degree from the University of Kentucky College of Law.

Also elected to the 2009-2010 FCBA Board were: **Erin McMahon** (President Elect) Wyatt, Tarrant & Combs; **Christopher Goode** (Treasurer) of Bubalo, Hiestand & Rotman; **Cassidy Ruschell Rosenthal** (Secretary) of Stites & Harbison; **Palmer Gene Vance, II** (Auditor) of Stoll Keenon Ogden; **Douglas T.**

Logsdon (Past-President) of McBrayer, McGinnis, Leslie & Kirkland; **D. Craig Dance** (Greenebaum, Doll & McDonald), **Christopher Frost** (University of Kentucky College of Law), **Glenda George** (Lexington-Fayette County Urban City Government), **Branden Gross** (Wyatt Tarrant & Combs), **Mark Hinkel** (Landrum & Shouse), **Guy Hughes** (Woodward Hobson & Fulton), **Lucy Pett** (Stoll Keenon Ogden), **Jana Smoot White** (Fowler Measle Bell), **Trigg Mitchell**, Young Lawyer Representative (Dinsmore & Shohl); and **James E. Keller**, Senior Advisor (Gess Mattingly Atchison).

LAWYERS OF KENTUCKY REIMBURSE VICTIM OF FORMER GRAYSON COUNTY ATTORNEY'S MISCONDUCT

The lawyers of Kentucky, through the Clients' Security Fund created by the Kentucky Supreme Court, have awarded \$2,700 to one individual following a request for reimbursement for funds misappropriated by attorney Maxwell Lee Hammond of Grayson County. This sum is in addition to \$30,743.60 previously awarded to 28 individuals in Grayson County and the surrounding areas who requested reimbursement for sums that were also misappropriated by Hammond.

Acting on a recommendation by the Kentucky Bar Association's Board of Governors, the Supreme Court of Kentucky disbarred Hammond on February 21, 2008.

The Clients' Security Fund was created and is funded by the Bar dues of all Kentucky lawyers to help victims of theft. It does not cover claims of malpractice or other problems with lawyers. The fund is administered by the Kentucky Bar Association in Frankfort. The function of the fund is "to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers arising out of a lawyer-client relationship between the lawyer and the claimant."

In fiscal year 2005-06 through 2008-09, the fund has paid \$436,457.86 to victims. For more information on the fund, please visit www.kybar.org or call (502) 564-3795.

The Meade County Bar Association

is proud to welcome **Alec G. Stone** as their newly appointed President. With over thirty years of comprehensive legal and business experience, Mr. Stone has managed a law practice since 1969 with two current locations in Brandenburg and Hardinsburg. His career history includes 1973-1974 State Representative, 18th Legislative District and 1975-1986, Commonwealth's Attorney, 46th Judicial District. Mr. Stone is a member of the Louisville Bar Association, the American Bar Association, the Kentucky Academy of Trial Attorneys (Board of Governors, 1982-1983), and the Association of Trial Lawyers of America.

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.

KENTUCKY BAR NEWS

SUMMARY OF MINUTES KBA BOARD OF GOVERNORS MEETING MARCH 20, 2009

The Board of Governors met on Friday, March 20, 2009. 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; *2nd District* – J. Harris, Jr., R. Sullivan; *3rd District* – R. Hay, G. Wilson; *4th District* – D. Ballantine, D. Farnsley; *5th District* – A. Britton, F. Fugazzi, Jr.; *6th District* – D. Kramer, T. Rouse; and *7th District* – B. Rowe, W. Wilhoit.

In Executive Session, the Board considered three (3) default discipline cases, one (1) reinstatement and two (2) restoration cases. Roger Rolfes of Florence, non-lawyer member 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 2009-2010 Budget & Finance Committee, Mentoring Committee, Office of Bar Counsel and Rules Committee.
- Heard a report from the Rule of Law Symposium Co-Chairs Norman E. Harned and Charles E. Ricketts, Jr. on the success of the Symposium which was held on February 6, 2009. The project was financially assured with the grant from the Kentucky Bar Foundation and private donations. In attendance were 120 individuals from different professional backgrounds. The breakout group discussions were: judicial independence; civil rights and social justice; the courts and dispute resolution; business, labor and the workplace; crimes, punishment and deterrence; and families, children and family courts. The discussions were taped and it is the goal of the committee that the symposium materials be used as future resource materials by educational, religious and professional agencies.
- Heard a report from Kentucky Delegate Norman E. Harned of the items addressed at the 2009 ABA House of Delegates Midyear Meeting in Boston.
- Louisville Bar Association President Colin Lindsay and Executive Director Scott Furkin were present to discuss the “Call-A-Lawyer Program” that the LBA has been doing for approximately 10 years.
- Approved the request by Access to Justice Foundation for additional funding in the amount of \$66,600 from the Donated Legal Services Fund to support the Kentucky Volunteer Lawyer Program.
- Approved the payment of expenses for Board members attending the Board of Governors meeting on June 9 and the convention itself on June 10-12 as follows: Lodging at the Embassy Suites at a rate of \$155.00 single/double per night or the Marriott RiverCenter at a rate of \$159.00 single/double per night for a maximum of four (4) nights. Reimbursement for round trip mileage at the rate of thirty-seven cents (\$0.37) per mile. Reimbursement for meal expenses incurred on Monday, June 8, and Tuesday, June 9, above and beyond group meal functions on those dates.
- Approved the following individuals to serve as members of the Executive Director Search Committee: Chair Charles E. English, Jr., Anita M. Britton, Margaret E. Keane, Scott D. Laufenberg, W. Douglas Myers, Thomas L. Rouse, Olu A. Stevens, William H. Wilhoit, M. Gail Wilson and Melissa Blackwell.
- Approved appointments and reappointments to the Attorneys’ Advertising Commission: Craig Houseman of Paducah for a three (3) year term beginning on July 1, 2009 and ending on June 30, 2012; Stephanie Leanne McGehee-Shacklette of Bowling Green for a three (3) year term beginning on July 1, 2009 and ending on June 30, 2012; and Ronald E. Johnson, Jr. of Fort Wright for a three

(3) year term beginning on July 1, 2009 and ending on June 30, 2012.

- Young Lawyers Section Chair Scott D. Laufenberg reported that the section had received a \$3,500 grant from the Kentucky Bar Foundation in September for the printing of 5,000 copies of the U@18 brochure and the section is on track to use all of them by the end of the school year in approximately 20 counties throughout the state. Mr. Laufenberg reported that the two hours of CLE can be obtained by addressing a high school class, with one hour of preparation time and one hour of presentation. Mr. Laufenberg reported that the section will be awarding a \$500 bar studies scholarship to a law school graduate from each of the three law schools to assist them in preparation for the bar exam.
- Approved the submission of three nominees to the Supreme Court of Kentucky for the appointment of one person from each District to the CLE Commission for three-year term ending on June 30, 2012: 1st Supreme Court District – Dennis Null, Jack Lackey and Norman Bush Bradley and 6th Supreme Court District – Shane Sidebottom, Cathy Stavros and David Andrew.
- Approved the submission of nominees to the Supreme Court of Kentucky for appointment to the IOLTA Board of Trustees for three-year term ending on June 30, 2012: 3rd Supreme Court District – Steve Cawood and 4th Supreme Court District – Charles E. Ricketts, Jr.
- President Bonar distributed an announcement regarding the 2009 Annual Convention for distribution by the Bar Governors in their respective districts to encourage membership participation in the annual convention.
- Approved the nominations for the 2009 Outstanding Awards: Outstanding Judge Award – Judge Patricia Summe, Covington and Judge Gregory Wehrman of Covington; Outstanding Lawyer Award – Arnold R. Simpson of Covington; Donated Legal Services

Award – Judge Michelle M. Keller of Covington; Bruce K. Davis Bar Service Award – Todd Horstmeyer of Versailles; and President’s Special Service Award – Norman E. Harned of Bowling Green, Charles E. Ricketts, Jr. of Louisville, and Bobby Clark of Lexington. President Bonar advised that she would also be submitting a female candidate for Outstanding Lawyer and because of time constraints this nominee would be approved by an email vote.

- Approved the creation of the Task Force on Building Blocks in Leadership Diversity (BBILD).
- Interim Executive Director John Meyers advised the Board that the Casemaker contract had been renewed and the 2.1 Casemaker is now available. He also advised that Casemaker has a new product for law schools called Casemaker X, which has a social networking site which can also be used to post employment information.
- Mr. Meyers advised that the E-News will be sent on the 1st of each month with an email notification to the membership that it is posted on the KBA website for which the link will be provided.
- Approved the Law Day Awards totaling \$900 (3 at \$300/each).
- Approved the Student Writing Competition Awards totaling \$1,500 (1st – \$1,000; 2nd – \$300; 3rd – \$200).

SUMMARY OF MINUTES KBA BOARD OF GOVERNORS MEETING MAY 15, 2009

The Board of Governors met on Friday, May 15, 2009. Officers and Bar Governors in attendance were *President* B. Bonar, *President-Elect* C. English, Jr., *Vice President* B. Davis, *Immediate Past President* J. Dyche, *Bar Governors 1st District* – D. Myers, J. Freed; *2nd District* – J. Harris, Jr.; *3rd District* – G. Wilson; *4th District* – D. Ballantine, D. Farnsley; *5th District* – A. Britton, F. Fugazzi, Jr.; *6th District* – D. Kramer, T. Rouse; and *7th District* – B. Rowe, W. Wilhoit. Officers and Bar Governors absent were: *Young Lawyers Section*

Chair S. Laufenberg, R. Hay and R. Sullivan.

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

- Heard status reports from Audit Committee, Kentucky Lawyer Assistance Program (KYLAP), Mentoring Committee, Office of Bar Counsel and Rules Committee.
- Approved the request of President-Elect Charles E. English, Jr. to allow KBA staff to work on the KLEO Summer Institute Program, established by former Chief Justice Joseph E. Lambert in 2002, and assist with the project, as well as authorization to coordinate a fund raising project to obtain funds for the Summer Institute in the approximate amount of \$35,000.
- Approved the following appointments and reappointments to the KYLAP Commission: Michael Cox as an At-Large Member from the 2nd Supreme Court District for a four-year term ending June 30, 2013; Ben Dusing as the 6th Supreme Court District representative for a four-year term ending on June 30, 2013; and Regina Jackson as the representative from the 2nd Supreme Court District for a four-year term ending on June 30, 2013.
- Approved appointments and reappointments to the Kentucky Bar Foundation: 2nd Supreme Court District reappointment of Keith M. Carwell of Bowling Green for a three (3) year term ending on June 30, 2012; 3rd Supreme Court District reappointment of Martha L. Brown of London for a three (3) year term ending on June 30, 2012; 4th Supreme Court District appointment of Charles H. Cassis of Louisville for a three (3) year term ending on June 30, 2012; 5th Supreme Court District reappointment of Eileen O’Brien of Lexington for a three (3) year term ending on June 30, 2012; 6th Supreme Court District reappointment of Harry D. Rankin for a three (3) year term ending on June 30, 2012 and Virginia J. Southgate of Newport as a new appointment for a three (3) year term ending on June 30,

2012; and 7th Supreme Court District reappointment of William G. Francis of Prestonsburg for a three (3) year term ending on June 30, 2012.

- Approved the reappointment of Palmer Gene Vance II of Lexington and David B. Sloan of Covington as the Kentucky Delegates to the ABA House of Delegates for another two-year term ending at the end of the ABA Annual Meeting in 2011.
- Approved a refund in the amount of \$2.50 of a member’s dues if the Bar engages in political or lobbying activities (*Keller v. State Bar of California*) and if the member requests a refund.
- Interim Executive Director John Meyers reported on the receipt of Orders from the Supreme Court, entered April 21, 2009: Appointment of members to the CLE Commission for three (3) year terms ending on June 30, 2012: 6th Supreme Court District – new appointment of Shane Christian Sidebottom of Covington and 1st Supreme Court District – reappointment of Dennis L. Null of Mayfield.

To KBA Members

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

September 18-19, 2009
November 20-21, 2009

To schedule a time on the Board’s agenda at one of these meetings, please contact John Meyers or Melissa Blackwell at (502) 564-3795

■ In Memoriam

Bobby Darrell Burns	Alexandria, VA
Robert Chadwick	Frankfort
John H. Davis	Crestwood
Merritt S. Deitz, Jr.	Henderson
Harry B. Diamond	Louisville
Fred Faulkner, Jr.	Campbellsville
Edward S. Gilson, Jr.	Lexington
Gordon B. Mills	Louisville
Robert C. Muncy	Hyden
Charles A. Rose	Louisville
James Shelton Scrogan	Louisville
James Greer Tripp	Middletown, OH
Sarah Louise Weyler	Louisville
Elizabeth Davis Wilson	Russellville



Avoid Clichés

Judith D. Fischer, Assistant Professor, University of Louisville School of Law

Clichés are common in everyday conversation. We may say someone is “tough as nails” or “drunk as a skunk.” But after thousands of repetitions, such phrases have lost whatever freshness they once had. Now they are merely tiresome.

Clichés are once-clever images that have become stale through repetition. Although they’re often used informally, experts advise against using them in professional writing, where there is more at stake and the writer has time to edit. George Orwell offered this simple advice: “Never use a metaphor, simile, or other figure of speech which you are used to seeing in print.”¹ Clichés, Orwell believed, have “the same relation to living English as a crutch has to a leg.”²

Legal writing experts agree. In *The Elements of Legal Style*, Bryan Garner advises lawyers to avoid clichés, providing a list of examples such as *seat of justice* and *there’s the rub*.³ Although Garner would not forbid all clichés, he advises lawyers to use them with caution, to consider whether the trite wording is the best way to make the point, and to check for “a tone of banality.”⁴ Two other commentators have made similar points through tongue-in-cheek advice to “think out of the box”⁵ and “avoid clichés and puns like the plague.”⁶

Clichés that appear often in legal documents are especially likely to annoy judges. Judge Stephan Reinhardt of the Ninth Circuit wrote disapprovingly of a lawyer’s repeated use of the overworked phrase “three bites at the apple.”⁷ Such clichés, Reinhardt wrote, “too often provide a substitute for reasoned analysis,” deadening us to “the nuances of language so often critical to

our common law tradition.”⁸ And Justice Antonin Scalia and Bryan Garner recently condemned as trite the phrase “for all the foregoing reasons,” calling it a “hopelessly feeble” way to conclude an argument.⁹

An appellate court recently declared that it had “long ago wearied of the trite and otiose” phrase “red herring.”¹⁰ Another court, annoyed by the oversimplified cliché “invades the province of the jury,” quoted Dean Wigmore’s view of that phrase as “misleading” and “a mere bit of empty rhetoric.”¹¹ One judge actually strikes briefs containing trite verbiage, returning them to lawyers with notes about improving their writing.¹²

Mixing clichés can be particularly troublesome. It is trite to say that a new employee “came on board” at a corporation. But mixing that cliché with others can bring the stale images back to life, creating unintended humor: “Smith came on board and put his nose to the grindstone and his shoulder to the wheel.” This sentence suggests such an odd picture that it detracts from the writer’s underlying point.

How can you avoid clichés in your writing? First, train your eye to notice them. Orwell’s yardstick will help: consider whether you’ve written a phrase that you are used to seeing in print. Second, when you do discover a cliché, don’t try to think of a newer, fresher image to replace it. It’s not easy to think of an effective one on command, and attempting to do so may result in convoluted or stilted phrasing. Instead, find a strong, direct way to make your point. Instead of writing that a father was “tough as nails,” write that he was a strict disciplinarian. Instead of saying a lawyer wants “three bites at the apple,”

write that she has lost two motions and is now bringing a third on the same issue. And instead of raising a point “on the other side of the coin,” use a standard English transition, such as “by contrast.” Direct phrasing is more precise than a cliché, and it will avoid annoying a judge who may long ago have tired of trite language. 

ENDNOTES

1. George Orwell, *Politics and the English Language*, in *George Orwell: Essays* 954, 966 (John Carey ed., 2002).
2. George Orwell, *The English People*, in *George Orwell: Essays* 608, 635 (John Carey, ed., 2002).
3. Bryan A. Garner, *The Elements of Legal Style* 204-05 (2d ed. 2002).
4. *Id.* at 206.
5. Steven T. Taylor, *Can We Think Out of the Box? Or, Is that No-Brainer?*, 22 *Of Counsel* 3, 3 (Feb. 2003).
6. Gerald Lebovits, *Writing on a Clean Slate: Clichés and Puns*, 75 *N.Y. St. B. J.* 64, 64 (Mar./Apr. 2003).
7. *Eminence Capital, LLC, v. Aspeon, Inc.*, 316 F.3d 1048, 1053 (9th Cir. 2003) (Reinhardt, J., concurring).
8. *Id.* at 1053, 1054 (Reinhardt, J., concurring).
9. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 38 (2008).
10. *State v. Tunoa*, 153 P.3d 464, 473 (Haw. Ct. App. 2007).
11. *People v. Chatman*, 133 P.3d 534, 653 (Cal. 2006) (quoting 7 *Wigmore on Evidence* §§ 1920, 1921 (Chadbourne rev. ed. 1978)).
12. Taylor, *supra* note 5, at 3.

ON THE MOVE



Paul Whitty

The law firm of **Goldberg Simpson** is pleased to announce the addition of an attorney in the zoning, land use, and general litigation areas. **Paul Whitty** is Of Counsel with the firm and brings to the firm over 25 years of experience. Whitty was previously general counsel for the Louisville and Jefferson County Planning Commission.



Tracey C. Smith

Gwin Steinmetz & Baird PLLC is pleased to announce that **Tracey Clemmons Smith** has become a member of the firm effective January 1, 2009. Smith attended Samford University's Cumberland School of Law and earned her J.D., *summa cum laude*, in 2000. She concentrates her practice of law in the area of civil litigation focusing primarily on defending trucking and commercial transportation claims, insurance bad faith claims, personal injury, product liability litigation, and contractual and commercial disputes.



Edwin A. Jones

Boehl Stopher & Graves, LLP has announced that **Edwin A. Jones**, a lawyer associated with the firm's Paducah office, has been elected to partnership. Jones concentrates his practice in civil litigation and insurance defense. He received his bachelor's degree from Evangel University in 1987 and earned his law degree from the University of Kentucky College of Law in 1990.

O'Bryan, Brown & Toner, PLLC is pleased to announce that **Brittany Perrin Asher** has joined the firm as an associate attorney. Asher received her B.A. from



Brittany P. Asher

Centre College, graduating *magna cum laude* in 2004, and earned her J.D. from the University of Kentucky College of Law in 2007. Her primary practice areas include insurance defense litigation with special emphasis on medical malpractice, product liability, negligence, and tort claims.



Nicole S. Elver

Nicole S. Elver practices in Louisville in **Middleton Reutlinger's** litigation section concentrating in the areas of commercial litigation and insurance defense litigation. Elver was an attorney in the Division of Enforcement of the U.S. Securities and Exchange Commission in Washington, D.C. for more than seven years. She also served as the manager of the Securities Enforcement Branch of the Kentucky Department of Financial Institutions. Elver graduated *cum laude* from Marquette University Law School and received her B.A. from Gustavus Adolphus College.



John M. Matter

John M. Matter is a member of the commercial litigation, insurance litigation and business and commercial practice groups at **Middleton Reutlinger**. He practiced law in Arizona for nearly seven years and received his M.B.A. from the University of Arizona. Matter has represented both plaintiffs and defendants in civil cases, arbitrations, and mediations. Matter, a graduate of the University of Arizona James E. Rogers College of Law, obtained a Master of Global Management from Thunderbird, and received a B.A. from Miami University in 1997.

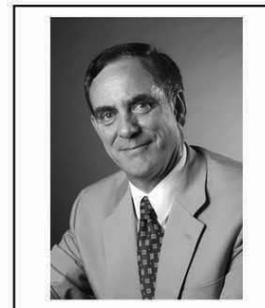
Joseph L. White announces his association with **Matt R. McCubbins** in opening their new office, **White & McCubbins**, at the Springs Office Center in Suite 235 at 950 Breckenridge Lane in Louisville. The firm will represent plaintiffs in the areas of personal injury, wrongful death, medical negligence, products liability, and premises liability. White and McCubbins may be reached at (502) 895-8999.

Nonprofit Organization Law Can Be Complex

My Practice Is Limited to Advising Nonprofits and The Attorneys Who Represent Them

Assistance Provided With

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Conley Salyer, Attorney, J.D., LL.M.; Examiner, Malcolm Baldrige National Quality Award (MBNQA) 2007. csalyer@nonprofitattorney.net, (859) 281-1171, 444 E. Main Street, Lexington, KY 40507. This is an advertisement.

WHO, WHAT, WHEN & WHERE



Jason M. Nemes

Jason M. Nemes, former director for the Kentucky Administrative Office of the Courts, has joined **Dinsmore & Shohl LLP** as a member of the litigation department in the firm's Louisville

office. Nemes' experience includes representing the Supreme Court of Kentucky for more than five years. During his tenure with the AOC, his responsibilities included running the day-to-day operations of Kentucky's courts, including oversight of 3,500 employees and managing a \$300 million budget. Nemes earned his J.D. from the University of Louisville School of Law and received his B.A. from Western Kentucky University.

C. Mark Bongard has joined **Dinsmore & Shohl LLP** as Of Counsel in the corporate department and a member of the



C. Mark Bongard

executive compensation and employee benefits practice group. He will practice in the firm's Lexington office. Prior to joining the firm, Bongard served as a benefits attorney and senior counsel for Ashland Inc. From 2003

through 2005, he served on the ERISA Advisory Council. Bongard obtained his LL.M. in Tax from the University of Florida, earned his J.D. from the University of Kentucky College of Law, and received his B.A. from the University of Cincinnati.

Carl Breeding and **Rusty Cress, Jr.**, formerly with Greenebaum Doll & McDonald PLLC, have joined **Dinsmore & Shohl** as partners effective May 1, 2009. Breeding will serve as the office managing partner for Dinsmore & Shohl's new office located at 314 West

Main Street in downtown Frankfort. Cress also will work from the office space in Frankfort, a location situated near the Franklin County Courthouse and the Federal Courthouse. Breeding brings more than 25 years of experience as a government relations and environmental lawyer to the firm. He formerly served as the chair of Greenebaum Doll & McDonald's government affairs team and also served as general counsel for the Kentucky Natural Resources and Environmental Protection Cabinet. Cress brings experience with respect to compliance with, and enforcement of, environmental and natural resource laws and regulations, as well as legislative and regulatory affairs.



Ann E. Samani

Wyatt, Tarrant & Combs, LLP is pleased to announce that **Ann E. Samani** has joined the firm's Lexington office. Samani is a member of the firm's bankruptcy and creditors' rights service team.

She is admitted to practice in the United States Court of Appeals for the Sixth Circuit and in the Eastern and Western Districts of the United States District Court. She received her B.B.A. degree in 1970 from the University of Iowa and earned her J.D. in 1976 from the University of Kentucky.



Jennifer M. Gatherwright

Jennifer M. Gatherwright has announced the opening of the law firm of **Gatherwright Freeman & Associates, PSC** located at 333 Terry Lane in Crescent Springs. Founding shareholders Jennifer

M. Gatherwright and John A. Freeman, formerly of the Horwitz Law Firm, mourn the loss of their friend and colleague, Martin J. Horwitz, and will continue to focus their practice primarily in the areas of tax and business law. Gatherwright earned her J.D. from the Salmon P. Chase College of Law and

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obtained her Masters in Tax from the University of Cincinnati School of Business.



Zachary D. Prendergast

Graydon Head & Ritchey LLP is pleased to announce that associate **Zachary D. Prendergast** has been admitted to practice law in the Commonwealth of Kentucky.

Prendergast's practice focuses primarily on representing secured and unsecured creditors in commercial loan workouts, bankruptcy proceedings, restructurings, collection and liquidation, and lender liability issues. He also has experience in general and commercial litigation. Prendergast is a 2006 graduate of the University of Toledo College of Law, where he earned his J.D. He also received a B.A., with honors, from Marquette University in 2003.

Weltman, Weinberg & Reis Co., LPA welcomes new associate, **Daniel C. Chilton**. He will be working in the legal action recovery department of the Cincinnati office. Chilton received his B.S. from Northern Kentucky University in 2004 and earned his J.D. from Salmon P. Chase College of Law in 2007. He is licensed to practice in the state courts of Ohio and Kentucky and can be reached at (513) 723-6003.



Linda H. Havel

Linda H. Havel has re-joined the law firm of **Vaughan and Vaughan** as a partner and has opened and manages the Indianapolis, Indiana office for the firm located at One Indiana Square in Suite 2540.

She may be reached at (317) 634-9770. Havel, a 1994 alumnus of the University of Louisville School of Law, was formerly with Vaughan and Vaughan from 1999 to 2005. Thereafter, she practiced with Tabbert Hahn Earnest & Weddle, LLP, in Indianapolis. Havel is licensed to practice in Indiana and

Kentucky and will continue to practice in the areas of personal injury, business law, and commercial litigation. She was also recently accepted as a Fellow with the Litigation Counsel of America.

Buechner Haffer Meyers & Koenig Co., LPA announces the addition of **Jennifer T. Leonard** as an associate. Leonard is admitted to practice in Kentucky and has joined the firm's estate planning, probate, tax, and corporate practice group. She received her



Jennifer T. Leonard

B.B.A. from the University of Kentucky, *cum laude*, in 2001 and earned her J.D. from Salmon P. Chase College of Law in 2007. Buechner Haffer Meyers & Koenig Co., LPA is a downtown Cincinnati general practice law firm celebrating its 30th anniversary.

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Daniel R. Braun is pleased to announce that he has been appointed as the city attorney for the **City of Newport** after serving as an assistant for the past 26 years. A 1979 graduate of Northern Kentucky University's Chase College of Law, Braun is a former Assistant Commonwealth's Attorney for Kenton County. He continues to maintain his private practice in Covington focusing in the areas of bankruptcy, domestic, and general civil matters.

Darby and Gazak, PSC is pleased to announce that **Nellie G. McCall** and **Nicholas K. Haynes** have joined the firm as associates. McCall formerly worked for the Legal Aid Society and is a graduate of the University of Louisville School of Law and Mercer University. Haynes formerly worked for Napier Gault Keith, PLC and is a graduate of the University of Dayton School of Law and Butler University. McCall and Haynes primarily practice in the area of professional liability defense, with an emphasis on medical malpractice defense.

The Louisville law firm of **Thompson Miller & Simpson PLC** is pleased to announce that **Kevin M. Murphy** and **Adam B. Shadburne** have become



Kevin M. Murphy



Adam B. Shadburne

partners with the firm. **Murphy**, a 2002 graduate of Emory University School of Law, concentrates his practice on the defense of products liability, medical malpractice, and nursing home neglect actions. **Shadburne**, a 2002 graduate of the University of Louisville School of Law, concentrates his practice on the defense of products liability, asbestos, and medical malpractice actions.

IN THE NEWS



Alfred S. Joseph, III

Kentucky Governor Steve Beshear has appointed Stites & Harbison attorney **Alfred S. Joseph, III** to serve on the Kentucky Oral History Commission. Joseph's term will run through February 15, 2013. The Kentucky Oral

History Commission is a nationally recognized program that has provided for the collection of more than 25,000 oral history interviews. The organization reaches across the state to record and preserve the diverse stories that are a part of Kentucky's rich and colorful history.



Jennifer L. Elliott

Governor Beshear also recently appointed attorney **Jennifer L. Elliott** to the Board of Trustees of the Kentucky Retirement Systems (KRS). Her term became effective April 2, 2009, and expires March 31, 2012.

Elliott replaces Henry Clay Owen, who resigned. The nine-member KRS Board of Trustees is responsible for administering three retirement systems: the County Employees Retirement System (CERS), the Kentucky Employees Retirement System (KERS), and the State Police Retirement System (SPRS).

Wyatt, Tarrant & Combs, LLP is pleased to announce that **Gordon B. Wright**, a partner in the firm's Louisville office, has been elected to membership in the American College of Trust and Estate Counsel (ACTEC). ACTEC's mission is to improve and reform probate, trust and tax laws, procedures, and professional responsibility.



Angela Stephens

Angela Stephens, an attorney in the Louisville office of Stites & Harbison, has been designated as an "Accredited Professional" by the U.S. Green Building Council to help construction projects meet emerging standards for

"green" buildings. The U.S. Green Building Council, formed in 1993, is a 501(c)(3) non-profit organization whose goal is to make green buildings available to everyone within a generation. To help accomplish this mission, the USGBC created the Leadership in Energy and Environmental Design

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(LEED) Green Building Rating System, which measures the “greenness” of a building and verifies actual compliance with claims of the green elements in that building.

McBrayer, McGinnis, Leslie & Kirkland, PLLC is pleased to announce that **Ryan Daugherty** has been accredited as a Leadership in Energy and Environmental Design Accredited Professional (LEED AP) by the United States Green Building Council (USGBC). The LEED Green Building Rating System is the widely accepted benchmark for the design, construction and operation of high-performance green buildings. With this accreditation Ryan joins a group of attorneys nationwide who have demonstrated a thorough understanding of green building practices and principles and the LEED Rating System.

Geoff White, a senior associate in both the real estate and construction service groups at Frost Brown Todd, has been accredited a Leadership in Energy and Environmental Design Green Associate (LEED GA) in accordance with the U.S. Green Building Council (USGBC). The LEED GA is a newly established accreditation by the USGBC. LEED gives building owners and operators the tools they need to have an immediate and measurable impact on their buildings’ performance through a whole-building approach to sustainability.



Ched Jennings

Louisville workers’ compensation attorney **Ched Jennings**, of the Jennings Law Offices, is serving as 2009 president-elect of the national organization, Workers’ Injury Law & Advocacy Group (WILG), the non-

profit membership organization dedicated to representing the interests of millions of workers and their families who, each year, suffer the consequences of work-related injuries or occupational illnesses and need legal assistance to obtain medical care and other relief under workers’ compensation programs.

Stoll Keenon Ogden attorney **Thomas M. Williams** has been elected chairman of the board of directors of the Leadership Louisville Center. His term began on July 1. A long-time supporter of Leadership Louisville, Williams was a member of the 2003 class of Leadership Louisville and received the “Spirit of Yes” Award from Leadership Louisville in 2003. He has also served as Leadership Louisville’s Vice Chair of Programs since 2007.



Frederick Straub, Jr.

Paducah attorney **Frederick “Rick” Straub, Jr.** has become a Fellow of the American College of Trial Lawyers. The induction ceremony at which Straub became a Fellow took place during the recent 2009 Spring Meeting of the

College in Fajardo, Puerto Rico. Fellowship in the College is extended by invitation only and only after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility, and collegiality.



Brett Goodson

Cincinnati attorney **Brett Goodson** also has become a Fellow of the American College of Trial Lawyers and was inducted in Fajardo,

Puerto Rico at the 2009 Spring Meeting of the College. The College, which was founded in 1950, strives to improve and elevate the standards of trial practice, the administration of justice, and the ethics of the trial profession.



James G. Amato

Lexington attorney **James G. Amato** was recognized on April 30, 2009 by the Fayette County Bar Association with the Henry T. Duncan Award. This award recognizes an individual whose dedication to the high ethical

standards of the legal profession has made a positive and lifelong contribution to the profession and to the community as a whole. Amato’s son, attorney Stephen G. Amato, presented his father with the Duncan Award at the annual Fayette County Bar Association Law Day Luncheon.



Allen Montgomery

The Foundation for a Healthy Kentucky Community Advisory Committee (CAC) elected **Allen Montgomery** as one of the newest members of the CAC. The CAC is a group of 31 Kentucky residents who share a commitment to improving health care and

whose role is to advise the Foundation’s board of directors on policy direction and to nominate and appoint new mem-

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- Corporate Labor & Employment In-house Counsel; United States Sixth Circuit Court of Appeals Staff Attorney; Private practice; Arbitration and Litigation, Employee Relations Consultant
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bers to the Foundation Board. Montgomery has served in various senior leadership roles with regional and national faith-based nonprofit healthcare systems over the last 20 years.

On April 28, 2009, Covington Catholic High School held an inaugural Mass and brunch to honor the establishment of the Wm. T. (Bill) & Joan Wernersbach Robinson III Scholarship Fund. **Wm. T. (Bill) Robinson** is member-in-charge of Frost Brown Todd's Northern Kentucky offices in Florence. Interest from this scholarship will fund tuition aid for students and families who could otherwise not afford to attend Covington Catholic High School.

Joseph L. Fink III received the Robert G. Zumwinkle Student Rights Award at the University of Kentucky on April 14, 2009. The award, presented by the U.K. Student Government Association, may be given each year to one faculty member, one staff member, or one student who has protected, enforced, and furthered student rights. Dr. Fink has served as the University Hearing Officer and chair of the University Appeals Board for ten years.

Thomas E. Rutledge, member of Stoll Keenon Ogden PLLC, presented the following programs at the April meeting of the American Bar Association Section of Business Law held in Vancouver: "Understanding LLC Operating Agreements – How the Deal Affects Drafting" and "The NCCUSL Model Statutory Trust Act – How its

Fundamental Provisions May Impact the Use of Statutory Trusts."



Kevin L. Murphy

Graydon Head & Ritchey LLP's **Kevin L. Murphy** has been recognized by The Children's Law Center as one of the individuals who *Have Mattered Most* to the Center over its 20 year history. The Children's Law Center was estab-

lished in 1989 to protect and enhance the legal rights and entitlements of children in Kentucky through quality legal representation, research and policy development, and training and education to attorneys and others regarding the rights of children.



Darren K. Mexic

Darren K. Mexic was presented with the *Pro Bono Publico* Award for his continued commitment to the mission of Lawyers Care and *pro bono* services at the 2009

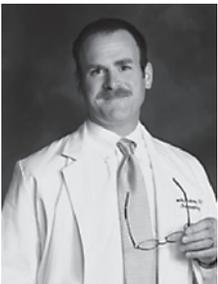
Law Day Ceremonies conducted by the Bowling Green/Warren County Bar Association. The award is presented each year by the Lawyer Care Volunteer Attorney Program to a member of the Bar who has made a significant contribution to the provision of donated legal services to low-income elderly or disabled individuals in their community.

Thomas J. Stipanowich, a long-time University of Kentucky faculty member, was awarded the William H. Webster Chair in Dispute Resolution at Pepperdine University. Stipanowich is the academic director of Pepperdine's Straus Institute for Dispute Resolution. The chair is named for the Honorable William H. Webster, the only person to have been the director of both the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA). Stipanowich joined Pepperdine University in Malibu, California in 2006 with a distinguished career as a leader in conflict resolution.

RELOCATIONS

James E. Cleveland, III is pleased to announce the relocation of **Huddleston Bolen LLP's** Ashland office to Suite 301 at 855 Central Avenue in Ashland. The firm's telephone number is (606) 329-8771, and its fax number is (606) 324-4651. Huddleston Bolen LLP also has offices in Louisville, Kentucky and Huntington and Charleston, West Virginia.

The law firm of **Keith & Associates, LLC** has relocated to 715 Bakewell Street in Covington effective June 1, 2009. **R. Frederick Keith** and **Deborah J. Zimmerman** practice at the firm. Keith & Associates, LLC will continue to focus its practice in the areas of tax, business, real estate, estate planning, and probate and will provide legal services to clients in Ohio and Kentucky, and throughout the country.

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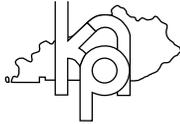


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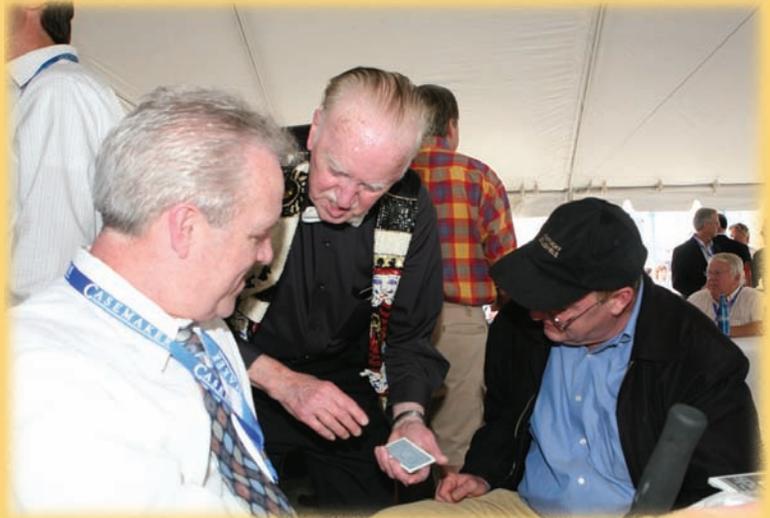
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KBA Labor & Employment Law Section

KBA Probate & Trust Law Section

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