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### POSTMASTER

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Frankfort, KY 40601-1812
The KBA Board of Governors recently held a regularly scheduled meeting in Lexington. It was my first opportunity to preside as president. I greatly enjoyed the meeting. It is a pleasure to work with the outstanding lawyers, and lay appointees, who take their time to give oversight to our professional organization. It is a further pleasure to have the guidance, and hard work of a well-trained and dedicated staff.

That which I found most enjoyable, however, was observing the members of the Young Lawyers Division going about their duties. They were meeting at the same time at the same hotel. The division's chairman, Brad Sayles, reported to the Board of Governors and laid out an ambitious, worthwhile and exciting program for the young lawyers. As I listened to him, I thought of past chairpersons of the division with whom I have worked in my past two years on the board, Jackie Sue Wright and Carl Frazier were strong leaders of the division and it was a pleasure to work with them.

I expect the same dedication and leadership from Brad.

Members of the division socialized with the board, Chief Justice Minton and Mrs. Minton, Court of Appeals Judge Laurence VanMeter and Fayette Chief Circuit Judge Tom Clark and Mrs. Clark. Their energy and interest added to the Friday night gaiety.

I found it comforting to realize that these young lawyers are available to carry on the proud tradition of Kentucky lawyers. They demonstrate that they recognize that as a profession we have a duty and responsibility to persons who are in need of our services. They are already working on projects to help their fellow man and woman. I encourage them to continue to provide leadership in the association. I also encourage all young lawyers to become members of the Young Lawyer Division and participate in the programs of the division.

We need to continue to develop leaders for our profession. The Young Lawyers Division has already taken steps to help fulfill our leadership needs.

Of special note, Erlanger attorney Roula Al-louch, an active member of the Young Lawyers Division's Executive Committee, was recently named to chair the national board of the Council on American-Islamic Relations (CAIR), in Washington, D.C., which serves as America's largest Muslim civil liberties and advocacy organization. Al-louch practices law with the firm of Smith, Rolles & Skavdahl Company, L.P.A., in Cincinnati. She also serves as the Kentucky Young Lawyer Delegate to the American Bar Association House of Delegates and is president of the Cincinnati Chapter of the Council on American-Islamic Relations. On behalf of the KBA Board of Governors, I offer her our congratulations for her numerous leadership roles on the state and national level.
**TERMS EXPIRE ON THE KBA BOARD OF GOVERNORS**

On June 30 of each year, terms expire for seven (7) of the fourteen (14) Bar Governors on the KBA Board of Governors. SCR 3.080 provides that notice of the expiration of the terms of the Bar Governors shall be carried in the Bench & Bar. SCR 3.080 also provides that a Board member may serve three consecutive two-year terms. Requirements for being nominated to run for the Board of Governors are contained in Section 4 of the KBA By-Laws and the requirements include filing a written petition signed by not less than twenty (20) KBA members in good standing who are residents of the candidate’s Supreme Court District. Board policy provides that “No member of the Board of Governors or Inquiry Commission, nor their respective firms, shall represent an attorney in a disciplinary matter.” In addition any member of the Bar who is considering seeking or plans to seek election to the Board of Governors or to a position as an Officer of the KBA will, if elected, be required to sign a limited waiver of confidentiality regarding any private discipline he or she may have received. Any such petition must be received by the KBA Executive Director at the Kentucky Bar Center in Frankfort prior to close of business on the last business day in October.

**THE CURRENT TERMS OF THE FOLLOWING BOARD MEMBERS WILL EXPIRE ON JUNE 30, 2015:**

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Michael M. Pitman

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3rd District
Howard O. Mann

4th District
Amy D. Cubbage

5th District
William R. Garmer

6th District
J. Stephen Smith

7th District
Earl M. “Mickey” McGuire

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**2015 DISTINGUISHED SERVICE AWARDS CALL FOR NOMINATIONS**

The Kentucky Bar Association is accepting nominations for 2015 Distinguished Judge and Lawyer, Donated Legal Services and Bruce K. Davis Bar Service Awards. Nominations must be received by Dec. 31, 2014. If you are aware of a Kentucky judge or lawyer who has provided exceptional service in these areas, please call (502) 564-3795 to request a nominating form or download it from our website at www.kybar.org by choosing “Inside KBA” and clicking on “Public Relations – Distinguished Service Awards.”

**Distinguished Judge Award**

Awards may be given to any judge or lawyer who has distinguished himself or herself through a contribution of outstanding service to the legal profession. The selection process places special emphasis upon community, civic and/or charitable service, which brings honor to the profession.

**Donated Legal Services Award**

Nominees for the Donated Legal Services Award must be members in good standing with the KBA and currently involved in pro bono work. The selection process places special emphasis on the nature of the legal services contributed and the amount of time involved in the provision of free legal services.

**Bruce K. Davis Bar Service Award**

Many lawyers take time from their practices to provide personal, professional and financial support to the KBA. This award expresses the appreciation and respect for such dedicated professional service. All members of the KBA are eligible in any given year except for current officers and members of the Board of Governors.
ABA SET TO LOSE MORE GROUND WITH KENTUCKY LAWYERS

By: Justice Bill Cunningham

I know only a handful of Kentucky lawyers who belong to the American Bar Association. That number is likely to diminish even further in the near future.

There are several reasons that the ABA has dwindling appeal to the Kentucky lawyer. Primarily it is an organization perceived to be out of touch with the practicing lawyers in this state.

This is particularly true as to the welfare of our law students and younger lawyers.

The latest hit against future lawyers of this state is the recent ruling by the ABA Council of the Section of Legal Education and Admissions during its August meeting in Boston. It turned down a recommendation by the ABA Standards Review Committee that would have permitted law students to be paid at the same time they receive law school credit by participating in externships. Not only was it a financial blow to our hard-pressed law students laboring under tremendous student debt, it was also a barrier to the strong tail wind sweeping the country to provide third-year students with more “hands on” training and preparation.

Let’s start with this important data. According to a most recent U.S. News and World Report, 76 percent of our Kentucky law school students are graduating with student debt. The average amount varies from one law school to another but settles into a range from $74,785 to $88,451.

Why does the ABA oppose the change? An explanation is given in the June 10 issue of the National Law Journal. Barry Currier, the ABA’s managing director for admissions and legal education, is quoted as saying that there is a “perceived tension between the obligations of someone who is a paid employee and a student.”

I respectfully submit that this argument is wrong. There is no “tension” between getting credit and getting paid. The “tension” is between the current law student’s pocketbook and a legal education.

The Society of American Law Teachers (SALT) opposed the change. According to its website, the mission of SALT is “advancing teaching excellence, social justice, and diversity.” It would appear to be a well-intended activist group. I would suggest, however, that it would do well to come to the aid of the very poor and disadvantaged class of citizens sitting in the law school class rooms of this country.

Who is looking out for law students these days, as well as the future of our profession, which is in great need of new lawyers who have practical knowledge?

I have to defend our law schools here. They are caught in the middle. Our Supreme Court rules require that those allowed to take our bar exam must graduate from an ABA accredited law school or a law school of “equivalent” quality. So law schools have to dance to the tune of the ABA in keeping their accreditation. At the same time they must answer to the growing clamor of our Court and the practicing bar of Kentucky who demand that new lawyers have hands on, practical experience. And it would be nice for them to be able to graduate fledgling lawyers who are not on the brink of bankruptcy as soon as they enter the practice because of stratospheric student debt.

The opposition by the ABA to giving students credit hours for paid externships is out of step with legal educational trends moving across this nation. There is more and more interest by the practicing bar and courts in making the last part of the law student’s formal education more practical. Clinical courses, internships, externships and off campus placements for credit are gaining favor. Externships are productive experiences for a lawyer in training. Most students with heavy debt cannot afford to engage in outside employment which does not pay.

The American Bar Association is a distinguished organization with a long record of commendable public service, but no organization can be all things to all people.

It will, no doubt, continue to thrive and prosper. Kentuckyless.

Justice Bill Cunningham was elected to the Supreme Court of Kentucky in November 2006 to serve the 1st Supreme Court District, which includes Allen, Ballard, Butler, Caldwell, Calloway, Carlisle, Christian, Crittenden, Edmonson, Fulton, Graves, Hickman, Hopkins, Livingston, Logan, Lyon, Marshall, McCracken, McLean, Muhlenberg, Simpson, Todd, Trigg, Webster counties.
JUSTICE JAMES E. KELLER REMEMBERED

In June, members of Kentucky’s legal community mourned the loss of one of its most distinguished members, retired Justice James E. Keller. Justice Keller practiced in Lexington and served on the Fayette County Circuit Court before his appointment to the Kentucky Supreme Court, but his roots were in the mountains of Eastern Kentucky where he grew up.

Justice Keller was respected and admired for his intellect and integrity, but most of all for his love of the law and the way he cared about all of those involved in the legal process — lawyers, clients, jurors and court officials alike. The preamble of Kentucky’s Rules of Professional Conduct describes the various roles of lawyers, including that of a “public citizen.” As a public citizen, a lawyer should seek “improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession … In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system [and] should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.” These goals are aspirational in nature, but for Justice Keller they represented guiding principles by which he lived his professional life.

Early in his career, Justice Keller chaired the board of the Fayette County Legal Aid, which provided representation to indigent criminal defendants. He served on numerous task forces covering a broad range of subjects, including criminal justice, the funding and delivery of public defender services, court reform, mental health proceedings, domestic violence and child abuse. As a circuit court judge, he instituted a case management system in felony drug cases and co-founded the Fayette Drug Court, a model that has been adopted in many other jurisdictions. He was a leader in the family court movement and was a highly regarded expert in family law, co-authoring a comprehensive treatise on Kentucky law and developing a number of handbooks for use by judges and lawyers practicing in the field. While on the circuit bench, Justice Keller advocated for the adoption of rules to improve the handling of family law cases, developed time-sharing guidelines for custody cases, established a support program for jurors and chaired the Child Support Guideline Review Commission. He was especially concerned about the impact of divorce upon children. He co-founded Kids’ Time, a clinic to help elementary school children deal with divorce and the Parents Education Clinic to counsel divorcing parents. Believing that some disputes were better resolved outside the courtroom, he introduced mediation into contested custody proceedings and co-founded the Mediation Center of Kentucky. Justice Keller also recognized the importance of public education about the law and was founder and chair of the Fayette County Law Day. Justice Keller was an innovator, reformer, and crusader, always working to improve the way the legal system worked for ordinary people.

After Justice Keller “retired” from the Supreme Court, he returned to private practice and the continuation of his life as a “public citizen” lawyer. In 2009, Justice Keller agreed to serve on the ABA Kentucky Death Penalty Assessment Team. The focus of the project was to evaluate the fairness and accuracy of the administration of the death penalty in Kentucky, and to make appropriate recommendations for improvement. Justice Keller brought his vast knowledge of Kentucky law and experience as both a trial judge and appellate judge to this two-year deliberative process. In addition, he shared his practical and political wisdom, as well as his compassion for people and his commitment to justice and fairness. And he always had a story! Not just any story, but ones that reminded the team of the importance of the project and the impact of it would have on the lives of real people. After the assessment team’s report was released, he worked to make the public aware of the concerns raised by the report and served as a resource to help members of the judicial, legislative and executive branches better understand critical issues addressed in the report. Though he was not the chair of the Kentucky Assessment Team, he was the team’s leader. As with many of the other projects and initiatives he undertook over the course of his life, he remained committed throughout the long and arduous drafting process, kept people engaged, and never lost sight of the ultimate goal of making the legal system work fairly, accurately and more efficiently for all.

Justice James E. Keller was a true “public citizen.” He will be remembered fondly by all whose lives he touched directly. His dedication and commitment to improving the administration of justice will have a lasting impact on Kentuckians throughout the Commonwealth.

The Kentucky Death Penalty Assessment Team

Linda Sorenson Ewald, Co-Chair
Michael J. Zydney Mannheimer, Co-Chair
Michael D. Bowling
Allison Connelly
Justice (ret.) Martin E. Johnstone
Frank Hampton Moore Jr.
Marcia Milby Ridings

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Q & A WITH KBA PRESIDENT WILLIAM E. JOHNSON
By: James P. Dady

William E. Johnson became president of the Kentucky Bar Association in July. • Johnson has practiced in the fields of civil, criminal, and administrative law for 57 years. • He has earned a passel of honors and distinctions in his long, illustrious career. He has won the War Horse Award from the Southern Trial Lawyers Association and continuous recognition as one of the Best Lawyers in America for the past 30 years. • Johnson received the Chief Justice’s Special Service Award this year in recognition, in part, for his determined advocacy for the judicial system with the Kentucky General Assembly. In 2012, the legislature recognized Johnson for his professional accomplishments. • He has practiced in courts far and wide, lectured often, and published extensively on the subject of trial practice. • Johnson has won the Hall of Fame award from the University of Kentucky College of Law, the achievement award from the National Alumni Association of Eastern Kentucky University, and had been made a member of the Wall of Fame at Pendleton County High School. • He practices with the firm of Johnson Newcomb, LLP, on Main Street in Frankfort.

The Bench & Bar invited Johnson to address the concerns of the courts and the practicing bar, and his responses follow.

Q: You have been active in lobbying the Kentucky General Assembly for more resources for the court system. Going forward, what should be the goals for the courts in future legislative sessions?

A: There has been a nationwide trend where the legislative bodies fail to adequately fund the courts. Courts must continue reminding legislators that there are three branches of government, executive, legislative and judicial, all equally important.

Q: In particular, could you address the issue of judicial salaries, which have not been increased in eight years?

A: I am concerned about judges’ salaries having been stagnant over the last several years. This is true for both federal and state judges. Nationwide, many qualified judges have left the bench so they can properly support their families. In order to ensure adequate quality of justice, we must have good judges. They must be adequately compensated.

Q: Are you confident that the needs of the court system – and the indispensable function of the courts in society – are being adequately communicated to the legislature in the competition for a fair share of the state budget?

A: I am now. One of the most important things that the Kentucky Bar Association has done is to work with Chief Justice Minton in seeing that individual legislators are contacted by constituent lawyers and judges about the fiscal needs of the judiciary. The Board of Governors intends to keep the Legislative Outreach Program functioning.

Q: How well is the profession doing in Kentucky in meeting the need for legal services, particularly in rural Kentucky, and among historically underserved segments of the population?

A: We need to do more. Legal proceedings are expensive and above the financial reach of some people. Lawyers need to undertake more pro bono services. At the same time, we need to encourage the legislature to adequately fund legal services entities. We also need to encourage young lawyers to consider rural areas for practice.

Q: In particular, could you address how well the profession is serving the criminally accused and non-English speaking population?

A: I have had a concern for a long time about legal services to indigent citizens accused of crimes. The Kentucky Department of Public Advocacy does a wonderful job of representing the accused when they have so many cases assigned to them? The funding of conflict counsel is a continuing problem. Here again it is a matter of money appropriated by the legislature. The need for interpreters has added to the problem. They have to be located and paid for their service. The bar association has a committee working to secure adequate funding for the conflict counsel problem. We have not been able to accomplish the result we want as of this date.

Q: Law school enrollment is down. The pressures are familiar to us – the high debt load many young lawyers carry out of law school and the tight job market, among others. Are you concerned that the profession might be less attractive to the brightest of our young people? Is the organized bar addressing this concern?

A: There have always been periods of distractions when law school enrollments fall. Computer technology seems to be the chosen area today. Further, professions have a way of regulating themselves as to the number necessary to fulfill the purpose of the profession. Further, I believe we have just gone through a period where law students focused more on large salaries upon graduation than upon serving the public. Salaries are down. I believe professionalism will be up.

Q: A follow-up: Are the graduates of our Kentucky law schools up to the professional challenges when they become lawyers?
I have practiced with and against lawyers who have graduated from schools all over the country. A good Kentucky lawyer graduate of any of our three law schools will hold his or her own with a graduate of any law school in the country.

The system by which lawyers are disciplined will always be under scrutiny. How well is the profession in Kentucky doing in protecting the consumer of legal services from misbehaving lawyers?

The discipline of lawyers should always be under public scrutiny. The practice of law is engaging in a profession that renders service to the public. We must be trusted by the public. A misbehaving lawyer brings hurt to the profession and must be dealt with appropriately by the Board of Governors and the judiciary. We must let the public know that lawyers who act improperly will not be permitted to practice law.

A follow-up: is the organized bar concerned that lawyers subject to the disciplinary process are being adequately represented?

Lawyers who take the time to defend or mitigate the charges against them generally employ counsel to represent them. I am often surprised at lawyers facing disciplinary proceedings who do not respond to the charges. A lawyer facing disciplinary charges is given every opportunity to defend.

The profession seems engulfed in revolutionary technological change. Many of the programs at the KBA convention in June concerned integrating technology into practice and meeting the challenges clients are facing in the digital world. The court system in Kentucky is moving rapidly in the direction of electronic case filing. The security of electronic data is near the top of the list of concerns for business and the professions. Can you give any advice to the baby lawyer who is working in Frankfort?

The day of ignoring the use of technology in the practice of law is past. Legal documents are now being filed electronically. This is more difficult for the older practitioners who did not grow up in the computer era. However, one has to learn how to use the computer in this modern time. Fortunately, the learning tools are available.

You have practiced for 57 years. Many of us would have, long ago, headed off to a golf course, to a fishing hole, to volunteer work, or to the back porch with a good book. What keeps you motivated to keep practicing?

I have always tried to organize my time so I can do those things I want to do. Being a lawyer is one of the things I want to do. I continue to find great excitement in representing people who need my service. I can think of nothing more fulfilling.

Is there a personal regimen you observe to stay healthy and keep you fresh for the work every day?

I try to walk a mile each day. I do a few exercises each morning. I read three newspapers daily except on Friday, Saturday and Sunday when I add the New York Times. I average reading a book a week. I take a drink of liquor when I want to do so.

Is there a particular lawyer, teacher, or other mentor who inspired you when you were young to have the career you've had?

Growing up on a farm, suckering tobacco, plowing behind a mule and working in a hay field caused me to believe there was something better to do. I have always loved to read history, and it speaks of lawyers who played important roles. I read A "Connecticut Yankee in King Arthur's Court;" "The Great Mouthpiece" and Earl Stanley Gardner novels. I liked what I read. Two high school teachers inspired me to get an education. I am a blessed man.

What is the key for a lawyer to maintain a fresh perspective and a good attitude about the practice of law?

I believe that if you feel you are here to work and help your fellow man and woman, you will strive to do good work in helping that person in a time of need. Good hard legal work will make a lawyer a good lawyer. Good lawyers are compensated in many ways for the good they do. This should be the goal of every lawyer.

You have been ensconced in Frankfort for decades. Certainly, you must have had opportunities to work in bigger cities. What brought you to Frankfort, and what has kept you here?

I have had opportunities to practice law in much larger cities. However, I have always loved living and working in Frankfort. There is always opportunity and excitement here because of state government and the people you meet. I have also attracted clients from other counties in Kentucky. I have been involved in cases in other states and represented clients in proceedings in St. Croix and Dubai. My experience in practicing law in Frankfort has been wide and varied. Frankfort is a great place to live and work.

James P. Dady is a senior associate in the Cincinnati branch of Mapother & Mapother, P.S.C. A former reporter and political consultant, Dady lives in Bellevue. A frequent contributor, Dady is editor of the Bench & Bar.
No Longer a Bar to Liability in Slip and Fall Cases

By: Ed Massey and Randy J. Blankenship

Virtually all trial lawyers will, at some point in his or her career, encounter a client or potential client who has suffered a slip and fall injury. Therefore, it is important to know how the law has changed over time in the Commonwealth of Kentucky. This article will address the significant changes in the law pertaining to “open and obvious” hazards, as the rule has evolved in recent years to transform the analysis of liability for open and obvious defects.

The duty of care owed in any premises liability case depends on the status of the injured party. This article will focus on the duties owed to an invitee or business visitor. “A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.” Generally, the owner of premises in which the public is invited has a duty to exercise ordinary care to keep the premises in a reasonably safe condition. However, “[r]easonable care on the part of the possessor of a business premises does not ordinarily require precaution or even warning against dangers that are known to the visitor or so obvious to him that he may be expected to discover them.” This standard was first articulated in Standard Oil Co. v. Manis, in which the court held that owners of premises do not possess a duty to warn against hazards which are obvious to discover them. The duty of care owed in any premises liability case is based on the status of the injured party. A business visitor is a person who is invited or so obvious to him that he may be expected to discover them. This standard was first articulated in Standard Oil Co. v. Manis, in which the court held that owners of premises do not possess a duty to warn against hazards which are obvious to discover them.

In the late 1990s, the evaluation of the responsibility for injuries on business premises began to shift. The inherent inequity of the courts’ approach to the burden of proof in premises liability cases was discussed at length in the concurring opinion in Smith v. Wal-Mart Stores, Inc. Before Smith, if a plaintiff could not explain why he could not avoid an open and obvious hazard, summary judgment was likely. Presumably, the courts reasoned that a plaintiff who knew or should have known of the presence of the substance/object before the accident would not have slipped on it. This responsibility to avoid injury, placed on the consumer, created a virtually insurmountable burden of proof for the injured customer.

This concept was inconsistent with the duty of a business proprietor to keep a premises in a reasonably safe condition for normal use by customers. Winn-Dixie Louisville, Inc., v. Smith. The shift of burden occurred when courts began to balance the competing principles of notice versus duty. That is, what was once the customer’s burden became an affirmative defense of the proprietor. The burden-shifting approach espoused in the Smith concurrence was subsequently adopted by the Supreme Court of Florida in Owens v. Publix Supermarkets, Inc. The Smith concurrence also foreshadowed changes in the analytical framework observed by the Kentucky courts.

The shift away from viewing the open and obvious rule as a purely legal issue which could be decided on summary judgment can be found in Wal-Mart Stores, Inc., v. Lawson. The court held, among other things, that a jury issue was presented as to whether the hazard causing the plaintiff’s fall was open and obvious. Thus, that issue was properly presented to the jury for resolution. In Lawson, the court held that a 10 foot by 30 inch strip of black substance, located in a concrete aisle in a Wal-Mart garden center, was not an open and obvious hazard as a matter of law. The Lawson court held that whether the danger should have been noticed by the plaintiff prior to his fall was properly addressed by the trial court as an issue of comparative fault to be decided by a jury.

This continuing shift of the burden from the customer to the proprietor is set forth in an unpublished case, Jenkins v. PetSmart, Inc. In that case, the plaintiff was injured while shopping in a PetSmart store. While perusing the advertisements, the plaintiff stepped into dog feces and fell, suffering serious injuries to her lower extremities. In her deposition, Jenkins testified that she shopped at PetSmart frequently. Customers were permitted to bring their pets onto the premises. Jenkins testified that on the date of her injury she did not see the dog feces before stepping into it, although the substance was clearly visible at the end of the aisle where she was walking and she could have seen it if she had been looking for it. Jenkins had no knowledge as to how long the feces had been on the floor and she possessed no evidence from which a jury could determine how long the feces had been present before she slipped. A motion for summary judgment was filed by the defendant, PetSmart, and was sustained in the Boone County Circuit Court. On appeal, Jenkins argued that due to the store’s policy which permitted dogs on the premises, PetSmart should possess a higher duty of care because it obtained the business advantage of customers accepting the invitation to bring their pets to the premises. In its defense, PetSmart argued that the case law placed no duty on businesses to remove or to warn against open and obvious hazards. Citing several cases, the defense argued that liability cannot be found where an invitee slips and falls in canine feces when she is not watching where she is going.

Relying on Lawson, the Kentucky Court of Appeals ruled that the obvious risk rule will not always bar a suit caused by a hazardous substance or object located on the floor of a business premises that was not observed by the customer prior to an injury. In arguing the case, counsel for the plaintiff urged the court to adopt a theory of liability premised on the “mode of operation” of businesses. This argument was contrary to the obvious-risk rule previously adopted by the majority of courts. Under the mode of operation theory, an invitee may recover without showing actual notice or constructive knowledge by the business owner of the specific object causing the accident if she shows the proprietor adopted a mode of operation where a patron’s carelessness should be anticipated and the proprietor fails to use reasonable measures commensurate with the risk involved to discover the condition and remove it. See Jackson v. K-Mart Corp. The court overturned summary judgment in Jenkins and held that Jenkins had met her burden of establishing the presence of excrement on the floor and that her injury was caused by her slipping in the substance. The burden of proof was shifted to PetSmart to show the absence of negligence or lack of notice as an affirmative defense.
The court in *Jenkins* relied on *Lanier v. Wal-Mart Stores, Inc.*, 11 which was decided while the appeal in *Jenkins* was pending. *Lanier* emphasized that the court had shifted the requirement from the invitee to the proprietor and had adopted the rule that one in possession of premises has an affirmative duty to make sure the premises are reasonably safe. The court, in *Lanier*, stressed also that the commercial realities control what is foreseeable. In *Lanier*, the court recognized that retail practices are designed to distract the plaintiff's attention away from the floor and toward the merchandise which the business hopes to sell. In determining liability, the *Lanier* court recognized that this commercial reality can create a jury question. Accord, *Vaughan v. Dillard's*. 12

In *Horne v. Precision Cars of Lexington, Inc.*, 13 the court continued the trend of entrusting these issues to the jury for determination. In *Horne*, the plaintiff visited the defendant's auto dealership to shop for a car. He and the salesperson, Spencer, walked out of the dealership and got into a red Firebird. The plaintiff was in the driver's seat and Spencer was in the passenger seat. Spencer suggested that they switch places, so he could drive the vehicle off the lot. As plaintiff walked around to the passenger side of the vehicle, he tripped over a partially exposed concrete parking barrier. The plaintiff in *Horne* had never been at the dealership before and testified he did not see the barrier prior to tripping over it. At the time he fell, Spencer was extolling the virtues of the Firebird and the plaintiff gave his attention to the salesperson. The trial court and the Court of Appeals both held the concrete parking barrier was an open and obvious hazard, entitling the defendant to summary judgment. The Supreme Court reversed. This decision adopted the rationale in the unpublished case of *Jenkins*.

Relying on the Restatement (Second) of Torts, §343, the court recited the general rule that a landowner owes no duty to warn an invitee of open and obvious hazards, but cautioned that such rule applied only where the “danger is known or obvious” to the invitee.14 According to the Supreme Court, for the danger to be “known” it must be shown that the invitee possessed not only knowledge of the existence of the condition or activity itself, but also that the invitee appreciated the danger it involved.15 In discussing the “obvious” prong of the “open and obvious” test, the court preferred an example, derived from the Restatement. The court noted:

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**Is the defendant's liability limited to some degree by the plaintiff's comparative negligence?**

**Was the duty of the defendant breached?**

**Is a land possessor's general duty of care not eliminated because of the obviousness of the danger?**

**Was the hazard open and obvious?**

**We, the jury find...**

---

The A Department Store has a weighing scale protruding into one of its aisles, which is visible and quite obvious to anyone who looks. Behind and about the scale it displays goods to attract customers. B, a customer, passing through the aisle, is intent on looking at the displayed goods. B does not discover the scale, stumbles over it and is injured. A is subject to liability to B.16

The court in *Horne*, relying on Comment f, held that the hazard there could not be deemed “open and obvious” because there was no evidence that the parking barrier was either known or obvious to plaintiff.17

In *Kentucky River Medical Center v. McIntosh*, 18 the court reviewed the prior cases and decided the time had come to quit viewing open and obvious as a part of the duty analysis and to evaluate slip and fall cases under a foreseeability standard. In *McIntosh*, the court noted that a growing majority of states has moved “away from the traditional rule absolving ipso facto, owners and occupiers of land from liability for injuries resulting from known or obvious conditions and, instead, adopted Restatement (Second) of Torts §343A, holding that ‘lower courts should not merely label a danger as ‘obvious’ and then..."
denied recovery. Rather, [the courts] must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger.20 According to §343A, harm to the invitee is reasonably foreseeable despite the obviousness of the condition “where the possessor has reason to expect that the invitee’s attention may be distracted, so that he will not discover what is obvious or will forget what he has discovered, or fail to protect himself against it” and, also, “where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because of a reasonable man in his position the advantages of doing so would outweigh the apparent risk.”21

Unfortunately, lower courts did not fully grasp the fundamental change in the law brought about by McIntosh. Consequently, the Supreme Court took the opportunity to clarify McIntosh in Shelton v. Kentucky Eastern Seals Society, Inc.22 The court stated, “we did not speak clearly enough in McIntosh; and we now face squarely the confusion it produced. McIntosh was undeniably a step forward in the development of our tort law, but our holding regrettably allowed the obtuse no-duty determination to survive.” The court clarified that the existence of an open and obvious danger, “does not pertain to the existence of duty” and that, “a land possessor’s general duty of care is not eliminated because of the obviousness of the danger.” The court then noted that the analysis should proceed as follows:

- Along with the defendant’s general duty of care, the defendant’s duty is outlined by the relationship between the parties, e.g., an invitee has a duty to maintain the premises in a reasonably safe condition in anticipation of the invitee’s arrival.
- Was the duty breached?
- Is the defendant’s liability limited to some degree by the plaintiff’s comparative negligence?

Practically speaking, analysis will almost always begin with the breach question, given the broad sweep of the general duty of reasonable care.

The change in the law resulting from Shelton is profound. In Shelton, the defendant tripped over wires dangling from medical equipment in a hospital room. The condition was, without doubt, both open and obvious, yet the Supreme Court held that the jury must decide whether defendant breached its duty of care. The court recognized that a reasonable juror might believe the hospital had reason to foresee that plaintiff would encounter the wires and fall. Since it was potentially foreseeable that the plaintiff might trip over the wires, the jury also had to consider whether a safer method of corralling the cords was feasible.

In a case decided on the same day as Shelton, the Supreme Court further limited the reach of the open and obvious rule by altering what is required to consider a hazard to be open and obvious in Dick’s Sporting Goods, Inc. v. Webb.23 The plaintiff in Webb noticed the mats in the store’s entryway had shifted and a puddle of water had collected between them. While attempting to step over the puddle, Webb stepped onto the tile floor, which she believed was dry. The tile, however, was also wet, causing Webb to fall and suffer injuries. The Supreme Court held that the hazard was not open and obvious. The Court ruled:

Simply put, the case before us does not present an open and obvious hazard. An open-and-obvious condition is found when the danger is known or obvious. The condition is known to a plaintiff when, subjectively, she is aware...not only...of the existence of the condition or activity itself, but also appreciate[s]...the danger it involves...And the condition is obvious when, objectively,...both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence and judgment....The defendant will be subject to liability if the condition is either known or obvious.24

The Court held that the condition was not open and obvious because the “appearance of the tile and the water” made the danger “not easily perceptible without closer inspection beyond the exercise of reasonable care.” The Court concluded that Dick’s Sporting Goods possessed an “affirmative duty” to maintain the entryway which it may have breached. Accordingly, summary judgment was in error.

Traditionally, the open and obvious rule has resulted in the dismissal of numerous cases involving falls on ice and snow. Recent cases demonstrate that McIntosh, Shelton, and Webb will change the outcome in many of those cases. In Hayden v. Up, Inc.,25 a young man suffered injuries to his head and knee when he slipped and fell on a chunk of ice in a McDonald’s parking lot. The day was described as “an ugly winter day” with more than normal snow accumulation. The trial court granted summary judgment, based on the open and obvious rule. The Court of Appeals reversed. The Court reasoned as follows:

...[T]he fact that the lumps of ice...were open and obvious does not as a matter of law eliminate Up’s duty...as it would have under the traditional rule. Instead, the question becomes whether Up breached its duty by failing to remove the ice. Our Supreme Court has emphasized existence of a breach of duty is a factual matter regarding foreseeability of the risk of harm which is normally left to the jury....26

But see, Cobb v. Kamer,27 in which summary judgment was affirmed because ice on the driveway was obvious to the plaintiff, despite her testimony that she did not observe the ice before her fall. The Court reasoned that nothing obstructed her vision of the ice.

In a decision designated as “to be published” and issued on June 20, 2014, McKinley v. Circle K,28 the Court of Appeals again considered whether a store owner was absolved from liability where the plaintiff fell on ice and snow in the store’s parking lot. The plaintiff, McKinley, parked in the rear of the store, in an area not designated for parking. He testified, though, that he and others regularly parked in the area. A snowstorm had passed through the area the day before McKinley suffered his injuries and Circle K had hired a contractor to clear the lot. The contractor cleared the front and sides of the lot, but not the rear. While returning to his truck after purchasing a lottery ticket in the store, McKinley slipped and fell on a patch of ice, breaking three ribs. The trial court granted summary judgment, finding the condition to be open and obvious and that injury to McKinley was not foreseeable. The Court easily disposed of the contention that the store owner owed no duty to McKinley. He was an invitee and “Circle K owed him not only a general duty of reasonable care, but also the more specific duty associated with the land possessor-invitee relationship.”29

The issue was not whether a duty existed, but whether there was evidence from which a jury could find a breach of that duty. In analyzing that issue, the Court noted, “the harm posed by the snow and ice on the back lot must be weighed with the burden of clearing and salting the back lot.”30 Since Circle K cleared the front and side lots, “a reasonable mind could find that Circle K was aware of the risk of physical harm the
ice and snow presented to invitees and sought to protect against it.”31 Likewise, it was foreseeable that invitees might park in the rear of the store, thereby encountering the risk of falling on the ice. The Court held that the jury must decide whether Circle K breached its duty of reasonable care.

The Supreme Court continues to say that summary judgment may be appropriate in some slip and fall cases where the hazard is open and obvious. Nonetheless, it has become clear that this class of cases has been significantly narrowed. No longer may a defendant obtain summary judgment simply by saying the hazard is obvious. In the overwhelming majority of cases, the obviousness of the hazard is now but one factor for a jury to consider in determining whether the defendant breached its duty to provide a safe premises. 32

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EMOTIONAL DISTRESS CLAIMS
IN A POST-IMPACT WORLD:

By: Chris Jackson and Lucas Humble

INTRODUCTION.

For years, the “impact” rule has limited claims for negligent infliction of emotional distress throughout the Commonwealth. Under this well-known rule, an action for negligent infliction of emotional distress would “not lie for fright, shock or mental anguish which [was] unaccompanied by physical contact or injury.” Stated simply, no physical “impact” resulted in no recovery for the plaintiff. While the rule had its critics, it served a useful purpose to defendants who could rely on the impact rule as a defense and dispose of emotional distress claims, which lacked physical impact, early in litigation.

On Dec. 20, 2012, the Kentucky Supreme Court issued a groundbreaking opinion in Osborne v. Keeney and eliminated the impact rule. In its place, the Court set forth a new test requiring a plaintiff seeking emotional damages to prove that he or she suffered a “serious” or “severe” emotional injury by presenting expert medical or scientific proof.

As soon as the opinion was handed down, a debate arose among Kentucky lawyers as to the scope of its application. Does it apply only in “non impact” cases or does it apply to all cases involving claims for emotional distress, even if these claims arise from actual physical injury caused by “impact.”

Nearly two years have passed since Osborne and some of the initial questions left unanswered have been addressed. Nevertheless, questions remain.

While courts and attorneys may have some trepidations in applying and interpreting the new rule, several recent opinions provide some insight into this key decision and offer litigants a compass – if not a road map – for emotional distress claims moving forward. These cases underscore that attorneys in Kentucky must take note and integrate it into their tort practice.

THE OLD “PHYSICAL IMPACT” TEST – A “BRIGHT LINE” RULE THAT WAS OFTEN NOT SO BRIGHT.

For decades prior to Osborne, Kentucky courts applied the “physical impact” rule to claims for negligent infliction of emotional distress. In the 1942 case, Morgan v. Hightower’s Adm’r, the Kentucky Court of Appeals discussed the purpose of the rule and showed the court’s suspicions toward emotional distress claims, explaining that they “are too remote and speculative, are easily simulated and difficult to disprove, and there is no standard by which they can be justly measured.” While the standard was, at least arguably, arbitrary, it nevertheless represented a bright-line rule that courts could presumably follow.

Yet, as courts applied the rule in subsequent decades, it became increasingly apparent that the rule led to inconsistent – and often inequitable – results. A striking example of this is the 1988 case, Wilhoite v. Cobb. In Wilhoite, a truck driver hit and killed a minor child. The truck driver settled the wrongful death claims with the child’s estate. The child’s mother, who witnessed the horrific accident and her child’s death, sued the truck driver for negligent infliction of emotional distress.

At first glance, these facts seem to be a benchmark example of when a negligent infliction of emotional distress claim might be viable. Yet, the Kentucky Court of Appeals, affirming the trial court, held that the mother’s claim was barred. The Court explained, “the thing which causes the injury to a victim must also come in contact with the witness for that witness to recover for mental distress. We are bound by this precedent.”

Thus, since “Mrs. Wilhoite did not herself receive any physical contact or injury from the appellee; therefore, we conclude that the court did not err in dismissing her claim insofar as it was based upon the tort of negligence.”

Perhaps the most controversial aspect of the Wilhoite decision was the Court’s rejection of the plaintiff’s argument that light rays physically impacted her eyes, thus satisfying the impact rule. In hindsight, this argument appears to be a stretch. But just eight years earlier, the Kentucky Supreme Court, in Deutsch v. Shein, ruled that a plaintiff could satisfy the physical impact rule by providing evidence that he was contacted by x-rays, holding that “[w]e find no difficulty in concluding that the physical contact necessary to support the claim for mental suffering occurred when, through Dr. Shein’s negligence, Mrs. Deutsch’s person was bombarded by x-rays.” Indeed, courts had effectively watered down the physical impact rule to the point that contact, which was “minimal” or “slight, trifling, or trivial,” was sufficient. Despite these inconsistent results, courts continued to apply the impact rule for over 20 years after the Wilhoite decision. During this time, attorneys were stuck interpreting an ambiguous rule while, at the same time, questioning whether it would be abolished. That time came in 2012.

THE KENTUCKY SUPREME COURT ISSUES OSBORNE V. KEENEY – AND RAISES MORE QUESTIONS.

After decades of confusion, the Kentucky Supreme Court eliminated the physical impact rule in Osborne v. Keeney. In Osborne, an individual sued after a pilot negligently crashed an airplane into her house. The plaintiff alleged, among other things, that she suffered emotional distress due to the crash. However, she was not physically contacted or injured.

The defendant attempted to rely on the impact rule, arguing that because the plaintiff had not been physically contacted she could not sue for mental damages. Surprisingly, the Court rejected the defense and, in doing so, eliminated the long-established impact rule. The Court explained that:

[The supposed beauty of the impact rule is that it draws a bright line for determining when a plaintiff is entitled to recover for emotional injuries. At first blush, this may make sense and seem to counterbalance the feared possibility of subjectivity in finding emotional injury. But, in practice, what constitutes a sufficient impact for purposes of liability is not an easy determination for courts.]
Comparing the arbitrary distinctions between Wilhoite and Deutsch, the Court noted that “[i]n reality, the bright line of impact establishing liability is not so bright.”

In its place, the Court established a new standard. The Court first reiterated that a plaintiff asserting a claim for negligent infliction of emotional distress “must present evidence of the recognized elements of a common law negligence claim: (1) the defendant owed a duty of care to the plaintiff; (2) breach of that duty; (3) injury to the plaintiff; and (4) legal causation between the defendant’s breach and the plaintiff’s injury.”

Recognizing “that emotional tranquility is rarely attained and that some degree of emotional harm is an unfortunate reality of living in a modern society,” the Court stated “that recovery should be provided only for ‘severe’ or ‘serious’ emotional injury.” Addressing what was required to satisfy this standard, the Court explained that “[a] ‘serious’ or ‘severe’ emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case.”

Suggesting a floor for what constitutes severe emotional distress, the Court continued, “[d]istress that does not significantly affect the plaintiff’s everyday life or require significant treatment will not suffice.”

Arguably, however, the most important, and controversial, aspect of the Court’s decision was its holding that “a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment,” explaining that this rule was appropriate “in light of societal advancements in mental health treatment and education.”

The Court wasted no time in applying its new standard, holding that “the new rules espoused today governing claims involving emotional distress . . . shall apply to: (1) the present case; (2) all cases tried or retried after the date of filing of this opinion; and (3) all cases pending, including appeals, in which the issue has been preserved.” Therefore, Osborne applies to all cases pending as of Dec. 20, 2012, the date the Court issued the opinion.

WHERE ARE WE NOW - CLARIFYING OSBORNE.

While the Court’s derogation of the old rule included its lack of a bright line standard, Osborne also raised several new questions. For example, is expert testimony required in situations where physical impact unquestionably occurred, or was it a test intended to apply only in the absence of physical contact? The opinion, likewise, left open the question of whether the new standard applies to all claims for emotional distress, including those for intentional infliction of emotional distress, an entirely separate tort. Yet another unanswered question: does Osborne provide grounds for dismissal of emotional distress claims that fail to satisfy its requirements?

More generally, attorneys and scholars were left to wonder about the import of this drastically different rule and how it would affect the future of Kentucky tort litigation. In the two years since Osborne came down, Kentucky courts have provided some guidance.

• Is expert proof required for all emotional distress claims based on negligence?

It is well settled in Kentucky that, unless the subject matter is within the common knowledge of a layman and does not involve any technical matters, expert testimony is required. Recognizing the complex subject matter in certain areas of the law, courts have held that expert evidence is required in cases such as product liability claims for failure to warn or medical malpractice cases. Does Osborne present a comparable rule and require expert evidence in all negligence cases seeking emotional distress damages?

Relying on the general rule above, one could argue that expert evidence is not required in all negligence cases claiming emotional distress. Surely a jury is equipped to determine whether emotional distress occurred in cases involving catastrophic accidents, such as a car or plane crash, or horrific injury, such as amputation or disfigurement. Perhaps, then, Osborne only applies to negligence where there is no physical impact and, thus, a more enigmatic emotional injury.

The language in Osborne seems to mandate a sweeping rule, requiring expert evidence in all negligence cases seeking damages for emotional distress. Indeed, the court specifically directed its new rule at “emotional-distress plaintiffs,” without limitation. Likewise, the court plainly and broadly stated that “a plaintiff will not be allowed to recover without showing, by expert or scientific proof, that the claimed emotional injury is severe or serious” and “a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment.” Apparently, the Osborne Court did not equivocate.

The question regarding the scope of Osborne’s application in negligence cases was considered by the federal court in Sergent v. ICG Knott County, LLC. Sergent involved a mineworker who suffered a “serious injury” when the mine in which he was working collapsed, ultimately requiring amputation of his leg. Plaintiff sued, alleging negligence in the maintenance of the mine and seeking damages, including emotional distress. In granting the defendant’s motion for summary judgment as to the emotional distress claims, the court turned to the clear language of Osborne and stated, “[p]lead plainly, Osborne announced a generally applicable rule that applies to all claims for emotional damages.” The court soundly rejected plaintiff’s argument that Osborne only required expert evidence in cases where there was no physical impact. Indeed, such an interpretation of Osborne would require application of the impact rule to determine whether expert evidence was required – frustrating the Court’s abrogation of the old rule. Relying on Osborne, the court held that expert evidence was required for all negligence claims seeking emotional distress. Impact or no impact, expert evidence is required.

• Does Osborne apply to all claims for emotional distress damages no matter the tort?

The facts and context of Osborne seem to limit its application to negligence claims. Osborne, after all, was a negligence case. Moreover, the Court abrogated the physical impact rule, a rule traditionally limited to negligence claims and not applicable to other torts. Likewise, the Court repeatedly framed its holding within the context of a prima facie negligence case, requiring plaintiffs to first show duty, breach, and causation, and then severe emotional distress supported by expert evidence. Nonetheless, does Osborne require expert evidence of severe emotional distress for every tort seeking damages for emotional distress, such as intentional infliction of emotional distress (“IIED”) claims?

In Keaton v. G.C. Williams Funeral Home, Inc., plaintiff sued a funeral home for negligence, and IIED, alleging mishandling of a family member’s remains. The Court of Appeals affirmed the trial court’s grant of summary judgment to the defendant on the negligence claim because, under Osborne, the plaintiffs failed to present affirmative evidence that they suffered severe emotional distress. Likewise, the court affirmed summary judgment for the funeral home on the IIED claim. The court held, “as previously stated, the [plaintiff] failed to present sufficient affirmative evidence con-
cerning any ‘severe emotional distress’ its members had experienced or were suffering. As this failure was fatal to their negligence claim, it is likewise fatal to their IIED claim.”

The implication of Keaton is far from clear. Perhaps the Keaton court was merely applying the elements of an IIED claim, which, itself requires evidence of severe emotional distress. It could be argued, however, that the court applied Osborne’s requirement of severe emotional distress to both the negligence and the IIED claims. If the latter is true, attorneys and courts may begin extending Osborne, including its expert evidence requirement, to intentional torts, such as IIED. However, focusing solely on the context and language of Osborne, it seems the more reasoned conclusion is that the rule is limited to negligence claims.

Does Osborne provide a means of summarily dismissing claims for emotional distress?

Readers beware - Osborne has teeth! Indeed, one need not look far for an abundance of cases where courts have granted defendants’ dispositive motions on emotional distress claims based upon plaintiff’s failure to provide expert evidence in support of their emotional distress claims. Osborne has even been the basis for granting motions to dismiss. Clearly, attorneys who ignore Osborne do so at great risk to their clients.

INTEGRATING OSBORNE INTO YOUR CASE.

The careful advocate on both sides of the “v” will certainly wonder how to use Osborne, and avoid its pitfalls, as they develop and practice their current and future tort cases. Hopefully, Osborne’s game-changing impact on the landscape of Kentucky law has become evident. At a minimum, then, given the consequences of ignoring Osborne, attorneys must be aware of Osborne and attentive to its sweeping effects. However, more can be done to further your client’s interests.

The following presents some basic, and non-exclusive, ways Osborne should be employed in your next tort case.

For the Plaintiff’s bar:

- Figure Osborne into the value of your cases, both when screening potential clients and negotiating settlement – can you prove severe emotional distress and does the value of the case warrant expert costs?
- Remember, physical impact is no longer required – claims for negligent infliction of emotional distress may be viable where, in the past, they would not.
- Be conscious of Osborne when drafting your complaint so as to not invite a motion to dismiss by inartful pleading.
- Draft discovery responses and prepare your clients for depositions with Osborne in mind – use these opportunities to evidence the severity of any emotional distress by focusing on its impact on plaintiff’s daily lives and the extent of treatment they have received.
- Secure expert proof, through either a retained expert or a qualified treatment provider, to support your client’s emotional distress claim and properly and timely disclose experts to avoid motions for summary judgment.

For the Defense bar:

- Draft written discovery requests and depose plaintiffs with an eye toward dismissal of emotional distress claims by focusing on the lack of severity of the plaintiffs’ emotional distress.
- Get a scheduling order in place with a clear expert disclosure deadline.
- Move for dismissal if plaintiff cannot present evidence of severe emotional distress or has failed to timely obtain an expert witness to support emotional distress claims.
- Consider whether a rebuttal expert to contradict plaintiff’s expert is necessary for trial.
- Secure expert proof, through either a retained expert or a qualified treatment provider, to support your client’s emotional distress claim and properly and timely disclose experts to avoid motions for summary judgment.
CONCLUSION.

Nearly two years after the Kentucky Supreme Court issued its opinion in Osborne, questions linger. Some answers have emerged, but the opinion’s full ramifications will become clearer only as parties continue to litigate and courts continue to interpret and apply the new rule.

What does appear certain, however, is that Osborne is a landmark opinion that will continue to impact tort litigation for years to come. Whether you represent a plaintiff, arguing that the rule opens the door for a litany of new claims, or a defendant, treating the rule as a shield to bar damages for emotional distress, litigants must be aware of Osborne and recognize its impact on Kentucky law.

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1 Morgan v. Highower’s Admir’, 163 S.W.2d 21, 22 (Ky. 1942) (overruled by Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012)).
2 399 S.W.3d 1 (Ky. 2012).
3 163 S.W.2d 21, 22 (Ky. 1942) (overruled by Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012)).
4 761 S.W.2d 625 (Ky. 1988) (overruled by Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012)).
5 Id. at 626.
6 Id.
7 Deutsch v. Shein, 597 S.W.2d 141, 146 (Ky. 1980) (overruled by Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012)).
8 Id.
9 399 S.W.3d 1 (Ky. 2012).
10 Id. at 15.
11 Id. at 16.
12 Id. at 17.
13 Id.
14 Id.
15 Id.
16 Id. at 17-18.
17 Id. at 24.
19 West v. KJK, LLC, 300 S.W.3d 184 (Ky. App. 2008).
20 Love v. Walker, 423 S.W.3d 751 (Ky. 2014) (“Under Kentucky law, a plaintiff alleging medical malpractice is generally required to put forth expert testimony to show that the defendant medical provider failed to conform to the standard of care.”). But, even in these cases, expert evidence may not be required if “the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant’s relation to it,” or in cases where the defendant physician makes certain admissions that make his negligence apparent.” (Id.)
21 399 S.W.3d 1, 6 (Ky. 2012).
22 Id.
23 Id. at 17-18.
25 Id. at *12.
26 Id. at *2.
27 Id. at *17.
28 Id. at *15-21.
29 Id. at *18-21.
30 See Childers v. Geile, 367 S.W.3d 576 (Ky. 2012) (“By adopting the tort of intentional infliction of emotional distress, this Court recognized that physical impact, or personal injury, need not be present for a plaintiff to recover.”).
31 399 S.W.3d 1, 6, 18, 23 (Ky. 2012).
33 Id. at *1-3.
34 Id. at *10-11.
35 Id. at *14.
36 Id. at *11-12 (citing Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781 (Ky. 2004)).
37 See e.g. Koontz v. G.C. Williams Funeral Home, Inc., 2013 Ky. App. LEXIS 153 (Ky. App. 2013) (affirming trial court’s grant of defendant’s motion for summary judgment as plaintiff had not provided the requisite proof of “some affirmative evidence of severe emotional distress to support the claim”); Powell v. Tosh, 2013 U.S. Dist. LEXIS 63567 (W.D. Ky. 2013) (granting defendant’s motion for summary judgment as plaintiff failed to provide evidence of severe emotional distress as “[i]t follows that a genuine emotional distress injury is one that necessarily requires significant treatment. Here, no Plaintiff has sought significant treatment—in fact, no Plaintiff has sought any treatment”).
38 Id.
40 See e.g. Taylor v. JPMorgan Chase Bank, N.A., 2014 U.S. Dist. LEXIS 1931 (E.D. Ky. 2014) (granting defendant’s motion to dismiss as the “facts alleged in [plaintiffs’] complaint certainly could not be said to qualify as serious or severe under the definition in Osborne”); Odom v. Cranzor, 2013 U.S. Dist. LEXIS 87503 (W.D. Ky. 2013) (granting defendant’s motion to dismiss as “Plaintiff’s complaint does not adequately state allegations regarding mental distress he suffered to avoid dismissal of these claims”); Odom v. Hiland, 2013 U.S. Dist. LEXIS 73687 (W.D. Ky. 2013) (same).

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FEATURE: TORTS

A STUDIED APPROACH TO MALPRACTICE
TORT REFORM: LONG OVERDUE

By: Gerald Toner and Stephanie Caldwell

Tort reform, in general, is controversial. Tort reform specific to medical malpractice, however, borders on the incendiary. The reason, very simply, is that medical malpractice is often the most personal and emotional form of litigation within the civil justice system. When any of us experience a vehicular accident, a slip and fall, or other form of bodily or property injury, the ensuing claims seldom strike at the heart of our self-esteem, our personal identity, or our professional competency. Products liability claims, exceptional cases excluded, seldom result in an emotional breakdown within the ranks of a company’s shareholders or leaders.

In contrast, medical malpractice cases, by their basic definition, question whether “Dr. X failed to act as a reasonably competent specialist acting under the same or similar circumstances.” When the relationship in question entails trust, confidential information, and the degree of intimate personal contact associated with a patient and physician relationship, no wonder both patient and physician approach medical malpractice litigation more sensitized to their respective “skin in the game” than they would if the discussion was truly “who ran the red light?” Moreover, when the case is finally over, more often than not, all litigants feel they have lost. Even worse, the experience seldom seems to have “enlightened” either winner or loser.

No other profession deals with the physical, mental, and emotional ills of the general population as extensively as doctors, nurses, and other medical personnel. Pain and suffering, in a cynical sense, are their bread and butter. Even so, a medical degree seems to many physicians to be the figurative equivalent to a bulls-eye target. Lawyers, teachers, accountants, architects, ministers, and other professionals seldom experience claims, let alone lawsuits, simply from doing their job. Yet, litigation tends to be an all too frequent reality for many practicing physicians. According to a study commissioned by the American Medical Association (AMA) in 2010, approximately 61 percent of physicians 55 and over have been sued, with an average of 1.6 claims asserted against each physician.† Physicians practicing in several medical specialties – obstetricians/gynecologists, neurosurgeons and emergency physicians, to name a few – almost never escape becoming defendants at some point in their career. Case in point, the AMA study also revealed that doctors practicing in high-risk medicine are increasingly likely to be sued; about 50 percent of obstetricians/gynecologists under the age of 40 were party to a lawsuit, while 90 percent of surgeons 55 or older had been sued.‡ Does this mean – as a clear, unassailable statistical reality – that those professionals, who are not only the “best and the brightest,” but also have undergone the longest and most rigorous schooling of any other profession, are also a collection of incompetents? In order for a plaintiff to prevail in a medical negligence action, he must contend failure of a physician’s competence.

The emotional stress of being sued does not stop after a physician has received his copy of the complaint and summons. Rather, it is a dread that pervades the practitioner’s every day and may present in situations similar to the facts in suit or simply by the receipt of correspondence or a phone call from counsel. We all know that litigation in medical malpractice suits, even those that do not end up going to trial, can last for anywhere between two and seven years. Tag on an appeal or two, and a decade has passed – a decade of having both personal and professional accusations hanging over the physician’s head. The length of time it can take to resolve even a relatively straightforward suit – which goes hand in hand with loss of control over one’s emotional well-being – can be unsettling and unfamiliar territory to defendant physicians facing their first malpractice action.

Emotional strains are not the only by-product of malpractice litigation for a physician. Increasingly, a settlement or trial loss has several automatic consequences: the first is an increase for several years in insurance premiums, ranging upwards from a few thousand dollars to $20,000 or $30,000 a year. The second is being listed in the dreaded National Practitioners Data Bank, and the accompanying listing of settlements and losses in all future applications for and renewals of hospital privileges. A third is the even more dreaded Kentucky Board of Medical Licensure investigation, which has adopted a program of expensive “re-education” at an institution in Colorado – preceded or followed by license suspension and/or other punishments. And, of course, given the explosion of damages that can be blackboarded in a...
NO ACCOUNTABILITY = NO SAFETY: HOW TORT “REFORM” ENDANGERS US ALL

By: Vanessa B. Cantley

The number of Americans killed or seriously injured by completely preventable medical errors every single year numbers in the hundreds of thousands. Preventable medical errors kill about 98,000 Americans annually, according to the Institute of Medicine, and severely injure many more.1 A study published in the Journal of Patient Safety estimates the number of our parents, siblings, children and fellow citizens’ deaths from preventable medical errors at up to 400,000 each year.2 This places purely preventable medical errors on the list of leading causes of death in the United States at between third (behind only heart disease and cancer, and ahead of stroke) and sixth.3

So, preventable medical errors—what we lawyers refer to as negligence—are the primary cause of the medical negligence litigation crisis, not litigious victims and unscrupulous lawyers, right? Well, yes, and no.

As it turns out, there is no litigation crisis. The “tort liability crisis” is a myth. A myth backed by a coordinated, multi-billion dollar campaign with the goal of avoiding the accountability of the judicial branch of government and increasing profits.4 Their lobbyists line K-Street and walk the halls of Congress; the executive branch’s watch-dog agencies are often headed by industry insiders. But, jurors cannot be bought. And, they can be really effective at holding wrongdoers accountable.

In truth, the number of personal injury, including medical negligence, lawsuits has been dropping for years. This has been documented by the courts’ own data along with study after study. For example, according to the National Center for State Courts (NCSC), tort cases accounted for just 4.4 percent of all civil cases filed in 2008, and declined by 25 percent between 1999 and 2008.5 The Bureau of Justice Statistics (BJS) has repeatedly found that the number of tort cases filed is dropping in state courts. BJS found that the number of tort trials in state courts in the nation’s 75 largest counties dropped 31.5 percent between 1996 and 2005.6 The median awards in these trials dropped 18.4 percent over the same time period.7 The downward trends in civil litigation filings are reflected in federal court caseloads as well. Between 1985 and 2003, the number of tort trials in U.S. District Courts declined by 79 percent, from 3,604 in 1985 to fewer than 800 in 2003.8

Ironically, the same study that found tort cases declined by 25 percent between 1999 and 2008 also revealed that contract filings, which are more likely to involve businesses as plaintiffs, rose by 63 percent over that period.9 Perhaps what we really need is business litigation reform.

And, if there is no tort liability crisis generally, there certainly is no medical liability crisis. While tort cases only comprise 4.4 percent of the civil caseload, medical negligence cases account for only 2.8 percent of that 4.4 percent — or a little more than one-tenth of one-percent of the civil caseload. Even that small number has declined by 15 percent over the last 10 years.10 Data from other sources such as the National Practitioner Databank (NPDB), to which all physicians’ medical negligence payments must be reported, confirms the same downward trend.11

So, is this one-tenth of one-percent of all civil cases filed comprised of these “frivolous” cases we hear so much about? Well, with between 100,000 and 400,000 of us being killed by preventable medical errors (i.e. medical negligence) every year, to say nothing of those severely and permanently injured, common sense would lead one to believe no. And, in fact, there is some really good, peer-reviewed research to back this up.

For example, in a study published in the New England Journal of Medicine in 2006, researchers at Harvard University found that most medical negligence claims involve preventable medical error and serious injury and concluded, “portraits of a malpractice system that is stricken with frivolous litigation are overblown.”12 The research revealed the overwhelming majority of claims filed to be meritorious, with 97 percent of claims involving medical injury and 80 percent involving physical injuries resulting in major disability or death. Very few claims not involving preventable medical error were ever paid. In fact, the opposite was true – non-payment of cases involving medical negligence was a much bigger problem.

The results of this study did not surprise anybody involved in the legitimate patient safety field. Kaiser Family Foundation President Drew Altman said, “Maybe the question instead of Why do we have so many lawsuits? is Why do we have so few?”13 William Sage, vice provost for health affairs at the University of Texas at Austin commented, “These findings are absolutely no surprise to any of us in the policy community. They are consistent with everything we suspected and learned from research over the last 20 years, which is the major problem out there is medical errors that are not compensated, rather than frivolous claims that are compensated.”

Contrary to the “frivolous lawsuit” myth that has been sold to the public, the data on the number of blatant, utterly inexcusable cases of medical negligence that never result in a claim is staggering.

In this country, in this era, with as much as we spend on health care, and as effective as we are at putting systems in place to prevent errors in other fields, a hospital should never allow a wrong side (physician removes the good kidney instead of the
malpractice suit, the chance of a verdict in excess of insurance coverage, and the exacting of personal resources, is very real. (We can hear some of our colleagues scoffing at these realities, but would only ask that they imagine the same occurring to them every time a case was lost instead of won.)

As a result, many physicians find themselves engaging in defensive medicine in some form, ranging from ordering additional confirmatory tests, to avoiding high-risk specialties, or avoiding particularly litigious areas in the state. Some retire from practice altogether or, as in the case of obstetricians/gynecologists, segue into gynecology exclusively. (Wherein we often lose some of our most skilled and experienced obstetricians.) Notably, a number of studies have linked an increase in the rates of primary cesarean section deliveries in the United States with the fear of anticipated litigation and the rising professional liability premiums for obstetricians and gynecologists. A cesarean section has become the most common major surgical procedure performed in the United States. Even so, it is not without significant risk, such as significantly higher morbidity and mortality to both mother and baby, as compared to vaginal births. Notwithstanding, the cesarean section is frequently offered as the “simple path not taken” – the panacea for many malpractice suits involving birth injuries.

To add to this conundrum, plaintiff’s counsel must look at the “value” of a case as much or more than the degree of a physician’s purported negligence. The “no harm, no foul” phrase – on a sliding scale – is a crucial step in the calculated evaluation of a case. If the most incompetent or negligent care imaginable results in a marginal increase in medical expense, lost wages, or pain and suffering, there is far less likelihood of a suit than in the instance of a textbook handling of a mother’s labor and delivery that culminates in a catastrophically brain injured neonate.

While many – among the bench, the bar, or the entertainment industry (who remember James Mason’s character in “The Verdict”) – would love to think of defense lawyers as insurance shills who delight in suppressing the interests of widows and orphans – this is only partially true. Sarcasm aside, if 90 percent of the medical negligence cases that actually go to trial are won by medical providers (usually physicians), then many patients, their families, or estates have sustained some legitimate level of uncompensated monetary loss. This is particularly true for birth injuries, adult and pediatric neurologic, and various other crippling conditions. Admittedly, some cases settle.

In an article discussing stress associated with medical malpractice litigation, Sara Charles describes (unfortunately) an all too familiar anecdote of a general internist who, after having been served with his first summons and complaint, was awakened that evening with his first episode of atrial fibrillation. Not only did this instance factor heavily in the physician’s decision to seek emergency medical attention that evening, but it also factored in his decision to settle the action and retire from medicine earlier than he had planned.

If the above scenario is true – if the emotional and professional toll on the physician is ultimately unproductive to society as a whole – if there is a reason other than juror’s blind faith in physicians that results in far more defense than plaintiff’s verdicts – then, is it not time for Kentucky to at least begin serious and sincere study of alternatives to traditional malpractice litigation?

What would the alternatives be? We will not address monetary caps as a stand-alone alternative. They lend to political sound bites, but present constitutional and practical challenges. In some settings, caps merely sink societal compensation to a level of mediocrity, where less meritorious claims are rewarded and more meritorious claims are often never filed, the least deserving paid and the most deserving left without relief.

One possible alternative would be requiring a prerequisite certificate of merit to be filed in all medical negligence actions. Several states call for some form of a certifying statement as to the merits of the medical negligence claim. The states of Florida, Minnesota, Mississippi, and North Carolina, to name a few, require an attorney to certify in the complaint that he or she has in good faith consulted with an expert who believes that there is evidence of negligence in the care at issue. Other states require an affidavit or certification from the consulted ex-

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Bill Farmer, President & CEO, United Way of the Bluegrass

In an article discussing stress associated with medical malpractice litigation, Sara Charles describes (unfortunately) an all too familiar anecdote of a general internist who, after having been served with his first summons and complaint, was awakened that evening with his first episode of atrial fibrillation. Not only did this instance factor heavily in the physician’s decision to seek emergency medical attention that evening, but it also factored in his decision to settle the action and retire from medicine earlier than he had planned. If the above scenario is true – if the emotional and professional toll on the physician is ultimately unproductive to society as a whole – if there is a reason other than juror’s blind faith in physicians that results in far more defense than plaintiff’s verdicts – then, is it not time for Kentucky to at least begin serious and sincere study of alternatives to traditional malpractice litigation?

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FEATURE: TORTS
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Transforming Healthcare recently reported, however, that as many as 40 wrong site, wrong side and wrong patient procedures happen every week in the U.S. Even remarkably few of these patients ever file a claim. Researchers in Colorado found that of patients who were operated on in error (wrong patient) or who received operations on the wrong site, only 21.5 percent ever filed a claim or a lawsuit. Equally astounding is a simple comparison of the typical annual number of medical negligence payouts (38,363) compared to the number of estimated annual deaths caused by preventable medical error (238,337), and that doesn’t even account for the cases resulting in severe injury short of death. In Kentucky alone, there are an estimated 2,700 deaths a year caused by preventable medical error, to say nothing of the number of severe injury cases not resulting in death. Yet, according to the Kentucky Department of Insurance, there were only 498 total claims of medical negligence in 2013.

So, if there is no “medical liability crisis,” and the number of medical negligence claims has always been small and is only getting smaller – even in an environment with an astonishing number of preventable medical errors – and the overwhelming majority of those claims are meritorious, then why has the insurance industry and other special interests been spending so much energy and money trying to push through “tort reform,” starting with medical review panels, in Kentucky? I think it’s safe to say it doesn’t have anything to do with promoting patient safety or lowering the costs of health care in our state.

As lawyers, we understand that accountability drives safety and a lack of accountability disincentivizes carelessness. Our nation’s and commonwealth’s founders created a tort system with two express goals: (1) to compensate and make whole, to the extent possible, any citizen who is harmed by a wrongdoer, and (2) to deter wrongdoing in the first place and, thereby, make everybody safer. It is imperfect, but it is the greatest legal system any civilization has ever known. In terms of accountability, it works remarkably well.

Many states have fallen for the “tort reform” swindle – and those states have experienced first-hand what happens when you create obstacles to accountability. A study from the American College of Emergency Physicians found that safety improves when injured patients can hold negligent hospitals or physicians accountable and gets worse when there is less accountability. The states with aggressive legislation limiting patient access to the legal system scored lowest in patient safety. Overall, the 10 states tort reform groups claim to have the “best liability environment” (i.e. more tort reform) have a D-+ score for patient safety. By contrast, the 10 states tort reform groups claim to have the “worst liability environment” have a B- for patient safety, above the C+ national average. The 25 states with the “best liability environment” (again, more tort reform) all rank below the national average for patient safety. Every single one.

Similarly, data collected from the non-partisan Commonwealth Fund show healthcare in states that cap damages in medical negligence cases tends to be of lower quality than healthcare in states that do not. A study from Tulane University found that states with medical negligence laws that cap liability experienced lower rates of mortality. A University of Texas analysis found that insulating medical providers from liability was detrimental to patient safety and concluded, “The widely held belief that fear of malpractice liability impedes efforts to improve the reliability of health care delivery systems is unfounded.” And, another peer-reviewed study noted, similarly, that medical negligence “reforms” resulted in lower healthcare quality and increased infant mortality.

On the other hand, there are many examples of hospitals and entire medical specialties that have increased accountability or reformed dangerous practices, often in response to lawsuits and jury awards, and experienced dramatic patient-safety results, not to mention economic savings. Hospitals that have embraced full disclosure of medical errors have found the number of negligence claims and their related costs decline. The Veterans Affairs (VA) hospital in Lexington has been a leader in the field by offering a strong disclosure program coupled with quick and fair offers of compensation when appropriate. Average settlements at the institution are now around $15,000, as opposed to $98,000 at other VA hospitals.

Maybe the most dramatic example is in the area of anesthesiology. In the 1970s, anesthesiology was one of the highest risk medical specialties. In order to improve patient safety and reduce doctors’ medical negligence costs, the American Society of Anesthesiologists created the Closed Claims Project to analyze data from lawsuits. Researchers were able to identify system failures and implement comprehensive practice changes. The results yielded a dramatic improvement in patient safety and, in the process, anesthesiologists drastically lowered their inflation-adjusted malpractice insurance premiums.

Before the Closed Claims Project, one of every 10,000 people who went under anesthesia died from the procedure. After the project, that number changed to one of every 200,000. Before the lawsuit analysis project, anesthesiologists were responsible for 7.9 percent of all negligence claims. Afterward, that number was more than cut in half to 3.8 percent. When adjusted for inflation, the average malpractice premium for anesthesiologists dropped between 1985 and 2002.

This type of accountability not only reduces costs for the hospitals and physicians who embrace it, it literally saves lives, and its savings to the healthcare system are dramatic. Preventable medical errors, especially those that do not kill the patient, lead to billions of dollars in additional healthcare costs each year. A 2010 report released by the Office of the Inspector General at the U.S. Department of Health and Human Services (HHS) found that one in seven Medicare patients are injured during hospital stays and that adverse events during the course of care contributes to the deaths of 180,000 patients every year. These adverse events, just in the Medicare system, cost the government and taxpayers an additional $4.4 billion annually.

While some insurance programs have started to alter their reimbursement plans, the majority of healthcare providers and facilities actually are compensated for the subsequent procedures needed as a result of the preventable medical errors they committed. In the year 2000, when the estimated deaths from preventable medical error was measured at 98,000, the Institute of Medicine estimated that the corresponding costs ranged from $17 billion to $29 billion annually. Today studies have found the costs of preventable medical error to be $1 trillion every year.

It is worth mentioning here that the tort reform lobby’s claim that the “medical liability crisis” is causing physician shortages and doctors are fleeing states with no liability barriers for ones with “reform” are, like their other claims, objectively false. According to a recent study published in the Journal of the American Medical Association, the number of physicians per 10,000 residents has increased by 10 percent in states that have assumed medical liability reform. It is interesting to note that the states with the “best liability environments” have the lowest rates of mortality.23 A University of Medicine estimated that the corresponding costs of preventable medical error to be $1 trillion every year.31
Therefore, it may be worth considering alternative to medical malpractice litigation. Of mediation – even if emotional rather dispute resolution who feel some form of the outset due to lack of physician consent occurred. A number of the states that re-
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curred.10 A number of the states that re-
quire an affidavit or certification from the consulted physician have specific require-
ments for the contents of the affidavit, while some go so far as to require that an “ap-
propriate specialist” be the one to sign the affidavit.11 Given that a plaintiff’s attorney should at least have consulted with a physi-
cian or some sort of healthcare practitioner prior to filing suit, this reform option would not necessarily impose any greater burden on a plaintiff than what is already expected of him. While some plaintiff’s attorneys may object to having to show their hand too soon, it seems reasonable for them to make such a marginal showing when there is so much at stake.

Pretrial screening panels, such as the ones currently used in Indiana, aim to reduce the amount of non-meritorious lawsuits that are filed or go forward to the court. In Indiana, lawyer authored submissions are tendered to a three-member panel consisting of physicians who practice the type of medicine at issue. The panel members are selected by the parties, as well as the presiding attorney. The panel’s determination in favor of the physician, while not binding, is admissible in any subsequent litigation. The Kentucky General Assembly recently considered adopting such medical review panels, as discussed further below, but the bill stalled in committee.

Health courts offer another unique alternative to traditional civil litigation. In theory, health courts would function much like workers compensation tribunals by removing medical negligence actions from civil courts and placing them within the purview of a medically knowledgeable administrative tribunal.12 It is difficult to dispute that medical negligence actions are technically involved, detail oriented, and highly fact and medicine specific – factors that can be overlooked by some jurors. In theory, health courts would be able to wade through the emotional, superficial, or extra-
neous presentations and focus on the key medical issues. The obvious downsides to health courts relate to public policy and constitutionality.13

While alternative dispute resolution efforts in medical malpractice actions can stall at the outset due to lack of physician consent to settle, there are proponents of alternative dispute resolution who feel some form of mediation – even if emotional rather than monetary – might be a productive alternative to medical malpractice litigation. Therefore, it may be worth considering to attempt pre-suit alternative dispute resolution, depending upon the reasonableness of the parties. The downside to alternative dispute resolution, as previously men-
tioned, is that all settlements, no matter how small, must be reported by physicians to the National Practitioner Data Bank. This mandatory reporting requirement, unfortunately, sways physicians away from nominal settlements, especially in instances where an adverse event occurred due to a known complication or the physician simply believes he or she has done nothing wrong.14 It is possible that alternative dispute resolution might be utilized more if the National Practitioner Data Bank reevaluated its re-

Tort reform – it undertook – should not be a mere reflection of national politics. Instead, it should be a product of consensus, painstakingly molded in the spirit of compromise, recognizing that concessions must be made by all participants and that absent a measure of “pain” there will be no “gain.”

As mentioned above, the Kentucky Senate recently considered and passed a form of medical malpractice reform which these authors believe was a step in the right direc-
tion. Senate Bill 119, proposed by Sen. Julie Denton, R-Jefferson, and Sen. Chris Girdler, R-Somerset, during the most recent legisla-
tive session, promised a possible and plausi-
ble effort at reform, but unfortunately it stalled before it made any significant head-
way. The bill called for the creation of a med-
ical review panel system in Kentucky for use of litigating all claims against health care providers, whereas previous efforts at reform focused only on long term care facilities. The language in the bill is very similar to Indiana’s medical review panel system, which has been in place for nearly 40 years. Notably absent, however, was any mention on caps or limits on recovery, which are tied to Indiana’s medical review panel system. All in all, the proposed medical review panel system was quite reasonable when compared to the current system in Kentucky. Even so, and despite having made it through the Kentucky Senate, the bill never made it out of the House Health & Welfare Committee.

There are several benefits to tort reform, aside from addressing the associated financial and emotional costs of litigation. Some studies have found that tort reform is associated with a resurgence in the number of physicians in a state or in particular area in the state. For example, following the implement-
ation of a comprehensive tort reform bill in 2003, Texas experienced a significant increase in the number of physicians in the state as compared to the state population, with the effect most prominent among pri-
mary care physicians and surgeons.15 Simi-
larly, some studies have identified a direct connection between the enactment of tort reform and increased physician supply in the area impacted by the reform.16

One of the first problems with even ad-
dressing the issue of reform, let alone structuring a fair and viable system that would pass constitutional scrutiny, is finding sup-
port in the legal community. While our brothers and sisters in the Kentucky Justice Association have shied from even a guard-
ed flirtation with medical malpractice re-
form and our counterparts in the Kentucky Defense Counsel have remained mute for fear of killing the golden – or perhaps bronze – goose, dialogue, at the least, seems overdue. All members of the bar – our lawyer-legislators included – owe it to both patients and medical providers – their clients and constituents – to at least create and empower a serious, knowledgeable, and respected commission to address our current system and possible alternatives. We would recommend creating a commit-
tee consisting of several Kentucky Justice Association members and several Kentucky Defense Counsel members, all of whom practice in medical malpractice, who could collaborate, along with the healthcare or-
izations that supported Senate Bill 119, to examine the most recent legislative ac-
tion designed to obtain medical malprac-
tice reform, consider why it was unable to get out of the House committee, and refor-
mulate a bill capable of enactment. It also might be worth reviewing other methods of tort reform enacted and implemented in other states, especially the system in Indi-
a which has its longevity, to consider what has worked and what has passed constitu-
tional muster to determine what could work for Kentucky.

article continued on pg. 22
ing to the American Medical Association, the number of physicians has been increasing for many years across specialties. In 2009, the number of physicians rose to another record high, and continued a trend of an increase in the total number of physicians outsourcing population growth in the U.S. once again. The number of physicians per 100,000 population is at an all-time high of 317.

Moreover, the number of physicians per 100,000 population is 21 percent higher in states without medical caps on damages than in states with caps (349 vs. 288). Here in Kentucky we have more doctors per capita than California, Indiana, and Texas, all of which have had medical tort “reform” measures, such as medical review panels, in place for a decade or more.

Yet, the insurance industry, hospital corporations and their special interest cohorts are proposing as a solution so-called tort “reform,” beginning with medical review panels, to a phony crisis they invented – a “so-called tort reform” – including this medical review panel bill – is a solution in search of a problem. And, it isn’t even a solution, because it will lead to less accountability in Kentucky’s hospitals and other medical facilities.

Mandatory and admissible medical review panel screenings would create an entirely new bureaucracy that would further delay what is already a time-consuming process. In practice, it would require a victim to present his or her claim twice, and it would prevent many Kentucky victims from bringing claims on behalf of themselves or their loved ones. Attorneys would be deterred from taking on smaller or more difficult claims. With less than 500 claims of medical negligence being brought in the state of Kentucky each year, despite the staggering number of preventable injuries and deaths caused by medical errors each year, a policy with the purpose of further decreasing claims is not only unjust, it is bad public policy and bad business.

At least seven states have enacted medical review panels only to later repeal them, and five other states have found them unconstitutional. Among these states is Arizona, which was one of the first proponents of the review panel policy. There have been four main constitutional challenges: That (1) mandatory panel screenings constitute an impermissible restriction on a person’s right to access the court; (2) the panels raise a question of whether non-judges are given judicial authority in violation of requirements for the separation of powers in both the U.S. and state constitutions; (3) the admissibility of panel findings disrupts the right to a trial by jury; and (4) constitutional scrutiny cannot be met when courts fail to find any evidence that there is a “malpractice crisis” at all. (Furthermore, research has found no evidence that screening panels reduce physician insurance premiums.)

In Kentucky, any victim’s advocate will tell you it is nearly impossible to get a Kentucky doctor to even review medical records in a claim against a Kentucky health care defendant, let alone testify against him or her. The panels proposed in SB 119 would require a plaintiff to select a health care provider for the panel out of a list of three Kentucky professionals from the same field as the defendant. And this is the inherent problem with the proposed scheme. Hospitals and doctors have displayed time and again an invertebrate unwillingness and inability to hold their own accountable.

Hospitals are on the front line of patient safety and are required by law to review medical care through peer review and other processes and report disciplinary action against their doctors to the National Practitioner Databank (NPDB). In spite of this, since the NPDB was created in 1990, 49 percent of U.S. hospitals have never reported a single disciplinary action against one of their doctors. Despite research from the National Academy for State Health Policy (NASHP) demonstrating that there is no relationship between mandatory reporting and increases in malpractice claims, the NPDB, which is the only national database of malpractice claims, is still closed to the public and has been deliberately undermined by the American Medical Association (AMA), which goes so far as to offer its members a primer on “How to Evade a Report to the NPDB.”

Moreover, state medical boards are supposed to discipline doctors who consistently violate standards of care. Yet doctors continue to shirk their responsibility. Two-thirds of doctors who make 10 or more malpractice payments over $250,000 are never disciplined in any manner. Texas enacted tort “reform,” including caps on damages, which was supposed to increase medical board action. In the five years after the Texas “reforms” were enacted, only 15 percent of the medical board complaints led to any sanctions and, of the doctors who were disciplined, most only received a slap on the wrist. In one case, a neurosurgeon who conducted four wrong site surgeries was ordered to attend 10 hours of continuing education classes. An emergency room physician who was unable to intubate a patient because he was drunk was ordered to attend therapy sessions and submit to urine tests. There were essentially no consequences for his actions – except for his patient, of course. She lost her life.

And then there’s the story Dr. Eric Scheffey, an orthopedic surgeon who, during a two-decade career, left hundreds of patients dead or maimed. Dr. Scheffey lost his privileges at one hospital and simply moved to another. Then he lost his privileges at the second hospital and was allowed to move to a third. Predictably, he finally lost his privileges at the third hospital, and admitted abusing cocaine. Yet, even after a judge recommended his license be taken away, the board allowed him to continue practicing. In 2005, after 24 years in practice and more than 78 medical negligence lawsuits, the board finally revoked his license.

If required to participate in this process, the victim of medical negligence will be forced to choose an extra critic who is predisposed to bias against any negligence claim in his or her field and who, history and empirical evidence suggest, will be exceedingly reluctant to find against one of their local colleagues. Schemes like this not only harm victims’ ability to exercise their constitutional rights, they do not even result in the cost savings that proponents promise. And, as the research detailed above clearly demonstrates, they result in a less safe environment for patients with a greater risk of injury or death from medical errors, which only further drives up health care costs.

article continued on pg. 23
FEATURE: TORTS

In conclusion, while we recognize that this article is structured as a “point/counterpoint” presentation, certain issues seem irrebuttable. The emotional and economic components of a malpractice case are unique for both patients and physicians. These components take a very real toll upon our health care system. In many instances, no one “wins.” Tort reform—if undertaken—should not be a mere reflection of national politics. Instead, it should be a product of consensus, painstakingly molded in the spirit of compromise, recognizing that concessions must be made by all participants and that absent a measure of “pain” there will be no “gain.”

Gerald Toner is a defense lawyer concentrating in medical malpractice, product liability, and first-party insurance liability. Thirty years ago, he was lead counsel in one of Kentucky’s seminal no-fault insurance cases and, over the past 10 years, he has tried over 25 cases to a verdict. He is a partner with O’Bryan, Brown & Toner in Louisville. Toner is on the board of directors of DRI, Kentucky Defense Counsel, Kentucky Pediatric Foundation, U of L Pediatric Endowment Foundation, and the Kentucky Bar Association’s Communications & Publications Committee. Toner graduated from Harvard College, cum laude, and from Vanderbilt University Law School. His interests include softball, photography, and writing; his short stories and a novel have been published in Redbook and other national magazines and in book form by Pelican Publishing & Butler Books. Toner’s wife, Carol, is a former school teacher who now caters professionally. His two grown children; Jennie and John, are out conquering the world and its problems.

Stephanie Caldwell is an associate at O’Bryan, Brown & Toner, PLLC. She concentrates her practice in the defense of physicians and hospitals in medical negligence claims. Prior to joining the firm, Caldwell worked as a staff attorney in the Jefferson County Circuit Court.

1 Carol K. Kane, Medical Liability Claim Frequency: A 2007-2008 Snapshot of Physicians, AMA Economic and Health Policy Research (August 2010).
2 Id.
5 Id.
6 Kane, supra note 1.
8 Id.
13 Id.
14 Id. at 53.
Limiting a victim’s access to the courts in this manner is unsound public policy and simply not justified. In addition to the above flaws, panels in other states have proven, in practice, to take up to four times longer than is provided for in the bills enacting them. For example, the Indiana law allows 180 days, just like SB 119 proposes, for the panel to issue a ruling. Studies show, however, a decade after the law was put in place, the process actually takes on average 23.4 months.43 Patients – and anybody genuinely interested in patient safety – want accountability; a two-year delay in the ability to file a civil complaint thwarts this and further promotes less accountability.

Having this mandatory screening process forced on those harmed in other contexts is unfathomable. What if a tenant seeking to file a claim against her landlord was forced to undergo a review by three Kentucky politicians, and our children, parents, other family and friends in danger, while actually driving up, rather than lowering health care costs.

Don’t fall for it, Kentucky. [3]

Vanessa Cantley holds two Bachelor of Arts (B.A.) degrees, one in psychology and another in sociology. Since earning her law degree, Cantley has experienced firsthand how her continued interest and research in those two disciplines help her serve her clients. Declining the opportunity to join several large defense firms after law school, Cantley founded Bahe Cook Cantley & Nefzer PLC with her partners—a firm dedicated to representing injured individuals and families. She has consistently been voted by her peers as one of Louisville’s top plaintiff’s personal injury attorneys, was named a 2013 and 2014 Kentucky Super Lawyer, and is the youngest plaintiff’s injury attorney to earn recognition in her category. In 2012, Cantley created Storytime Heroes, a nonprofit organization dedicated to providing reading materials and enthusiastic volunteers to read to children who are hospitalized, in long-term care facilities, group homes and shelters. She currently sits on the governing boards of the Kentucky Justice Association, where she is the incoming treasurer and current chair of the Women Lawyers Caucus, the American Association for Justice, and the Louisville Bar Foundation. She grew up in a small town in Indiana, where she is also licensed to practice law.

4. Mary H. Graftam, The Web of Tort “Reform,” American Association for Justice (2012), at www.justice.org/elps/justice/hs/xdr%2019614.htm (The “litigation crises” myth was invented and has been perpetuated by an extremely well-financed group of the largest and wealthiest corporations in the world and a well-coordinated, largely secret, multi-billlion dollar campaign.)
9. Id.
14. Wrong Site Surgery Project, Joint Commission Center for Transforming Healthcare.
21. Id.
33. Id.
34. Id.
35. Catherine T. Strueve, Expertise in Medical Malpractice Litigation: Special Courts, Screening Panels, and Other Options, Pew Project on Medical Liability (2003).
36. Id.
KEEP MOVING ON

From an early age, I was obsessed with stand-up comedy. The first summer my family had an HBO Comedy Central channel, I filled a Mead Five Star notebook with notes taken while watching stand up. I wasn’t the most popular kid in middle school.

I was teased heavily in grade and middle school and it seemed that many of the comedians were too. Bullying is an epidemic and I am proud of the YLD’s commitment to empowering Kentucky’s middle school students with tools to combat bullying through the BullyProof program. I suffered from depression at a young age. At times I still do. Watching or listening to stand-up comedy is still one of my go to escapes when those feelings of self-hatred and doubt set in.

Like so many others, I was sad to hear of Robin Williams’ suicide. To be honest, I wasn’t Robin Williams biggest fan. Two of my favorite comedians (Chris Farley and Greg Giraldo), much younger than Williams, had already lost their lives to depression and substance abuse. Greg Giraldo was a Comedy Central regular and I loved his sharp wit and intelligence.

Comedy was Giraldo’s “Plan B.” He had earned a bachelor’s degree from Columbia and law degree from Harvard. Prior to entering comedy full-time, Giraldo, much younger than Williams, had already lost his lives to depression and substance abuse. Greg Giraldo was a Comedy Central regular and I loved his sharp wit and intelligence.

Giraldo experienced great success as a comedian, but continued to suffer from depression. A year before his 2010 prescription drug overdose, he openly discussed his depression in an interview with “Psychology Today”:

“I’m constantly tormented by a sense of failure. I feel like quitting all the time. I feel like hiding in drugs or alcohol. I feel like I’ve failed in terms of what my potential is. I don’t think I’ve achieved my potential because I haven’t worked that hard and I haven’t found the right angles. . . . If I had only stayed focused, I would have been further along. It’s this constant feeling of not having achieved enough.”

I can relate to Giraldo’s sense of failure. I think at times maybe we all can. During my own personal struggles, I have been fortunate to have a loving support system, full of loved ones willing to fight through my pride and resistance and ensure I received the help that I needed.

If you are struggling with depression, do not know what to do. I would urge you to reach out to a friend or colleague, contact the Kentucky Lawyers Assistance Program (KYLAP) at (800) 564-3795, visit their website (www.kylap.org), or call the National Suicide Prevention Lifeline at (800) 273-8255.

I will close with a quote from one of my favorite comedians, Michael Ian Black. In the wake of Giraldo’s suicide, Black posted a tweet on his passing with a closing that has stuck with me since. It has helped me and I hope it will help others as well:

The lesson I take away from it is one I hope I’ve been learning over the years: have gratitude for what you have and forgive yourself for what might have been. We are all failures in one way or another, but failure is more than the end of something. It is the opportunity to begin something else. Enjoy your successes, accept your failures. Move on from both. But keep moving on.”


Id.


9 Kentucky is not alone; South Carolina experienced the same turn, I would urge you to reach out to a friend or colleague, contact the Kentucky Lawyers Assistance Program (KYLAP) at (800) 564-3795, visit their website (www.kylap.org), or call the National Suicide Prevention Lifeline at (800) 273-8255.

10 According to a CDC study, the legal profession ranks fourth for its high rate of suicides, behind dentists, pharmacists, and physicians. Substance abuse among lawyers is twice that of the general population. A Johns Hopkins University study of more than 100 occupations found that lawyers lead the nation with the highest incidence of depression. The depression starts early, with one study showing that before law school, law students were no more depressed than the general population; by graduation, about 40 percent of law students were clinically depressed.

11 Tyger Lathan, Psy. D. posits that the tendency towards perfectionism among lawyers may be a contributing factor. He writes, “While this characteristic is not unique to the legal profession – nor is it necessarily a bad thing – when rigidly applied, it can be problematic. The propensity of many law students and attorneys to be perfectionistic can sometimes impede their ability to be flexible and accommodating, qualities that are important in so many non-legal domains.”


17 Latham, “The Depressed Lawyer.” Id.

18 Dixit, “Greg Giraldo on Failure.” As former KBA President Doug Myers noted, lawyers “are very good at referring other troubled people for help. We need to do the same for ourselves.” Myers, Bench & Bar (November 2012). Available at www.michaelianblack.net/blog/2011/09/greg-giraldo.html.

COLUMNS
THE KENTUCKY SUPREME COURT UPHOLDS E-435 AS LAW

In the exercise of its authority to regulate the practice of law and the legal profession in the Commonwealth, the Kentucky Supreme Court has delegated to the Kentucky Bar Association (KBA) the authority to issue opinions on the ethical propriety of lawyer conduct. See Kentucky Supreme Court Rule (SCR) 3.530. In addition to providing a hotline service to Kentucky lawyers, the KBA Ethics Committee drafts and submits formal ethics opinions to the Board of Governors concerning the application of Kentucky’s Rules of Professional Conduct (KRPC), found at SCR 3.130, to lawyer conduct. If the board approves an ethics opinion by a three-fourths vote, the opinion is published in the Bench & Bar. Anyone “aggrieved or affected” by such an opinion may challenge it within 30 days of the end of the month of publication. If there is no challenge, the opinion becomes official and is posted on the KBA website. Even so, published ethics opinions are advisory only and do not have the force and effect of law.

In 2013, the KBA published Ethics Opinion E-435 in the March issue of the Bench & Bar. E-435 advised that Kentucky’s professional responsibility rules prohibited a criminal defense attorney from counseling a client concerning a waiver of future claims of ineffective assistance of counsel (IAC) contained in a plea agreement offered by a prosecutor. In addition, E-435 advised that the KRPC prohibited a prosecutor from making a plea offer requiring a waiver of IAC claims.

The U.S. Attorneys for both Eastern and Western Districts of Kentucky filed a formal challenge to E-435 and the issues were briefed. Because of the fundamental import of the issues, amicus briefs were filed on behalf of entities such as the Innocence Network and the National Association of Criminal Defense Lawyers. In September of 2013, the Kentucky Supreme Court heard oral argument on the matter.

On August 21 of this year, the Court unanimously held that E-435 correctly applies Kentucky’s professional responsibility rules. Kentucky ethics rules are derived from, but not identical to, the ABA Model Rules of Professional Conduct (Model Rules). Forty-nine of the 50 states and the District of Columbia have ethics rules based on the Model Rules. Therefore, the Court’s decision likely will influence ethics decisions nationwide on the ethical issue of plea agreements that require a waiver of IAC claims.

An important aspect of the Court’s opinion is its clarification that Kentucky and other states have the rule to regulate attorney conduct, and that E-435 is within that right. After concluding that E-435 does not improperly venture into federal waters, the Kentucky Supreme Court turned to the substance of E-435, the ethical propriety of lawyers working in an environment in which plea agreements require waiver of IAC claims.

The Kentucky Supreme Court observed that most criminal cases are negotiated to conclusion by plea agreements between prosecutor and defense counsel; so no trial occurs. In an effort to finalize criminal cases, prosecutors often propose plea agreements containing waivers of future appeals and other matters. In recent times, prosecutors often have made plea deals which are dependent on defendants waiving the right to claim IAC in a later collateral attack on the plea.

The Court agreed with E-435’s conclusion that a lawyer cannot advise a criminal defendant regarding a plea offer which requires a waiver of IAC claims. E-435 stated that Rule 1.7 of the KRPC prohibits defense counsel from advising a client whether to accept or reject a plea offer containing an IAC because such counsel would have a non-waivable conflict of interest. E-435 advised that such a situation would present a “significant risk” that defense counsel’s representation of the defendant client would be “materially limited” and thus, the lawyer would have a conflict of interest. In addition, the lawyer as defense counsel could not offer advice on whether he/she reasonably believed he/she could render competent and diligent representation, so the lawyer could not ask the client to consent to the conflict. E-435 also noted that Rule 1.8(h) was relevant by analogy in that it prohibited a lawyer from making an agreement with a client to limit liability prospectively unless the client is independently represented.

The Kentucky Supreme Court agreed with E-435, concluding that Rule 1.7 prohibited defense counsel’s representation on conflict of interest grounds. The Court also acknowledged the relevance of Rule 1.8(h), stating, “The language of our ethics rules aside, public policy supports our conclusion that advising on an IAC waiver in a plea agreement is prohibited under 1.8(h).”

The Court also agreed with E-435’s advice that the KRPC prohibits a prosecutor from offering a plea agreement which requires a defendant to waive IAC claims. Rule 8.4 prohibits a lawyer from “knowingly assist[ing] or induc[ing] another [lawyer] to “violate or attempt to violate the Rules of Professional Conduct.” Prosecutors who include IAC waivers in plea offers induce defense counsel to violate 1.7, the rule regarding conflicts of interest, and therefore, are prohibited by 8.4.

KBA ethics opinions are not binding upon members of the bar, and are advisory only. However, by affirming E-435 in its entirety and adopting its substance, the Supreme Court has given the opinion the force of law. Thus, the substance of E-435 is binding upon criminal defense practitioners and prosecutors who practice in the courts of Kentucky.

NKU CHASE STUDENT ADVOCATE 1-0 IN U.S. SIXTH CIRCUIT COURT OF APPEALS

By the time Megan McKay stepped foot inside NKU Chase College of Law in August 2012, she already had her eye on the prize – to become a trial attorney. Yet since completing a battery of rigorous substantive legal courses, skills courses including trial team, and field placements with the Fayette County Commonwealth Attorney’s Office and the Kentucky Supreme Court, becoming a trial attorney is no longer enough for McKay. Now, she wants to become an advocate. Today, as this Georgetown College graduate prepares to enter her third and final year of law school, she celebrates her first win at the U.S. Sixth Circuit Court of Appeals and is well on her way to becoming a trusted advocate for her clients.

At the urging of Kentucky Supreme Court Justice Michelle Keller ’90, McKay enrolled to earn course credit in the Constitutional Litigation Clinic where she would have a chance to represent prisoners and former offenders in Ohio state and federal courts. The clinic, housed in the Ohio Justice & Policy Center (“OJPC”) in Cincinnati, offers eight Chase students experience handling all aspects of civil rights cases, from client interviews through trials and appellate brief writing and argument.

“I really love helping law students get the confidence they need to hit the ground running, by becoming practice-ready by the time they graduate. There is no substitute for live client experience,” said David Singleton, executive director of the OJPC and NKU Chase Law Professor. Regarding his work mentoring McKay, he added, “Simulation is helpful and students can learn a lot from those experiences. But seeing that she can do it, and do it well and even win, will be the confidence she needs to carry with her for the rest of her life. She has the skills. That’s what keeps me going.” Though McKay was not scheduled to begin work in the clinic until this fall and is still a year away from being eligible to sit for the bar exam, Professor Singleton selected her to parachute into the clinic this summer to present an oral argument on behalf of the OJPC and client, Phillip Cordell, before a three-judge panel of the U.S. Sixth Circuit Court of Appeals.

Cordell filed suit under 42 U.S.C. § 1983 alleging that Deputy Sheriff Glen McKinney ran afoul of the U.S. Constitution’s guarantees under the Eighth Amendment when he slammed Cordell, who was hand-cuffed and restrained, headfirst into a concrete wall. The district court rejected Cordell’s suit, granting summary judgment and qualified immunity to Deputy McKinney. The Sixth Circuit Court of Appeals reversed, holding that a genuine dispute as to several material facts exists, and if Cordell’s version of events is credited, a reasonable jury could conclude that Deputy McKinney inflicted serious pain upon Cordell with malicious and sadistic intent.

“On June 25, 2014, I argued before the Sixth Circuit Court of Appeals on behalf of my client, Mr. Cordell. I thought that was the best day of my life,” McKay said, “until July 16, when I read the opinion reversing the District Court’s decision in favor of my client, Mr. Cordell – that was the best day of my life! I advocated for someone before the court and I made a difference.”

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NKU CHASE LAW PROFESSOR, STUDENTS CELEBRATE FREEDOM WITH WASHINGTON PARK WIN

With the assistance of several Chase students, NKU Chase Assistant Professor of Law Jennifer Kinsley successfully challenged a series of special rules for Washington Park adopted by the Cincinnati Board of Park Commissioners. Washington Park is located in the Over-the-Rhine section of downtown Cincinnati. Kinsley and her team represented three low-income residents of Over-the-Rhine who were directly affected by the special rules. The case was filed in 2012, and following an undisclosed monetary settlement with the city, settled on July 14, 2014.

Continue reading (bit.ly/1rE7FUp)
This issue of the Bench & Bar focuses on tort law. This is an area of practice for many attorneys in Kentucky spanning a wide array of issues from medical malpractice to products liability to automobile accidents. Professor Emeritus David Leibson, who retired last December, wrote the first edition of the Kentucky Practice Series book on Torts (published by West) in 1996. This past spring he published his last supplement to the 2008 Second Edition. The book will now be taken on by a new author. I know you join me in thanking him for serving as a resource on tort law for our bench and bar for almost two decades.

In addition to Professor Leibson’s coverage of traditional tort law, theories applying tort law have been raised in recent faculty scholarship in some unique ways.

Professor Jamie Abrams has a forthcoming article in the Florida State Law Review titled “The Illusion of Autonomy in Women’s Obstetric Decision-Making.” She discusses how the standard applied to obstetric decision-making deviates from tort standards when it requires the complete compliance with medical advice, positions the fetus as the primary patient, and acts to eliminate even reasonable risks.

Professor James T.R. Jones recently presented a paper to the International Elder Law and Policy Conference in Chicago. The topic was “Abuse of Elders with Mental Illness” in which he addressed tort claims in the case of abuse involving professionals who are mandated to report abuse and do not do so.

Professor Russ Weaver’s 2011 article, on “The Fourth Amendment, Privacy and Advancing Technology,” 80 Miss. L.J. 1131-1227 (2011) is a 100-year review of courts and technology. As a result of this work, Professor Weaver has concluded that Fourth Amendment theories are not adequate to protect individual privacy against government intrusions and that a similar analysis would apply in tort cases related to private intrusions. His view is that courts are not up to the task and they do not have sufficient tools to address this issue.

Professor Mark Rothstein’s recent article in the Journal of Law, Medicine and Ethics, discusses the Tarasoff duties of mental health professionals in light of the tragic shootings by mentally unstable individuals. He concludes that confusing and inconsistent legal standards are one of the main reasons why mental health professionals do not act to protect the potential victims of threats made by mental health patients. He proposes ways in which state statutory and common law duties can be harmonized with the HIPAA Privacy Rule and other federal laws.

Tort law can be a means of addressing civil rights. This was the topic of a fall 2013 conference at Ohio State University Law School at which Professor Laura Rothstein spoke. Her article, to be published in the “Ohio State Law Journal,” addresses the relationship of tort law to cases seeking remedies for injuries that occur as a result of architectural barrier design issues, such as a steep ramp or a poorly designed parking space. Her article discusses both statutory remedies under the Americans with Disabilities Act and tort law remedies.

The interconnection of discrimination laws to torts gives me an opportunity to note and applaud the KBA for its plans for a spring Diversity Summit on April 9 and 10 in Louisville. The preliminary plan is to allow a focus on a range of diversity issues – race, gender, sexual orientation and disability. Please stay tuned for more details but you will not want to miss this inaugural summit which will be beneficial for employers seeking to recruit and retain diverse attorneys as well as diverse attorneys themselves.

So, mark your calendars for those dates. Just before that summit, on Wednesday, April 8, the Brandeis Medal will be presented to Professor Arthur Miller.

His 1971 book, “Assault on Privacy, Data Banks, and Dossiers,” pursued Justice Brandeis’ early concerns about privacy and foreshadowed many of the issues still being debated. Because 2015 is the 50th anniversary of Griswold v. Connecticut, another type of privacy decision, it is especially appropriate to recognize Professor Miller for his early awareness of the issues raised by developing technologies.

So, to those of you from outside of Louisville, mark your calendars for both events, come to Louisville for both the Brandeis Medal and the KBA Diversity Summit, take advantage of the wonderful Louisville hospitality and see how downtown and the Waterfront is being transformed. For those of you who live in Louisville, you can serve as ambassadors to our bench and bar colleagues from outside of Louisville.
University of Kentucky Law School Keeps Busy Schedule of Service During Summer Months

Law School was out for the summer, but the UK College of Law faculty and staff were in—and busy preparing both incoming and future students for law school over the three-month break.

The University of Kentucky College of Law, in conjunction with the Fayette County Bar Association (FCBA), co-hosted the first Summer Law Institute (SLI) — a seven-day residential Law Camp for high school students interested in law and the legal profession — June 8-14.

Law Camp brought together a diverse group of 17 rising juniors and seniors, representing six area high schools, to take part in four days of classes, a day of job shadowing, and a day of oral argument presentations. The classes held at the UK College of Law covered the fundamentals of trial procedure, the judicial system, and criminal and civil law. On Friday, students had the opportunity to tour the Fayette Circuit Courthouse, view live court sessions, and shadow an attorney to see what a day in the life of a lawyer is like. In the evenings, students worked on daily assignments in Blanding Tower (the dorm they were housed in) to prepare for the individual arguments that they presented on Saturday morning in the College of Law courtroom.

“A wonderful group of bright students who are attentive, intellectually curious, and unexpectedly knowledgeable,” said Judge Sheila Isaac, executive director for the FCBA.

Aside from the busy educational agenda, created by College of Law Professor Allison Connelly, there was also room for social events. On Wednesday night, students attended a presentation of “Lady from Shanghai” at the Kentucky Theater. On Thursday night, they enjoyed a historical walking tour guided by former Mayor Foster Pettit, and students caught a glimpse of the downtown atmosphere during Thursday Night Live!

The idea to host a law camp is credited to Judge Isaac. When she first began as director of the FCBA, she met with the director of the Louisville Bar Association who informed her about their annual law camp funded by the Louisville Bar Foundation — the only program funded every year. She loved the idea, decided to write for a grant, and the rest fell perfectly into place with the help of UK College of Law faculty and staff.

“It’s been a great super collaboration,” said Judge Isaac. “It was vital that the UK College of Law allowed us to use their facilities and courtroom.”

Judge Isaac hopes to continue Law Camp next year, a project that directly educates young people on the fundamentals of the law and trial, broadens their understanding and awareness of the bar, and promotes a positive image of the law profession.

UK College of Law Serves as Host Site for KLEO Summer Institute

On July 12-23, the Kentucky Legal Education Opportunity (KLEO) Program held its KLEO Summer Institute at the University of Kentucky College of Law for the 12th year in a row.

The KLEO program has two parts: a scholarship component and the KLEO Summer Institute, a 12 day residential pre-law preparatory program designed to prepare students
from low-income, minority and disadvantaged backgrounds for the rigors of law school.

Each year the KLEO program accepts five entering first year law students from each of Kentucky’s three public law schools: the University of Kentucky College of Law; the University of Louisville Louis D. Brandeis School of Law; and, Northern Kentucky University Salmon P. Chase College of Law. During the summer institute, law professors introduce the scholars to the curriculum they will encounter during their first year of law school. They are also exposed to the special study skills and strategies they will need to succeed in law school. Former KLEO scholars from each law school serve as mentors to the new KLEO students. Each student is also assigned a practicing attorney or judge who serves as the student’s mentor.

In the spring of 2002, the KLEO Program was born from the vision and determination of Kentucky Supreme Court Chief Justice Joseph Lambert and state Rep. Jesse Crenshaw. Chief Justice Lambert proposed that the Kentucky General Assembly adopt and fund the program, which is patterned after the national CLEO program, to increase the number of historically under-represented students in Kentucky’s public law schools. The funding for the KLEO Program would not have remained possible without the generosity of the Kentucky Bar Foundation, the grant writing efforts of the KLEO Summer Institute Director, UK College of Law Professor Allison Connelly, and the two-year funding so graciously approved by the Kentucky General Assembly during the 2014 legislative session.

Since the first KLEO Summer Institute was held in July of 2003, more than 160 students have successfully completed the program.
THINKING IN PARAGRAPHS

By: Phillip M. Sparkes

When was the last time you heard a paragraph? You probably haven’t ever. We do not hear paragraphs; we see paragraphs. The paragraph is a convention of the written word. Good writers, William Zinsser tells us, think in paragraphs.¹

Imagine reading this page – or a will, contract, pleading, or brief – without paragraphs. Readers need paragraphs so that they can absorb information in manageable chunks. They use paragraphs to learn how a writer’s thoughts fit together, to keep from getting lost. Writers need paragraphs to stay in control of what they are writing. They maintain control with paragraphs that have three qualities: unity, coherence, and cohesion.

UNITY

Unity means that the paragraph has a single, clear focus.

The first step to assuring unity in a paragraph is to begin with a clear topic sentence (or thesis sentence, for those who draw the distinction²). The topic sentence states the central idea to be developed. A strong topic sentence creates a context for the reader and anchors the paragraph in the overall logical development of the document.

The second step is to control the content of every other sentence in the body of the paragraph. Each sentence must maintain the same focus as the topic sentence, and the concluding sentence must reinforce the central point. The presence of irrelevant information can disrupt the reader’s understanding of the paragraph and weaken the writer’s point.

It can be helpful to think about unity in terms of a paragraph’s shape. Some paragraphs, like those in the statement of facts section of a memo or a brief, are hourglass-shaped. They begin with a general statement about the topic, then narrow to specific support for that statement, and conclude with a broader sentence that summarizes the topic and transitions to the next. Other paragraphs, like those in the argument or discussion sections of a memo or a brief, are funnel-shaped. The rim of the funnel is a proposition, and the subsequent sentences narrow as the writer proves the proposition.

COHESION

Cohesion refers to the logical connections that readers perceive in a written text and that allow the reader to make sense of it. Readers feel a passage is coherent when the writer helps them accomplish two tasks: identifying the topics of individual sentences quickly, and recognizing how the topics form a connected set of ideas.

A writer gives coherence to a paragraph by linking the sentences in a way that allows thought to flow smoothly from one sentence to the next. A coherent paragraph flows because it is arranged according to a definite plan and demonstrates the writer’s awareness of his purpose for writing. As a result, all the sentences are not just about the same main topic, but they also “stick together” and lead readers smoothly from the topic sentence to the concluding one. Each sentence takes a logical step forward.

One way to achieve coherence is to decide on an ordering principle for the ideas in your paragraph, a pattern of development that creates a logical flow between the sentences. Readers’ understanding of text is guided largely by their expectation of conventional patterns. When the pattern of the paragraph coincides with what the reader expects to see, it has coherence.

Common patterns include sequence description, cause and effect, compare and contrast, and problem and solution. Other ways to achieve coherence include the use of inductive or deductive logic, examples or illustrations, classification or division, definitions, or analogy.³ Coherence can also be improved by strengthening the ties between old information and new. This includes repeating key words or using variations and synonyms of key words, using parallel structures to bind a series of sentences; and providing transitions both at the sentence level and between paragraphs.

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The first step to assuring unity in a paragraph is to begin with a clear topic sentence (or thesis sentence, for those who draw the distinction²). The topic sentence states the central idea to be developed. A strong topic sentence creates a context for the reader and anchors the paragraph in the overall logical development of the document.

The second step is to control the content of every other sentence in the body of the paragraph. Each sentence must maintain the same focus as the topic sentence, and the concluding sentence must reinforce the central point. The presence of irrelevant information can disrupt the reader’s understanding of the paragraph and weaken the writer’s point.

It can be helpful to think about unity in terms of a paragraph’s shape. Some paragraphs, like those in the statement of facts section of a memo or a brief, are hourglass-shaped. They begin with a general statement about the topic, then narrow to specific support for that statement, and conclude with a broader sentence that summarizes the topic and transitions to the next. Other paragraphs, like those in the argument or discussion sections of a memo or a brief, are funnel-shaped. The rim of the funnel is a proposition, and the subsequent sentences narrow as the writer proves the proposition.

COHESION

Cohesion refers to the logical connections that readers perceive in a written text and that allow the reader to make sense of it. Readers feel a passage is coherent when the writer helps them accomplish two tasks: identifying the topics of individual sentences quickly, and recognizing how the topics form a connected set of ideas.

A writer gives coherence to a paragraph by linking the sentences in a way that allows thought to flow smoothly from one sentence to the next. A coherent paragraph flows because it is arranged according to a definite plan and demonstrates the writer’s awareness of his purpose for writing. As a result, all the sentences are not just about the same main topic, but they also “stick together” and lead readers smoothly from the topic sentence to the concluding one. Each sentence takes a logical step forward.

One way to achieve coherence is to decide on an ordering principle for the ideas in your paragraph, a pattern of development that creates a logical flow between the sentences. Readers’ understanding of text is guided largely by their expectation of conventional patterns. When the pattern of the paragraph coincides with what the reader expects to see, it has coherence.

Common patterns include sequence description, cause and effect, compare and contrast, and problem and solution. Other ways to achieve coherence include the use of inductive or deductive logic, examples or illustrations, classification or division, definitions, or analogy.³ Coherence can also be improved by strengthening the ties between old information and new. This includes repeating key words or using variations and synonyms of key words, using parallel structures to bind a series of sentences; and providing transitions both at the sentence level and between paragraphs.

A text can have coherence but lack cohesion and vice versa, as the following examples show:

- Torts was my favorite class in law school. Long classes can be tiring. Fatigue is a frequent cause of automobile accidents. Because a mishap tied up traffic, I once missed a job interview. I later went to work in California.
- I always wanted to go to law school. Helping people is deeply satisfying. I represented a childless couple in an international adoption. Adopting an older child is challenging for all involved. The first example has cohesion but lacks coherence. The italicized words show how the sentences connect to one another, but the paragraph makes little sense. It starts out talking about taking torts and ends up talking about working in California. The second example has coherence but lacks cohesion. We can understand, admittedly with some effort, the writer is offering an explanation and an example to elaborate the reason for going to law school.

Sometimes to achieve cohesion it is necessary to disregard other familiar advice about writing, such as the advice to avoid the passive voice. Joseph Williams offers the following examples:

- Some astonishing questions about the nature of the universe have been raised by scientists studying black holes in space. The collapse of a dead star into a point perhaps no larger than a marble creates a black hole. So much matter compressed into so little volume changes the fabric of space around it.
in puzzling ways.

- Some astonishing questions about the nature of the universe have been raised by scientists studying black holes in space. A black hole is created by the collapse of a dead star into a point perhaps no larger than a marble. So much matter compressed into so little volume changes the fabric of space around it in puzzling ways.5

Our sense of flow calls for the use of the passive construction in the second sentence of the second example. As these examples show, cohesion between sentences has a higher priority than the structure of any particular sentence.

LENGTH

While authorities on writing generally agree that unity, coherence, and cohesion are necessary attributes of effective paragraphs, some authorities would include other attributes as well. Two of these – completeness and length – tend to overlap. The writer must avoid inadequately developed paragraphs and concurrently avoid excessively long paragraphs.

Adequacy of development depends on the complexity of the central idea, the purpose and audience of the document, and the role of the paragraph within the document. A lawyer might develop the same idea differently in a client letter, an appellate brief, or a newspaper op-ed. Similarly, the writer might treat the same idea differently in an introductory paragraph, a concluding paragraph, or in the body of the document. To be fully developed, a paragraph must have the right level of detail, the right kind of detail, and the right pattern of presentation.

As to its length, a good paragraph is as long as it needs to be. The determinant is not the number of words or sentences but the number of ideas – one. A long paragraph may be a signal that it has more than one central idea or that the idea is too big to cover without subdividing it. Moreover, with reading habits changing and attention spans decreasing, it is probably a good idea to keep paragraphs short.

It can be helpful to think about unity in terms of a paragraph’s shape. Some paragraphs, like those in the statement of facts section of a memo or a brief, are hourglass-shaped. They begin with a general statement about the topic, then narrow to specific support for that statement and conclude with a broader sentence that summarizes the topic and transitions to the next. Other paragraphs, like those in argument or discussion sections of a memo or a brief, are funnel-shaped. The rim of the funnel is a proposition, and the subsequent sentences narrow as the writer proves the proposition.

Most readers feel comfortable reading paragraphs that range between one hundred and two hundred words. Shorter paragraphs force too much starting and stopping, and longer paragraphs strain the reader’s attention span.6

Strunk and White tell us, “As long as it holds together, a paragraph may be of any length – a single, short sentence or a passage of great duration.”7 Still, they are mindful that we see paragraphs. “In general, remember that paragraphing calls for a good eye as well as a logical mind. Enormous blocks of print look formidable to readers, who are often reluctant to tackle them.”8 William Zinser put it this way: “Writing is visual — it catches the eye before it has a chance to catch the brain. Short paragraphs put air around what you write and make it look inviting .... "9

2. See Linda H. Edwards, LEGAL WRITING AND ANALYSIS 273 (3d ed. 2011) (“A topic sentence identifies the topic the paragraph will discuss, but that is all it does .... A thesis sentence, however, asserts a position.”).
5. Id. at 68.
8. Id. at 33.
KBA BOARD OF GOVERNORS MEETING:
JUNE 17, 2014

The KBA Board of Governors met on Tuesday, June 17, 2014. Officers and Bar Governors in attendance were, President T. Rouse; President-Elect B. Johnson; Vice President D. Farnsley; Immediate Past President D. Myers and Young Lawyers Division Chair C. Frazier. Bar Governors 1st District – J. Freed, M. Pitman; Bar Governors 2nd District – T. Kerrick, J. Meyer; 3rd District – H. Mann, G. Wilson; 4th District – D. Ballantine, A. Cubbage; 5th District – A. Britton, W. Garmer; 6th District – D. Kramer, S. Smith; and 7th District – M. McGuire, B. Rowe.

In Executive Session, the Board considered five (5) default disciplinary cases, involving three attorneys and one (1) restoration case. Brenda Hart of Louisville, Roger Rolfes of Florence, and Dotty Moore of Elizabethtown via telephone; non-lawyer members serving on the Board pursuant to SCR 3.375, participated in the deliberations.

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

- Heard a status report from the KBA Rules Committee.
- Young Lawyers Division ("Division") Chair Carl Frazier reported that the Division recently held its annual dinner with the Supreme Court and advised them of their projects throughout the year. Frazier also reported on the public service projects, the new Bully Proof program, programs being presentation during the annual convention and extended an invitation to the Board to attend their annual luncheon and reception scheduled on Thursday, June 19, during the annual convention.
- President Thomas L. Rouse reported there are approximately 1,600 pre-registered for the annual convention and it is projected that we could have onsite registrations to bring our total to an estimated 1,800.
- Approved the following new appointments to the Attorneys' Advertising Commission (AAC) for three-year terms ending on June 30, 2017: Third Supreme Court District Rhonda Hatfield-Jeffers of Somerset; Fourth Supreme Court District Robert Thomas Watson of Louisville; Seventh Supreme Court District Rhonda Jennings Blackburn of Pikeville; and, approved the reappointment of Lisa Brones Huber of Louisville for a second three-year term ending on June 30, 2017. Also approved appointing Lisa Brones Huber to serve as Chair of the AAC.
- Approved the following appointments to the Kentucky Bar Foundation Board of Directors for three-year terms ending on June 30, 2017: Fourth Supreme Court District – Margaret E. Keane, John R. Crockett, Ill and Ekundayo Seton, all of Louisville; Fifth Supreme Court District – William H. Fortune of Lexington; Sixth Supreme Court District – Penny Hardy of Fort Wright; and, Seventh Supreme Court District – Robin Lynn Webb of Grayson, Glenn Martin Hammond of Pikeville and Robert Stephen McGinnis of Greenup.
- Approved the appointment of Robert Stephen McGinnis of Greenup to the Ethics Hotline Committee for the Seventh Supreme Court District to replace incoming Bar Governor John Vincent.
- Approved the proposed change to the 2014-2015 dues statement wherein language is to be inserted under the "Kentucky Bar Foundation" item stating: "Please see the enclosure regarding the Kentucky Bar Foundation and the programs it supports." The Kentucky Bar Foundation will be holding a certain amount of funds from each member’s contribution to support inclusion and diversity programs. The information along with the other programs supported will be outlined on the inserted sheet sent with the dues statement.

To KBA Members
Do you have a matter to discuss with the KBA's Board of Governors?
Board meetings are scheduled on
November 21-22, 2014
January 16-17, 2015
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.

- Approved increasing the amount of funds allocated to the Kentucky Delegates in the amount of $2,250 for the ABA Annual Meeting and $1,750 for the ABA Midyear Meeting.
- Approved the recommendation of the KBA Investment Committee to revise the language in the Investment Policy Section No.7 – Investment Restrictions and Requirements to shift to a full index allocation using the Fidelity Spartan 500 Index Fund as the 500 Index proxy and for the Mid and Small Cap Funds to use the Vanguard Mid-Cap.
- Approved ratifying the email vote of the Board for the IOLTA Board of Trustees appointments as follows: Robert Kellerman of Frankfort representing the Fifth Supreme Court District for a new three-year term ending on June 30, 2017, and David Latherow of Ashland representing the Seventh Supreme Court District who would be serving a second three-year term ending on June 30, 2017.
- Approved ratifying the email vote of the Board approving employment of Rudler, PSC to conduct the Kentucky Bar Foundation 2014-2015 audit.
- Executive Director John D. Meyers reported that he has been appointed to the National Association of Bar Executives Program Committee for a three-year term. Meyers advised that the NABE is a subgroup of the ABA which meets before the ABA meetings and includes Executive Directors from state and local bars. He stated that a lot of good ideas are exchanged through the association and his affiliation with the group has been very beneficial with regard to networking.
- Meyers reported that an opinion has been received from the Kentucky Attorney General’s Office in response to his request with regard to the issue of the City of LaGrange collecting a fee from attorneys practicing in its local courts. He advised that the Attorney General’s Opinion states they do have the right to tax attorneys but that it is improper and impermissible to tax those with minimal contacts. Meyers stated that the City of LaGrange is trying to revise its ordinance.
KY PUBLIC DEFENDERS RECOGNIZE INDIVIDUALS ADVANCING PROTECTIONS FOR CITIZENS AND THE RIGHT TO COUNSEL

Public defenders statewide gathered on June 17 to recognize individuals advancing the right to counsel and protections for persons facing a loss of liberty. Presentations of the awards were made during the 2014 Kentucky Public Defender’s Recognition Lunch at the METS Center in Erlanger.

“The right to counsel stands above all other constitutional protections,” Monahan said. According to U.S. v. Cronic, 466 U.S. 648, 654 (1984): “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”

The Department of Public Advocacy depends on many lawyers in private practice to provide conflict representation at rates that are inadequate. DPA contracted with 175 attorneys for 3,858 cases in FY 13 at an average of $385 per case. Most were felony cases. For their selfless conflict representation of indigent clients, Public Advocate Awards were presented (below) by Public Advocate Ed Monahan (far right) to, from left to right, conflict lawyers Rebecca Murrell, Carlos Moran, Jim Cox, Larry Simon, Brent Cox, James R. Hampton; and, front row, KBA President Thomas L. Rouse for his support of increasing funding for lawyers doing conflict contract work for the Department of Public Advocacy.

Pictured above from left to right are Public Advocate Ed Monahan, who presented the Public Advocate Award for passage of SB 200 juvenile reform to state Rep. John Tilley of Hopkinsville and state Sen. Whitney Westerfield, also of Hopkinsville (not pictured); the Public Advocate Award to state Rep. Brent Yonts of Greenville for passage of a KRS Chapter 31 public defender measure; and the Rosa Parks Award to Charolette Brooks of Lexington for her “courageous capital investigation work,” according to the DPA release. KBA President William Johnson (not pictured) presented Amy Staples of Frankfort with the Professionalism and Excellence Award. Additionally, Monahan presented the Gideon Award to Emily Rhorer of Frankfort for her litigation advocacy; the In Re Gault Award to Elizabeth McMahon of Louisville for her juvenile advocacy; and the Anthony Lewis Media Award to KET’s Renee Shaw of Lexington and PBS’ Dan Edge (not pictured) for enlightening the public and policy makers on criminal justice issues through the KET program “Prison State: A Kentucky Community Conversation” and the PBS Frontline series program “Prison State.” Not pictured: Jim Gibson of Prospect, who received the Furman Award for his capital advocacy.

THIRD ANNUAL FORUM ON CRIMINAL LAW REFORM IN THE COMMONWEALTH OF KENTUCKY, NOVEMBER 7

The KBA Criminal Law Section and the University of Louisville Louis D. Brandeis School of Law are sponsoring the Third Annual Forum on Criminal Law Reform in the Commonwealth of Kentucky on Friday, November 7. The forum will be held from 11:45 a.m.-5:00 p.m. in the Allen Court Room at the law school in Louisville. The CLE program has been accredited for 3.50 CLE credits in Kentucky. Admission to the forum is free, but space is limited. Registrations will be accepted on a first come, first served basis until the seminar capacity is reached. The registration deadline is Friday, October 31. A registration form with the full agenda is available on the Criminal Law Section’s webpage at www.kybar.org/357.
After nomination by the KBA Board of Governors, Kentucky Public Advocate Ed Monahan has been elected to the ABA Government and Public Sector Lawyers Division as a state bar representative. The division serves public lawyers by offering programs, publications, and online resources specifically for government, public sector & military lawyers, as well as interested law students.

Also, ABA President William C. Hubbard has appointed Monahan as a member of the ABA Death Penalty Due Process Review Project. The project conducts research and educates the public and decision-makers on the operation of capital jurisdictions’ death penalty laws and processes in order to promote fairness and accuracy in the death penalty system. The project encourages adoption of the ABAs Protocols on the Fair Administration of the Death Penalty; assists state, federal, international, and foreign stakeholders on death penalty issues; and collaborates with other individuals and organizations to develop new initiatives to support reform of death penalty processes.

In 2011, the American Bar Association Kentucky Assessment Team on the Death Penalty issued a 438-page audit which reviewed all death penalty cases prosecuted in Kentucky. The independent audit uncovered major deficiencies in the way the death penalty has been implemented in Kentucky since 1976. The audit evaluated Kentucky procedures and practices against national ABA capital benchmark protocols. The audit makes a series of critically important findings and recommendations to address the problems identified with the way the death penalty is administered in our state. The report focuses on fairness and accuracy in capital cases; it took no position with regard to whether or not the death penalty should be abolished, and was only concerned with its proper administration. The Kentucky Assessment Team co-chairs were Linda Ewald, formerly University of Louisville Louis D. Brandeis School of Law, and Michael J.Z. Mannheimer of the Northern Kentucky University Salmon P. Chase College of Law. Additional members were Michael Bowling, former state representative and an attorney with in Middlesboro; Allison Connelly of the University of Kentucky College of Law; former Supreme Court Justice Martin E. Johnstone of Prospect; former Supreme Court Justice James Keller of Lexington; Frank Hampton Moore Jr., an attorney with Cole & Moore in Bowling Green; and Marcia Milby Ridings, an attorney with Hamm, Milby & Ridings in London.

David F. Latherow of Ashland, at left, was recognized for his service to the KBA’s Attorneys’ Advertising Commission (AAC) from 2008-14 and as AAC Chair from 2011-14 during the AAC’s June 13 annual meeting. Making the presentation was Jay R. Garrett, chief deputy bar counsel, at right. Outgoing AAC Commission member Blaine Lewis of Louisville was also honored for his service during the meeting, but was unable to attend. The AAC receives and reviews lawyer advertising pursuant to the Supreme Court Rules.

During the KBA Board of Governors’ July meeting, Jay R. Garrett, chief deputy bar counsel, at right, presented outgoing Attorneys’ Advertising Commission member, Melinda Gillum Dalton of Somerset, with a plaque recognizing her service to the KBA’s Attorneys’ Advertising Commission from 2010-2014.
2014 Kentucky Legal Training for Dependency, Neglect and Abuse Cases

Four Convenient Locations
Earn Continuing Education Credits
Only $25 Per Person

Sponsored by the Kentucky Administrative Office of the Courts with Federal Court Improvement Program funds

HOW TO REGISTER
There is a registration fee of $25 per person. Make check or money order payable to Kentucky State Treasurer and write “DNA Training” in the memo section of your check. Include full name, mailing address, email address, phone number and KBA number with payment and mail to:

Attn: Legal Training
Department of Family and Juvenile Services
Administrative Office of the Courts
1001 Vandalay Dr.
Frankfort, Ky. 40601

FOR MORE INFORMATION
Attn: Legal Training
Department of Family and Juvenile Services
Administrative Office of the Courts
1001 Vandalay Dr.
Frankfort, Ky. 40601
Phone 800-928-2350, x50519 • Fax 502-782-8705
DNATraining@kycourts.net

The Administrative Office of the Courts is pleased to oversee the Legal Training for Dependency, Neglect and Abuse Cases (formerly the Guardian ad Litem Training Program). Since 1999, the AOC has been responsible for preparing attorneys to provide legal representation to dependent, neglected and abused children throughout Kentucky.

The goal of the program is to produce highly qualified guardians ad litem by offering training sessions, providing educational materials and serving as a comprehensive resource.

The curriculum gives Council for Children an overview of Kentucky statutory and case law while also meeting the federal requirements set forth in CAPTA (Child Abuse Prevention and Treatment Act) and ASFA (Adoption and Safe Families Act).

CLE Credits. Judges will receive 6.25 continuing judicial education credits for the basic program. The registration fee is waived for Kentucky judges.

CLE Credits. An application for CLE accreditation in Kentucky will be submitted which requests 6.25 credit hours of continuing legal education, which includes 1 credit hour of ethics.

CEU Credits. The AOC has been approved for 6.0 continuing education units from the Kentucky Board of Social Work.

Trainings offered at 4 locations in Kentucky

September 12, 2014
Basic Curriculum
University of Kentucky College of Law
Law School Courtroom
620 S. Limestone, Lexington, KY

October 24, 2014
Basic Curriculum
Warren County Justice Center
Circuit Room B
1001 Center Street, Bowling Green, KY

November 14, 2014
Basic Curriculum
Muhammad Ali Center
144 North Sixth Street, Louisville, KY

December 5, 2014
Basic Curriculum
Laurel County Judicial Center
Family Court Room
305 S. Main Street, London, KY
The Kentucky Clients' Security Fund (CSF) was established by the Supreme Court of Kentucky (Rule 3.820) to be administered by the Kentucky Bar Association. It is funded by the Bar dues of the lawyers of Kentucky to reimburse clients for losses caused by their attorney’s dishonest conduct, defined as the wrongful taking of clients’ money or other property or failure or inability to return unearned fees. The amount of $7.00 per lawyer, $6.00 per member of the judiciary, is allocated from member dues by the Kentucky Supreme Court for this Fund. The CSF does not consider losses resulting from negligence, nor does it consider consequential damages. There are caps on recovery.

In the fiscal years 2005-2006 through 2013-2014 the CSF has paid $1,598,364.16 to victims. The CSF provides a last-resort avenue for client victims who are unable to get reimbursement for their losses from the responsible lawyer, or from insurance or other sources. There is no charge to the client for this process. The Rule prohibits lawyers from being compensated for assistance in a claim.

Claims are reviewed by a Board of Trustees appointed by the Board of Governors of the Kentucky Bar Association. These five (5) Trustees consist of three lawyers and two lay members who perform their duties as a public service and receive no compensation.

**CSF Payments in Fiscal Year 2013-2014**

<table>
<thead>
<tr>
<th>Attorneys Whose Clients Suffered Losses*</th>
<th>Total Paid</th>
<th>Number of Clients Reimbursed</th>
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<tbody>
<tr>
<td>Chandler, Samuel P.</td>
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<tr>
<td>Gilfedder, Brian</td>
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<tr>
<td>James, Daniel W.</td>
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<td>Mayer, Edward A.</td>
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<td>McClintock, Rocky</td>
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<td>Megibow, Tod D.</td>
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<td>Morehead, Donald H.</td>
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<td>Nisbet, IV, William A.</td>
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<td>Reinhart, III, Louis E.</td>
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<tr>
<td>Reynolds, Ronnie</td>
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<tr>
<td>Robertson, Daniel K.</td>
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</tr>
</tbody>
</table>

(* Additional claims have been approved by the CSF that are in the process of being distributed and not included in the above list.)

Further information regarding the CSF can be found on the Kentucky Bar Association website, www.kybar.org under the Ethics menu.
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DISTINGUISHED NEUTRALS

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The National Academy of Distinguished Neutrals is an invitation-only association of over 900 top-rated premier mediators & arbitrators throughout the US, and proud Neutral Database Partner to the national defense (DRI) & plaintiff (AAJ) bar associations. For more info, see www.nadn.org/about
Judicial Conduct Complaints:
In the 2013-2014 fiscal year, the Commission considered 209 complaints—193 new complaints and 28 complaints carried over from the 2012-2013 fiscal year. The Commission concluded 192 complaints, five of which resulted in imposed sanctions:

- Two Private Admonitions
  1. Violation of Canon 4C(3)(b)(i) and (iv) for using the prestige of the judicial office for the solicitation of donations for a charitable organization.
  2. Violation of Canon 3B(5) for making a statement during a court proceeding which could be perceived as gender bias.

- Two Public Reprimands (Judge Martin McDonald and Judge Frank A. Fletcher)

- One 30-day Suspension (Judge Rebecca S. Ward)

Twenty-nine complaints were pending at the end of the fiscal year, eighteen of which were received prior to the end of the fiscal year but too late to be considered before the first meeting in the new fiscal year and eleven of which were carried after initial consideration.

Jurisdiction:
There are 367 judicial positions in the Commonwealth of Kentucky within the jurisdiction of the Commission. Additionally, the Commission has jurisdiction over attorneys who have filed as candidates for judicial office. Of 193 total complaints filed for fiscal year 2013-2014, 81 complaints were filed against circuit court judges of general jurisdiction, 51 were filed against circuit family court judges, 50 were filed against district court judges, and 17 were filed against judicial candidates.
Percentages of Complaints by Judicial Position:

- Family Court: 24%
- Circuit Court: 39%
- District Court: 24%
- Judicial Candidate: 8%
- Former Judge: 1%
- Current Judicial Candidate: 1%
- Senior Judge: 1%
- Supreme Court: 1%
- Domestic Relations Commissioner: 1%
- Master Commissioner: 1%

What Types of Proceedings Resulted in Complaints?

- Criminal: 28.00%
- Domestic Relations: 15.00%
- General Civil: 13.00%
- Non-Litigation: 11.00%
- Multiple Proceeding Types: 7.00%
- Dependency/Neglect/Abuse: 6.00%
- Mental Illness/Disability: 4.00%
- Protective Order: 4.00%
- Probate: 3.00%
- Traffic: 2.00%
- Other: 0.00%
Who Filed Complaints?

Fiscal Year 2013-2014

Complainant Representation in Court:
- 50.24% were represented by counsel
- 1.90% were represented by counsel, then appeared pro se
- 24.17% appeared pro se
- 7.58% unknown
- 16.11% not applicable (non-litigation)

What were the Allegations?

Legal Error/Improper Procedure 41%
Conflict of Interest 12%
Substance Abuse 1%
Delay in Administering Docket 6%
Ex Parte Communication 3%
Prejudice/Discrimination 5%
Political Activity 10%
Bias/Partiality/Prejudgment 12%
Improper Influence 2%
Judicial Temperament 6%
No Specific Allegations 1%
Other 1%
2013-2014 Presentations:

- **University of Louisville Brandeis Inns of Court** - Presentation on judicial elections, given by Mr. Stephen Wolnitzek, on October 29, 2013.

- **District Bar** - Presentation on general Commission procedures and statistics given by Judge Janet Stumbo, in Ashland, on September 16, 2013, and in Prestonsburg, on November 21, 2013.

- **Circuit Judges College** - “When Trouble Comes: How to Avoid It and How to Respond to It” presented by Judge Eddy Coleman, Justice Michele Keller, Mr. Stephen Wolnitzek, and Ms. Jimmy Shaffer, on November 20, 2013.

- **Louisville Bar Association** - "Recusing and Reporting Judges: The Legal, Ethical & Practical" presented by Judge David Bowles, with co-presenter J. Vincent Aprile II, on March 5, 2014.

### 10-Year Complaint History

![10-Year Complaint History](image)

**About the Judicial Conduct Commission**

The mission of the Kentucky Judicial Conduct Commission is to protect the public, to encourage judges, commissioners and candidates for judicial office to maintain high standards of conduct, and to promote public confidence in the integrity, independence, competence, and impartiality of the judiciary.

The Commission accomplishes this mission through its investigation of complaints of judicial misconduct, wrongdoing or disability. In cases where judges, commissioners and candidates for judicial office are found to have engaged in misconduct or to be incapacitated, the Kentucky Constitution authorizes the Commission to take appropriate disciplinary action, including issuing admonitions, reprimands, censures, suspensions, or removal from office.

COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION

ORDER OF PRIVATE REPRIMAND

The Commission issues this order of private reprimand to a candidate for judicial office for violation of SCR 4.300, the Code of Judicial Conduct, Canon 5A(1)(d).

After becoming a candidate for judicial office, the candidate made a contribution to a political candidate. By this conduct, the judicial candidate violated 5A(1)(d), which prohibits a judicial candidate from making a contribution to a political candidate.

In issuing this private reprimand, the Commission duly considered that the candidate fully cooperated in the investigation, self-reported the contribution, requested and received a refund of the contribution and had no prior infractions.

Therefore, for the foregoing conduct, the candidate is hereby privately reprimanded.

Date: July 23, 2014

/s/  
Stephen D. Wolnitzek, Chair

COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION

ORDER OF PRIVATE REPRIMAND

The Commission issues this order of private reprimand to a candidate for judicial office for violation of SCR 4.300, the Code of Judicial Conduct, Canon 5A(1)(b).

After becoming a candidate for judicial office, the candidate held office in a political organization in violation of Canon 5A(1)(b), which prohibits a candidate for judicial office from acting as a leader or holding any office in a political organization.

In issuing this private reprimand, the Commission duly considered that the candidate fully cooperated in the investigation, acknowledged the improper conduct and had no prior infractions. It is a condition of this order that the candidate certify to the Commission in writing that the candidate has read the Kentucky Code of Judicial Conduct, SCR 4.300.

Therefore, for the foregoing conduct, the candidate is hereby privately reprimanded.

Date: August 15, 2014

/s/  
Stephen D. Wolnitzek, Chair
COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION

IN THE MATTER OF:

DANA M. COHEN

AGREED ORDER OF PUBLIC REPRIMAND

Dana M. Cohen is a candidate for district judge in the 30th Judicial District, consisting of Jefferson County. Ms. Cohen has waived formal proof and has agreed to accept the disposition made in this order.

The Commission received information during a preliminary investigation that, after she became a candidate for judicial office, Ms. Cohen made a Facebook posting that publicly endorsed a candidate for public office and also made a contribution to a political candidate. In agreeing to entry of this order, Ms. Cohen acknowledges that she engaged in this conduct. By doing so, she violated the Kentucky Code of Judicial Conduct, SCR 4.300, Canon 5A(1)(c), which prohibits a candidate for election to judicial office from publicly endorsing a candidate for public office, and Canon 5A(1)(d), which prohibits a candidate for judicial office from making a contribution to a political candidate.

In making the disposition in this order, the Commission duly considered that Ms. Cohen fully cooperated in the investigation, that she candidly acknowledged the violations, that she requested and received a refund of the contribution and that she had no prior infractions.

It is therefore ordered by the Commission that for the foregoing conduct Ms. Cohen is hereby publicly reprimanded.

Date: July 21, 2014

/s/ Stephen D. Wolnitzek, Chair

Agreed to:

/s/ Dawn R. Elliott, Attorney for Dana M. Cohen

/s/ Dana M. Cohen

Judge David Bowles recused from any consideration of this matter.
FORMAL JUDICIAL ETHICS OPINION JE-126
August 13, 2013

This opinion addresses the following question:

MAY A JUDGE BE A MEMBER, AND BE ON THE BOARD, OF A GROUP WHICH WILL SEEK APPROVAL AND FUNDING FOR A “RECOVERY KENTUCKY” CENTER LOCATED IN A COUNTY IN WHICH THE JUDGE SITS?

Answer: No.

A judge has requested an opinion from the Judicial Ethics Committee regarding membership in a group, and service on the board of a group, which will seek approval and funding for a Recovery Kentucky Center located in a county in which the judge sits. The judge advises the Committee that Recovery Kentucky is a residential program that helps Kentuckians recover from chronic substance abuse, and that it supplies supportive housing, a stable place to live and a support system. The judge advises the Committee that placement in a Recovery Kentucky Center is the only available opportunity for meaningful long-term residential treatment for many drug court participants.

The judge advises the Committee that the program is a joint effort by the Department for Local Government, the Department of Corrections and the Kentucky Housing Corporation. The judge advises the Committee that funding is provided from a combination of Low Income Housing Tax Credits, the Affordable Housing Trust Fund, HOME funds, Federal Home Loan Bank funds, Community Development Block Grants, cost savings to the Department of Corrections, Food Stamps, community fund raising/grants, and Project-Based Section Eight housing funds.

As noted by the judge, Recovery Kentucky is a joint effort by the Department for Local Government, the Department of Corrections, and Kentucky Housing Corporation. The Department for Local Government is a governmental agency under the Office of the Governor of the Commonwealth. Likewise, the Department of Corrections is a governmental agency. Kentucky Housing Corporation is a public corporation of the Commonwealth of Kentucky administratively attached to the Finance and Administration Cabinet. A portion of Kentucky Housing Corporation’s funds are derived from the interest earned through the sale of tax-exempt mortgage revenue bonds. Thus, membership on a board seeking approval and funding for such a center would constitute holding an office in a non-judicial governmental entity.

Canon 4C(2) of the Kentucky Code of Judicial Conduct provides:

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.

In Judicial Ethics Opinion JE-117, based on the foregoing Canon, the Committee stated that a judge could not serve as a Trustee of a public university. The Supreme Court denied review of that Opinion, 2009-SC-000225-OA. The Committee believes that JE 117 applies to the proposed participation and that the judge may not serve as a member or board member of the Recovery Kentucky Center. Specifically, JE-117 provides that under Canon 4(C)(2), service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice is prohibited. Recovery Kentucky’s stated corporate purposes primarily include reduction of chronic homelessness and to assist Kentuckians with chronic drug and substance abuse problems, including the facilitation of counseling and treatment. While these are worthy purposes and no doubt service on Recovery Kentucky’s Board would be a noble endeavor as would be service on many public quasi-governmental not for profit boards, it nonetheless would be service in a governmental position that is not connected with the improvement of the law or the legal system and otherwise fails to directly assist with the administration of justice.

Another reason the Committee concludes that the service under discussion is not allowed is that circuit judges potentially have a great deal of interaction with such programs and a judge should avoid the appearance of impropriety, as prohibited by Canon 2A of the Kentucky Code of Judicial Conduct. The Recovery Kentucky Center is not part of the court system, as are the operations of “drug courts.”

Likewise, Canon 4C(3) contains several provisions that militate against such service. That Canon allows a judge to serve as a member of a civic organization not conducted for profit, but 4C(3)(a)(iii) prohibits such service if

by reason of its purpose, will have a substantial interest in other proceedings in the Court in which the judge is a member....

Finally, the Committee also believes that participation by the judge in seeking funding for the center would violate Canon 4C(3)(b)(i), which provides that a judge:

...shall not personally participate in the solicitation of funds or other fund-raising activities....

The Committee acknowledges that this program is certainly a needed and well-founded program, but for the foregoing reasons the Committee is of the opinion that the suggested service is prohibited.

One member concurs in the result of opinion JE-126 on the basis of JE-117, but submits that JE-117 has not been reviewed by the Kentucky Supreme Court and does not believe it is a correct interpretation and application of Canon 4(C)(2) and (3). But for JE-117, this member believes the judge’s participation in Kentucky Recovery should be permissible under Canon 4(C)(3) as a not for profit entity subject to the express limitations set forth therein in subsecs. (a) and (b). This member further believes JE-117 should be set aside and JE-64 reinstated since JE-117 effectively prohibits all service by judges to all quasi-governmental or any government related organizations outside of the judicial branch of government, including those that are not for profit educational, charitable and civic entities.

Finally, 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. 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.

Sincerely,

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

cc: Donald H. Combs, Esq.
The Honorable Jeff Taylor, Judge
The Honorable Jean Chenaund Logan, Judge
The Honorable Jeffrey Scott Lawless, Judge
Jean Collier, Esq.
The Kentucky Lawyers Assistance Program continues to offer weekly, one-hour meetings in Lexington and Northern Kentucky. The Northern Kentucky Lawyers in Recovery meeting is held 7:30 a.m., on Tuesdays at Lakeside Christian Church, 195 Buttermilk Pike, Lakeside Park, (Erlanger). The church is located off I-75 exit 186 for Kentucky 371/Buttermilk Pike. The facility will open at 7:15 a.m. Please bring your own coffee.

The Lexington meeting is held 7:30 a.m., on Wednesdays at the Alano Club, 370 East Second Street. Coffee and drinks are available for purchase beginning 7 a.m. All meetings are open to law students, lawyers and judges who are already involved or who are interested in a 12-step program of recovery, including but not limited to Alcoholics Anonymous, Narcotics Anonymous, Overeaters Anonymous and Al-Anon. Come meet other attorneys and network. All meetings and contacts are confidential. SCR 3.990. For additional information, please visit www.kylap.org, call (502) 564-3795, ext. 266, or email abeitz@kylap.org.

KYLAP is excited to be participating in the 2015 Kentucky Law Update! KYLAP Director Yvette Hourigan will be speaking on the issue of age-related cognitive decline in attorneys. As Baby Boomers move into the twilight of their legal careers, the Kentucky legal community will experience what is becoming known nationally as the “senior tsunami.” As a result, lawyers and judges will likely see more age-related issues that may impact job performance. Learn how to recognize and address these issues in your practice and in your colleagues. For more information on the Kentucky Law update visit www.kybar.org/186.
Our deepest appreciation goes to these distinguished members of the Kentucky Bar for their financial support of the Foundation’s charitable efforts.

Christine C. Adams practices law in Somerset. A graduate of Washington & Lee University and Washington & Lee School of Law, she was admitted to the Kentucky Bar in 1993.

Judge Sara Walter Combs of Stanton was elected to the Kentucky Court of Appeals in November 1994 and re-elected in 2000 and again in 2006. She was the first woman and the first judge from the Eastern Kentucky counties of the 7th Appellate District to serve as chief judge of the Kentucky Court of Appeals, serving in that role from June 2004 until May 2010. A graduate of the University of Louisville and the University of Kentucky Brandeis School of Law, she was admitted to the Kentucky Bar in 1980. Judge Combs is a Life Fellow.

Robert Sean Deskins practices law in Louisville with the Oldfather Law Firm. A graduate of the University of Louisville and the University of Louisville Brandeis School of Law, he was admitted to the Kentucky Bar in 2008. Mr. Deskins is a Life Fellow.

Allison J. Donovan practices law in Lexington with the law firm of Stoll Keenon Ogden. A graduate of Eastern Kentucky University and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 2006. Ms. Donovan currently serves as a member of the Kentucky Bar Foundation Board of Directors.

Susan Hanley Duncan joined the Brandeis School of Law faculty as an adjunct in 1997 and full time in 2000, and is presently serving as interim dean from 2012-2017. Dean Duncan currently serves as an ex-officio member of the Kentucky Bar Foundation Board of Directors. A graduate of Miami University and the University of Louisville Brandeis School of Law, she was admitted to the Kentucky Bar in 1991. Dean Duncan is a Life Fellow.

W. Blaine Early III practices law in Lexington with the law firm of Stites & Harbison. A graduate of DePauw University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1996. Mr. Early is a Life Fellow.

John M. Famularo practices law in Lexington with the law firm of Stites & Harbison. A graduate of Loyola University New Orleans and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1971. Mr. Famularo is a Life Fellow.

Robert W. Goff practices law in Paducah with the law firm of Denton & Keuler. A graduate of Centre College of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 2007. Mr. Goff is a Life Fellow.

William T. Gorton III practices law in Lexington with the law firm of Stites & Harbison. A graduate of Pennsylvania State University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1990 and is also a member of the Pennsylvania Bar. Mr. Gorton is a Life Fellow.

Larry F. Hinton practices law in Bowling Green with the law firm of Reynolds, Johnston, Hinton & Pepper. A graduate of Western Kentucky University and the University of Louisville Brandeis School of Law, he was admitted to the Kentucky Bar in 1977. Mr. Hinton is a Life Fellow.

Lindsay H. Hinton practices law in Bowling Green with the law firm of Reynolds, Johnston, Hinton & Pepper. A graduate of Western Kentucky University and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 2005. Ms. Hinton is a Life Fellow.

S. Richard Hughes practices law in Bowling Green with the law firm of Cole & Moore. A graduate of Transylvania University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1994.

Justice Michelle M. Keller of Covington was appointed to the Supreme Court of Kentucky in April 2013 by Governor Steven Beshear to fill the unexpired term of the late Justice Wil Schroder who had retired in January 2013. Prior to her appointment to the Supreme Court, Justice Keller served as a Kentucky Court of Appeals judge for Division 1 of the 6th Appellate District for six years after having practiced law for 17 years. A graduate of Northern Kentucky University and Northern Kentucky University Chase College of Law where she was an IOLTA scholar, Justice Keller was admitted to the Kentucky Bar in 1990.

Judge James H. Lambert of Mount Vernon was elected to the Kentucky Court of Appeals in November 2006 to serve Division 2 of the 3rd Appellate District. He began private practice with Lambert & Lambert of Mt. Vernon. He was elected Rockcastle County Attorney in November 1981 and served in that capacity for three terms. Judge Lambert also served as trial commissioner for the Rockcastle County District Court from 2002 to 2005 and as an administrative law judge for the Kentucky State Department of Corrections. A graduate of Eastern Kentucky University and Northern Kentucky University Chase College of Law, he was admitted to the Kentucky Bar in 1976. Judge Lambert is a Life Fellow.

G. Eric Long practices law in Benton with the law firm of Long & Long. A graduate of Murray State University and Northern Kentucky University Chase College of Law, he was admitted to the Kentucky Bar in 2007. He currently serves as a member of the Kentucky Bar Foundation Board of Directors. Mr. Long is a Life Fellow.

J. Paul Long, Jr. practices law in Stanford. A graduate of Eastern Kentucky University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1980. Mr. Long is a Life Fellow.

David Mattingly of Covington serves as director of Enterprise Risk Management and Insurance at Ashland Inc. A graduate of Centre College of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1996. Mr. Mattingly currently serves as a member of the Kentucky Bar Foundation Board of Directors.
Judge Irv Maze of Louisville was elected to the Kentucky Court of Appeals in November 2012 and serves Division 1 of the 4th Appellate District, which encompasses all of Jefferson County. He has served in that position since April 2012 when he was appointed to fill the vacancy left by Judge Thomas B. Wine. Judge Maze was a circuit court judge in Jefferson County for nearly five years until his appointment to the Court of Appeals. Prior to his appointment, he served as Jefferson County Attorney from 1999 until being appointed to the bench in 2008. A graduate of Indiana University and the University of Louisville Brandeis School of Law, he was admitted to the Kentucky Bar in 1976. Judge Maze is a Life Fellow.

Dustan Chad McCoy practices law in Bardstown with the law firm of McCoy & Hiestand. A graduate of the Virginia Polytechnic Institute & State University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1995. Mr. McCoy is a Life Fellow.

Frank Hampton Moore III practices law in Bowling Green with the law firm of Cole & Moore. A graduate of Transylvania University and the Appalachian School of Law, he was admitted to the Kentucky Bar in 2009.

Judge Joy A. Moore of Burlington was elected to the Kentucky Court of Appeals in November 2006 to serve Division 2 of the 6th Appellate District, and in July 2012 was appointed to the position of chief judge pro tem. Prior to her election to the Court of Appeals, Judge Moore served six years as chief law clerk for William O. Bertelsman, senior judge of the U.S. District Court for the Eastern District of Kentucky. She has also served as a staff attorney to Kentucky Court of Appeals Judges Daniel T. Guidugli and Robert W. Dyche III, and as a special justice to the Supreme Court of Kentucky. A graduate of Morehead State University and Northern Kentucky University Chase College of Law where she was a member of the Northern Kentucky Law Review, Judge Moore was admitted to the Kentucky Bar in 1996.

Judge Christopher Shea Nickell of Paducah was elected to the Kentucky Court of Appeals in November 2006 and represents Division 1 of the 1st Appellate District. Prior to his election, Judge Nickell practiced law 22 years, serving as a Kentucky trial attorney, prosecutor, and public defender, and as a college instructor at Murray State University and the University of North Carolina at Chapel Hill. A graduate of DePauw University and the University of Kentucky College of Law where he served as president of the Student Bar Association, he was admitted to the Kentucky Bar in 1975 and is also a member of the Florida Bar. Justice Scott is a Life Fellow.

Jennifer S. Smart practices law in Lexington with the law firm of Stoll Keenon Ogden. A graduate of Louisiana State University and Tulane University Law School, she was admitted to the Kentucky Bar in 1991 and is also a member of the Louisiana and Tennessee Bars. Ms. Smart is a Life Fellow.

Richard M. Wehrle practices law in Lexington with the law firm of Stites & Harbison. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1983.

Kristen N. Worak practices law in Paducah with the law firm of Denton & Keuler. A graduate of Mid-Continent University and Southern Illinois University School of Law, she was admitted to the Kentucky Bar in 2011. Ms. Worak is a Life Fellow.

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EARNING AND REPORTING CLE CREDITS: LET ME COUNT THE WAYS...

By: Deborah B. Simon

Many of you may not be aware that you can earn CLE credits in several ways other than by attending an accredited, approved educational program. The additional options are set out in SCR 3.650 and 3.655:

LEGAL WRITING - A member who publishes a legal writing that contributes to the legal competence of the attorney, other attorneys or judges, and is approved by the CLE Commission, may earn CLE credits. (A writing for which the author is paid shall not be approved by the commission.) For this activity, a member may earn up to a maximum of six credits per year. One hour of credit is earned for each two hours of actual preparation time including research, writing and editing. Any excess credits (up to 20 hours) will be applied toward the CLE Award established in SCR 3.690.

PREPARATION TIME - An attorney will be eligible to receive one credit for each two hours spent in preparation as a panel member or seminar leader for an approved activity, up to a maximum of 12 credits per educational year.

TEACHING - A member who teaches or participates as a panel member or seminar leader at an approved activity may earn one credit for each 60 minutes of actual instructional time.

PREPARATION TIME - A member may also earn one credit for each two hours spent researching, writing or editing material presented by another member at an approved activity up to a maximum of 12 credits per year.

LAW SCHOOL CLASS - If a member registers for and completes attendance of a law school class, whether for credit or by audit, he or she will be eligible for credits equal to two times the number of credit hours awarded by the law school for successful completion.

PUBLIC SPEAKING - CLE credit may be earned for teaching or participating as a panel member, mock trial coach or seminar leader for law-related public service speeches to civic organizations or school groups. A maximum of two credits earned per educational year may be applied to meet the annual minimum requirement. (If you are paid for the public speaking, you are not eligible for credit.)

NON-LEGAL SEMINARS - Attendance at seminars for non-lawyer professionals which will benefit the lawyer by delivering certain services in unique areas of practice may qualify for credits to be determined on a case-by-case basis by the commission. Any credits earned under this category shall not count toward the annual required minimum but may count as CLE award credits (see SCR 3.690).

You might now realize that you have participated in one or more of the activities described above and have not reported the same to the CLE Commission. What do you do?

In a perfect world, all certifications of completion of CLE activities must be received by the CLE Director no later than August 10 immediately following the educational year in which the activity is completed. You may submit a “past due” certification, however, along with a $50 fee per certificate, no later than June 30 for the educational year immediately following the year in which you completed the unreported activity.

Some of the activities I have described in this article have particular reporting requirements of which you must make yourself aware prior to sending in certifications to the CLE Director. This may be a good topic for a future article in the KBA Bench & Bar! In the meantime, should you have any questions regarding CLE credits or reporting them, feel free to contact any of your Commission representatives or the CLE Director or her staff. We will be happy to assist you.

Deborah Simon attended DePauw University (B.A., History 1972), and the University of Kentucky College of Law (J.D., 1979). She was admitted to the practice of law in Kentucky in 1979. She was employed by Morgan & Potter (Louisville); the Federal Land Bank (Louisville); Lloyd & McDaniel (Louisville); the commonwealth attorney for McCracken County; and self-employed since 1999. She was appointed by the Office of the U.S. Trustee to Chapter 7 panel of bankruptcy trustees for the Western District of Kentucky on Jan. 1, 2002, and still currently serves as a panel trustee in the U.S. Bankruptcy Court for the Western District of Kentucky, Paducah Division. She is a member of the Kentucky Bar Association, McCracken County Bar Association, National Association of Bankruptcy Trustees, American Bankruptcy Institute, and the Rotary Club of Paducah.
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This easy to use search engine contains up to date information on CLE events that have been accredited by the Kentucky Bar Association Continuing Legal Education Commission.

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

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

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There are seven more program locations left of the 2014 Kentucky Law Update program series. Don't miss out on this great opportunity. The KLU program series is an exceptional benefit of KBA membership and Kentucky is the only mandatory CLE state that provides its members a way of meeting the annual CLE requirement at no additional cost. The program agenda, online registration and other information is available online at www.kybar.org/186.

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**October 23-24**
Louisville
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**October 30-31**
Prestonsburg
Jenny Wiley State Resort Park

**November 5-6**
Paducah
Julian Carroll Convention Center

**November 19-20**
London
London Community Center

**December 4-5**
Covington
Northern Kentucky Convention Center
Great Place to Start
Resource Center for New Attorneys in Kentucky

The Kentucky Bar Association CLE Commission would like to thank those KBA members who have volunteered to help our new lawyers by serving as Attorney Advisors and/or Mentors through our Great Place to Start (“GPS”) mentoring program.

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James R. Irving to the firm's Louisville office. Irving focuses his practice on bankruptcy matters and creditors' rights, as well as commercial litigation. He has experience representing debtors, creditors, committees, trustees and interested third parties in Chapter 11 and Chapter 7 bankruptcy cases, in addition to representing creditors in foreclosure proceedings and other litigation. Irving has also practiced commercial litigation with a broad range of experience in state and federal courts and before the American Arbitration Association. He was the recipient of the Chicago Bar Association's 2013 Exceptional Young Lawyer Award. His experience with matters of juvenile justice through his pro bono work has led to opportunities to teachCLEs and edit publications on the subject for the American Bar Association.

Janet Norton has been named chief legal officer and general counsel for Baptist Health. As general counsel, she works with a staff of six attorneys to provide legal services for Baptist Health and its 30 affiliated corporations. She oversees the Baptist Health risk management program and professional liability, workers compensation and general litigation matters. Norton joined Baptist Health (then known as Baptist Healthcare System Inc.) in 1988 as corporate counsel, rising to vice president and general counsel in 1999. Prior to joining Baptist Health, she served as legal counsel at Humana, Inc., and as a staff attorney at the Kentucky Court of Appeals. She earned a law degree with distinction from the University of Kentucky College of Law. Norton received her bachelor’s degree with high distinction from the University of Kentucky, graduating with Phi Beta Kappa honors. Norton is a member of the American, Kentucky and Louisville Bar associations, as well as the American Health Lawyers Association, Kentucky Academy of Hospital Attorneys, the Defense Research Institute, the Kentucky Society for Healthcare Risk Management, Healthcare Roundtable for General Counsel and the Louisville Forum. In addition, she serves on the board of the Partnership for Commonsense Justice, Inc., and is a volunteer for several community organizations. She is a graduate of the 2001 Leadership Louisville program and the 2007 Healthcare Fellows Program.

James W. Morgan, Jr., Tracy A. Smith, Jack L. Porter, Jr., and Daniel T. Guidugli announce the formation of Morgan Smith Porter Guidugli, Attorneys at Law. James Morgan is a 1980 graduate of the Thomas M. Cooley Law School and has been in the private practice of law for 33 years. His practice consists primarily of plaintiffs’ personal injury, medical malpractice, employment litigation, family law, federal/state criminal defense and products liability. Tracy Smith is a 1995 graduate of the Northern Kentucky University Salmon P. Chase College of Law and has been in private practice for 19 years. Smith is licensed to practice in both Kentucky and Ohio. Her practice consists primarily in the areas of divorce/family law, plaintiffs’ personal injury and criminal defense. Jack Porter is a 1986 graduate of the Northern Kentucky University Salmon P. Chase College of Law. He served as a police officer prior to graduating from law school. He served in the Office of the Campbell County Commonwealth’s Attorney for 21 years, serving as both an assistant commonwealth’s attorney and the elected commonwealth’s attorney before retiring and entering private practice. His practice consists primarily of criminal defense and plaintiffs’ personal injury. Daniel Guidugli is a 1978 graduate of Northern Kentucky University Salmon P. Chase College of Law. He served as a Campbell County District Court judge for 10 years before being elected to the Kentucky Court of Appeals where he served for 11 years. His practice consists primarily of plaintiffs’ personal injury, family law and criminal defense.

Larry Forman announces that he opened his firm — Larry Forman Law, PLLC — last fall. He is a 2013 graduate of the University of Louisville Louis D. Brandeis School of Law. Forman focuses in DUIs, and has branded himself as “the DUI Guy” in Louisville. He also does general...
criminal work and personal injury. Forman’s office is located at 138 S. Third St., Louisville, KY 40202. Phone: (270) 945-2778; Fax: (419) 574-7156; email: larry@larryformanlaw.com. Forman has also been named to the “National Trial Lawyers: Top 40 Under 40” earlier this month.

The law firm of Goldberg Simpson LLC announces Megan Cleveland has joined the firm as an associate. Her practice primarily focuses on family law. Prior to joining the firm, she served as a law clerk to the Franklin County Family Court Judge. Cleveland is originally from Versailles. She graduated from Transylvania University with Bachelors of Arts in Business Administration. Thereafter, Cleveland earned her Juris Doctor from the University of Louisville Louis D. Brandeis School of Law. Cleveland was admitted to the Kentucky Bar in October 2012. She is a member of the Kentucky Bar Association, the Young Lawyers Division and the Family Law Division. She is also an active member of the Junior League of Louisville.

The law firm of O’Bryan, Brown & Toner, PLLC, announces that Krista A. Willike has joined their Louisville office as an associate attorney. Willike received her Bachelor of Arts, magna cum laude, from Bellarmine University in 2010 and her J.D. from University of Louisville Louis D. Brandeis School of Law in 2013. Her primary areas of practice include insurance defense litigation with a focus on medical and legal malpractice and defense of general civil liability claims.

Jefferson County Attorney Mike O’Connell has appointed Danielle Yannelli and DeAndre Baltimore as assistant county attorneys.

The Paducah law firm of Denton & Keuler, LLP, is pleased to announce that J. Paul Bradford has joined the firm. Bradford is a graduate of the University of Louisville Brandeis School of Law. He concentrates his practice in the areas of civil litigation and corporate law.

The Paducah law firm of Denton & Keuler, LLP, is pleased to announce that J. Paul Bradford has joined the firm. Bradford is a graduate of the University of Louisville Brandeis School of Law. He concentrates his practice in the areas of civil litigation and corporate law.

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Kentucky lawyers have elected two Stites & Harbison, PLLC, attorneys to leadership roles in the Kentucky Bar Association (KBA). Doug Farnsley was elected president-elect of the KBA and Ken Gish, Jr., was elected chair of the KBA’s Environment, Energy & Resources Law Section. Farnsley took the oath of office at the 2014 KBA Annual Convention held in Covington. Their one-year terms began July 1, 2014.

Farnsley is a member (partner) of Stites & Harbison based in Louisville. He previously served for six years as a member of the KBA Board of Governors, and he chaired the KBA’s highly successful 2013 Convention. Farnsley focuses on civil trial work, including the defense of product liability claims and professional and hospital liability claims. He has more than 30 years of trial experience and has argued cases before state and federal appeals courts. He is a Fellow of the American College of Trial Lawyers, the International Academy of Trial Lawyers, and the International Society of Barristers. Farnsley’s other honors include: The Best Lawyers in America® (2007-2014) and its 2011 Louisville Product Liability Litigation Lawyer of the Year, and Kentucky Super Lawyers (2007-14) and its Top 50 Lawyers in the state list (2009-11). Lawyers Mutual Insurance Company of Kentucky appointed Farnsley to its board in June 2014. He is from Louisville and graduated from the University of Louisville J.D. cum laude in 1976.

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Bingham Greenebaum Doll LLP (BGD) announces that Louisville partners Janet P. Jakubowicz and Margaret E. Keane have been named in the 2014 edition of “Benchmark: Top 250 Women in Litigation.” The annual publication honors female litigators from around the country for their achievements in the field. This is the third listing for both Jakubowicz and Keane since its inaugural publishing in 2012. Listed attorneys are selected based on peer review, overall career depth and targeted research completed during the U.S. Benchmark Litigation review process. Jakubowicz is chair of BGD’s partnership board and focuses her practice on business and commercial litigation. She is the past president of Louis D. Brandeis American Inn of Court and the Louisville Bar Association. Keane focuses her practice on defense of products liability actions, general commercial litigation, defending employers in various employment actions and representing parties in family law actions. She is the past president of the Kentucky Bar Association, Louis D. Brandeis American Inn of Court and Louisville Bar Association. Published in June 2014, “Benchmark: Top 250 Women in Litigation” will be distributed with the main “Benchmark Litigation” book in September. The special publication is dedicated to honoring the accomplishments of leading female trial lawyers in the United States.

“Lawyers of Color” magazine has named Stites & Harbison, PLLC, attorneys Vonda Kirby and Ozair Shariff to the second annual Hot List, which recognizes early- to mid-career minority attorneys excelling in the legal profession. Honorees were profiled in the magazine’s Hot List 2014 issue on July 28. “Lawyers of Color” selected the Hot List honorees through a two-part process. The selection committee, comprised of editorial staff and advisors, spent months reviewing nominations and researching legal publications as well as legal blogs in order to identify candidates. Nominations were accepted from mentors, peers and colleagues. Editorial picks were also made based on research of attorneys who had noteworthy accomplishments or were active in diversity pipeline initiatives.

Ozair Shariff is an attorney in the firm’s Louisville office where he is a member of the business litigation service group. Shariff’s practice is devoted to a wide range of issues affecting health care providers. He focuses on regulatory, compliance, physician contracting, and general transactional matters. He has appeared on behalf of health care clients in numerous administrative hearings.

“Lawyers of Color” has been recognized by the American Bar Association, National Black Law Students Association, and the National Association of Black Journalists. Founded in 2008 as a news and resource center, the company has grown into a social media firm providing research, career development, and brand marketing opportunities to clients.

The law firm of Goldberg Simpson LLC announces that S. Carlos Wood has joined the firm as an associate. His primary practice areas are insurance defense, general civil litigation, and criminal defense. Wood graduated from Auburn University Montgomery in 2001 with a Bachelor of Arts in English. He also graduated cum laude from the Northern Kentucky University Salmon P. Chase College of Law in 2006. He was admitted to the Kentucky Bar in 2006.

The law firm of O’Bryan, Brown & Toner, PLLC, announces that Brant W. Sloan has joined their Louisville office as an associate attorney. Sloan received his Bachelor of Arts, cum laude, from Butler University in 2007 and his Juris Doctor, cum laude, from University of Louisville Louis D. Brandeis School of Law in 2010. His areas of practice involve matters of insurance defense litigation, including medical, legal, and real estate malpractice, premises liability, and a variety of other general litigation matters.

IN THE NEWS

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Award from the University of Kentucky College of Law Alumni Association. Edwards received the award at the June 18th alumni reception held in association with the KBA’s Annual Convention for her commitment to giving back to the community. In 2013, Edwards was appointed to the University of Kentucky Board of Trustees by Gov. Steve Beshear. She has just completed a term as a trustee for St. Catharine College and is a former board of trustee member for Transylvania University. In 2008, Gov. Beshear appointed Edwards to the Executive Branch Ethics Commission. She is president-elect of the Louisville Bar Association (LBA) and serves on the LBA’s Summer Internship and Diversity committees. Edwards is a partner in Dinsmore’s litigation department. She practices in the areas of ERISA litigation and commercial litigation. Edwards counsels clients with business disputes and represents employee benefit plans, claims administrators and employers with benefits issues. Edwards earned her J.D. from the University of Kentucky College of Law and her B.A. from Transylvania University.

Sturgill, Turner, Barker & Monleyn, PLLC, announces that Kevin W. Weaver was appointed by University of Kentucky President Eli Capilouto to serve a four-year term on the UK College of Law Visiting Committee. The visiting committee brings together some of its most distinguished graduates to meet regularly with the dean, faculty and students of the college, and to consult with the president, provost and other top administrators of the university. Weaver has served as the managing member of Sturgill Turner since 2010. He is an experienced civil litigator in the areas of premises liability, insurance defense, contract disputes and estate contests. He also practices extensively in the area of workers’ compensation. He was selected by the Best Lawyers in America as the 2014 Lexington “Lawyer of the Year” in the area of “Workers’ Compensation Law – Employers,” and has been listed as a Best Lawyer in that category since 2012. He has been named a Kentucky Super Lawyer in the category of workers’ compensation defense since 2012, and was named a Kentucky Super Lawyer in the civil litigation defense category in 2007. In 2008, Kevin was elected a fellow of the Litigation Counsel of America, an honorary society limited to 3,500 trial lawyers nationwide, representing less than one-half of one percent of American lawyers. Weaver has also been selected to join the Leadership Kentucky Class of 2014.

Leslie Rudloff, senior counsel for Physicians Committee for Responsible Medicine in Washington, D.C., was elected Steering Committee Director of the Kentucky Bar Association’s Animal Law Section.

Sitis & Harbison, PLLC, attorney Nicole Maddox was selected to deliver the keynote address for the Kentucky Legal Education Opportunity (KLEO) Program’s 2014 Awards Dinner held July 22 at the University of Kentucky’s Boone Center. The dinner marks the final event for the KLEO Summer Institute held at the University of Kentucky College of Law each year for new KLEO scholars. The KLEO Program was adopted by the Kentucky General Assembly in 2002. The goal of the program is to increase the number of historically under-represented students in Kentucky’s public law schools. The KLEO Program accepts five entering first-year law students from each of Kentucky’s three public law schools: the University of Kentucky College of Law, the University of Louisville Louis D. Brandeis School of Law and Northern Kentucky University Salmon P. Chase College of Law. These 15 KLEO scholars are each awarded a scholarship which requires them to attend a two-week pre-law program held at the University of Kentucky College of Law. The KLEO Summer Institute is especially designed to prepare students from low-income, minority and disadvantaged backgrounds for the rigors of law school. A former KLEO scholar, Nicole Maddox is a transactional attorney in Stites & Harbison’s Real Estate & Banking Service Group and is based in the firm’s Louisville office. Her practice concentrates on commercial real estate acquisitions and development, commercial leasing, and commercial lending. Maddox keeps active in a variety of community groups, including Metropolitan Housing Coalition (board of directors, Affordable Housing Committee and Annual Meeting Planning Committee), Friends of the Fernley Kaufman House (board of directors, chair of Strategic Planning Committee and Annual Dinner & Auction Fundraiser Committee), Jefferson County Public Law Library (chair of the board of trustees) and International Conference of Shopping Centers (Kentucky Next Generation chair).

Brittany C. MacGregor, real estate attorney with McBrayer, Leslie & Kirkland, PLLC, has been selected to the 2014-2015 Leadership Lexington program, a leadership development program sponsored by Commerce Lexington and directed toward individuals who demonstrate leadership qualities.

Public Service degree from Morehead State University (MSU) at the university’s 2014 spring commencement ceremony. This degree recognizes Hinkle’s long and sustained support of MSU and his professional and business accomplishments. Hinkle has been dedicated to MSU for more than 20 years. He served two terms as a member of MSU’s Board of Regents (1991-2004), including board chair from 2001-04. He currently serves on the advisory board of MSU’s Kentucky Center for Traditional Music and the Board of Directors for the MSU Foundation Inc. Hinkle is a member (partner) of Stites & Harbison based in the Lexington office. He currently chairs the firm’s construction service group and is a member of the sustainability & emerging technologies practice group and the business litigation service group. Additionally, Hinkle has served as chair of the governing committee of the American Bar Association Forum on the Construction Industry, one of the top positions affecting construction law policy nationally. He has been a fellow of the American College of Construction Lawyers since 1996. The Associated General Contractors of Kentucky honored him with the 2011 Lifetime Achievement Award, the 2009 Distinguished Service Award and named him the 2007 Legislative Advocate of the Year.

Dinsmore & Shohl’s Robert Croft, Jr., has been named to Louisville’s 2014 “40 Under 40” list by “Business First.” Croft was selected from a pool of almost 500 nominees by a panel of four judges. The 40 Young Professionals that make up the 2014 class share the goal of making a difference in Louisville through their community service efforts and in their work. “Business First’s 40 Under 40” list will be featured in the September 26 edition. Croft has also taken part in the Louisville Bar Association Leadership Program and was honored as a 2013 YMCA Adult Black Achiever. He was named a 2014 Kentucky Rising Star by “Super Lawyers” magazine. Croft is a member of the product liability and toxic tort practice groups. He concentrates his practice in the areas of product and commercial litigation. He has been dedicated to MSU for more than 20 years.

The Leadership Louisville Center has selected Stites & Harbison, PLLC’s Marjorie Farris to participate in the Leadership Louisville Class of 2015. The 60-member Class of 2015 will spend 10 months of training and hands-on experiences with local lead...
ers who currently tackle our community’s biggest challenges. With the benefit of new perspectives and connections, Leadership Louisville graduates are prepared to become effective community leaders. Farris is a member (partner) of Sites & Harbison as well as the Louisville office executive member. She is an experienced trial lawyer who has handled a wide variety of litigation ranging from products liability, insurance bad faith, ERISA, complex business litigation, and class actions. She has actively defended more than 50 class actions nationwide. Created in 1979, the Leadership Louisville Center is the region’s most valuable resource for leadership development and civic engagement.

Schachter, Hendy & Johnson, PSC, is pleased to announce that Judge Matthew Kennelly has appointed Ronald E. Johnson, Jr., as co-lead counsel of the Plaintiffs Steering Committee for MDL 2545, in re: Testosterone Replacement Therapy Litigation, pending in the federal district court for the Northern District of Illinois in Chicago. MDL 2545 is a federally coordinated proceeding involving six manufacturers of various forms of testosterone replacement therapy. Johnson maintains a national practice in the field of complex and multi-district litigation with a specific emphasis on product liability litigation involving pharmaceutical products and medical devices. He is currently serving as co-lead counsel in MDL 2308 pending in the Western District of Kentucky and as a member of the Plaintiffs Steering Committee for MDL 2385 pending in the Southern District of Illinois. Johnson was also appointed to co-chair the Testosterone Replacement Therapy Litigation Group for the American Association of Justice. Johnson practices in the firm’s offices in Fort Wright and Louisville.

A team of lawyers from Wyatt, Tarrant & Combs, LLP, have authored the latest edition of Legal Aspects of Horse Farm Operations Monograph (4th ed. 2014) for the University of Kentucky Continuing Legal Education’s Equine Law Practice Library. Partners Lisa E. Underwood, Daniel I. Waxedman, Craig Robertson, George L. Seay, Jr., Debra H. Dawhare, George Miller and several other Wyatt counsel and associates authored chapters designed to guide the practitioner through many legal issues involved in owning and operating a horse farm. Topics in the nine chapters include: choosing a business entity; liability and employment issues; environmental concerns; creditors’ rights and collection issues; and zoning and land use planning. The book and searchable CD may be purchased by contacting the University of Kentucky CLE Office at (859) 257-2921.

The American College of Real Estate Lawyers (ACREL) has elected Sites & Harbison, PLLC, attorney Jamie Cox to fellowship in its organization. The American College of Real Estate Lawyers is the premier organization of U.S. real estate lawyers. Admission is by invitation only after a rigorous screening process. Criteria for fellowship in ACREL include outstanding legal ability along with high standards of professional and ethical conduct. Cox is a member (partner) of Sites & Harbison based in the Louisville office. She concentrates on commercial real estate development and leasing, commercial lending, and corporate-related real estate issues with an emphasis on the hospitality industry and New Markets Tax Credits transactions. She is the chair of the firm’s sustainability & emerging technologies practice group and is also a LEED Accredited Professional. Cox serves on the board of directors of The Morton Center and as a member of the Resource Development Committee for the Home of the Innocents. She also volunteers for the Legal Aid Society. Sites & Harbison is privileged to have three fellows in ACREL. The other honored attorneys include Alfred Joseph III from the firm’s Louisville office and Thomas Meng from its Lexington office.

E. Frederick “Rick” Straub, Jr., managing partner of Whitlow, Roberts, Houston & Straub, PLLC, has been accepted for membership in the International Association of Defense Counsel. The IADC is an elite international organization comprised of approximately 2500 peer-reviewed in-house counsel, insurance executives, and outside trial counsel representing business entities throughout the world. To be accepted for membership, Straub was nominated by a member of the organization, sponsored by two additional members, and his nomination received a thorough review by the membership committee and the entire board of directors. According to the IADC, membership standards are very exacting and membership is offered only to “the best and the brightest” in the legal profession. According to its website, Straub is one of 12 Kentucky attorneys who have been recognized for membership and are current members. The organization focuses on training and education for its members through meetings, webinars and publications. Straub has been asked to be involved in committees related to medical defense, trial techniques, technology and alternative dispute resolution.

Dinsmore & Shohl’s Ian Koffler received the Northern Kentucky Chamber’s Legacy Next Generation Leader Award (NGLA) in the legal services category at the annual NGLA program and dinner on July 17. The awards honor young professionals for their significant accomplishments in their profession, as well as their leadership and contribution to the community. There are 10 awards that are presented, and a panel of industry experts and community leaders select three finalists in each category. Legacy is a leadership program in partnership with the Northern Kentucky Chamber of Commerce; its mission is to offer the next generation of leaders the tools to be successful in their careers and personal life. Koffler is a partner in the public finance group and joined the firm in the March merger with Peck, Shaffer & Williams LLP. He serves as bond counsel to numerous local governments in Kentucky including cities, counties, utilities and special library, fire, and extension districts. Koffler has also served as bond and lender’s counsel in financings for nonprofit, healthcare and economic development projects. Koffler is engaged in a wide variety of community activities, including the Northern Kentucky Chamber of Commerce. He is a member of the 2013 Class of Leadership Kentuck and a member of the Leadership Northern Kentucky Class of 2007.

McBryar, McGinnis, Leslie & Harbison, PLLC, announces that Robert T. Watson, a member, has been elected to the Kentucky Bar Association’s Attorneys’ Advertising Commission which has general responsibilities for implementing the lawyer advertising rules. In discharging its responsibilities, the commission is given the authority to issue and promulgate regulations subject to prior approval by the KBA Board of Governors. Watson has been appointed to a three-year term which expires July 2017.

Dinsmore & Shohl’s Colin H. Lindsay has been appointed as a member of the Center for Racial and Ethnic Diversity by the president of the American Bar Association (ABA). He will serve a one-year term starting in August at the ABA’s 2014 Annual Meeting. Lindsay also represents the Louisville Bar Association (LBA) in the ABA’s House of Delegates and was recently re-elected to that position. The Center for Racial and Ethnic Diversity is made up of four ABA groups that have a joint goal of promoting diversity and inclusion within the legal system. He was an inaugural member of the LBA’s diversity committee and served as a president of the Louisville Bar Association in 2009. At Dinsmore, Lindsay is a partner in the litigation department, primarily focusing on commercial and intellectual property litigation. He serves on the firm’s diversity committee. Lindsay has also been honored for his efforts to fight human trafficking. He was a 2013 recipient of the Liberation Award, bestowed by Kentucky Rescue and Restore for dedicated efforts to fight human trafficking.
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As a final tribute, the *Bench & Bar* publishes brief memorials recognizing KBA members in good standing as space permits and at the discretion of the editors. Please submit either written information or a copy of an obituary that has been published in a newspaper. Submissions may be edited for space. Memorials should be sent to sroberts@kybar.org.

<table>
<thead>
<tr>
<th>Name</th>
<th>City</th>
<th>State</th>
<th>Deceased</th>
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<tbody>
<tr>
<td>Virgil Thomas Fryman Jr.</td>
<td>Lexington</td>
<td>KY</td>
<td>July 10, 2014</td>
</tr>
<tr>
<td>Daniel G. Grove</td>
<td>Port Charlotte</td>
<td>FL</td>
<td>July 15, 2014</td>
</tr>
<tr>
<td>Robert Martin Losey</td>
<td>Huntington</td>
<td>WV</td>
<td>May 20, 2014</td>
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<tr>
<td>John A. Nold</td>
<td>Naples</td>
<td>FL</td>
<td>Jan. 8, 2014</td>
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<tr>
<td>John W. Oakley</td>
<td>Nicholasville</td>
<td>KY</td>
<td>Sept. 22, 2013</td>
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<tr>
<td>Assistant Attorney General Beth Myerscough</td>
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Assistant Attorney General Beth Myerscough passed away June 20, 2014, after battling cancer for a number of years. At the time of her death, Myerscough was still working in the Office of Attorney General, and has the distinction of being the longest serving female assistant attorney general in Kentucky history – 34 plus years, an honor that deserves recognition. During her years of service, she served in five different divisions in the Attorney General's Office, and served seven attorneys general, beginning with then Attorney General, now governor, Steve L. Beshear.

Myerscough was one of the early prosecutors in the Special Prosecutors Division, which was created to handle cases where local prosecutors have a conflict of interest, and she took on child abuse cases at a time when many such crimes were not reported, much less prosecuted. In one of her cases, Anastasi v. Commonwealth, 754 S.W.2d 860 (Ky. 1988) (Myerscough was the prosecutor as well as appellate counsel), the defendant’s confession for first degree sexual abuse of four child victims was upheld by both the Court of Appeals and Kentucky Supreme Court, and is often cited as precedent for admissibility of a defendant's prior bad acts in child sexual abuse cases.

During her tenure in the Criminal Appellate Division, one of Myerscough's cases was accepted for decision by the United States Supreme Court, and she prepared then Attorney General Fred Cowan to give the oral argument. Myerscough's overriding humility belied her brilliant mind, and was one of the reasons jurors loved her; always a quick study, she was one of the rare persons who never had a television in her home. Her sense of humor was most evident in her storytelling; she could never get very far into a story before she was laughing at herself – she had one of those laughs that is contagious, engaging, and somehow always lifted the spirits of those around her. Beth Myerscough's work as an assistant attorney general and dedication to public service over the last 34 years made a difference and left the world a better place.

Before you move...

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

Visit our website at www.kybar.org to make ONLINE changes or to print an Address Change/Update Form – OR – EMAIL the Executive Director via the Membership Department at kcobb@kybar.org – OR – FAX the Address Change/Update Form obtained from our website or other written notification to: Executive Director/Membership Department (502) 564-3225 – OR – 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.
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