LEGAL FEES

• Money is the Root of All Fees
• Fees in the Discipline Arena
• Legal Fee Arbitration at the KBA
• Alternative Fee Arrangements: An Impending Revolution in the Pricing of Legal Services?
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In October, 296 new lawyers took the oath of office, swearing that they had not fought a duel with deadly weapons nor had they sent or accepted a challenge to fight a duel nor acted as a second in carrying a challenge, so help them God. It is an exciting day for new members of our profession and their families. You can feel the excitement and relief in the Supreme Court chambers as the oath is administered and these individuals become attorneys.

Unfortunately, the prospects of employment for many of these new lawyers are not good. Some have estimated that as many as half of this year’s class may not have any job opportunities at this time. Firms that traditionally hire large numbers of new graduates are either not hiring or have substantially reduced offers of employment.

Other firms have determined that they can find experienced unemployed lawyers who will work at a substantially reduced salary and not incur the cost of training a new lawyer right out of law school. Everyone wants to reduce costs and expenses rather than take on new attorneys without any prospects for substantial increase in business.

Many new lawyers are carrying large debt loads incurred while in college and in law school. Those promises of six figure starting salaries for new lawyers have not come to fruition in these difficult economic times.

So what obligation does the Kentucky Bar Association have to these new lawyers and what are these new lawyers going to do?

The first thing that those of us who have practiced for years should remember is that law school does not teach new lawyers how to practice law. It never has. Law schools do a great job teaching legal theory and basic principles. Law schools also have expanded curriculum in recent years to include practical skills seminars that have increased the knowledge of recent graduates in some areas.

The practice of law, however, can only be learned through mentoring, guidance from knowledgeable lawyers, feedback, and experience. We have an obligation as a profession to ensure that new lawyers, whether they are employed by us or not, gain that knowledge and experience, and learn the values of our profession.

New lawyers who have no employment may choose to “hang out a shingle” and begin their professional careers as solo practitioners. While many successful lawyers started their careers as solo practitioners, even those who have always practiced by themselves can look back and remember circumstances when a more experienced lawyer gave them some much needed help and advice. With the large number of new lawyers who do not have an association with a law firm or a more experienced lawyer, we should remember our obligation to the profession and these new lawyers to help teach them how to practice law.

Last year, the KBA began a formalized mentoring program as a pilot project. We are re-evaluating the program and hope to expand it to become a permanent part of the practice of law. If you are interested in working with a new lawyer as a mentor, please contact the KBA.

Besides participating in a formal mentoring project, all of us can find ways to help these new lawyers. These include:

• Take a new lawyer to a deposition or to motion hour and explain how the process works.
• Reach out and offer to help a new lawyer starting a new practice by explaining the basics of filing a complaint, defending a criminal case, or preparing a deed or title.
• Talk to new lawyers about what can happen if they do not comply with the Rules of Professional Conduct. Tell them about what has happened to lawyers who have lost their license to practice.
• Offer to allow a new lawyer to work with you on a particular case which will give them the opportunity to learn.

For those new lawyers who have recently graduated and do not have any employment opportunities at this time, the KBA Young Lawyers Section has prepared a program that will be offered at the three law schools to give advice on potential job prospects. Along those lines, if you do not have employment prospects at this time, I would encourage you to:

• Attend as many mentoring programs, seminars, workshops, and networking events as you can. Get active in the Young Lawyers Section. Use every opportunity to...
meet members of the bar. Ask if they know of anyone looking for help.
• Expand your search outside the major metropolitan areas. Many parts of the state do not have the flood of lawyers that Louisville, Lexington and northern Kentucky currently have.
• If a lawyer or law firm tells you they do not have the work to employ a lawyer full-time, ask the lawyer or firm if you can do research or draft documents on an hourly basis. If you do good work and prove your value, the lawyer or firm may offer you a job.
• Get practical experience. You are more likely to stand out among other candidates if you have an internship or history as a volunteer who possesses some practical experience.
• Keep an open mind and consider other employers outside the legal field. The J.D. is a versatile degree and the skill set of law graduates possess, including analytical thinking and communication skills, is attractive to a whole host of other employers.
• Do not be afraid to accept a position that is not exactly what you thought you would get. Most recent law graduates do not end up with their dream jobs right out of law school. Having a “starter job” is perfectly O.K. What is essential is that you continue your education and take something important from each position.

While these are difficult economic times, we cannot forget the professional values that have served us for many years. The practice of law has changed and will continue to change in the future. Nonetheless, we must remember that all of us have an obligation to teach our profession to our new members of the bar.

Kentucky Bar Association
2010 Outstanding Service Awards
Call for Nominations

The Kentucky Bar Association is accepting nominations for 2010 Outstanding Judge and Lawyer, Donated Legal Services, and Bruce K. Davis Bar Service Awards. Nominations must be received by December 31, 2009. 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 – Outstanding Service Awards.”

Outstanding Judge Award
Outstanding Lawyer 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.
A Lawyer’s Duty to Report under New Rule 8.3 of the Kentucky Rules of Professional Conduct

By Linda Sorenson Ewald
Professor of Law, Brandeis School of Law, University of Louisville
Chair, KBA Ethics Committee

For the last 20 years, Kentucky has been one of only two or three states that has not required lawyers to report serious ethical misconduct of other lawyers and judges. On July 15, 2009, that all changed and Kentucky joined the mainstream. It amended (SCR) 3.130 (8.3) to require a lawyer to report when he or she “knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question at to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Before addressing the specific requirements of the new rule, two points should be noted. First, although there was considerable debate surrounding the adoption of the reporting rule, this is not the first time Kentucky lawyers have been obligated to report the misconduct of others. From 1971 to 1990, DR 1-103 of the Kentucky Code of Professional Responsibility required lawyers to report an even broader range of activities than the current rule requires. The reason for the rule, then as now, relates to the fact that as a self-regulating profession, and in order to retain that privilege, lawyers must assume substantial responsibility for ensuring that those who violate the rules are subject to discipline. Lawyers are often the only ones in a position to know of the misconduct and of its potential harmful consequences.

What information must be reported?
• The rule describes certain information that should not be disclosed, such as information protected by Rule 1.6 or obtained through KYLAP or the Hotline, but it does not describe what information must be provided in order for the lawyer to satisfy the obligation imposed by Rule 8.3. The purpose of the reporting rule is to permit the appropriate authorities to undertake an inquiry of the alleged misconduct. Thus, lawyers should report whatever material information they have relative to the alleged misconduct so that the Office of Bar Counsel or the Judicial Conduct Commission can do its job.

What if the information about the misconduct of another lawyer came from a confidential source?
• If the lawyer’s knowledge is based on information protected by Rule 1.6 (confidentiality) or other law, then the lawyer’s duty to the client trumps the obligation to report. Remember that Rule 1.6 is much broader than the attorney-client evidentiary privilege and includes any information learned in the course of the representation. However, the client can waive confidentiality which would then obligate the lawyer to report.

Is a lawyer obligated to report misconduct unrelated to the practice of law?
• There may be circumstances where conduct unrelated to the practice of law must be reported. Although most of the Rules of Professional Conduct relate to the relationship between the lawyer, the client and the court, Rule 8.4 is far broader. It provides that it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects … [or] engage in conduct involving dishonesty, fraud, deceit or misrepresentation….”

To whom is the report made?
• If the misconduct involves a lawyer’s honesty, trustworthiness or fitness, then the report must be made to Bar Counsel. The same is true if a lawyer is reporting discipline by another authority or a prosecutor is reporting the conviction of another lawyer. The

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duty to report is an individual obligation and one is not relieved of this responsibility merely because a report may be made by someone else. Reporting misconduct to a tribunal or making a referral to KYLAP does not relieve a lawyer of the obligation to report the misconduct Bar Counsel.

If the misconduct involves a judge’s fitness for office, the report is to be made to the Judicial Conduct Commission.

If a report does not result in discipline, may the reporting lawyer be sued?

A lawyer who makes a voluntary or mandatory report in good faith is immune from any civil or criminal action, or disciplinary action by the bar, except for conduct prohibited by Rule 3.4(f). Rule 3.4(f) prohibits a lawyer from filing or threatening to file disciplinary charges “solely to obtain an advantage in any civil or criminal matter….”

Under the new rule, a lawyer does not have a duty to report every known violation, but must report those that go to the core values of the profession. Thus, for example, a lawyer would not normally be obligated to report every infraction of the discovery rules, such as late response to interrogatories, but would be obligated to report another lawyer’s alteration of critical documents provided in the discovery process, or offered to a tribunal.

It seems clear that conduct which would lead to disbarment or suspension would have to be reported. Typical examples include theft, conversion, abandonment of clients, falsification of evidence, perjury, misrepresentation to a tribunal and comingle of client funds. These examples all involve the most egregious conduct raising serious questions about honesty, trustworthiness and fitness. But the obligation to report may also arise in more subtle situations, as when a lawyer is not dishonest, but merely ceases to function as a lawyer because of some type of impairment. As Comment [1] notes, “an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important when the victim is unlikely to discover the offense.”

This article reflects the personal views of the author, not necessarily the views of the Ethics Committee or the KBA. The Ethics Committee is currently working on a Formal Opinion, but it may not be available for several months. Lawyers having questions about their own personal responsibility to report under Rule 8.3 may contact the Ethics Hotline Member in their Supreme Court District. Information on the Hotline and other ethics topics is available under the “Ethics” tab on the KBA website <kybar.org>.
The Young Lawyers Section has been busy this fall with programs and events. I hope that you have taken advantage of the opportunities in your area. The YLS hosted Meet & Greet events during the Kentucky Law Update programs in Covington, Owensboro and Paducah. Those at the events enjoyed visiting with law school friends and making new contacts. Additionally, the YLS hosted continuing legal education programs in Lexington and Covington in conjunction with the Voices Against Violence project. Both programs were well attended. Attendees learned about representing domestic violence victims in DVO hearings and signed up to take referrals from the local domestic violence centers. On October 23rd, YLS representatives welcomed new admittees during the KBA reception following the swearing-in ceremony in Frankfort.

The YLS has several upcoming events. On November 5th and 10th, the YLS will host programs for new admittees and law students about searching for a job in the current market. These programs, to be held in Lexington, Louisville and Covington, will offer practical tips for job search and suggestions for thinking outside-the-box about employment opportunities. The YLS has also planned Meet & Greet events in Bowling Green and Louisville during the Kentucky Law Updates in those areas. Also, please mark your calendar for March 26th, when the YLS will host a CLE in Louisville about bankruptcy issues. There is no charge for YLS members for any of these events. If you are interested in attending any YL event, please contact Lori Alvey at lalvey@kybar.org.

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

On September 2, 2009, at the Sixth District Meet & Greet held during the KLU, YL enjoyed the soulful sounds and electric piano chops of Dav “Fathead” Davis.

Lisa Hart, from Stoll Keenon Ogden PLLC, taught CLE attendees about representing litigants in DVO proceedings. Over 30 attorneys attended the Voices Against Violence CLE in Lexington.

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MONEY IS THE ROOT OF ALL FEES

Risk Managing the Evil

By Del O’Roark

When it is a question of money everyone is of the same religion.

Voltaire

The two most beautiful words in the world in the
English language are “Check Enclosed.”

Dorothy Parker

INTRODUCTION

Risk managing fees involves two primary considerations. First, lawyers must have a thorough appreciation for the black letter requirements for determining allowable fee arrangements found in the Kentucky Rules of Professional Conduct (hereinafter Rules or Rule), KBA ethics opinions, and case law. Second, lawyers must use sound business and risk management practices in reaching fee agreements with clients.

This article covers both considerations using the following organization:

- Fee Fundamentals
- Billing
- Collections
- Special Fee Issues

Space limitations preclude covering all aspects of each subject. The intent here as in all my articles is to, as concisely as is feasible, present useful information applicable to your daily practice with alerts for problem issues requiring further research.

RISK MANAGING FEE FUNDAMENTALS

The Standard For Setting Fees

The overarching rule for fees provided in the 2009 Kentucky Rule of Professional Conduct 1.5, Fees, is that “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” (emphasis added)¹ This language is an important change from the language in the 1990 Rule 1.5 that provided “A lawyer’s fee shall be reasonable.” (emphasis added)

The point of the change was to overcome the problem that the 1990 Rule did not include a corollary provision prohibiting fees or expenses that were larger than “reasonable.” This omission made it more difficult than intended to impose discipline for excessive fees and expenses. Changing the test to “charging an unreasonable fee or an unreasonable amount for expenses” overcomes this omission, thus making it easier to impose discipline. While the changed language may seem subtle, it is a clear signal that disciplinary authorities will aggressively pursue fee and expense abuse. Risk managing fee arrangements is now even more critical to avoiding bar discipline and malpractice claims.

Calculating Fees

Rule 1.5(a) lists these factors in determining a reasonable fee:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

A business approach in applying these factors makes justification of a challenged fee straightforward. This includes:

Overall Practice Considerations: Start off with some cost accounting - how much is the minimum you have to make to keep the door open (overhead); i.e., your budget.

Market Factors: What is charged in your practice area - the going rate. (no bar rules establishing minimum fee schedules allowed)

Matter Factors: What fees, costs, and expenses are involved?

- medical/legal
- expert/consulting
- court costs
- discovery/investigative
- travel
Recovering Soft Costs: Treat as overhead or charge to client?

- photocopy, binding
- travel, meals
- long distance telephone
- computer assisted legal research
- local messenger service
- courier service
- postage and fax transmissions
- overtime for staff (hourly rate or + benefits cost factor?)
- housekeeping services (e.g., for meetings, luncheons)
- bill preparation time
- document storage
- proofreading
- talking to the media
- credit card service charges

The type of fee agreement selected for a matter provides a formula for fee calculation. The formula should not be a cover for an excessive fee. Examples of types of fees are:

**Fixed Fees:**

- **Fixed Fee/Task Billing/Unit Billing/Project Billing:** A fixed fee, agreed upon in advance for handling a specific assignment - e.g., prepare a will, write an environmental regulation action plan for a business, review a contract, or prepare an opinion letter.

- **Fixed Fee with Incentive Bonus:** A fixed fee established at the outset with an incentive bonus if the lawyer obtains specific results (sometimes called value billing).

**Percentage:** Used in transaction matters, with the fee as a percentage of the amount involved - e.g., 5% of a commercial real estate transaction price. (not to be confused with a contingent fee.)

**Hourly Pricing:**

- **Billable Hours:** Fees based on a per hour rate for the lawyer’s services.

- **Blended Hourly Rates:** A uniform hourly rate, averaged among the partner, associate, and support staff rates.

- **Discounted Hourly:** A reduced hourly rate, often tied to high volume or granted to major clients.

- **Capped Fee:** An hourly rate, but client is guaranteed that total billing will not exceed a predetermined amount.

**Contingency Fees:**

- **Contingency:** Amount of a plaintiff lawyer’s fee is determined by the outcome of litigation.

- **Reverse or Defensive Contingency:** Defense attorney’s fee is based on how much the lawyer saves the client. (See ABA Formal Ethics Opinion 93-373, Contingent Fees Based on the Amount of Money Saved For the Client)

- **Modified Contingency:** A reduced hourly rate with additional compensation dependent on the outcome of the matter.

**Fee Discounting:**

- **Off-the-Top Volume Discounts:** A growing technique used by corporate counsel to get reduced fee arrangements with outside counsel. Also comes up frequently in bidding for government work.

**Target Fee:** Lawyer and client agree on a target amount for a fee, with a bonus for lawyer if charges come in under target, and a discount to the client on charges above target.

**Referral Fees:** Fees shared with lawyers outside the firm.

It is important to appreciate that each fee type carries with it the potential for abuse. For example:

- A fixed fee can lead to cutting corners, over-reliance on boilerplate, assigning the matter to less experienced lawyers - reducing cost at the expense of quality of service.

- Priority of resources given to high-dollar contingency fee cases may lead to low priority or procrastination in less lucrative matters, resulting in professional responsibility problems concerning diligence and client communications, as well as violation of advertising and solicitation rules.

- Fees based on billable hours can lead to over-practicing a matter. As one sophisticated client put it, “Lawyers can always think of something more to do that is relevant to my case, but is not necessary.” Training of new lawyers can become a problem with billable hour fees because clients won’t accept second chairing – this is not a problem with a fixed fee agreement.

**Fee Abuse – Gold Rush Lawyers**

The landmark ABA Formal Opinion 93-379 (12/6/93), Billing for Professional Fees, Disbursements and Other Expenses, responded to an increasing public furor over fee
abuse that accused lawyers of being opportunistic, predatory, and dishonest. This opinion should be required reading for lawyers. The key points from the opinion are:

■ General Overhead: “In the absence of disclosures ... the client should reasonably expect that the lawyer’s cost in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like would be subsumed within the charges the lawyer is making for professional services.”

■ 2 for 1 billable hour fees are per se unreasonable – examples are:
  • Travel for one client – work on another matter in flight.
  • Simultaneous appearance for three clients.
  • Recycled work product.

■ Soft Costs: “… the lawyer may recoup expenses reasonably incurred in connection with the client’s matter for services performed in-house such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other or similar services, so long as the charge reasonably reflects the lawyer’s actual cost for the service rendered. A lawyer may not charge a client more than her disbursements for services provided by third parties like court reporters, travel agents or expert witnesses, except to the extent that the lawyer incurs costs additional to the direct cost of the third party services.”

Kentucky authority on soft costs is contained in KBA Ethics Opinion E-303 (1985) citing Kentucky Bar Association v. Graves:

In affirming the attorneys censure, the court observed, inter alia: ... billing to the escrow account expenses of law clerks, secretarial assistance ... especially in the absence of a specific agreement with respect to those particular items is improper. ... It is difficult for this court to comprehend an attorney with a full-time practice to expect his clients to meet his overhead expenses. ... It is doubtful if any member of the public who needed a lawyer would employ one who was to charge a standard fee for his legal services and then charge the costs of his secretaries and law clerks as expenses of litigation.

... In light of the above authorities we conclude that an attorney who has agreed to represent a client for a statutory or a lump sum or contingent fee should not pass on additional charges for law clerk or paralegal services, in the absence of an agreement. If agreed otherwise, or in instances in which the lawyer charges an hourly rate, charges for law clerk or paralegal services may be separately stated. Of course, a lawyer may absorb such charges as overhead, which is not billed to the client.

In no event should the services of a law clerk or paralegal be billed as attorney time, since this would amount to a representation that such services were rendered by an attorney.

All Fee Agreements Should Be In Writing – Some Must Be In Writing

The fee agreement

The first risk management action that should be taken with every new matter is the preparation of a comprehensive letter of engagement including fee terms and conditions. A fee agreement at a minimum should:

• Clearly identify the client or clients represented – it is absolutely necessary to establish whose interest a lawyer represents.

• Specify the scope of the representation – what the lawyer is supposed to do for the client and what is excluded from the representation.

• Explain the basis for fee charges to include whether a retainer is required and charges for costs and expenses. This explanation should include consideration of other fee types that may be more advantageous to the client.

• Explain the firm’s billing procedures to include:
  1. The client’s responsibilities for fee payment.
  2. How often the client will be billed.
  3. When payment is expected to be made.
  4. The firm’s options when fees and costs are not paid timely.
  5. Whether interest will be charged for late fee payment.
  6. What fees are due if the client discharges the lawyer before completion of the representation.

Limited space precludes going into further detail on drafting fee agreements. Legal Malpractice – 2009 Edition (Mallen & Smith), § 2.10 Initiating and terminating representations – Engagement agreements is an outstanding treatment of letters of engagement including several model agreements. Fee terms are described in detail. Legal Malpractice and the ABA/BNA Lawyers’ Manual on Professional Conduct are prime resources for developing ethical fee practices and improving fee agreements. Both are recommended.

The Kentucky Rules of Professional Conduct provide the following requirements for written fee agreements that must be carefully risk managed.
General rule

Rule 1.5 (b): “The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, **preferably in writing**, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.” *(emphasis added)*

Rule 1.5, Comment (2) includes this practical guidance: “Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer’s customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.”

Contingency fees

Rule 1.5(c) permits fees contingent on the outcome of the matter. Specific requirements are:

- The fee must meet the requirements of Rule 1.5(a).
- The fee agreement **must be in a writing signed by the client.**
- The agreement must include the method by which the fee is determined and the percentage or percentages that accrue to the lawyer in the event of settlement, trial or appeal.
- The agreement must cover litigation and other expenses to be deducted from the recovery; and must state whether such expenses are to be deducted before or after the contingent fee is calculated.
- The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.
- Upon conclusion of a contingent fee matter, the lawyer must provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

While not stipulated in Rule 1.5, recommended additional matters to cover in contingency fee agreements to avoid disputes are:

- How the lawyer is paid if the client rejects a reasonable settlement offer and the lawyer withdraws.
- How the lawyer is paid if the lawyer is terminated by mutual agreement or if the client unilaterally discharges the lawyer and obtains other counsel.
- Whether the lawyer is obligated to pursue an appeal if there is an adverse judgment.

Rule 1.5(d) prohibits contingency fee agreements in:

- Criminal cases.
- Domestic relations representations involving the securing of a divorce or the amount of alimony, maintenance, support, or property settlement.

Finally, alternative fee arrangements should be offered if a contingency fee is not in the client’s best interest.

Division of fees

Rule 1.5(e) covers division of fees between lawyers not in the same firm, sometimes referred to as fee sharing or fee splitting. The key risk management considerations when sharing fees with a lawyer in another firm are:

- The division must be in proportion to the services performed by each lawyer, or each lawyer must assume joint responsibility for the representation.
- The client agrees to the arrangement and the agreement is **confirmed in writing.**
- The total fee is reasonable.

Comment (7) to Rule 1.5 concerning division of fees with another lawyer not in the same firm provides in part: “Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter.” The days of “refer it and forget it except to collect a fee” are over. A referring lawyer dividing fees must carefully monitor a referred matter to prevent malpractice and avoid a claim.

Fees paid with an interest in the client’s business or other nonmonetary property

Rule 1.8, Conflicts of Interest: Current Clients: Specific Rules, contains strict guidance on doing business with a client. The concern is expressed in Comment (1) as follows:

“A lawyer’s legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client.

The Comment expressly includes fees as covered by 1.8(a):

It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although **its requirements must be met when the lawyer accepts an interest in the client’s**
business or other nonmonetary property as payment of all or part of a fee. (emphasis added)

Good risk management requires scrupulous compliance with Rule 1.8(a) when accepting an interest in a client’s business or other nonmonetary property for a fee. Specifically, the Rule provides:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; (emphasis added) and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction. (emphasis added)

Do not accept an interest in a client’s business or other nonmonetary property as payment of all or part of a fee before you read and comply with Rule 1.8(a) and Comments (1 - 4).

SMART BILLING AVOIDS FEE DISPUTES

The first line of defense in avoiding fee disputes is a comprehensive written fee agreement. The second line is to bill in a way that is fair, understandable to the client, and consistent with good business practices.

Common Billing Mistakes

• The bill is as big as the client’s file – looks like over-practicing the matter.
• Client gets a large bill that is the first thing the client has heard from the lawyer since the initial interview.
• Secret identities – no names and no billing rates for the work done.
• Over-qualified personnel for the work or conversely, charging lawyer rates for administrative work.
• Too many meetings, telephone calls, and research hours – looks like over-practicing the matter.
• Billing for several lawyers reviewing or preparing to discuss the file – looks like over-practicing the matter.
• Billing for several lawyers attending a meeting when one would have been adequate – looks like over-practicing the matter.
• Billing for “soft costs” without the client’s prior agreement and general overhead costs (heat, air conditioning, etc.).
• Itemized bills with generic terms such as “phone call” or “meeting” with no substantive information.
• All telephone calls take exactly .3 hours; all dollar amounts are nice round numbers or end in five; and inserted along with all the routine itemized expenses is a charge for expert witness fees of several thousand dollars.
• Billing for billing – this adds insult to injury.
• A too-quick billing reduction if client complains strongly implies that the lawyer must be overcharging.
• Billing out of cycle with the client’s preference.

Good Billing Practices

The single best billing practice is to bill early and bill often. Whatever billing cycle you are using, stick to it religiously. The following is a helpful checklist of other good billing practices:

• Improve client communications – at the outset explain the entire billing process.
• Prepare a client for the total cost of legal services being provided.
• Prepare written fee letters outlining the specific terms of an engagement.
• Use retainer arrangements, especially when a client’s ability to pay is in question.
• Identify for the client the people being assigned to work on a matter.
• Use the billing process to communicate details of the work performed.
• Reach an agreement about what time and costs will be charged to a client and what will not be charged.
• Discuss billing formats and what information will make invoices easier for the client to process.
• Provide a budget, as a matter of firm policy, on all matters in excess of a specified amount.
• Schedule periodic meetings with clients to discuss ways to improve service.
• Review invoices to ensure that they contain no mistakes.
• Send regular reminders for invoices that remain unpaid.

Anthony E. Davis, a highly regarded risk management expert, in his article How to Better Manage the Billing Process offers the following advice on how to eliminate billing fraud, avoid fee disputes, and get paid:

• Establish strict policies regarding accuracy in timekeeping and recording of time. Do not require minimum hours to be billed to clients. To do so encourages bill padding.
• Enforce frequent time reporting – preferably daily.
• Monitor the billing process with internal audits and
independent review of all expenses either claimed by a lawyer or billed to a client.

• Send bills that, in addition to reflecting charges, demonstrate the progress made in the client’s matter during the billing period.

• Avoid billing for overhead items. Only bill or have the client pay directly out-of-pocket third-party expenses.

• Send a cover letter with a bill that includes:
  1. A thank you for past payments.
  2. A simple “plain English” summary of how the work performed as described in the bill advanced the client’s interest toward the desired outcome.
  3. An explanation of the activities planned for the next month and how these advance the client’s interest toward the desired outcome.
  4. An invitation for the client to call with any questions regarding the bill.

**COLLECTING FEES**

**The Easy Way – Get a Retainer**

A fee agreement on retainers should cover:

• Whether a retainer is refundable.
• Will it bear interest, and if so, for whom.
• Whether the retainer is applicable to fees, expenses or both.
• Whether it must be replenished at some point in time – sometimes referred to as an “evergreen retainer.”

The three basic retainer agreements are:

• **General Retainer/Right to Call**: A fixed sum for the right to get immediate service. It is earned when received and deposited in the lawyer’s operating account.

• **Advance Retainer**: A specified fee in advance for specified services. It is earned as services are provided. It is deposited in the lawyer’s client trust account and withdrawn as earned.

• **Non-refundable Retainer**: A fee paid in advance of services being rendered and is non-refundable if the client terminates services. It is earned when received and deposited in the lawyers operating account. Rule 1.5 (f) provides: “A non-refundable retainer fee agreement shall be in a writing signed by the client evidencing the client’s informed consent, and shall state the dollar amount of the retainer, its application to the scope of the representation and the time frame in which the agreement will exist.” (emphasis added) (See also Rule 1.15 on non-refundable retainers.)

Lawyers should get retainers routinely – especially in matters requiring immediate intensive work, or when the ability of a client to pay is questionable. Clients who have not paid a retainer or fee do not yet have a financial stake in the matter. It gives them a different attitude about paying fees. Retainers avoid this attitude and facilitate smooth fee collection.9

**The Easy Way – Accept Credit Card Fee Payments**

If you are not accepting payment fees, expenses, and retainers by credit card, you are missing one of the surest ways to get paid and avoid fee disputes. KBA E-426 (3/23/2007) describes the conditions for Kentucky lawyers to accept credit card payments. The opinion points out that:

Consumers rely heavily upon the use of credit cards and other forms of electronic payment and the Kentucky Rules of Professional Conduct authorize lawyers to accept credit cards for the payment of fees. See SCR 3.130(7.05) and KBA E-172 (1977). As the use of credit cards and other forms of electronic payment become more common, lawyers will need to be increasingly cautious in structuring these arrangements to ensure compliance with all of their ethical obligations, particularly those relating to client communication, segregation of client funds and accounting.

The opinion addresses whether credit card service charges may be passed on to the client:

A number of ethics committees in other jurisdictions have considered this issue and concluded that lawyers may pass reasonable transactional costs of credit card use on to clients if the client agrees to such a charge. …. SCR 3.130(1.5) provides that “the basis or rate of the fee [and expenses for which the client will be responsible] should be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.” Because the practice of passing service charges on to the client deviates so dramatically from the commonly accepted practice in the commercial world, lawyers have an unusually high burden in making sure the client fully understands the consequences of electing to use a credit card. The client must be advised that he or she will be responsible for an amount in excess of the billed charge if a credit card is used and what the additional charge will be, as well as any other information that may be necessary to adequately inform the client of the nature of the payment arrangement. Moreover, although the current rules do not require that such communications be in writing, it is the Committee’s view that, especially where an additional charge is added for credit card use, both clients and lawyers will be best served if the agreement is in writing.
While the soft cost of credit card service charges may be passed on to clients with full disclosure and informed consent, in my opinion this is not the best business practice and may conflict with some credit card providers’ conditions for service. Accept the cost as part of practice overhead expenses.

Read KBA E-426 and get started with credit card fee collection.

The Easy Way? – Novel Fee-Financing Plans

Over the years a number of client fee-financing plans for payment of lawyer fees have been attempted. They usually involve a lawyer referring a client to the financing plan, providing client information to the plan, with some form of fee charged to the lawyer for the client service or payment to the lawyer for a client referral. Space precludes a detailed analysis of financing fees. What follows is a list of the Rules that should be considered before participating in any such plan:

- Disclosing or improperly using client confidential information without consent (Rules 1.6; 1.8(b)).
- Providing financial assistance to client in connection with pending litigation (Rule 1.8(e)).
- Sharing fees with a nonlawyer (Rule 5.4).
- Charging excessive fees (Rule 1.5).
- Retaining unearned fees if lawyer withdraws or is discharged (Rule 1.16(d)).
- Third-party paying fees without the client’s permission (Rule 1.8(f)).
- Representing a client when services may be affected by lawyer’s own financial, business, or personal interest (Rule 1.7(b)).

When in doubt about a novel fee-financing plan, call the KBA Ethics Hotline for advice.

The Hard Way – Charging Liens

A charging lien is the right of the lawyer to have payment of fees secured by a judgment the client recovers as a result of the lawyer’s efforts. Rule 1.16, Declining or Terminating Representation, Comment (10) makes it clear that in Kentucky, lawyers are not allowed to file a retaining lien on the client’s file until fees are paid, but may only obtain a charging lien:

The lawyer may not condition return of the client’s file, papers, and property upon payment of a fee. KRS 376.460 gives a lawyer the right to have payment of fees secured by a judgment the client recovers as a result of the lawyer’s efforts.

Charging liens are an exception to the rule against taking a proprietary interest in a cause of action as reflected in Rule 1.8(i):

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

1. acquire a lien granted by law to secure the lawyer’s fee or expenses. . . .

The Hard Way – Suing A Client For Fees

For a number of years, Lawyers Mutual has advised extreme caution in suing a client for fees. One authority estimates “that at least 20%, and perhaps as much as 30%, of all malpractice claims and counterclaims, are directly or indirectly attributable to disputes over legal fees and expenses.”

Many experienced Kentucky lawyers have a policy of never suing a client for fees. One recommended policy is “… a law firm should consider a rule that no suits for fees will be filed to collect fees, and no threats to do so or use collection agencies will be made. Any exception to the rule should be approved by the management committee, another governing body, or another lawyer in a small firm.” In considering an exception to not suing a client for fees, use the following checklist that Lawyers Mutual published in its Spring 2009 newsletter:

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

SPECIAL FEE ISSUES

Contract Lawyers

Contract lawyer fee ethics questions concern sharing fees
with contract lawyer referral agencies and dividing fees with lawyers not a member of the firm. In Oliver v. Board of Governors, Kentucky Bar Ass’n, 779 S.W. 2d 212, (Ky. 1989) the Kentucky Supreme Court provided guidance on both questions:

**Referral Agency Fees:** The professional responsibility concern is that the referral agency not exercise any control over the contract lawyer’s independent professional judgment by controlling the money. In Oliver the Supreme Court advised that a referral agency could be paid a fee as a percentage of or in proportion to the lawyer’s compensation, provided the hiring firm pays the contract lawyer directly for legal services. If the firm passes on the referral fee to the client, the client must be informed by itemizing it on the bill.

**Division of fees and disclosure to clients:** Stories of irate clients learning after the fact that contract lawyers were used in their matter are frequent. Simply put, clients feel cheated. The question of whether this information should be disclosed to clients in Kentucky is answered in Oliver. The Supreme Court recommended “disclosure to the client of the firm’s intention, whether at the commencement or during the course of the representation, to use a temporary attorney service on the client’s case, in any capacity, in order to allow the client to make an intelligent decision whether on not to consent to such an arrangement.” This disclosure in a fee agreement should serve to comply with the fee division written disclosure requirements of Rule 1.5(e) (2))…”13

ABA Formal Opinion 00-420 (11/29/2000) addresses the question of surcharges for use of contract lawyers. I know of no Kentucky authority on point. The ABA opinion concluded that a surcharge could be made if the contract lawyer is billed as an expense, the client may be billed only the costs of such services including those associated with obtaining the contract lawyer’s services. This is a good question for the KBA Ethics Hotline.

**Of Counsel**

Of counsel fee questions concern dividing fees with lawyers not a member of the firm, thereby invoking the division of fee requirements of Rule 1.5(e). I can find no Kentucky authority on point. There is a split of authority in other states. A balanced approach is “the rules governing division of fees between lawyers in different firms apply unless the of counsel lawyer in effect functions as a partner or associate in the affiliated firm.”14

Disclosing of counsel involvement in a letter of engagement is a professionally responsible way of complying with Rule 1.5(e) to include the written fee disclosure requirements of the Rule.

**Interim Fee Increase**

There is no express prohibition to increasing a fee during a representation, but doing so may not be prudent or good risk management. Modification of a fee agreement to a lawyer’s benefit during a representation is generally unenforceable.15 Courts are suspicious of fee increases after the representation has begun and the lawyer is in a fiduciary relationship with a client. The client is then perceived as being under a great disadvantage in negotiating an interim increase for fear of the lawyer withdrawing.16 Good risk management is to honor the original fee agreement. If the representation is expected to require a lengthy period to complete, include in the fee agreement conditions for modifying the fee. At a minimum do not surprise a client with a unilateral increase.17

The one Kentucky case located dealing with an interim increase in fees concerned a lawyer who was suspended from practice for two years in part for attempting to change a fee agreement to a contingency fee after indicating he would charge an hourly rate.18 Lawyers should assume that Kentucky courts will not look favorably on interim fee increases that are not covered in the initial fee agreement and are unfair to the client.

**Fee Agreements That Mislead A Client Or Infringe On A Client’s Control And Authority Over A Case**

It is not uncommon for fee agreements to attempt to usurp a client’s unqualified right to decide whether to settle a case. A gross example of such an attempt was a fee agreement that provided that both the lawyer and the client had to consent to settle the claim – a clear violation of Rule 1.2(a).19

Some fee agreements attempt to discourage clients from discharging the lawyer by penalizing them with significant fee and expense increases if they do. This is often seen in contingency fee agreements. Rule 1.16, Declining or Terminating Representation, Comment (4) provides in part: “A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer’s

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services.” Any client condition on discharge beyond that in a fee agreement is a violation of the Rule.

Finally, some fee agreements have ‘escape’ clauses that provide that the lawyer may withdraw at any time fees are not paid as agreed. This is a misleading condition because there are circumstances when a lawyer may not withdraw in spite of not being paid. If the matter is before a court, the lawyer must seek permission to withdraw and may be ordered by the judge to continue the representation. Do not use escape clauses in fee agreements that:

- Purport to authorize lawyer withdrawal under circumstances that the Rules of Professional Conduct do not permit.
- Mislead the client as to the lawyer’s fiduciary duty to continue the representation under certain circumstances.
- Use a client consent stipulation authorizing withdrawal under specified circumstances if it implies that the client has no right to object to withdrawal because of material adverse effect.
- Predicate withdrawal on failure to follow advice relating to ethics, strategic, and tactical matters if the effect is to require the client to accept the lawyer’s advice on issues that the ethics rules reserve for the client to decide (e.g., settlement).

SUMMING UP

Reasonable fee agreements that clients understand and accept, even if unorthodox, are your best protection against a fee dispute, bar complaint, or malpractice claim. If your fees:

1. are based on the eight criteria in Rule 1.5;
2. use realistic overhead and expense factors;
3. are covered in a fair fee type;
4. are put in writing;
5. are carefully explained; and
6. are billed using good billing practices, you should have little problem over the reasonableness of your fees or their collection.

ENDNOTES

1. SCR 3.130(1.5) Fees (a).
2. 556 S.W.2d 890 (Ky. 1977).
3. ABA/BNA Lawyers’ Manual on Professional Conduct, Fees, Fee Agreements, §41:101 et seq. The Manual provides a thorough treatment of fee agreement issues and is the place to start in researching fees.
4. Reinforcing this view is ABA Formal Opinion 02-427 (5/31/2002), Contractual Security Interest by a Lawyer to Secure Payment of a Fee, that concluded, “A lawyer who acquires a contractual security interest in a client’s property to secure payment of fees earned or to be earned must comply with Model Rule 1.8 (a).”
5. Amy Stevens (Wall Street Journal), Larry Bodine (Lawyers Weekly USA), and Jay Foonberg (Lawyers Weekly USA) have all written articles listing their 10 favorite “Billing Bloopers.” This list is a composite of their ideas and some of my own.
9. The October 2008 issue of the ALI/ABA The Practical Lawyer has the helpful article “Creating The (Almost) Perfect Retainer Agreement (With Form)” by Lori A. Colbert. It includes a model form and a practice checklist. It is available on the Internet for $19.00. Just Google The Practical Lawyer (last viewed on 8/16/2009).
10. This language was added in the 2009 revision of the Rules.
12. Ibid at page 219.
13. This paragraph and the preceding one are extracts from the Bench & Bar article “Barrister in a Box,” KBA Bench & Bar, Vol. 61 No. 2, Spring 1997, page 86. To read the article go to www.lmick.com, click on Risk Management, Bench & Bar Articles, and select the article.
16. Rule 1.5, Comment (5) adopts this view in the context of fixed fees: “… a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.”
17. See generally, ABA/BNA Lawyers’ Manual on Professional Conduct, Fees, Fee Agreements §41:114 and §41:316.
20. See the Bench & Bar article “How to Fire a Client” for more information on escape clauses. KBA Bench & Bar, Vol. 65 No. 3, May 2001, page 31. To read the article go to www.lmick.com, click on Risk Management, Bench & Bar Articles, and select the article.
Fees in the Discipline Arena

By Jane H. Herrick & Sarah V. Coker

The new Rules, effective July 15, 2009, have incorporated significant changes regarding fees. These changes have the effect of requiring the attorney to be more engaged in the discussion and explanation of fees with the client, but also provide the attorney with guidelines on how to effectively communicate with the client to ensure better understanding and agreement regarding fees.

A Roadmap for Kentucky Practitioners

The Rules relating to fees are but part of the universe of disciplinary rules. All of the fee-related Rules are under the general overlay of the most basic of ethical requirements — those of competence, diligence and communication (SCR 3.130-1.1, SCR 3.130-1.3 and SCR 3.130-1.4). For example, some of the new requirements regarding a certain level of communication (such as “informed consent,” as discussed below) presuppose that the lawyer has adequately communicated with the client regarding certain aspects of the representation.

Matters routinely come to the Office of Bar Counsel where attorneys have neglected these basic rules in dealing with clients. For example, last year (the 2008-2009 fiscal year), the following possible rule violations were noted upon initial intake:

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<thead>
<tr>
<th>Rule</th>
<th>Violation</th>
<th>Number</th>
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<tbody>
<tr>
<td>Rule 1.1</td>
<td>Competence</td>
<td>77</td>
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<tr>
<td>Rule 1.3</td>
<td>Diligence</td>
<td>269</td>
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<tr>
<td>Rule 1.4</td>
<td>Communication</td>
<td>262</td>
</tr>
<tr>
<td>Rule 1.5</td>
<td>Fees</td>
<td>80</td>
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Kentucky practitioners may be interested in knowing how the Rules are applied in the disciplinary process. Although every case is different, there are certain areas or points which the Inquiry Commission will typically note or on which the investigation will focus when reviewing matters involving fees:

Was there a written fee agreement?

- What evidence is there that the attorney explained the fee to the client?
- Is there any type of writing confirming the fee arrangement, even in cases where none is required?
- Into what type of bank account was the money placed; trust account or operating account?
- Is there evidence as to time spent, result achieved, or any of the other factors used in determining that a fee is reasonable?
- If there is a fee dispute, has the attorney returned any portion of the fee?
- Has the attorney attempted to use the fee to negotiate? (i.e., return of fee or partial return of undisputed refund in exchange for signing a release)
- Has the attorney used or attempted to use a release that does not comply with SCR 3.130-1.8(h)(2)?

Keeping in mind these simple points should help Kentucky attorney’s better deal with clients and understand the new Rules.

What is “Informed Consent”?

The term “informed consent” is peppered throughout the new Rules, and specifically appears in several rules pertaining to fees. See Rules 1.5(b), (c), (e), (f); 1.8(g). It is essential that Kentucky practitioners become familiar with this term.

“Informed consent” is the “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” SCR 3.130-1.0(e). Comments 6 and 7 to this Rule specifically address the nature of informed consent and how it can be obtained by attorneys. Generally, the level of communication necessary to obtain informed consent will depend on the particular circumstances, and will require the attorney to “make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision.” Additionally, an attorney cannot assume consent from silence but consent may arise from a course of conduct.

In certain situations, informed consent must be “confirmed in writing.” Rules 1.5(b), (c), (e), (f); 1.8(g).

“Confirmed in writing” is “informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent...If it is not feasible to obtain or transmit the writing at the time the person gives the informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.” SCR 3.130-1.0(b).

Where May Fees Be Deposited?

If an attorney receives an amount of money, regardless of the label (“retainer,” “draw,” “flat fee,” etc.), and the attorney has not yet done the work to earn the money, that money must be deposited into the attorney’s escrow account. The attorney may access that money (deposit into an operating account or personal account, or simply cash it out) upon performance of the work. See SCR 3.130-1.15; Kentucky Bar Association v. Bubenzer, 145 S.W.3d 842 (Ky, 2004)(attorney received public reprimand for violations of Rules 1.15(a) and 1.16(d); failed to deposit retainer into escrow and timely refund unearned portion of fee).

Many practitioners, especially in criminal and domestic relations cases, charge “non-refundable retainers” or flat fees, or a similarly-named fee. Upon receipt of such fees where the lawyer...
Nonrefundable Retainers and the Writings Required

Nonrefundable retainers are now governed by SCR 3.130-1.5(f), which provides: “A fee may be designated as a non-refundable retainer. A non-refundable retainer fee agreement shall be in a writing signed by the client evidencing the client’s informed consent, and shall state the dollar amount of the retainer, its application to the scope of the representation and the time frame in which the agreement will exist.” Note that the agreement must evidence a client’s “informed consent.”

If an attorney has a valid non-refundable retainer agreement, it allows the attorney to deposit the funds received pursuant to such an agreement in the attorney’s operating or personal account, rather than being required to place the funds in an escrow account pursuant to SCR 3.130-1.15.

However, although an attorney may have a valid non-refundable retainer agreement with a client, the fee is still subject to scrutiny regarding its reasonableness pursuant to SCR 3.130-1.5(a).

In many instances, a valid non-refundable retainer agreement does not give the attorney the automatic right to keep an otherwise unreasonable fee. See Comment 11, Rule 1.5.

Kentucky attorneys have been disciplined, sometimes by private admonition or private reprimand, for failing to have a valid non-refundable retainer agreement with a client. In many instances, the crux of the failure is the lack of a signed agreement with the client. In this regard, the law has not changed.

In Clendenin v. Kentucky Bar Association, 114 S.W.3d 858 (Ky. 2003), the attorney was paid $3,000.00 by a grandmother to represent her grandson in a criminal matter. After meeting with the client perhaps once, the representation ended and the grandmother requested a refund, which the attorney failed to provide. The grandmother eventually sued the attorney for the unearned fee. The Court found that the attorney violated Rules 3.130-1.15(a), 1.15(b), and 1.16(d) by failing to deposit the retainer an escrow account, by failing to promptly return the unearned portion of the fee. This attorney did not have a written agreement with his client or the grandmother. See also Kentucky Bar Association v. Justice, 198 S.W.3d 583 (Ky. 2006) and Kentucky Bar Association v. Adair, 155 S.W.3d 43 (Ky. 2005). These attorneys were disciplined prior to the enactment of the new rule, but were instead subject to KBA Ethics Opinion E-380. The fundamental requirements listed in that opinion are now formally incorporated into new Rule 1.5(f).

Written Fee Agreements

New SCR 3.130-1.5(b) requires that the attorney have effective communication with a client regarding fees:

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably, in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly-represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

The Rule does not require a written fee agreement, but that is an excellent way to demonstrate good faith in trying to comply with the Rule’s requirement about communication with a client regarding fees. The comment to the Rule suggests that information about fees can even be conveyed to a client with a basic written explanation: “Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer’s customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.” Comment 2, Rule 1.5.

Reasonableness of Fees

A lawyer’s fee must be reasonable; that has not changed. However, Rule 1.5(a) has been expanded to specifically apply the reasonable analysis to conduct surrounding the fee itself: “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”

The factors to consider when determining the reasonableness of a fee have not changed, and constitute a totality of the circumstances analysis. They include:

- The “time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly”; SCR 3.130-1.5(a)(1);
- The “likelihood that the acceptance of the particular employment will preclude other employment by the lawyer”; SCR 3.130-1.5(a)(2);
- The “fee customarily charged in the locality for similar legal services”; SCR 3.130-1.5(a)(3);
- The “amount involved and the results obtained”; SCR 3.130-1.5(a)(4);
- The “time limitations imposed by the client or by the circumstances”; SCR 3.130-1.5(a)(5);
- The “nature and length of the professional relationship with the client”; SCR 3.130-1.5(a)(6);
- The “experience, reputation, and ability of the lawyer or lawyers performing the services”; SCR 3.130-1.5(a)(7); and
- “[W]hether the fee is fixed or contingent.” SCR 3.130-1.5(a)(8).

As the comments point out, the factors are not exclusive and may not be applicable in all circumstances. Comment 1, SCR 3.130-1.5.

Kentucky lawyers have been disciplined for unreasonable fees. In Yeager v. Kentucky Bar Association, 84 S.W.3d 454 (Ky. 2002), the attorney over-
reached in the collection of a fee. The attorney represented a client on a claim involving an allegedly defective vehicle. The attorney had a written fee agreement with the client, and settled the case for $3,500, with the attorney explicitly receiving $1,500 in attorney fees. The client also was to have his vehicle repaired and release the defendant from future liability. The attorney took the $1,500 in attorney fees, charged a percentage against the $3,500, and kept a portion of a retainer previously paid by the client: “When all of these separate fees are tallied, [the attorney] was paid a total amount of $4,370.00 for her services, while her client only received a total of $3,500.00.” This attorney admitted a violation of Rule 1.5(a), was ordered to refund a portion of the fee to the client, and was suspended from practice for thirty days.

One of the more egregious fee cases is Kentucky Bar Association v. Profumo, 931 S.W.2d 149 (Ky. 1996). Profumo did not create new law; it affirmed the holdings of well-settled law in Kentucky. Profumo involved an attorney who, although not named in the will as both executor and attorney, had served as both executor and attorney for an estate and had collected several thousand dollars in fees for both roles. Profumo also paid himself fees for prior legal services and other services (realtor’s fees). He was charged with violations of the old Code of Professional Responsibility because his misconduct occurred prior to January 1, 1990 (the effective date of Kentucky’s Rules of Professional Conduct). Profumo was charged with and found guilty of violations of: 1) DR 2-106(A), which stated a “lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee” (three counts); 2) DR 7-102(A)(3) “by concealing or knowingly failing to disclose to the probate court a fact which he was required by law to reveal”; 3) DR 1-102(A)(4) (dishonesty, fraud, deceit or misrepresentation); and 4) DR 5-101(A) “which prohibited a lawyer form accepting employment if ‘the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interest’ unless the client consents after full disclosure.” The Court suspended Profumo for three years (rather than one, as recommended by the Board of Governors).

Contingent Fees

Rule 1.5(c), originally effective in 1990, requires that all contingent fee agreements be in writing. Despite this now-longstanding rule, the Office of Bar Counsel routinely reviews complaints where such agreements were not in writing.

In Kentucky Bar Association v. Womack, 269 S.W.3d 409 (Ky. 2008), the attorney was found guilty of violating Rule 1.5(c), 1.16(d), and 8.1(a). The attorney claimed he had a written contingency fee agreement with his clients but was unable to produce such a document. When the clients complained after the attorney unilaterally took a percentage of certain funds, the attorney

Announcing

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refused to return any funds to which they were entitled. The attorney was suspended for thirty days, ordered to make restitution of $4,089.00, and ordered to complete the Ethics and Professional Enhancement Program (EPEP).

The attorney in *Webster v. Kentucky Bar Association*, 183 S.W.3d 174 (Ky. 2006) received a public reprimand for violations of Rules 1.4(b), 1.5(c), and 1.15(a)(two counts). He also had to make restitution of $4,089.00, and suspended for thirty days, ordered to complete the Ethics and Professional Enhancement Program (EPEP).

By Frank Burnette

**Legal Fee Arbitration at the KBA**

**SCR 3.810**

**By Frank Burnette**

**Scope & Requirements:** SCR 3.810 provides a convenient tool for resolving fee disputes between a lawyer and client, or a fee dispute between two lawyers. Either party to a fee dispute may file a Petition for Fee Arbitration with the KBA. The rule requires a good faith effort to resolve the dispute before filing a Petition for arbitration and an amount in controversy above $1,500.

A Petition filed with the KBA is reviewed by the Executive Director. If jurisdiction over the dispute is accepted, based on the requirements above, the Petition is sent to the other party for an Answer. Generally, participation in Fee Arbitration is voluntary. However, SCR 3.160(3) and SCR 3.185 permit a fee issue initially filed as a bar complaint to be referred to Fee Arbitration, either by the Office of Bar Counsel or the Inquiry Commission.

- Applies to fee disputes between lawyer and client, or between two lawyers
- Good faith prior effort to resolve a disputed amount above $1,500
- Parties agree to arbitrate or referred to arbitration under SCR 3.160(3) or SCR 3.185

**Arbitration Panel:** The KBA Executive Director appoints the lawyers to the arbitration Panel, consisting of one lawyer (amount in dispute of $10,000 or less), or two lawyers and one lay person (amount in dispute above $10,000). The lay member is appointed by the Chief Circuit Judge of the county in which the Petitioner resides. All arbiters are volunteers. The Panel schedules a hearing at which the parties appear and present their evidence.

- Panel of one lawyer if disputed amount $10,000 or less
- Panel of two lawyers and one lay person if disputed amount above $10,000
- Hearing before independent Panel

**Process:** The Panel will issue a written Award within 30 days of the hearing. The award is binding and enforceable under KRS 417.180. There is no cost to the parties for the process.

- Binding Award issued in 30 days from hearing
- Enforceable under KRS 417.180
- No cost to parties for the process

For more information about Fee Arbitration go to the KBA website, [www.kybar.org](http://www.kybar.org) and look under Resources/Dispute Resolution Programs, or contact Frank Burnette at (502)564-3795 ext. 283 or at fburnette@kybar.org.

**Fee Forfeiture**

Fee forfeiture is a severe sanction and therefore effective remedy for combating solicitation of cases. If an attorney solicits the case, the attorney forfeits the fee. SCR 3.130-7.10 provides: “If a lawyer illegally or unethically solicited a client...”

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Jane H. Herrick rejoined the Kentucky Bar Association Office of Bar Counsel as Deputy Bar Counsel/Administrative Manager in 2008 after serving as the KBA’s Assistant Director for Continuing Legal Education since 2004. She served as KBA Deputy Bar Counsel from 1996 to 2004. Ms. Herrick received her B.A., *cum laude,* from Centre College in 1990 and earned her J.D., with distinction, from the University of Kentucky College of Law in 1993. She then served as a law clerk for Fayette Circuit Judge (now former Kentucky Supreme Court Justice) James E. Keller. She was admitted to the Kentucky Bar in 1994 and practiced with Brock, Brock & Bagby. Ms. Herrick is the author of “Misconduct, Mental State, and Mitigation: The Developing Role of Mental State, Condition, or Impairment in Kentucky Lawyer Discipline,” 6 *Appalachian Journal of Law* 31 (2007); “Lawyer Regulation and the Movement Toward a Unified Bar in Kentucky,” *Kentucky Bench & Bar* (May 2006); and “Development of the Law Governing Reinstatement to Legal Practice in Kentucky,” 29 *Northern Kentucky Law Review* 2 (Spring 2002). Ms. Herrick has also written articles relating to legal ethics that were published in the American Bar Association’s *The Young Lawyer*, the *Louisville Bar Briefs*, and *Northern Kentucky’s Lex Loci.*

Sarah V. Coker serves as the Deputy Bar Counsel. She received her B.A., *cum laude*, from the University of Louisville in 2000. Ms. Coker is a 2005 graduate of the University of Louisville Brandeis School of Law, where she was a published member of the *Brandeis Law Journal.*
for which compensation is paid or payable, all fees arising from such transaction shall be deemed waived and forfeited and shall be returned to the client. A civil action for recovery of such fees may be brought in a court of competent jurisdiction.”

**Fees in Aggregate – Rule 1.8(g)**

Rule 1.8(g) governs circumstances in which an attorney represents multiple clients in a matter. *Gallion v. Kentucky Bar Association*, 266 S.W.3d 802 (Ky. 2008) and *Cunningham v. Kentucky Bar Association*, 266 S.W.3d 808 (Ky. 2008). These two lawyers were permanently disbarred for this and other rule violations, including the rule prohibiting an unreasonable fee.

The Rule provides that the attorney shall not participate in making an aggregate settlement of claims unless all clients give informed consent, in a writing signed by the client. The lawyer is required to disclose the existence and nature of all claims involved and the participation of each person in the settlement.

Comment 13 to the Rule states that Rule 1.8(g) is a “corollary” of Rules 1.7 and 1.2(a), which require the lawyer to discuss the risks of the representation prior to undertaking it, and to abide by a client’s decision to settle, respectively.

**Division of Fees**

Division of a fee between lawyers who are not in the same firm may be made only if: each lawyer assumes joint responsibility for the representation; the client agrees to the arrangement and; the agreement is confirmed in writing. Rule 1.5(e). This is not a new rule; the concept has been contained in the Kentucky Rules of Professional Conduct since their adoption in 1990.

In two of the most egregious disciplinary cases in Kentucky history, *Gallion* and *Cunningham*, supra, the attorneys settled a class action lawsuit and received a large ($200 million) sum from the defendant to distribute amongst their clients. Included in the litany of rule violations which led to these attorneys’ permanent disbarment were violations of Rule 1.5(e). The disbarred attorneys failed to tell their clients that they were splitting their fees with several other attorneys.

**Fees and Advertising**

The new Rules, as did the prior Rules, require that advertisements contain disclosures about fees. SCR 3.130-7.04(a) requires that those who advertise a fee for routine services must perform the services for that fee and provide the Attorney’s Advertising Commission with a description of the services which are considered “routine.” SCR 3.130-7.04(b) requires that any advertisement mentioning attorneys’ fees, including contingency fees, should explain who will be responsible for costs and expenses. Specifically, if the client will be required to pay court costs or case expenses, or both, the advertisement must state “COURT COSTS AND CASE EXPENSES WILL BE THE RESPONSIBILITY OF THE CLIENT.” The disclosure must be written in all capital letters.

Additional requirements are contained in Attorneys’ Advertising Commission Regulation 14 (the Regulations can be found on the KBA website, www.kybar.org). The regulation provides that failure to disclose a client’s responsibility for costs and expenses, in an advertisement that contains fee information, could constitute a violation of SCR 3.130-7.15, which prohibits false, deceptive and misleading communications. In addition, Regulation 14 provides that advertisements which state contingent fee percentages must also contain information about when the percentages are computed – i.e., before or after the deduction of costs and expenses.

**Conclusion**

The recent amendments to the RPCs incorporate the Court’s decisions on fee issues over the past few years and clarify the attorney’s responsibility to explain a fee arrangement to the client. The Rules also provide valuable guidance to attorneys regarding the proper handling of client funds.
ALTERNATIVE FEE ARRANGEMENTS: AN IMPENDING REVOLUTION IN THE PRICING OF LEGAL SERVICES?

By J. David Smith, Jr.

Even a cursory review of the legal industry press during the past year suggests that a radical change may be at hand in our profession regarding a fundamental financial component of our craft, namely, how we price our services. The hourly rate model for pricing the delivery of legal services is under duress when a front-page, above-the-fold article appears in The New York Times on January 30, 2009 with the title “Billable Hours Giving Ground at Law Firms,” wherein the managing partner of venerable Cravath, Swaine & Moore opined that “[t]his is the time to get rid of the billable hour”. While there are naysayers in this debate (see e.g. ABAJournal Law News Now, “Billable Hour Hullabaloos is ‘Overblown,’ Drinker Partner Says,” May 21, 2009), I’ve come to the conclusion that the alternative fee debate is a rational and healthy development that will have dramatic consequences on how lawyers have generally priced their services for nearly a century.

1. Types of Alternative Fee Arrangements.

It is important at the outset to clarify the definition of “alternative fee arrangements.” Fundamentally, this concept refers to any pricing model for the delivery of legal services other than pricing based on a lawyer’s hourly rate and the amount of time spent by such lawyer on the engagement in question. While one frequently finds included among alternative billing arrangements pricing structures involving some use of hourly rates (such as reduced hourly rates based on the volume of work, blended hourly rates with success fees, etc.), this discussion will focus on alternative fee arrangements which in no fashion rely upon hourly rates or the amount of time spent on an engagement.

Researching this concept quickly leads one to realize that innumerable alternative fee arrangements can be crafted. See e.g. J. Rose “An Inventory of Creative Billing Arrangements,” Law Office Management & Administration Report, September 2009 (twenty-two different alternative pricing methods are enumerated). For our purposes, however, such arrangements can be categorized into two basic groups:

• Fixed Fee Engagements. Charging a client a fixed fee for engagements can take several guises. For example, a monthly or annual retainer received for legal advice regarding ad hoc queries in a particular area of the law (e.g., routine corporate law questions) is an example of a legal relationship where the client pays a fixed amount for a prescribed set of legal services. A more common example of this pricing model is a fixed fee charge for a specific project (e.g., corporate merger or acquisition, unemployment hearing, review of an employee handbook, etc.). Assessment of a fixed fee for completion of various stages or units in projects or matters (e.g. fixed payments for completion of phases of pretrial discovery in litigation) is another variation of fixed fee engagements.

• Percentage Contingent Fee. This broad category encompasses a number of pricing models for the delivery of legal services which entail both (i) payment of legal fees based upon some percentage of the outcome of the engagement and (ii) a successful outcome for the client. While contingent fees have been common for decades in the context of plaintiff personal injury engagements, contingent fees can be applied in myriad legal engagements both within and without the litigation practice area. For example, not only can a large percentage of plaintiff commercial litigation engagements be structured on a contingent fee basis, but defense litigation can be structured on a “reverse contingent fee” basis where compensation is based upon a percentage of the agreed-upon exposure to the client which is averted as a result of the firm’s work. Likewise, a variety of legal engagements on the transactional side can be performed under a pricing model involving a percentage fee award (e.g. negotiation of certain contracts).

2. Rationale for Alternative Fee Arrangements.

Any effort either to understand why changes are occurring in the pricing model for legal services or to make a case for why a firm should move to a different model, necessitates an articulation of the rationale for such action. In that regard, it seems incumbent on members of law firm management to set forth both theoretical and real-world justifications for what is obviously a radical departure from our pricing traditions. Not only do a number of philosophical justifications present themselves in support of an alternative fee structure but the assault now taking place upon the components of the traditional model offers further compelling evidence for the need to be open to change on this front.

A. Philosophical Rationale.

From the myriad philosophical ratio-
nales proffered in support of alternative fee arrangements, I think three core justifications are the most compelling:

- **Alternative fee arrangements are more rational and efficient than the traditional hourly rate structure.** One of my mentors for years used to observe that, in a world preoccupied with, and placing a high premium upon, speed, our profession remained the rare one where “we got paid for how long it takes us to do something.” The inefficiencies which inhere in the hourly rate model should be apparent to us as practitioners; they are certainly becoming clearer to (and less tolerated by) our clients.

- **Alternative fee arrangements provide clients more transparency and clarity.** This is obvious in the context of fixed fee engagements which serve to shield the clients from the uncertainty attendant to hourly rate arrangements (and thereby shield us from client exasperation when the accumulating fees driven by the hours spent on the matter break through the client’s budget or expectations). While contingent fees are by definition uncertain this uncertainty is neutralized by the client’s understanding that any fee will be paid only in the context of a successful outcome.

- **The interests of clients and lawyers become congruent as each partner in the relationship shoulders the risk attendant to legal battles.** This is particularly evident in the contingent fee arena where, unlike the case with hourly billing arrangements where the lawyer’s compensation is (at least nominally) in no fashion tied to the outcome, lawyers “put skin in the game”. Such congruence between the interests and risk assumption of lawyers and clients strikes me as a strong antidote to the carping and mistrust all too often engendered in an hourly rate environment.

**B. Market Rationale.**

A long-standing Finance Committee chairman in my firm for years would preach to our partners that the economics underlying law firm revenues under an hourly rate model consisted of only two elements: the number of hours worked and the hourly rates of our lawyers. Despite being self-evident (though managing partners like myself spend countless hours exhorting our troops about the obvious requirements under this model), this truism serves to highlight the market forces which have put the hourly billing rate model under assault:

- **Rates.** With respect to hourly rates, the intense pressure upon increases in hourly rates (and even demands for decreases) which have manifested themselves during the past year’s economic crisis are only the culmination of a long simmering frustration on the part of clients.

  - **(i) Rates.** With respect to hourly rates, the intense pressure upon increases in hourly rates (and even demands for decreases) which have manifested themselves during the past year’s economic crisis are only the culmination of a long simmering frustration on the part of clients. Moreover, this growing frustration I believe is creating a client appetite for changes in legal services pricing models that differs from the mere background noise regarding this issue generated by legal consultants during my nearly three decades in the practice. For example, as reported in the *ABAJournal Law News Now* on June 30, 2009, an Altman Weil survey of corporate chief legal officers found that only five percent of such legal officers felt law firms were serious about changing their legal service model to deliver more value for their clients. Such deep-seated skepticism should not be ignored by us as it conjures up a scenario where clients will drag their law firms into a pricing revolution rather than both parties in the relationship working hand in hand to craft an alternative pricing universe.
(ii) **Billable Hours.** The number of hours being worked by lawyers has been declining for over a decade; many larger firms have experienced a decrease of 15-20% during that time in recorded hours per lawyer but, with hourly rate increases during that same period of 100% or more, profits have increased dramatically. However, while all managing partners in our markets fear they have partners who actually think this trend will result in an Arcadian era where they work 500 hours a year at a $1,000 hourly rate, this is obviously not a mathematically sustainable model. Many pressures not likely to abate are being exerted on the number of hours recorded by lawyers in delivering their services, including the following:

- Technology adds increasing pressure to the number of hours being worked. The fact (among myriad others) that I can conduct a very high percentage of my legal practice through my Blackberry from any spot in the world inevitably leads to less time being required to accomplish the provision of legal services.

- Generational differences seem to be playing a role in recorded hours trends. While in my view discussions of this issue all too often lead to inaccurate generalizations that sell younger lawyers short, there are clearly differences in career and life balance perspectives between, say, Boomers and Millennials, that appear to affect recorded hours patterns.

- I wouldn’t be a Managing Partner if I didn’t mention complacency as a factor in this regard. We have all become a bit self-satisfied and “less hungry” in the face of being blessed with a long run of financial good fortune.

### 3. Impediments and Risks to Alternative Pricing.

If one acknowledges what I believe to be the compelling philosophical basis for unleashing our profession from hourly rate billing models, and understands what seem to be the irreversible market pressures at work upon that traditional economic model, it’s easy to understand the increasing drumbeat of late for alternative fee models. At the same time, embarking down the alternative fee path is in many respects fraught with peril. In order to proceed in a prudent and professional manner down this path, it’s important to be clear minded as to the impediments and risks attendant to such a significant practice management initiative.

#### A. Inertia.

Change (as should be the case with important issues in the life of a law firm) comes incrementally to law firms and changing the way we have provided our services for some 75 years clearly carries with it an unpleasant whiff of revolution. Moreover, notwithstanding the enhanced market pressures we have seen on the traditional model, we have without question benefitted from the traditional pricing model and accordingly there is more than a little fear of “killing the goose that laid the golden egg” behind the institutional reluctance (particularly of larger firms) to take a new path in this regard.

#### B. Client Resistance.

While the complaints of clients regarding legal bills become more and more acute, clients may be trapped by inertia in the hourly rate box. Moreover, any discussion of a new pricing model may be viewed with suspicion by those same clients. Many expect clients will feel such proposals are only being made by lawyers in an effort to increase the net fees received by the firm and accordingly any alternative fee proposal may be met with suspicion. My experience tells me this fear, both with respect to current and prospective clients, is much overblown but it can’t be dismissed.

#### C. Economic Risk.

To their credit, lawyers are risk adverse; indeed, much of our counsel entails devising structures and plans for clients which seek to minimize or eliminate risk. Accordingly, a pricing model which of necessity entails more entrepreneurial risk assumption by law firms will not be readily embraced. A significant move into alternative fee arrangements demands not only confidence by a firm in the abilities of its lawyers to deliver successful outcomes for clients; such a move must also rest upon a sure understanding by management of the economics underlying the spectrum of legal services provided by the firm. Moreover, this pricing transition will require an intensive management of risk in terms of, *inter alia*, careful delineation in engagement letters of the scope of services, the components of the fee arrangement, etc. To describe such a venture as a momentous initiative for any law firm management team would be a significant understatement.

#### D. Ethical and Loss Prevention.

We are far from a complete understanding of the ethical and loss prevention risks associated with alternative fee arrangements. As I was writing this piece, for example, I received a hotline from our firm’s malpractice insurance carrier about

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**J. David Smith, Jr.**

Serves as Stoll Keenon Ogden PLLC’s Managing Director. He is a member of the business entities and transactions practice group and primarily focuses his practice on corporate and banking law, mergers and acquisitions, securities, and equine law in the firm’s Lexington and Louisville offices. Mr. Smith is a graduate of Georgetown College and the University of Kentucky College of Law, where he was elected to Order of the Coif. Active within the community, he serves on the board of directors for the Lexington Public Library Foundation and is secretary of Keeneland Association and Turfway Park. Mr. Smith is also involved with LexArts, the Paris-Bourbon County YMCA, and the Kentucky Historical Society Foundation.
alternative fee arrangements. In terms of our Code of Professional Responsibility, not only will these new fee arrangements require us to rethink the admonition of SCR 3.130(1.5)(a) that “[a] lawyer’s fee shall be reasonable,” but new provisions in Rules 1.5, 1.15 and 1.16 will impinge on, among other things, contingent fee and retainer relationships. The reasonableness of fees will come under scrutiny in many contingent fee arrangements as the outcome of an engagement in terms of time expended and the like could raise questions on a “look back” basis as to the reasonableness of a fee arrangement. Moreover, I can foresee other loss prevention issues arising in this regard. For example, the same inefficiency built into an hourly rate pricing model that incentivises firms to “throw bodies” at a legal matter will work in reverse under an alternative economic model, thereby creating incentives for firms to spend fewer hours (taking fewer depositions in a litigation engagement than appropriate) and involve less experienced lawyers in an engagement, leading to the risk of malpractice claims premised upon such accusations.

4. Conclusion.

The above discussion can serve of course as an outline for a case against changing the economic model we rely upon for pricing what we do. Naysayers can recite, among other things, (i) this change will only happen if it is client driven and clients don’t really want it, (ii) the obvious benefits to us from the traditional model in terms of little risk and efficiency disincentives should make us resistant to change, (iii) for larger firms the internal upheaval to the traditional pyramid economic and compensation models of such firms resulting from this change would create too much friction and turmoil and (iv) the alternative model can create new loss prevention exposure.

All of these arguments (and others) suggest the need for caution, education and creativity in any effort to implement an alternative pricing initiative. Extant market forces will likely bring about this change, and such a change would be a rational and healthy one from which (if implemented wisely) law firms can benefit in a number of ways. I would also observe that the growing list of marquee law firms in the United States widely reported to be transforming a material portion of their practice to alternative fee arrangements (including the aforementioned Cravath, Swaine & Moore, Holland & Knight, Kirkland & Ellis, Morgan, Lewis & Bockius and Alston & Bird) suggest that a number of very capable law firm management teams have concluded this is more than a passing fancy. In any case, we can all agree that we will see many interesting developments on this front in the near term and that law firm management teams must of necessity be open-minded and nimble in addressing these developments.
Kentucky Lawyers Speak on Legal Fees

“Fees back then were not very high. Planning an estate and writing a will, about $25. Divorce case, $15. Criminal cases whatever you could get. Lawyers would congregate down in City Hall at the police court, and they would pick up two, four, and five dollars, whatever traffic would bear.”

—Samuel Steinfeld, p. 444

“As county judge, I became very community-oriented and enjoyed trying to see that people were helped. In those days that office dispensed welfare and information. When I left that office, I started running into these Social Security disability cases. If you won a case in those days, you would receive six dollars.”

—John M. Milliken, p. 313

“We had 33 condemnation actions from one pipeline. Although I didn’t try these cases by myself, I did the paperwork. We were paid $5.00 an hour for the work that we performed in our office, and we got $7.50 an hour for the work that we performed in the courthouse. That was pretty good pay.”

—A.R. Burnam, III, p. 75

“I can remember the first case I ever had. It was a Police Court case. I was going to charge this fellow $15 on a criminal case, and he came to me the morning of the trial and he said, ‘I can’t get it together. I’ve got five. I promise you, I promise you on my mother’s grave. I’ll have the other ten for you next Saturday.’ So, I took it and I never got the other ten. That first case taught me a lesson that I have never forgotten. If you are in a criminal case, get the money up front.”

—Rodney S. Bryson, p. 53
“Saturdays were when my clients came in to talk to me and to pay me. I never sent a bill in my life.” —Woodrow W. Burchett, p. 66

“We had no standards on fees except what we had learned either in ethics courses in law school, by experience, or by talking with older lawyers. There were no written fee guidelines when I started. Before I left the practice in state courts, there were minimum fee schedules, but I don’t think everybody felt bound to follow them. It’s a relationship that works best if there’s a mutual agreement between the client and lawyer as to what the case is worth. Tell the client, ‘This is my estimate for what is going to be involved in the way of a fee, but it could change, and if it does change, we will talk about it.’” —Pierce Lively, p. 243

“My first client was a little lady on a real estate matter. My fee was a topaz ring.” —Georgia Mae Nelson Dunn, p. 125

“The most distasteful thing that I ever had to do is to charge a fee. I hate to figure fees. I’ve never been efficient at keeping time-slips. I’ve always felt like that your fee should be somewhat commensurate with the value of the service you render, which we are getting away from in the law. I know you’ve got to make a living, you’ve got to pay the cost of your practice, and you’ve got to survive, but I’ve never felt that a client should pay a lawyer’s tuition to learn the law. If you are not proficient in something, you should take that into consideration when you start computing the fee. You’d better get proficient before you start charging people for serving them.” —John G. Prather, Sr., pp. 365-366

“I can remember when we would bill a file. We would look at a small automobile accident file.... It was not unusual to bill the insurance company $300 for a case that went to trial. Well, the insurance companies became disenchanted with it, and said they wanted more precise billing. ‘We want you to tell us exactly how much time you spent doing each thing in the case.’ So, the billing itself became more complex.” —Lively M. Wilson, p. 529

“When billable hours became the standard for charging for legal services, the effect was that your senior partners expected you to develop so many productive hours in the course of a year. It dramatically affected what was expected of younger associates. Unfortunately, if they didn’t get enough billable hours there would be some change in the composition of the firm. Prior to that, the fee was established on the basis of the type of case and the results obtained.” —Herbert D. Sledd, pp. 419-420
The value of Ms. Dyer’s efforts are considerable. A teacher by profession, Ms. Dyer has captured the ambience of an antebellum period in Breckenridge, Nelson and Jefferson Counties. One sees both the courtly manners of Old South gentility – in which Bardstown seems very much the setting for My Old Kentucky Home – and the reality that Breckenridge County was still sufficiently isolated so as to seem part of the western frontier.

Ms. Dyer on the other hand has chosen not to write a traditional biography. While she undoubtedly consulted numerous sources, including personal interviews, letters, diaries and existing biographical and historical works, she does not cite these in her book. It is virtually impossible to tell – beyond certain basic stated facts – to what extent Ms. Dyer’s narrative is excerpted from source materials or spun from her fertile imagination.

It is possible, of course, that there simply were no source materials related to the courtship of Holt’s parents or of Holt himself. We are treated, instead to whole chapters that are more novel-like in their content. Presumably there are materials that could be explored in greater depth by future historians. It is also possible that these materials would be bereft of details about Holt’s legal career in the river towns of Mississippi (where he apparently made his fortune before returning to Kentucky) or the courtship of his first wife, Mary Harrison, or about the courtship of his second in Wickliffe, Kentucky.

On the other hand, Ms. Dyer touches upon one early episode in Holt’s life – his role as a Democratic delegate at the Baltimore Convention of May, 1835, which is both titillating and disappointing in its brevity. The convention was called by President Andrew Jackson to seal a year in advance the presidential nomination of Martin Van Buren. Jackson’s favorite for the choice of vice-president, Richard M. Johnson of Kentucky, was confronted with stiff opposition from a wing of the party that opposed Johnson because he had “a slave mistress and mulatto daughters.” According to Dyer, Holt delivered a stirring speech on Johnson’s behalf, recounting his service during the War of 1812 and as an Indian fighter. Holt was only 29 at the time, but we are told his speech carried the day, and Johnson received the nomination. Surely this is fertile ground for future scholarly pursuit. Were the allegations of Johnson’s detractors true? If so, why were they not fatal to Johnson’s candidacy? Was Holt really that effective or was his speech one of many on Johnson’s behalf? Just as Ms. Dyer takes great lengths to depict the romance and courtship of Holt with both of his wives (they both later succumbed to tuberculosis) she spends very little time analyzing incidents of historical moment. One suspects she was confronted with composing a readable, romantic tale versus a scrupulously footnoted biography and chose to let others take on the latter task.

After what must have been a highly successful law practice in Louisville, Holt received an appointment as Commissioner of Patents by President Buchanan in April of 1857. One sentence later we are told that in 1859 Buchanan elevated Holt to Postmaster General and shortly thereafter, in 1861, to the position of Secretary of War. While we are given hints as to the political machinations that may have led to this series of events, Ms. Dyer does not offer any insight into the times, or what may have prompted Holt’s durability or versatility in a tumultuous period.

Similarly, Ms. Dyer gives us only
eleven pages of text about Holt during “The Lincoln Years.” We are told that Holt was a Unionist in a Buchanan administration sorely challenged by the North-South divide. He joined the U.S. Army as a Colonel, but we are told nothing about his military skills – if any. Lincoln appointed Holt Judge Advocate General of the Union Army on September 3, 1862. Lincoln apparently offered Holt the positions of Secretary of the Interior and Attorney General in 1864 – Holt declining both. He was purportedly considered for the vice-presidency. Why these subsequent positions were not pursued by Holt is a story Ms. Dyer leaves for others. And perhaps that was her intent. Her purpose is to entertain and stimulate interest, not to offer scholarly insights.

One of the most intriguing mysteries raised in the book involves the military tribunal’s actions regarding the execution of Mary Surratt. Apparently, following her conviction, five of the nine members of the commission favored clemency for Surratt because of her age and gender. Controversy surrounded Holt’s presentation of the case to President Andrew Johnson and his signing of the death warrants for Surratt and the other three conspirators. Holt insisted that President Johnson had read, discussed, and refused the petition for clemency. The President issued a statement denying he had ever seen the recommendation. Ms. Dyer raises some incisive questions about an apparent “rush to judgment” and notes in closing that Holt remained as Judge Advocate until 1875 and continued to live in Washington until his death on August 8, 1894.

As earlier noted, there were innumerable Kentuckians who played key roles of national prominence during the nineteenth century. Many ran for President. Many more served multiple presidents as members of their cabinet. Joseph Holt was one, and the Kentucky bar is indebted to Ms. Dyer by her interest and efforts to celebrate Holt’s career. What was the nature of his legal cases? Was he involved in either the courts or the legislature in furthering the cause of freedom or improving living conditions for Kentucky slaves? What prompted Buchanan, a Democrat and then Lincoln, a Republican, to appoint Holt to prominent posts in their administration? Ms. Dyer has spurred these questions. Hopefully other scholars will take up the torch and run with it!

Gerald R. Toner graduated Harvard College in 1972 and Vanderbilt Law School in 1975, beginning his practice in Kentucky in 1975. In 1991, Mr. Toner joined the firm of O’Bryan & Brown, which became O’Bryan, Brown & Toner. While civil trial work is his primary focus, he is the author of three books and his short fiction has appeared in Redbook, Saturday Evening Post and other magazines. He serves as the Kentucky Bar Association’s Oral History Project Chair and was the executive editor of the KBA’s new book, Kentucky Lawyers Speak: Oral History From Those Who Lived It. Mr. Toner has served on the national Defense Research Institute Board of Directors, the Kentucky Defense Counsel, the Kentucky Pediatric Foundation, and the University of Louisville Pediatric Endowment Foundation.
The netbook is a new iteration of the competition to make computers as nice to use as a notebook. A paper notebook, that is: solid, light-weight, easy to use, reliable and affordable.

Netbooks reduce cost while adding convenience in portability and use that may outweigh the trade-offs of shrinking keyboard and screen and reduced power. Some models accomplish this while significantly reducing the price of these devices, making a netbook a reasonable option as a second machine for travel use, a school machine for our children, or a first machine for folks who can’t otherwise afford to join the digital revolution.

A laptop or notebook computer, though powerful, can be cumbersome and intrusive. There have been powerful, light-weight “subnotebooks” on the market for some time, but at a premium price. The netbook comes as a relative bargain while being light and small, but with tradeoffs on power and features you’ll have to weigh against what you need in a particular situation.

In reducing its size, the netbook gives a smaller screen and keyboard and reduced storage and power. Depending on your use these may or may not interfere with your needs. To lower price, a netbook may use the Linux operating system rather than Windows XP; that may raise some training and compatibility issues with other machines you use.

On the other hand, having borrowed an Asus netbook from a colleague to test, I’m hooked.

**Size Reduction**

Reduced size and weight are what make netbooks of interest to a mobile information professional. The size and weight reductions in netbooks enhance their portability and utility while you roam. Netbook weights tend to be between two to three pounds, 1/3 to 1/2 that of current model notebook and laptop computers. The size is about that of a sheet of paper or less with thickness of about one inch. A netbook fits easily within a thin portfolio, satchel or briefcase with a profile about the same as or less than some traditional weekly calendars.

In competitive efforts to expand functionality, netbooks of increased size and power are coming available. That design race may lead to laptop size systems with netbook weights and prices, giving even more choices to match our particular needs.

But the current versions of the smaller netbooks reduce the screen size and keyboard size proportionally; these may be important issues for how helpful, or frustrating, you’d find a netbook.

**Screen Size**

Screen sizes are much smaller and generally range from 8” to 10” in diagonal width, less than current desktop and laptop screens of 14” to 17” to 21”. How this may affect your work depends on how you work; it is a factor to carefully consider and, if possible, test before you buy. Other factors to consider are the brightness and clarity of the screen, which impacts ease of viewing.

For standard work with email or word processing, I found the smaller screen size sufficient. Letters, e-mails, short motions and other text items display and scroll adequately. On the Assus Eee model I tested, the screen was adequate, with clear, sharp resolution in color of text and graphics. The clarity declined with side viewing but was still adequate.

**Keyboard and Data Entry**

The keyboard feel may be the next most important issue for comfort and usability. Simply put, the keyboard may feel more cramped than you’re used to. The keys are smaller with less spacing, requiring you to adapt or hit the wrong key. Mis-keying, of course, slows down typing and can, in extreme cases, lead to serious frustration with the device.

But I found it fairly smooth to adapt to this, so text entry became fairly easy. This took a bit of time, but not much.

Feature keys, though, may be relocated from their familiar spots on the keyboard and reduced in size. For me this led to more typing errors than with the content keys. For example, the right shift key was half-size of a normal keyboard and adjacent to the Page Up key, which itself was moved from its typical location; thus when trying to type a capital letter I would end up with the cursor somewhere else on the page. Adapting to this took much more time.

Briefly testing several other netbooks in stores, some clearly had better keyboard layouts than others. Given that this is the primary data entry for the netbook, you should test out a netbook’s keyboard before purchase, if possible, to see if it fits your typing style.

Mouse functionality comes from a mouse pad. On my test model, the mouse pad was sensitive but well-timed, making cursor use
straightforward. Although I prefer an external mouse, the mouse pad was good enough that I didn’t much miss an external mouse.

**Power and Light**

Depending on the model you chose and the money you spend, your netbook probably won’t be as powerful a computing device as current model laptops or desktops. Indications of less processor power were longer start-up times for both the system overall and particular applications than you have with more powerful laptop or desktop machines. Yet for basic functions and applications like word processing and web browsing, the model I tested was adequate. NOTE: I did not test multiple power-intensive applications running together this time around.

One benefit of the low-power configuration is extended battery life. Given the focus on portability and the accompanying issue of access to power, netbook battery life generally should exceed that of typical laptops. While it varies between machines, you should expect battery life of between four to six hours. That is enough to cover most flights or motion hearings, and the time waiting for either.

**Operating and Connecting**

Netbooks generally come with native wireless installed, so there were no problems connecting to wireless hotspots with the test model. Several cellular providers now offer wireless access plans over their proprietary networks that offer connectivity wherever they have cell service, albeit for a monthly charge. Connectivity, a key need of roaming users, does not appear to present any difficulties.

Operating system choice is a different issue. Netbooks may come with Windows XP or Linux due to issues of processor power and cost. If you are not willing to learn a new operating system like Linux and explore the interoperability issues with other computers you use, it may be best to stay with Windows XP, even if it costs a bit more.

Windows 7 may be available for netbooks, although the final terms and conditions of use are not clear. Windows 7 will offer several nice features, but it will also require more system resources; before buying a netbook with Windows 7, you should test it out with all your usual applications, from start-up to shut-down.

Lastly, consider the security features available for your netbook, such as disk encryption and password-protected login. As we carry more and more of our work around with us, we want to be sure it’s secure.

**Conclusion**

I like the portability of the netbook. With some models well below $300, it may be a very productive choice if you are much out of the office. Given the power issues, you should be careful to test for your particular needs, especially with power-intensive litigation support and presentation applications.

Before buying, 1) test your machine of interest hands-on to see how you like its feel and response and 2) check the online reviews for the particular model you’d like. The online community can often find quirks in models you might never otherwise learn of until after you’ve bought.

Our future reviews will look at how netbooks and other highly portable devices handle other features useful in legal practice.

Debbie Lee of Asus Corporation opined that the netbook space will break out into more varied devices with extra power features. This may add an additional premium to the price, justified by the increased functionality they will offer. One example is the tablet netbook that accepts data entry without using a keyboard. This may apply to other special services needed for litigation support.

Please share your thoughts on ubiquitous computing and legal practice, whether netbook, iPhone or other portable device, via email at computing@losavio.win.net.

The One Laptop Per Child (OLPC) project came out of M.I.T. as an initiative to make durable $100 laptops available to children in developing countries. The laptops would come with basic applications, books and a wireless system that lets each laptop share with other nearby laptops. Although the final price was nearly twice the hoped-for price, tens of thousands of these machines are deployed around the world, including in some U.S. school districts. This should begin to provide the data needed to study what benefits such a project can produce.

One benefit may well be the netbook phenomenon. By making low-cost laptops conceivable, commercial manufacturers, beginning with AsusTek of Taiwan, came up with netbooks that are rapidly approaching the price goal set by OLPC. That is a major success in itself, as this charitable initiative pushed a free-market solution that holds benefits for many.

Although meant for students, OLPC laptops are generally available through a buy-one-give-one program where you pay for two, one that’s given to a child in the world and one for yourself. If you are interested in this or other donation programs, check out http://laptop.org/en/.

**Digital inclusion is the effort to overcome the digital divide, an issue for Kentucky as well as other countries in the world. Over 90 grant requests, including several by the University of Louisville, were submitted to the www.broadband usa.gov competition to expand digital inclusion in disadvantaged and rural communities in Kentucky. Netbook affordability may be a key component in making the benefits of the Internet more available. Even three years ago, the problem of the cost of computing devices was a barrier for some to digital participation. With the netbook phenomenon, that may no longer be the case, moving the focus to issues of knowledge, training and competent computing for health, education and public safety in the Commonwealth.**
The Electronic Bluebook: A New Format for a Familiar Tool

By Helane E. Davis, Professor and Law Library Director, University of Kentucky College of Law

For years we’ve been asked in academia if the Bluebook is available online. Until recently the answer was no. Now not only is there an electronic edition, but that edition has been well-designed, it offers a recognizable structure, and maximizes its online platform. To access the Bluebook online, go to http://www.legalbluebook.com.

Once you’ve accessed the home page you have several options. You can explore the online product before purchasing, or purchase either online or print versions of the Bluebook. The first clue that the site was well-executed is that the editors were smart enough to realize that law students might want a three-year subscription, and at a discount. But for anyone who is just getting their feet wet, or who isn’t convinced that this format is worth the (slightly) extra cost (compared to the print edition), a one- or two-year subscription rate is also available.

Surprisingly, free – but valuable – content is also available from the home page. In a navigation bar at the top of the page you’ll find a link to a set of “Blue Tips” that represent the most commonly asked Bluebook-related questions complete with answers from the editors. That these tips are available without a subscription makes this site worth bookmarking even should you decide not to subscribe. The home page also includes a list of “Bluebook Updates” that represent a running list of corrections or updates since the last printed edition. Like the “Blue Tips” section, this section is available without a subscription to the online product.

What’s Inside

Assuming you’ve decided the online Bluebook is worth trying, purchasing a subscription is as easy as using a credit card online and creating log in credentials.

Once you’ve logged in to the Bluebook, you’ll see an account start page that indicates a variety of recent activity. Subscriber-added content (i.e., annotations and bookmarks) will be listed here. This start page also has a list of the recent tips added by the editors. A menu-driven list on the left of the page provides access to the practitioner pages (Bluepages), rules (1-21), and tables. This section, or some version of it, is persistently available on the site whether you’re viewing Bluebook copy, making notes, or using other features. This design makes it easy to navigate the site or jump to another rule, table, or section.

All of the content a print user is accustomed to is also available in the electronic edition: the same organizational structure – by rule – and the same use of examples. Every effort appears to have been made to make the online product look and feel like the print product, but with enhancements.

A set of persistent navigation bars make it easy to always access parts of the site. One bar provides direct links to the rules, tables, Bluepages, table of contents, or index. This bar also includes links to online help as well as the tutorials. Another bar provides access to account information and preferences. To further aid navigation, the site uses “show previous” and “show next” links to provide context when you’re viewing any section of the Bluebook. For example, if you’re viewing Rule 7, a “show previous” link to Rule 6.2 and a “show next” link to Rule 8 provide helpful orientation. These links also make it easy to scroll through multiple sections quickly.

The Best Features

Easy to use. This site provides sufficient background about the purpose and use of the Bluebook so that users who’ve never used a print edition will be able to easily use the electronic edition. At the same time, those subscribers used to the print edition will not find it difficult to transition to the online edition.

Bookmarks. Do you have a dog-eared or sticky note-strewn print Bluebook? You can note the location of specific information in your electronic version as well by using bookmarks. Subscribers can make and name bookmarks, as well as add explanatory notes so that the most common rules, tables, or sections are noted for convenience. Each line or section of Bluebook text has an interactive flag that allows you to bookmark that line or section.

Annotations. Need to make the equivalent of a note in the margin of a specific rule? The annotations feature allows you to make such notes, title them, and track the date and time of when they were made. As with the bookmarking feature, each line or section of Bluebook text has an interactive flag that allows you to insert an annotation exactly where you need one.

Searchability. The upper right hand corner of every page contains a search box, allowing you to search the entire content of the Bluebook as well as any of the copy contained in subscriber-added annotations or notes. This “simple” search feature produces a list of all the places within the electronic text that satisfy your search terms, with
those terms highlighted in the list. An advanced template allows subscribers to fine-tune a search on the front end by limiting a search to any of these sections (or others). These features are particularly helpful for experienced print users who have grown accustomed to relying on the examples as much as the letter of a rule, but who, before the advent of an electronic version, were unable to narrow their search to only that material.

Cross-references. Cross-references to other sections within the Bluebook are hyperlinked, making it easy to maneuver between rules or between rules and tables or Bluepages.

Groups. Subscribers can create groups to share subscriber-added content (e.g., notes and annotations) with other subscribers. This feature turns the electronic edition into a smart, interactive tool that can help practitioners stay up-to-date on standard citation practices within an organization.

Tutorials. If you’re unsure of how you might use an online Bluebook, a set of free, short tutorials (entitled “Tour the Bluebook”) collectively provide a quick, thorough, and hands-on introduction to every feature of the electronic Bluebook. There are six tutorials – most between two and six minutes – that cover the following: an introduction to using the online Bluebook; the ease of transitioning between the print and online versions; searching the online version; how to organize content based on individual needs; and, how to use the tips from the editors. These tutorials use screen captures to walk you step-by-step through using the online products many features and sections.

The Best Reasons
For years, using the Bluebook successfully required practitioners and law students to master the tool as much as the rules it contained. The online edition lessens the need to conquer the format by making the Bluebook text not only easily browsable but searchable. The ability to customize this electronic text and share it with others will help make practitioners more productive and take some of the sting out of adhering to the rules of legal citation.

Settle With Experience.

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

Robert F. Duncan
Since 1993 Mr. Duncan has successfully mediated civil matters involving issues pertaining to personal injury, professional liability, construction, health care, insurance coverage/bad faith, as well as hospital and nursing home liability. Mr. Duncan is the Chair of the Mediation Section of the Fayette County Bar Association. Mr. Duncan received his undergraduate degree in Civil Engineering from the University of Kentucky and is a graduate of the University of Kentucky School of Law.

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

IN RE:
ORDER AMENDING
RULES OF THE SUPREME COURT (SCR)

2009-12

The following rules’ amendments shall become effective January 1, 2010.

AMENDMENTS TO THE SUPREME COURT RULES OF PROCEDURE

I. SCR 2.002 (1), (4) and (5) Fiscal provisions

The amendments to sections (1), (4), and (5) of SCR 2.002 shall read:

(1) The fees collected by the Kentucky Office of Bar Admissions shall constitute a fund to provide for the ordinary and necessary expenses of the administration of the bar examination and the operation of both the Board of Bar Examiners and the Character and Fitness Committee.

(4) All fees collected by the Kentucky Office of Bar Admissions for the Board and the Committee shall be recorded and deposited promptly in a joint account of the Board of Bar Examiners and Character and Fitness Committee. Each repository of funds and each bank account shall be designated by the Board and the Committee and approved by the Court.

(5) All disbursements shall be in accordance with the budget and recorded. Checks shall bear such signatures and countersignatures as the Board and the Committee shall direct.

II. SCR 2.007 Qualification, compensation, expenses, and assistants of board of bar examiners and committee on character and fitness

The amendments to SCR 2.007 shall read:

Each member of the Board of Bar Examiners and each member of the Character and Fitness Committee shall have the qualifications of a circuit judge, and shall be engaged in the active practice of law, including active practice before the Supreme Court. Except for compensated expenses and allowances for services rendered as members of the Board and of the Committee as authorized by the Supreme Court to be paid out of special funds for such purposes, no member of the Board of Bar Examiners and no member of the Character and Fitness Committee shall knowingly receive, or agree to receive, directly or indirectly, compensation for any services rendered or to be rendered, either by himself/herself or another, in any matter which is before the Kentucky Supreme Court relating to the admission of a person to practice law in this state. As appointees of the Supreme Court, neither the members of the Board of Bar Examiners nor the members of the Character and Fitness Committee constitute officers or employees of any agency within the meaning of KRS 45A.335, 45A.340 and 61.990. Subject to the approval of the Supreme Court, the Board of Bar Examiners and the Character and Fitness Committee each may employ such personnel as it deems appropriate, compensation therefore to be paid out of special funds for such purposes.

III. SCR 2.018 (1) Application packets

The amendments to section (1) of SCR 2.018 shall read:

(1) All applications for admission to the Kentucky Bar shall be on forms approved by the Board and Committee. Application packets will be available upon written request to the Kentucky Office of Bar Admissions and accompanied by a fee of $10.00 made payable to the Kentucky Office of Bar Admissions.

IV. SCR 2.022 (3) and (7) Application for admission by examination

The amendments to sections (3) and (7) of SCR 2.022 shall read:

(3) Every person who intends to apply for admission to the Kentucky Bar by examination shall file with the Kentucky Office of Bar Admissions, a verified application on a form provided by the Kentucky Office of Bar Admissions. The applicant shall provide such information as requested on the form. An application must be complete at the time of filing including a properly executed Authorization & Release form.

(7) An applicant who wishes to withdraw from the Bar examination must notify the Kentucky Office of Bar Admissions, in writing, not later than five (5) days prior to the examination date or have a verified excuse, otherwise, the Bar examination fee shall be forfeited.

V. SCR 2.040 (1) Character and Fitness Committee; nominations

The amendments to section (1) of SCR 2.040 shall read:

(1) There is hereby created a Committee on Character and Fitness, hereinafter referred to as the Committee, to be composed of five attorneys, appointed by the Supreme Court for terms of three years, the members to serve until the expiration of their terms and until their successors are appointed. The Supreme Court of Kentucky shall appoint the Chair of the Committee.

VI. SCR 2.080 (4) Bar examinations

The amendments to section (4) of SCR 2.080 shall read:

(4) An applicant must pass both the essay and Multistate (MBE) portions of the examination. A general average of 75% or higher on the essay portion of the examination shall be deemed a passing score on the essay portion of the examination. A scaled score of 132 or higher on the Multistate (MBE) portion of the examination shall be deemed a passing score on the Multistate portion of the examination. After failing to pass five (5) Kentucky Bar Examinations, an applicant shall not be permitted to sit for the Kentucky Bar Examination. An applicant who has failed only one portion of the exam must only reapply to sit for the failed portion; however, a passing score on one portion of the exam may only be used for a period of three years to exempt the applicant from taking that portion of the examination. An applicant who has taken the Multistate (MBE) examination in another jurisdiction within three years of the date of the Kentucky examination may transfer a score of 132 or higher and need only sit for the essay portion of the examination. In situations where the applicant has first passed the Kentucky essay portion of the examination, subsequently has taken the Multistate (MBE) examination in another jurisdiction, and wishes to be admitted by transferring in a score of 132...
VIII. SCR 2.111 (1), (2), (3), (4)(b) and (6) Limited certificate of admission to practice law

The amendments to sections (1), (2), (3), and sub-section (b) of section 4 and section (6) of SCR 2.111 shall read:

(1) Every attorney not a member of the Bar of this Commonwealth who performs legal services in this Commonwealth solely for his/her employer, its parent, subsidiary, or affiliated entities, shall file with the Kentucky Office of Bar Admissions an application for limited certificate of admission to practice law in this Commonwealth. Such application shall be reviewed by the Character and Fitness Committee. If approved, a limited certificate of admission to practice law shall be granted, and shall be effective as of the date such application is approved, provided that the following prerequisites are satisfied.

(a) The applicant must be admitted to practice in the highest court of another state or the District of Columbia, and be a member in good standing at the Bar of such court, or in such state, at the time of filing such application.

(b) The attorney applying for limited certificate of admission to practice law shall sign a sworn statement certifying to the Court that:

(i) He/she has completed the study of law in an accredited law school;

(ii) He/she has been admitted to practice in the highest Court of another state or the District of Columbia;

(iii) He/she is presently in good standing at the Bar of such Court, or such state;

(iv) He/she will perform legal services in this Commonwealth solely for his/her employer, its parent, subsidiary, or affiliated entities.

(c) A statement signed by a representative of such applicant’s employer stating that such applicant is an employee for such employer, and performs legal services in this Commonwealth for such employer, its parent, subsidiary, or affiliated entities, shall be filed with the application.

2) Such applicant shall pay to the Kentucky Office of Bar Admissions, at the time of submission of such application a fee of one thousand dollars ($1,000) and shall make payment of the current annual dues or fees to the Kentucky Bar Association, as authorized under SCR 3.040.

3) Upon granting of such limited certificate of admission to practice law, and issuance of said limited certificate by the Clerk of the Supreme Court of Kentucky, such applicant shall be and shall remain, during the period the limited certificate of admission to practice law remains in effect, an active member of the Kentucky Bar Association, subject to all duties and obligations of members admitted under SCR 2.110, SCR 2.120, and SCR 3.661.

(4) The only restrictions and limitations applicable to such membership in the Kentucky Bar Association and to such attorney’s right to practice in this Commonwealth shall be:

(b) Such attorney shall not appear as attorney of record for his employer, its parent, subsidiary or affiliated entities, in any case or matter pending before the Courts of this Commonwealth, without first engaging a member of the Association, admitted under SCR 2.120 or SCR 2.110, as co-counsel, whose presence shall be necessary, when required by the Court, at all trials or other times specified by the Court. Nothing herein shall prevent such attorney from appearing on his/her own behalf or representing himself/herself in any case or matter to which he/she is a party, or appearing in the Small Claims Division of the District Court as otherwise provided in Rule 3.020.

(6) The limited certificate of admission to practice law in this Commonwealth shall expire if such attorney is granted a certificate of admission to practice, or is admitted to the Bar of this Commonwealth under any other rule of this Court, or if such attorney ceases to be an employee for the employer or its parent, subsidiary, or affiliated entities, listed on such attorney’s application, whichever shall first occur; provided, however, that if such attorney, within thirty (30) days of ceasing to be an employee for the employer or its parent, subsidiary, or affiliated entities, listed on such attorney’s application, becomes employed by another employer for which such attorney shall solely perform legal services, such attorney may maintain his admission under this Rule by promptly filing with the Clerk of the Supreme Court a statement to such effect, stating the date on which his prior employment ceased and his new employment commenced, identifying his new employer and reaffirming that he shall not provide legal services, in this Commonwealth, to any other individual or entity. In the event that the employment of an attorney admitted under this rule shall cease with no subsequent employment by a successor employer within thirty (30) days, such attorney shall promptly file with the Clerk of the Supreme Court a statement to such effect, stating the date that such employment ceased.

IX. SCR 2.112 (4) Attorney participants in defender or legal services programs

The amendments to section (4) of SCR 2.112 shall read:

(4) Payment of a fee of one hundred dollars ($100.00) made payable to the Kentucky Office of Bar Admissions (cashier’s or certified check or money order).

X. SCR 2.120 Certificate of admission to practice law

The amendments to SCR 2.120 shall read:

When an applicant is approved for admission under SCR 2.085, 2.110, 2.111 or 2.112 that applicant must file for and be granted a certificate of admission prior to engaging in the practice of law in this state. As prerequisites for the issuance of such a certificate an applicant shall submit to the Clerk satisfactory evidence of payment of the current annual dues or fees of the Kentucky Bar Association authorized under SCR 3.040 and of payment of a final Board Certification Fee of fifty dollars ($50.00) to the Kentucky Office of Bar Admissions, and shall be administered the Constitutional Oath of Office either by a Justice of the Supreme Court or by the Clerk of the Supreme Court. Upon completion of the prerequisites, the Clerk shall deliver to the applicant a certificate of admission on a form approved by the Court, and the issuance of the certificate shall be duly recorded by the Clerk.

XI. SCR 2.300 (1)(a) and (b) Reinstatement of persons to practice law

The amendments to sub-sections (a) and (b) of section (1) of SCR 2.300 shall read:

November 2009 Bench & Bar 35
Scope and Purpose of Reinstatement Guidelines.

The guidelines set forth in SCR 2.300 apply to applications for reinstatement filed by any person who has been suspended from the practice of law, who seeks reinstatement under the provisions of SCR 3.510, and whose application is referred by the Kentucky Bar Association to the Office of Bar Admissions, Character and Fitness Committee.

These guidelines have been formulated to govern the manner in which Reinstatement Applications are processed so that all parties, including the public at large, are assured that a systematic and thorough character and fitness investigation is conducted and applicants are assured that their applications are addressed in a timely and procedurally consistent manner.

(1) Initial Reinstatement Application Process:

(a) The initial forms necessary to apply for reinstatement may be obtained from the Kentucky Bar Association. Completed applications for reinstatement, along with the necessary fees, must be delivered or mailed to the Kentucky Bar Association in accordance with SCR 3.500 and SCR 3.510.

(b) Upon receipt of a complete application for reinstatement and payment of necessary fees by an applicant who has been suspended more than 180 days (and in some cases where the suspension has been less than 180 days) the Kentucky Bar Association will refer the application to the Kentucky Office of Bar Admissions, Character and Fitness Committee for investigation, for a hearing, if necessary, and for a formal recommendation regarding the disposition of the application in accordance with SCR 3.500, SCR 3.505 and SCR 3.510.

XII. SCR 3.480 (1), (2), (3) and new section (4) Withdrawal from the association; negotiated sanctions

The amendments to sections (1), (2), (3) and new section (4) of SCR 3.480 shall read:

(1) Any member who desires to withdraw from membership and is not under investigation pursuant to Rule 3.160(2), and does not have a complaint or charge pending against him/her in any jurisdiction, shall file a written motion to that effect with the Court and serve a copy on the Registrar and the Inquiry Commission. The motion shall be docketed by the Clerk. The Registrar shall, after consultation with the Inquiry Commission, within ten (10) days after the filing of the motion, certify in writing to the Court whether the movant is an active member in good standing of the Association and whether movant is under a disciplinary investigation by the Inquiry Commission or has a complaint or charge pending against him/her in this or any jurisdiction. Said motion may be granted if movant is an active member in good standing and has no pending disciplinary investigation, complaints, or charges.

(2) The Court may consider negotiated sanctions of disciplinary investigations, complaints or charges if the parties agree. Any member who is under investigation pursuant to SCR 3.160(2) or who has a complaint or charge pending in this jurisdiction, and who desires to terminate such investigation or disciplinary proceedings at any stage of it may request Bar Counsel to consider a negotiated sanction. If the member and Bar Counsel agree upon the specifics of the facts, the rules violated, and the appropriate sanction, the member shall file a motion with the Court which states such agreement, and serve a copy upon Bar Counsel, who shall, within ten (10) days of the Clerk’s notice that the motion has been docketed, respond to its merits and confirm its agreement. The Disciplinary Clerk shall submit the Court within the ten (10) day period the active disciplinary files to which the motion applies. The Court may approve the sanction agreed to by the parties, or may remand the case for hearing or other proceedings specified in the order of remand.

(3) Any member who has been engaged in unethical or unprofessional conduct and desires to withdraw his membership under terms of permanent disbarment shall file a verified motion with the Court stating as follows:

(a) He/she has violated the Rules of Professional Conduct, or his/her conduct fails to comply with those rules, the specifics of which shall be detailed in the motion.

(b) He/she will not seek reinstatement and understands the provisions of SCR 3.510 and SCR 3.520 do not apply.

(c) He/she will not practice law in the Commonwealth of Kentucky subsequent to the permanent disbarment order.

The motion shall be served on Bar Counsel and docketed by the Clerk. Bar Counsel may file a response within 10 days after the filing of the motion to respond for investigation, for a hearing, if necessary, and for a formal recommendation regarding the disposition of the application in accordance with SCR 3.500, SCR 3.505 and SCR 3.510.

(4) Any member suspended or disbarred by order of this Court shall:

(a) Take all steps necessary and practicable to cease all forms of advertisement of the member’s practice immediately upon entry of an order of suspension or disbarment and shall report the fact and effect of those steps to the Director in writing within twenty (20) days after the order of suspension or disbarment is entered.

(b) Pay all costs of the disciplinary investigation and proceedings in accordance with Rule 3.450, and

(c) Comply with the provisions of Rule 3.390 regarding notice to clients of suspension or disbarment.

XIII. SCR 3.500 (1), (2) and (5) Restoration to membership

The amendments to sections (1), (2) and (5) of SCR 3.500 shall read:

(1) No former member who has withdrawn under Rule 3.480, or who has been suspended for failure to pay dues as provided by Rule 3.050, or who has failed to pay dues for such period of time as to warrant suspension under that Rule, or who has been suspended for failure to comply with the continuing legal education requirements as provided by Rule 3.661, and such status has prevailed for less than a period of five (5) years can be restored to membership unless the former member, applies for restoration by completing forms provided by the Director, to include a certification from the KBA that there is no pending disciplinary matter, tendering a fee of $250.00, and payment of dues for the current year and all back years, unless he/she has been in withdrawal status by order of the Court. In cases where a suspension or withdrawal has prevailed for five (5) years or less and the restoration application is referred to the Character and Fitness Committee, a fee of $250.00 shall be made payable to the Kentucky Office of Bar Admissions.

Upon receipt of such application and payments, the Director shall
XIV. SCR 3.510 (1) Reinstatement in case of disciplinary suspension

The amendments to section (1) of SCR 3.510 shall read:

(1) No former member of the Association who has been suspended for a disciplinary case for more than one hundred eighty (180) days shall resume practice until he/she is reinstated by order of the Court. Application for reinstatement shall be on forms provided by the Director and Continuing Legal Education Commission, filed with the Director, and shall be accompanied by a filing fee of $250.00 which shall be made payable to the Kentucky Bar Association. An additional filing fee of $1250.00 shall be made payable to the Kentucky Office of Bar Admissions. The Director shall not accept an application for filing unless all costs incurred in the suspension proceeding have been paid by the former member, the Office of Bar Counsel has certified to the Applicant that there is no pending disciplinary file, and the costs in the reinstatement proceeding (whether costs of the Association or of the Character and Fitness Committee or of the Kentucky Office of Bar Admissions) have been secured by the posting of a cash or corporate surety bond of $2500.00. Any additional costs will be paid by Applicant. The Director shall refer the application to the Continuing Legal Education Commission within ten (10) days of receipt for certification under Rule 3.675. The Continuing Legal Education Commission shall make its certification within twenty (20) days of the referral which shall be added to the record in the reinstatement proceedings.

(a) The Board shall, within thirty (30) days of review of the information, make its recommendation to the Court for approval of an entry of an order restoring the Applicant or

(b) Refer the matter to the Committee for proceedings under Rule 2.040 and SCR 2.011. The Committee’s recommendation shall be made to the Board for its action and recommendation to the Court.

(c) As to any Applicants, including those who have been suspended for failure to pay dues or to meet continuing legal education requirements, the mere submission of the application for restoration and tendering the required fee shall not automatically restore the privilege of practicing law, and such suspension or withdrawal shall remain in force pending entry of an order of the Court restoring the Applicant.

(2) No former member who has withdrawn or has been suspended for failure to pay dues or has been suspended for failure to meet continuing legal education requirements, and such status has prevailed for five (5) or more years, can be restored to membership unless the former member applies, for restoration by completing forms provided by the Director, which shall include a certification from the KBA that there is no pending disciplinary matter, and tendering payment of $500.00. If the former member has been suspended for nonpayment of bar dues or CLE non-compliance he/she shall also tender payment for current dues and all back dues. The application shall then be referred to the Committee for proceedings under Rule 2.040 and SCR 2.100 and to the Continuing Legal Education Commission for certification under Rule 3.675. An additional fee of $500.00 shall be made payable to the Kentucky Office of Bar Admissions.

The Committee shall make its recommendation to the Board.

(5) All costs incurred in excess of the filing fee shall be paid by the Applicant. A cash or corporate surety bond in the amount of $2500.00 to secure costs to be incurred shall be posted with the Office of Bar Admissions upon the filing of the application.

XV. SCR 3.830 Kentucky IOLTA Fund

SCR 3.830 shall read:

The Kentucky Bar Foundation, Inc., a nonprofit corporation, shall maintain a special fund for the purpose of depositing interest from Kentucky Bar Association members’ trust accounts, as hereinafter provided, and the name of the fund shall be the Kentucky IOLTA Fund ("IOLTA").

Except as set forth in paragraph (14) of this rule, a lawyer or law firm shall create and maintain in a participating financial institution, as defined in paragraph (4) below, an interest-bearing trust account for clients’ funds which are nominal in amount or to be held for a short period of time so that they could not earn interest income for the client in excess of the costs incurred to secure such income (hereinafter sometimes referred to as an "IOLTA account") in compliance with the following provisions:

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

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

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

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

(5) A participating financial institution may satisfy the comparability requirements set forth in paragraph (4) above by electing one of the following options: (i) Pay an amount on funds that would otherwise qualify for the investment options equal to 70% of the federal funds targeted rate as of the first business day of the month or other IOLTA remitting period, which is deemed to be already net of allowable reasonable service charges or fees. The foregoing option of paying 70% of the federal funds targeted rate shall only apply when such rate is established in the range of 1.0% to 4.0% unless otherwise agreed to by IOLTA and the participating financial institution. (ii) Pay a yield rate specified by IOLTA, if IOLTA so chooses, which is agreed to by the participating financial institution. The rate would be deemed to be already net of allowable reasonable fees and would be in effect for and remain unchanged during a period of no more than twelve months from the inception of the agreement between the financial institution and IOLTA.

(6) IOLTA accounts may be established as: (i) An interest-bearing checking account such as a negotiable order of withdrawal account; (ii) a checking account with an automated investment feature, such as an overnight and investment in repurchase agreements or money market funds invested solely in or fully collateralized by U.S. Government

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Securities, including U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrument thereof; (iii) a checking account paying preferred interest rates, such as money market or indexed rates; (iv) any other suitable interest-bearing deposit account offered by the institution to its non-IOLTA customers.

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

(A) Nothing in this rule shall preclude a participating financial institution from paying a higher interest or dividend than described above or electing to waive any service charges or fees on IOLTA accounts.

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

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

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

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

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

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

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

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

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

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

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

(B) to establish appropriate reserves;

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

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

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

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

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

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

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

(B) does not have a trust account in a financial institution within the Commonwealth of Kentucky;
C. serving full time as a judge, attorney general, public defender, U.S. attorney, commonwealth attorney, county attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law;

D. is a corporate counsel or teacher of law and is not otherwise engaged in the private practice of law;

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

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

G. does not manage or handle client trust funds.

The determination of whether or not a financial institution is a participating financial institution which will not violate the requirements IOLTA must observe shall be made for a three-year term. Members may be reappointed, but no member shall serve more than two (2) successive three-year terms. Each member shall serve until a successor is appointed and qualified. Vacancies occurring through death, disability, inability, or disqualification to serve, or by resignation, shall be filled for the remainder of the vacant term in the same manner as the initial appointments are made by the Court. The members of the Board of Trustees of the Kentucky IOLTA Fund shall serve without compensation, but shall be paid their reasonable and necessary expenses incurred in the performance of their duties. The staff support for the Board of Trustees shall be paid by IOLTA.

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

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

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

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

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

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

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

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

All Sitting. All concur.

Entered this ______ day of September.
REVISION OF JUDICIAL ETHICS OPINIONS (“JE”) 67 and 78

In the course of its ongoing review of existing Judicial Ethics Opinions, the Committee discussed a possible contradiction between JE-67, prohibiting a judge from serving on an advisory board of a local bank, and JE-78, permitting a district judge to serve as a director of a local bank. In addition, the Committee received two inquiries from judges concerning this issue.

MAY A KENTUCKY JUDGE OR JUSTICE, CONSISTENT WITH THE CODE OF JUDICIAL CONDUCT, SERVE AS A DIRECTOR ON THE BOARD OF DIRECTORS OR ON THE ADVISORY BOARD OF A FINANCIAL INSTITUTION?

The Committee has concluded that the current answer to the question is a “Qualified No,” irrespective of the type of director, and irrespective of the level of judiciary on which the judge serves. The Committee hereby withdraws both JE-67 and JE-78, and substitutes this opinion.

Canon 4D specifically provides:

(3) A judge may serve as an officer, director, manager, general partner, advisor or employee of any business entity subject to the following limitations and the other requirements of this Code:

(a) A judge shall not be involved with any business entity

(i) generally held in disrepute in the community, or

(ii) likely to be engaged in proceedings that would ordinarily come before the judge, or

(iii) likely to be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(b) A judge involved with any business entity may assist such a business entity in planning fund-raising and may participate in the management and investment of the entity’s funds, but shall not personally participate in the solicitation of funds, the raising of capital or the selling of stock in such a manner as to use or permit the use of the prestige of judicial office for promotion of the business entity.

The Commentary to this section provides:

Subject to the requirements of this Code, a judge may participate in a business. Although participation by a judge in a business might otherwise be permitted by Section 4D(3), a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge’s court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a business if the judge’s participation would involve misuse of the prestige of judicial office.

Service on an Advisory Board. The Committee notes the express language of Canon 4D(3) seemingly permits a judge to act as an advisor to a business entity. The Commentary, however, cautions that such service may be prohibited by other provisions of the Code. In this regard, Canon 2D states that “[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.” Just as in JE-67, the Committee is unable to ascertain any purpose to an Advisory Board other than to lend the judge’s name “to enhance the prestige of the institution to enable it to draw more business.” The Committee in JE-78 appeared to make the distinction that JE-67 involved a circuit judge’s service on an Advisory Board. The Committee, however, believes that the restriction imposed by Canon 2D applies equally to any judge, irrespective of the level in the Kentucky judiciary in which the judge, or justice, serves.

Service on a Board of Directors. Again, the Committee notes the express language of Canon 4D(3) generally permits a judge to serve as a director of a business entity. However, subsection (a) states that “a judge shall not be involved with any business entity . . . (ii) likely to be engaged in proceedings that would ordinarily come before the judge, or (iii) likely to be engaged frequently in adversary proceedings in the court of which the judge is a member. . . .” The Code does not contain a definition of “frequent.” The word’s common meaning is “happening often or at close intervals”. Webster’s II New Riverside Dictionary (New York: Berkley Publ. Co., 1984). Common knowledge is that banks, by their business, are likely to be engaged in proceedings that would ordinarily come before the judge and/or engaged frequently in adversary proceedings in the court of which the judge is a member. Certainly, banks are engaged in litigation much more frequently than other businesses.
While a judge’s disqualification in a proceeding due to serving as a director of a party may be subject to remittal under Canon 3F, the Committee notes the broad language of subsection (iii) is directed to “adversary proceedings in the court of which the judge is a member.” This language imparts a much broader prohibition than, for example, “adversary proceedings before the judge”. Thus, the prohibition clearly extends to all circuit, family, and appellate judges and justices.

Additionally, while the Committee drew a distinction between district and circuit judges in JE 78, the Committee believes the risk too great that any judge, irrespective of level of judicial service, would implicitly be using, and allowing, the prestige of the judicial office to enhance the prestige of the institution to enable it to draw more business.

The Committee recognizes the right of a Judge to have and maintain investments, and if a Judge has invested personal funds in a banking company, he or she has a right to be elected to a Board of Directors and participate in oversight of the investment. However, service without any such personal financial investment, or by reason of some gratuitous grant of stock to the Judge, is prohibited by the Canons.

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

Very truly yours,

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

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

1 Under the Kentucky Constitution, all family court judges are circuit judges, and “retain the general jurisdiction of the Circuit Court.” Ky. Const. § 112(6).

COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION

IN RE THE MATTER OF:
MARGARET R. HUDDELLSTON
JUDGE, EIGHTH JUDICIAL CIRCUIT, DIVISION III

ORDER OF PUBLIC REPRIMAND

Margaret R. Huddleston, Judge, Eighth Judicial Circuit, Division III, has waived formal proof and has agreed to accept the disposition of this order.

On February 20, 2009, Judge Huddleston entered a plea of guilty to operating a motor vehicle under the influence, first offense. The Commission determined that, in committing such an offense, Judge Huddleston failed to respect and comply with the law and to act in a manner that promotes public confidence in the integrity of the judiciary in violation of Canon 2 of the Code of Judicial Conduct, Supreme Court Rule 4.300. This infraction does not appear to have disrupted or compromised the administration of Judge Huddleston’s official judicial duties.

The Commission, by majority vote, reached its decision regarding the sanction of a public reprimand after giving due consideration to the fact that Judge Huddleston had no prior infractions and that she fully cooperated in the investigation.

IT IS THEREFORE ORDERED that Margaret R. Huddleston, Judge, Eighth Judicial Circuit, Division III, is hereby publicly reprimanded.

DATE: September 21, 2009

STEVEN D. WOLNITZEK, CHAIR

AGREED TO:
Margaret R. Huddleston
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Approved by: Kentucky Bar Association, Kentucky Justice Association, Louisville Bar Association, Northern KY Bar Association, Fayette County Bar Association
Following is a list of TENTATIVE upcoming CLE programs. REMEMBER circumstances may arise which result in program changes or cancellations. You must contact the listed program sponsor if you have questions regarding specific CLE programs and/or registration. ETHICS credits are included in many of these programs. Some programs may not yet be accredited for CLE credits - please check with the program sponsor or the KBA CLE office for details.

NOVEMBER

24 Professionalism, Ethics and Substance Abuse (Video Replay)
Cincinnati Bar Association

DECEMBER

1 Famous Political Trials: The Trial of Dr. Jack Kevorkian
Cincinnati Bar Association

1 Ohio Supreme Court Highlights
Cincinnati Bar Association

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

2 Substance Abuse Instruction
Cincinnati Bar Association

3 Health Care Law Seminar
Cincinnati Bar Association

3-4 Kentucky Law Update – Louisville
Kentucky Bar Association

4-5 Southwestern Ohio Tax Institute
Cincinnati Bar Association

5 Professionalism, Ethics & Substance Abuse Instruction
Cincinnati Bar Association

8 Alternative Billing Methods
Cincinnati Bar Association

9 Professionalism: Professional Persuasion
Cincinnati Bar Association

9 Video Replay: Ethics, Professionalism & Substance Abuse
Northern Kentucky Bar Association

9 Analyzing Financial Statements
Cincinnati Bar Association

10 Bankruptcy Update
Cincinnati Bar Association

11 Real Property Institute
Cincinnati Bar Association

15 Gain the Edge – Negotiation Skills for Lawyers
Cincinnati Bar Association

16 Ethics: Managing Your IOLTA
Cincinnati Bar Association

17 Workplace Health & Safety Issues
Cincinnati Bar Association

17 Video Replay: Ethics, Professionalism & Substance Abuse
Northern Kentucky Bar Association

18 Legal Writing 201
Cincinnati Bar Association

22 Time Management for Lawyers
Cincinnati Bar Association

22 Presentation Skills
Cincinnati Bar Association

29 Video Replay: Adoption Law, Child Support & Domestic Violence
Cincinnati Bar Association

29 Video Replay: Professionalism, Ethics & Substance Abuse Instruction
Cincinnati Bar Association

30 Video Replay: Professionalism, Ethics & Substance Abuse Instruction
Cincinnati Bar Association

30 Video Replay: Drug Defense, Mechanic's Liens & Managing Your IOLTA
Cincinnati Bar Association

31 Video Replay: Professionalism, Ethics & Substance Abuse Instruction
Cincinnati Bar Association

JANUARY

8 Legislative Update
Cincinnati Bar Association

8 Bankruptcy Update
Cincinnati Bar Association

12-13 New Lawyers Program
Kentucky Bar Association

20 Property tax Appeals
Cincinnati Bar Association

Kentucky Bar Association
CLE Office • (502) 564-3795

AOC Juvenile Services
Lyn Lee Guarnieri • (502) 573-2350

Louisville Bar Association
Lisa Maddox • (502) 583-5314

KYLAP
Randy Ratliff • (502) 564-3795

Kentucky Justice Association
(formerly KATA)
Ellen Sykes • (502) 339-8890

Chase College of Law
Bonnie Osborne • osbornel1@nku.edu

Kentucky Department of Public Advocacy
Jeff Sherr or Lisa Blevins
(502) 564-8006 ext. 236

AOC Mediation & Family Court Services
Amanda LeMaster
(502) 573-2350 ext. 4250

UK Office of CLE
Melinda Rawlings • (859) 257-2921

Mediation Center of the Institute for Violence Prevention
Louis Siegel • (615) 662-0026

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

Children's Law Center
Joshua Crabtree • (859) 431-3313

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

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

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

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

Administrative Office of the Courts
Amanda LeMaster
(502) 573-2350, Ext. 4250

2009 KENTUCKY LAW UPDATE
Dates and Locations
December 3-4 (TH/F) Louisville
KY International Convention Center
The Northern Kentucky University Chase College of Law Alumni Association honored four alumni during its annual Chase Alumni Luncheon on Friday, October 9, at the Bank of Kentucky Center on NKU’s campus.

Judge Ralph Winkler, class of 1970, was the recipient of the Lifetime Achievement Award. He is a retired visiting judge on Ohio’s First District Court of Appeals. He has served on the bench for more than 30 years, including four years on the Hamilton County Municipal Court and 18 years on the Hamilton County Court of Common Pleas before being first-elected to the Ohio Court of Appeals in 1998. He also served in the United States Army, as a federal agent, and as the First Assistant United States Attorney for the Southern District of Ohio.

Mary Denise Kuprionis, class of 1994, was the recipient of the Professional Achievement Award. She is vice president, secretary, and chief ethics and compliance officer of the E.W. Scripps Company. She was the first woman elected as an officer of the company, and she has held numerous leadership positions. She serves as chair of the board of trustees of the College of Mount St. Joseph and is a member of the board of trustees of Cincinnati Children’s Hospital Medical Center. In September 2009, she was selected as one of twenty-one women lawyers nationwide to participate in the American Bar Association’s 2009 “DirectWomen” Program, an initiative designed to identify and promote qualified women lawyers to serve on corporate boards of public companies.

Judge John Andrew West, class of 1971, was the recipient of the Exceptional Service Award. A Hamilton County Court of Common Pleas Judge, he has served the greater Cincinnati/Northern Kentucky community for more than forty years as a history teacher, a lawyer, a jurist, and a board member of the Cincinnati Bar Association (CBA), the National Conference of Community and Justice, and the YMCA. He is a founding member of the Black Lawyers Association of Cincinnati (BLAC), and is co-chair of the BLAC-CBA roundtable, an organization dedicated to increasing the presence of African Americans in the legal community. He is also a member of the Chase College of Law Board of Advisors.

Brett A. Schatz, class of 2000, was the recipient of the Outstanding Recent Alumnus Award. Brett is a partner at the law firm of Wood, Herron and Evans, where he has litigated complex lawsuits in all areas of intellectual property. He has served as an adjunct professor at Chase College of Law and currently serves as the vice chair of the intellectual property section of the Cincinnati Bar Association.

More than 300 Chase alumni and friends attended the luncheon. The alumni association also hosted a CLE program before and after the luncheon titled “A View From Across the River II: Nuances Between Kentucky and Ohio Practice.” Featured speakers were...
November 2009

University of Kentucky College of Law

By David A. Brennen
Dean and W.T. Lafferty Professor of Law

University of Kentucky College of Law – 100 Years of Educating Kentucky’s Legal and Community Leaders

On the occasion of this, my first submission for the Kentucky Bench & Bar, I would like to briefly introduce myself to the Kentucky legal community and say a few words about Kentucky’s flagship public law school – the University of Kentucky College of Law – in its 100th year of existence.

I began as Dean of U.K. College of Law on July 1, 2009. Born and raised in Florida, I have since lived in New York, Virginia, Georgia and Maryland, with brief stints in Pennsylvania and Alabama. Throughout this time, I practiced law in Florida before serving on the faculties of a number of law schools. Most recently, I spent two years as Deputy Director of the Association of American Law Schools in Washington, D.C. My many experiences as a practicing lawyer, legal scholar, teacher and administrator have served me well as I come to know more about Kentucky and its legal community. My family, including my three boys and my partner of more than twenty years, Kimberly, look forward to a lifetime of new experiences here in the Bluegrass state.

What better vantage point from which to embark on an exploration of Kentucky and its legal environment than as Dean at U.K. College of Law? The U.K. College of Law has played a significant role in educating many of Kentucky’s legal and community leaders, including its governors, senators and federal and state judges. In fact, of the seven current Kentucky Supreme Court Justices, five graduated from U.K. College of Law and each of these...
five U.K. Law graduates was taught by our very own Professor Robert G. Lawson who has been teaching at the law school since 1966.

In a recent survey of all accredited law schools in the United States, U.K. College of Law was recognized as one of only four law schools, and the only law school in Kentucky, with 100 per cent employment for its graduates within nine months of graduation. What a remarkable achievement! Though it might not be possible for any law school to achieve a repeat of such a high employment rate in today’s economy, U.K. College of Law will certainly try its best to do so. One of the primary ways we intend to do so is by hiring a new career services resource professional to assist our students as they embark on a job search during one of the most challenging legal job markets in United States history.

Another notable achievement for U.K. College of Law is its attraction of minority law students. This year, despite the low minority population overall in the state of Kentucky, U.K. College of Law achieved a record 17 percent minority enrollment for its 2009 entering class. This is a feat that has never been achieved before in the history of U.K. College of Law. My hope is we at the law school will continue to create a diverse population of attorneys in Kentucky going forward.

Legal education, like legal practice, is in a state of transformation. It is no longer sufficient to rely on the tried and true methods of educating future lawyers. Instead, law schools must focus on teaching law students to think about the law in expansive ways, while also exposing students to the realities of the practice of law. U.K. College of Law is engaged in an effort to capitalize on its status as the premier law school in the state of Kentucky to ensure that Kentucky’s future legal and community leaders have the best education possible. Through a top notch legal education program, continuing legal education, and a supportive alumni base, the U.K. faculty and staff will ensure that U.K. College of Law is THE place to be for those who want to be legal or community leaders in the state of Kentucky.

University of Kentucky College of Law Trial Team Placed Second in National Championship Tournament; Kentucky Student Named Best Advocate in the Nation

The University of Kentucky College of Law Trial Team, composed of third-year students Regan Merkel and Christopher Schaefer, took second place in the American College of Trial Lawyers National Trial Competition. The competition is the most prestigious law school trial competition in the nation with over 300 teams and 1,000 students competing on behalf of approximately 150 law schools.

Schaefer, of Louisville, and Merkel, of Cincinnati, qualified for the National Championship Tournament by winning their regional tournament in Lansing, Michigan. After the regional, a new criminal case problem was distributed to the students, who then had less than a month to prepare both a prosecution and defense presentation of the case. The students worked extremely hard during that month and were aided by faculty advisor and Coach Professor Allison Connelly, former trial team members Justin Peterson and Katherine Paisley, and fellow teammates Jen Jabroski and Preston Worley.

Upon reaching the National Championship Tournament, all 28 regional qualifying teams competed in three preliminary rounds, or trials. U.K. competed against and defeated Syracuse University College of Law, Villanova University School of Law, and Chicago-Kent College of Law, the two-time defending national champions. At the end of the preliminary rounds, the top eight teams proceeded to the quarterfinal rounds. At this stage, Schaefer and Merkel beat a team from the University of Virginia School of Law to advance to the semi-final round against an excellent team from the University of Georgia. Following what can only be described as an outstanding trial, U.K. was named the winner and advanced to the national championship round against Baylor Law School. The championship round was as close as possible and Schaefer and Merkel finished just shy of a national championship, losing the round 7-6. This was by far the best U.K. has ever done at the National Championship Tournament.

In addition to the team’s success as the second best trial program in the nation, Schaefer was awarded the George A. Spiegelberg Award. The Spiegelberg Award is personally selected by fellows of the American College of Trial Lawyers and given to the student that served as the best advocate in the nation. As a result of the award, the College will be sending a representative to U.K. to present a prize donated by the law firm of Fried, Frank, Harris, Shriver & Jacobson, and Schaefer will be invited to the College’s annual meeting in Boston as an honored guest.

In summarizing the team’s accomplishments, Connelly, who has been coaching the team for thirteen years and has qualified teams for the National Championship tournament seven of those years, said, “Not only did Chris and Regan excel on a national stage, they epitomize the excellence of the College’s trial program; a program built on student dedication, sacrifice, and persistence. However, I’m even prouder of the way Chris and Regan represented our law school. They won and lost with great integrity, professionalism, and honor. They represent the ideal every lawyer strives to achieve.”
Of time and the circle

Aside from graduation, the annual Alumni Awards Banquet may be the most important public event staged by the University of Louisville School of Law. At an absolute minimum, our awards banquet proves that Thomas Wolfe, the great Southern writer, got it just right. Look homeward, angel: you can indeed go home again. Whether you walked a few blocks or crossed the continent to join us tonight, our Law School is home to us all. It is the alma mater of roughly half the lawyers in Louisville, a quarter of the lawyers in the Commonwealth of Kentucky, and two-fifths of the judges and justices in the Kentucky Court of Justice. Above all these tangible things, our Law School is a place in the heart and a catch in the throat. It is home.

With your indulgence, I would like to personalize my comments on the occasion of our annual homecoming gathering. I have striven in my three years at the University of Louisville to convey my sense that law and legal education, at their best, should traverse and translate both truth and beauty. [Footnote: See Jim Chen, Truth and Beauty: A Legal Translation, http://ssrn.com/abstract=1157093.] Law as social engineering – in the finest sense of that term – should bridge all things mathematical and mythical. The lemma and the legend have this much in common; they both seek truth and beauty in a way that transcends time. I therefore invite you to think about time in a way that makes sense of the geometry of our relationships and the trajectory of our lives.

Does time follow the form of a line, or that of a circle? Whatever one might say of time as a matter of religious eschatology, or as a matter of Einsteinian relativity, I firmly believe that time as lived by real people seeking real solutions to real problems bends around and meets full circle. If we admit that time is the longest distance between two places, we might yet find in motion and emotion what has been lost in space. Our hope of mastering the mystery of time lies in embracing the manifest and manifold destiny of circular being.

Consider the story of Wayne Bach. Today Wayne Bach is a partner in the Hickory, North Carolina, firm of Young, Morphis, Bach & Taylor. He concentrates in tax, trusts, and estates. Perhaps you will more readily remember his firm by its web address, http://www.hickorylaw.com. Some four decades ago, Mr. Bach was a law student at the University of Louisville. He had reached a point of desperation and feared that he would have to abandon his dream of legal education.

Professor Norvie Lay was then serving as associate dean of the Law School. Mr. Bach went to Dean Lay’s office, prepared to do the unthinkable and drop out. Dean Lay simply would not let Mr. Bach give up. He found the money that Wayne Bach needed to continue his studies. Of course, you know that Mr. Bach stayed in school. He graduated as a member of the class of 1973 and proceeded to enjoy a successful career in Hickory. What many of you may not know, till now, is this:

This past winter, Mr. Bach had the opportunity to make a major gift on behalf of our moot courts. He had a single request: that the gift find some way to honor Norvie Lay. I take great pleasure in reporting that the Norvie Lay Endowment now supports our moot courts (which in many ways are to the Law School as Cardinal sports teams are to the rest of the University of Louisville), including the Norvie Lay Tax Moot Court Team.

A single gesture of kindness, performed some four decades ago, saved a young man’s career in the law. Thanks to Norvie Lay’s wisdom and generosity, Wayne Bach went on to thrive in the law. And thanks to Wayne Bach’s wisdom and generosity, successive generations of law students will learn by doing, in the very place where all of us have taught, learned, and lived. In their turn, in their time, today’s students will become tomorrow’s alumnus and alumni. From financial generosity to physical presence, our graduates have found many, many ways to get involved with their alma mater. Our students and these graduates have completed, in the finest fashion possible, the circle of legal education. We shall endure. Planting and harvest, heat and cold, summer and winter, day and night, and most of all teaching and learning will never cease. (†)
The Children’s Law Center hosted a Gala recently at the Carnegie in Covington in celebration of its 20th anniversary and the Center’s longevity and success, as well as the benefits it has brought to children over the years.

The Center was established in 1989 to protect and enhance the legal rights and entitlements of children in Kentucky through quality legal representation, research and policy development, and training and education to attorneys and others regarding the rights of children. The Center’s priorities include juvenile justice, child welfare, and education issues generally, as well as an emphasis on improving the quality of and accessibility of legal representation for children in Kentucky and Ohio.

The event honored and recognized those who have worked to protect the legal rights of children on a local and national level. There was a special presentation honoring Kim Brooks Tandy, who not only founded the Center, but has also served as the executive director for the past 20 years. The Gala also honored many others who have helped open doors, create legislation, provide needed funds and give their time and effort to continue and support the work of the Children’s Law Center. These people included: J. David Bender, Donald G. Benzinger, William and Sue Butler, Fran Carlisle, Judith G. Clabes, Ava Crow, Richard Cullison, Jean Deters, Rebecca B. DiLoreto, Marcia Egbert, Sharon S. Ellison, Al Gerhardstein, Jennifer Kinsley, Eric Haas, James R. Kruer, Louise Roselle, Lowell Schechter, Alice Sparks, Karen Tapp, Rachel Votruba, Thomas White, Jr., and the Youth Law Center.

CERTIFICATION OF CANVASSING BOARD FOR BAR MEMBERS, SPECIAL ELECTIONS FOR THE 17TH JUDICIAL CIRCUIT NOMINATING COMMISSION

Pursuant to the provisions of Section 118 of the Kentucky Constitution and SCR 7.040(6), a duly appointed canvassing board, on September 11, 2009, met in the Office of the Executive Director of the Kentucky Bar Association, and tabulated ballots for the special election as reflected above. Pursuant to the provisions of SCR 7.030(11), the following candidates for the designated commission received the indicated number of votes.

17th JUDICIAL CIRCUIT

Robert Edward Blau, 3699 Alexandria Pike, Cold Spring, KY .................18
Mott V. Plummer, 53 Villagrande Boulevard, Fort Thomas, KY ............64
Write-In Votes .................................................................................0

Certified as true and correct Election Results Pursuant to SCR 7.030(11), this 11th day of September 2009. Karen Cobb, Chairman
Supreme Court Clerk Susan Stokley Clary installed as President of National Conference of Appellate Court Clerks

Susan Stokley Clary, clerk of the Supreme Court of Kentucky, was installed as president of the National Conference of Appellate Court Clerks (NCACC) at the organization’s annual meeting August 6, 2009 in Sacramento, California.

The NCACC focuses on continuing education for appellate court clerks and court administrators, providing them with information and training designed to help improve the appellate court system. Clary is the organization’s 37th president.

“There is no one working in the courts who has a deeper knowledge or greater love of the court system than Susan Clary,” Chief Justice of Kentucky John D. Minton, Jr. said. “Her election to the presidency of this professional organization is not only a significant accomplishment for Susan, but it also brings honor to the commonwealth of Kentucky.”

Clary has been clerk of the Supreme Court of Kentucky since March 1995. She also serves as the court’s administrator and general counsel. She has been the court administrator since 1988 and the court’s general counsel since 1983.

Governor Steve Beshear praised Clary’s work with the Supreme Court. “For almost 15 years, Susan has served as clerk of the Supreme Court of Kentucky, earning a reputation as an invaluable resource and trusted advisor,” Beshear said. “Her seamless management skills honed here in Kentucky will certainly be welcomed as head of the NCACC, as we continue to show the nation that Kentucky is a state filled with unparalleled leadership.”

Clary was elected as NCACC vice president in 2007. The vice president automatically succeeds to the office of president-elect and then president.

Clary is a member of the Supreme Court Rules Committee and the Civil Rules Committee and is chairwoman of the Supreme Court Appellate Rules Subcommittee. She is also a member of the court’s Appellate Technology Committee and is the Supreme Court liaison with the Office of Bar Admissions.

Prior to her appointment as clerk, she served the Supreme Court as a law clerk for Justice James B. Stephehson and as administrative assistant to Chief Justice Robert F. Stephens. She earned her J.D. from the University of Kentucky College of Law, graduating in 1981. She also previously served as general manager of the Department of Juvenile Services for the Administrative Office of the Courts, during which time she established a statewide juvenile intake and diversion program.

Clary has co-authored a book on Kentucky juvenile law and taught family law and juvenile law at Midway College.

John D. Meyers Appointed Executive Director of the Kentucky Bar Association

The Kentucky Bar Association (KBA) appointed John D. Meyers as its new Executive Director after a four-month selection process. Meyers, a Lexington attorney, served as the KBA’s interim executive director and director of Continuing Legal Education (CLE).

In making the announcement, KBA President Charles E. “Buzz” English, Jr., of Bowling Green, said Meyers’ knowledge of the association and his solid working relationship with KBA members statewide will allow him to serve the KBA with vision and versatility.

“Since joining the staff of the KBA in October 2005, John has energized and expanded our CLE program and, in the process, greatly enhanced its benefit to our membership,” English said. “He has shown the ability to deal with a number of complex issues and challenges since assuming the position as interim executive director, including leading the KBA staff to produce one of the largest and most successful Annual Conventions we have ever sponsored in a time of great economic difficulty. The selection committee and the Board of Governors feel strongly that John has demonstrated the leadership skills necessary to guide this organization by exhibiting many positive qualities as a lawyer, an administrator, and an executive.”

Meyers will lead a staff of 53 employees as he oversees the programs, policies, and activities adopted by the Board of Governors, the KBA’s governing body. There are over 16,000 members of the KBA.

“This is an incredible honor for me to serve as the executive director of an organization that seeks to serve not only Kentucky’s legal community, but the many Kentuckians who depend upon its services,” Meyers said. “I look forward to leading the Kentucky Bar Association as we continue our commitment to professionalism and public service.”

A native of Lexington, Meyers is a graduate of Lafayette High School and received his B.S. from Purdue University. He earned his J.D. from the University of Kentucky College of Law.
The Supreme Court of Kentucky Adopts Mandatory IOLTA

Pursuant to an Order entered on September 10, 2009, the Supreme Court of Kentucky approved amendments to Supreme Court Rule 3.830 which effective January 1, 2010 makes participation in the Kentucky IOLTA Fund mandatory unless certain exceptions apply, or an attorney is exempt under the provisions of the amended rule. Kentucky has the distinction of becoming the 41st state to adopt a mandatory IOLTA program. The full text of the revised rule is set forth in another section of this magazine, but the following is a quick review of some of the more important aspects of the rule, and addresses a number of frequently asked questions:

Prior to the recent action of the Supreme Court, the IOLTA program was designated as an “opt-out” program, wherein a lawyer or law firm was required to participate unless they specifically opted out of the program by sending a written request to the IOLTA Board of Trustees. Even though participation in IOLTA has not been required, approximately 80% of the attorneys and law firms practicing in the Commonwealth have been utilizing IOLTA escrow accounts in conjunction with their practice. There are currently 120 banks that are participating in the program. This has essentially created a partnership between the two professions to provide revenue to IOLTA, which in turn is used to help fund legal services for the indigent who otherwise would not have access to the justice system.

The new amendments are designed to accomplish greater participation in the program without making IOLTA more complex with additional “red tape.” If a lawyer has no need to have a “pooled client escrow account” (an escrow account containing more than one client’s funds), the lawyer or law firm is not required to establish an IOLTA account simply to comply with the rule. Similarly, in the case where there are funds belonging to a client that can earn interest for the client over and above the costs and fees of maintaining the escrow account with the bank, such funds, upon agreement of the client, should be deposited in an interest-bearing account for the sole benefit of the client, with the client receiving a Form 1099 at the end of the calendar year.

Another important aspect of the rule is that all banks that hold IOLTA escrow accounts as of January 1, 2010 and after, must agree to provide an interest rate on its IOLTA accounts that is comparable to the interest rate set for its non-IOLTA interest-bearing accounts, when the IOLTA accounts meet or exceed the same minimum balance and other account eligibility qualifications. This is commonly called a “comparability provision” and has been adopted in a majority of the states that have a mandatory IOLTA program. This aspect of the rule is designed to ensure that IOLTA accounts are in no way treated differently by the participating banks, when other similarly situated accounts, in such banks, are earning higher rates of interest.

There are seven primary exemptions set out in paragraph 14 of the amended rule, which cover those instances when a law firm or attorney is most likely not to maintain a pooled client escrow account in conjunction with their practice or employment. If a special circumstance exists, the rule also provides for application to the Kentucky IOLTA Fund for an exemption under factors specifically not covered by the rule.

The following are frequently asked questions and answers about different aspects of a mandatory IOLTA program with an interest rate comparability requirement:

**Q: Is the IOLTA program unique to Kentucky?**
A: No. IOLTA has been adopted in all 50 states. Kentucky has had an opt-out program but under the new rule will follow a mandatory program. As a result of the 2003 United States Supreme Court decision upholding mandatory IOLTA programs, 40 other states have converted their programs from opt-out to mandatory programs.

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

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

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

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

**Q: What if I do not have a commingled non-interest-bearing client escrow account?**
A: Lawyers who do not hold clients’
Q: Authorization for Kentucky IOLTA to participate in IOLTA. In order to the lawyer’s bank of the lawyer’s intent
A: The Kentucky IOLTA Fund notifies
Q: Who notifies the banks?
A: The Kentucky IOLTA Fund notifies the lawyer’s bank of the lawyer’s intent to participate in IOLTA. In order to establish an IOLTA account, a lawyer or law firm must do is complete an Authorization for Kentucky IOLTA Account form and forward the form to IOLTA. There is no change to the operation of the escrow account.

Q: Who notifies the banks?
A: The Kentucky IOLTA Fund notifies the lawyer’s bank of the lawyer’s intent to participate in IOLTA. In order to establish an IOLTA account, a lawyer or law firm must do is complete an Authorization for Kentucky IOLTA Account form and forward the form to IOLTA. There is no change to the operation of the escrow account.

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

Q: How does a financial institution comply with the Supreme Court’s IOLTA Rule that they treat IOLTA accounts similar to non-IOLTA accounts regarding the amount of interest they pay?
A: Rule 3.830(4) simply means that IOLTA accounts must earn the same interest as other customers’ accounts, when they meet the same eligibility requirements. For example, if the financial institution only offers one type of interest-bearing checking account, then that is the rate that should be applied to IOLTA accounts. However, if the institution offers multiple types of interest-bearing checking accounts, the highest yielding product that an IOLTA account would meet the qualifications for should be applied to that IOLTA account.

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

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

It is the interest and intention of the Supreme Court and IOLTA to conduct a financially successful program under these difficult economic times, especially as they affect the legal services and pro bono programs throughout the state. The participation and cooperation among the members of the bar will ensure that this success can be accomplished to the fullest extent possible.
FEATURE YOUR LOCAL BAR ASSOCIATION’S EVENT IN THE KBA e-NEWS

At the beginning of each month, the Kentucky Bar Association features its most up-to-date news and information through the distribution of the KBA e-News to our more than 16,000 members across the Commonwealth. Subjects range from discipline alerts, CLE offerings, special events, membership benefits, news from the Board of Governors, volunteer opportunities and much more.

Local and regional bar associations are encouraged to e-mail information regarding upcoming events and educational opportunities for distribution in the e-News by contacting Amy Carman, KBA Director of Communications, at acarman@kybar.org by the 20th day of each month for inclusion in the next month’s edition.

Please also forward us your suggestions for making the KBA e-News a better product for our membership. If you are not receiving the KBA e-News and would like to update your e-mail address on file with the KBA, you may do so by completing one of the address change forms located under the Membership menu on the website at www.kybar.org.

To access this month’s edition of the KBA e-News, visit our website at www.kybar.org.

In Memoriam

Charles Adams
John R. Bagby
Robert J. Beale
Daniel N. Brock
Paul Edward Bugay
Ronald Douglas Burchett
Ollie Douglas Carter
James F. Cook
Carl G. Cunnagin
Arthur Lingle Dillard
Harland W. Downard
George E. Dudley
Gregory S. Fatovic
Nicholas William Ferrigno, Jr.
John George
Howard B. Hodge, Jr.
Robert R. Humphreys
Floyd Arnold Mann
Patricia Shaw McMeen
Samuel Wilson Moore II
Allen Schmitt
John Nelson Seibel
Charles M. Tackett
Richard C. Ward
Lively M. Wilson

Doug Burchett passed away on September 15, 2009 after a hard-fought battle with brain cancer. Doug’s strength, courage and positive attitude throughout his fight were truly an inspiration to all who knew him. While the incredible outpouring of support for Doug speaks volumes and is the truest testament to the type of person he was, Doug’s passion for his career and his professional spirit require special mention by his partners at Blackburn Domene & Burchett PLLC. Doug was an outstanding lawyer, an excellent partner, and an exceptional friend. Doug will be fondly remembered and greatly missed by all of us.
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I certify that all information furnished is true and complete.

John D. Meyers, Publisher, September 29, 2009

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**Before You Move...**

Over 16,000 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](http://www.kybar.org) to make **ONLINE** changes or to print an Address Change/Update Form

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

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

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* 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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**KENTUCKY BAR NEWS**

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The Board of Governors met on Friday and Saturday, July 24-25, 2009. Officers and Bar Governors in attendance were President C. English, Jr., President-Elect B. Davis, Vice President M. Keane, Immediate Past President B. Bonar, Young Lawyers Section Chair J. Moore, Bar Governors 1st District – D. Myers, J. Freed; 2nd District – J. Harris, Jr., R. Sullivan; 3rd District – R. Hay, G. Wilson; 4th District – D. Ballantine, D. Farnsley; 5th District – A. Britton; 6th District – T. Rouse, D. Kramer; and 7th District – B. Rowe, W. Wilhoit. Bar Governor absent was: F. Fugazzi, Jr.

In Executive Session, the Board considered two (2) restoration cases.

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

- Heard a status report from the Attorneys’ Advertising Commission, KYLAP, and Office of Bar Counsel.
- Young Lawyers Section Chair Jennifer H. Moore reviewed with the Board the YLS Safe Project, adopted from the ABA service project in 2008, encouraging young lawyers to become involved and promote awareness of domestic violence. The section will host free three-hour CLE programs in Bowling Green, Lexington, and Covington on October 12. This project will help the young lawyers obtain their pro bono hours. In the Spring, the section plans to host a golf scramble to help raise money for the Kentucky Domestic Violence Association Victim Survivor Fund. Ms. Moore reported that the section is continuing its Brief Insights project and plans to prepare 15 new clips by the end of next June. Ms. Moore encouraged the Bar Governors to volunteer their time taping a 10-minute clip with regard to their particular law practice areas. The section hopes to have diversity initiative goals and its mentoring program in place in the fall in Lexington, Louisville, and Covington for the law schools’ minority students. This program, with materials provided through the ABA, will assist high school students in making the decision to attend law school.
- President English acknowledged the Young Lawyers Section, and in particular the Lexington young lawyers, who are contributing toward and assisting with the KLEO project, and who have raised approximately $15,000 of the $30,000 project goal.
- Approved the appointments of Past Presidents Jerry D. Truitt of Lexington, Robert C. Ewald of Louisville, and George E. Long II of Benton to the Special Conflicts Committee provided for in the Board Conflicts and Recusal Policy adopted at the June 2009 Board meeting.
- Approved the reappointment of Mark Howard of Covington for a three (3) year term and the reappointment of Earl Calhoun of Hopkinsville for a three (3) year term to the Clients’ Security Fund Board of Trustees.
- President English reported that he appointed Bar Governor W. Douglas Myers of Hopkinsville as the President’s designee on the IOLTA Board of Trustees for a one year term ending on June 30, 2010.
- President English reported that he appointed Bar Governor Fred E. “Bo” Fugazzi, Jr. of Lexington as the President’s designee on the Kentucky Bar Foundation for a one year term ending on June 30, 2010.
- Approved the recommendations to the following Supreme Court Committees: Civil Rules Committee – R. Michael Sullivan of Owensboro; Criminal Rules Committee – Fred E. “Bo” Fugazzi, Jr. of Lexington; and Supreme Court Rules Committee – Thomas L. Rouse of Ft. Mitchell.
- Approved the appointment of Pat Barnes Wheeler of Simpsonville as the non-lawyer member of the KYLAP Commission.
- Approved the appointment of John Ressor of Louisville as the financial professional member of the Audit Committee for a three (3) year term ending on December 31, 2011.
- President-Elect Bruce K. Davis reported that the Kentucky Bar Association will host the 2011 Southern Conference of Bar Presidents in Lexington which encompasses 17 states and 20 bar associations, both volunteer and mandatory.
- President English reported that approximately $25,000 had been raised, toward the $30,000 goal, for the KLEO Summer Institute through fundraising efforts by the LBA Diversity Committee, the Young Lawyers in Lexington, and other bar member contributions.
- President English reviewed the current list of committees and asked for recommenda-
The firm of Kerrick, Stivers, Coyle & Van Zant, PLC is pleased to announce that James D. Harris, Jr., Jeffrey S. Stein and Harlan E. Judd, III have joined the firm and are practicing at the Bowling Green office. All three attorneys previously practiced with Wyatt Tarrant & Combs, LLP at the firm’s Bowling Green office. Harris’ practice consists of general tort law, insurance litigation defense, and contract and construction disputes. Stein’s practice consists of commercial real estate and lending, general business/corporate transactions, banking, and probate law. Judd’s practice consists of insurance litigation, construction law, workers’ compensation, and general civil defense litigation.

ON THE MOVE

James D. Harris, Jr.

Jeffrey S. Stein

Harlan E. Judd, III

O’Bryan, Brown & Toner, PLLC is pleased to announce that Stephanie Caldwell has joined the firm’s Louisville office as an associate attorney. Caldwell received her B.A., summa cum laude, from the University of Kentucky in 2001. She completed law school course work at the University of Oxford St. Anne’s College in 2005 and earned her J.D. from the University of Louisville School of Law in 2006. Caldwell is licensed to practice law in Kentucky. Her primary area of practice will be insurance defense litigation with special emphasis on medical malpractice defense, product liability, negligence, and tort claims.

Fisher & Phillips LLP has announced that Cynthia Blevins Doll has joined the firm’s Louisville office as a partner. Doll was practicing at the Louisville-based law firm of Wyatt, Tarrant & Combs, LLP. She focuses her practice on labor and employment-related litigation. In her 17 years of legal practice, she has represented several area corporate clients, including Papa John’s International, Inc., Rohm and Haas, and Yellow Book USA, Inc. Doll graduated, summa cum laude, from the University of Louisville School of Law as valedictorian in 1992.

Johnson, True & Guarnieri, LLP is pleased to announce that Sheilah Galvez Kurtz has joined the Frankfort firm as an associate attorney. Kurtz received her B.A. from the University of the Philippines in 1986, obtained her L.L.B. from the University of the Philippines College of Law in 1991, and earned her J.D. from the University of Kentucky in 2008. She is the former senior judicial clerk for Chief Judge Thomas D. Wingate of the Franklin Circuit Court. Kurtz holds licenses to practice law in Kentucky, New York, and the Philippines.

Zielke Law Firm PLLC is pleased to announce its newest addition to the firm, Karen Campion. She earned her J.D. in 2008 from the University of Kentucky College of Law, where she was editor-in-chief of the Journal of Natural Resources & Environmental Law. Campion concentrates her practice in the area of civil litigation in employment law.

Graydon Head & Ritchey LLP is pleased to announce that attorney Candace S. Klein has joined the firm’s Northern Kentucky office. Klein is a graduate of Northern Kentucky University and the Salmon P. Chase College of Law. She is dedicated to providing private sector, governmental, quasi-governmental entities, and public/private partnerships with comprehensive legislative, regulatory,
economic development, tax, real estate, land use, and litigation services. Klein is a former lobbyist for the Northern Kentucky Chamber of Commerce and the United Way of Greater Cincinnati. Prior to joining Graydon Head, she was in private practice.

Boehl Stopher & Graves, LLP is pleased to announce that James M. Inman has joined the firm as an associate in its Lexington office. His practice primarily focuses on civil litigation. Inman holds degrees from Centre College and the University of Kentucky College of Law. He served as a captain in the U.S. Army and is a veteran of the Iraq War. Inman recently served as a law clerk to the Honorable Joseph M. Hood, U.S. District Court Judge for the Eastern District of Kentucky.

McBrayer, McGinnis, Leslie & Kirkland is pleased to announce that Kembra Sexton Taylor has joined the firm as Of Counsel in the Frankfort office. Taylor retired in January 2009 as chief of staff and executive director of the Office of General Counsel in the Kentucky Labor Cabinet. Previously she served the Labor Cabinet as deputy general counsel for seven years and as general counsel for eleven. In 2002, she was appointed deputy secretary, a position she held for one year while also serving as Taylor graduated from the University of Kentucky in 1981.

Robert W. Peeler, of Mason, Ohio, has been appointed Judge, Warren County, Ohio, Court of Common Pleas.

The Drew Law Firm is proud to announce that new partner George Zamary has joined the Cincinnati firm – committed to its philosophy of service to clients, the law, and the community. Zamary practices in the areas of civil and business litigation, corporate, estate planning, construction, and election law. He also has represented local and national companies in contract negotiations.

Wyatt, Tarrant & Combs, LLP is pleased to announce that it has elected two new partners, Brian Baugh and Peter Diakov. Baugh is located in Wyatt’s Lexington office, and Diakov is located in the firm’s Louisville office. Baugh concentrates his practice in the areas of products and premises liability, employment and labor, and general commercial litigation. He graduated with honors.
from the University of Kentucky College of Law and served as a judicial law clerk for U.S. District Chief Judge Henry R. Wilhoit. Diakov concentrates his practice in the areas of mergers and acquisitions, venture capital, and general business law with particular focus in the mineral and energy and healthcare industries. He graduated, magna cum laude, from the University of Louisville School of Law.

Stoll Keenon Ogden PLLC is pleased to announce that James G. LeMaster has joined the firm as Of Counsel. LeMaster practices in the firm’s Lexington office and concentrates primarily in the area of government relations. He joined Stoll Keenon Ogden after being the Kentucky Association of Manufacturers’ President and CEO since July 2007. LeMaster attended the University of Kentucky while playing basketball under Adolph Rupp from 1964-1968. He received his J.D. in 1972 from the University of Kentucky College of Law.

Greenebaum Doll & McDonald PLLC is pleased to announce that Reva D. Campbell and William J. Kishman and Daniel W. Redding have joined the firm as associates and practice in the Louisville office. Campbell primarily practices in the area of commercial litigation, including complex business disputes, securities, class action defense, antitrust, and employment matters. A former organic chemist with experience in both chemical and mechanical research and development, she also litigates patent and trademark cases. Campbell received her bachelor’s degree from the University of Kentucky and earned her J.D. from the University of Louisville. Kishman has joined the firm as a member of the labor and employment practice group. He received his bachelor’s degree from Miami University of Ohio and earned his J.D. from Ohio State University. Redding has joined the firm as a member of the litigation and dispute resolution practice group. He received his bachelor’s degree from the University of Virginia and earned his J.D. from the College of William and Mary.

Jewish Hospital & St. Mary’s HealthCare is pleased to announce that John Johnson has joined the organization as vice president and general counsel. Johnson comes to the organization from Stites & Harbison, PLLC in Louisville. He represented a variety of different healthcare clients, while practicing law there since 1994. Prior to that, he served as house counsel at Columbia/HCA HealthCare Corporation and Humana, Inc. After completing his undergraduate studies at Centre College, Johnson obtained his M.B.A. and earned his J.D. from the University of Louisville.

John Lucas has been elected vice president, general counsel, and assistant secretary for Union Central Life Insurance Company in Lincoln, Nebraska. Since joining the company in 1988 as assistant to the corporate secretary, Lucas has held various posi-
WHO, WHAT, WHEN & WHERE

The Louisville law firm of Morris & Player, PLLC is pleased to announce the recent addition of Adrienne Worsham Kim as an associate of the firm and William F. McMurry as Of Counsel. Kim is a 2006 graduate of the University of Louisville School of Law and is licensed to practice law in Kentucky. She formerly practiced with McMurry and will continue her practice concentrating primarily in the area of catastrophic personal injury litigation. McMurry has been practicing law in Kentucky for 30 years and is board certified in medical and legal malpractice by the American Board of Professional Liability Attorneys.

IN THE NEWS

Chief Judge James Shake of the Jefferson Circuit Court was recently honored as the 2009 Henry V. Pennington Outstanding Trial Judge by the Kentucky Justice Association. The award is given annually to one member of the bench who demonstrates a high standard of ethical conduct, fairness in all court proceedings, and a consistent understanding of and appreciation for the art of trial practice and the right to trial by jury.

BOWLING GREEN

Steven Downey was recently honored as the 2009 Peter Perlman Outstanding Trial Lawyer by the Kentucky Justice Association. The award is given annually to one member who demonstrates exceptional talent as a trial practitioner, fights for the rights of consumers – even when cases and causes may be unpopular, shares his or her legal talents with young lawyers and other members of the bar, and gives back to the legal profession by working with others to protect America’s constitutional right to trial by jury.

The American Bar Association recently announced that Wm. T. (Bill) Robinson III of Frost Brown Todd LLC has been appointed to serve as chair of the American Bar Association Standing Committee on Governmental Affairs. Additionally, he will serve as a member of the ABA Strategic Planning Committee for the coming year and will continue to serve on the American Bar Foundation Board and on the ABA Retirement Funds Board. Robinson is currently an unopposed candidate for ABA President-Elect 2010 with the vote on his candidacy to be held in February 2010 at the ABA Mid-Year Meeting in Orlando, Florida.

The Bowling Green law firm of Kerrick, Stivers, Coyle & Van Zant, PLC is pleased to congratulate Scott D. Laufenberg for being recognized as a Star of the Year for his work as the Communications Director of ABA Young Lawyers Division during the 2008-2009 bar year. During his tenure, Laufenberg oversaw the Division’s two print publications, The Young Lawyer and The Affiliate, and the Division’s strategic use of its website and other electronic media. Laufenberg was also nominated by the ABA Young Lawyers Division Council to be a Fellow of the ABA Young Lawyers Division.

Bob Hoffer, partner at Dressman Benzing LaVelle in Crestview Hills, was recently named as one of the six Leaders of Distinction as part of the 30th anniversary of Leadership Northern Kentucky (LNK). Hoffer, a graduate of the LNK Class of 2007, and his fellow

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WHO, WHAT, WHEN & WHERE

The honorees were formally inducted at the NKY Chamber’s annual dinner on Tuesday, September 29, 2009. As class vice president and chair of his class project for LNK, Hoffer helped raise more than $60,000 to construct a covered play area for the residents at Northern Kentucky Children’s Home.

Joseph A. Cleves, Jr., also a partner at Dressman Benzinger LaVelle, was recently published by the American Bar Association in their Under Construction August 2009 journal. Cleves authored an article entitled “Why Lean Economic Times Call for Lean Construction.” Cleves has published a number of lean construction articles in local and national outlets including the Cincinnati Business Courier, the Builder’s Exchange and Grant Thornton’s nationally distributed newsletter. He is the firm’s liaison with the Lean Construction Institute and is currently working to establish a Greater Cincinnati area chapter. Cleves also serves on the steering committee of Division Two on Construction Documents of the ABA’s Construction Law Forum.

Stacy Christman Blomeke, a member in the West Chester, Ohio office of Frost Brown Todd LLC, was named a Business Courier’s 2009 Forty Under 40 Award recipient. Forty Under 40 was started in 1995 to identify and recognize the tri-state’s up-and-coming business, community, and economic leaders. Blomeke practices in the areas of estate planning, probate and trust administration, guardianship implementation and management, asset protection, special needs planning, charitable planning, and elder law.

The Cleveland Metropolitan Bar Association (CMBA) has announced that Executive Director D. Larkin Chenault is leaving his post to become the executive director of the Connecticut Bar Association (CBA). He will begin his work with the CBA this month. Chenault has served as the executive director of the Cleveland Metropolitan Bar Association since its formation in March 2008, at which time the Cleveland and Cuyahoga County Bar Associations consolidated. Prior to the consolidation, he worked for nearly eight years as executive director of the Cleveland Bar Association. Before beginning his work in Cleveland in 2000, Chenault served as the executive director of the State Bar of Michigan for six years, as executive director of the Cincinnati Bar Association for seven years, and as assistant director of the Kentucky State Bar Association for nearly four years.

Earl F. “Marty” Martin, a 1987 graduate of the University of Kentucky College of Law, has accepted the position of Gonzaga University’s Acting Academic Vice President for the 2009-2010 academic year. Martin became dean of Gonzaga University School of Law on July 1, 2005. Prior to joining Gonzaga, he served as associate dean and professor of law at Texas Wesleyan University School of Law in Fort Worth, Texas. During the 2009-2010 academic year, he will continue his role as dean of the law school with assistance from Professor George Critchlow. Martin received his LL.M. from Yale Law School in 1996 and served twenty years as an active duty and reserve Judge Advocate General in the United States Air Force, retiring in November 2007.

J. Vincent Aprile II, who practices with Lynch, Cox, Gilman & Goodman PSC in Louisville, was elected in August 2009 as one of the two executive directors of the Professional Development Division of the American Bar Association’s Criminal Justice Section. In this new position, Aprile will continue as a member of the ABA’s Criminal Justice Section’s Council, where he has been a member for a number of years. In August 2009, Aprile concluded four years as chair of the editorial board of Criminal Justice magazine. He will remain a member of the editorial board and continue as the author of the magazine’s “Criminal Justice Matters” column. The ABA’s General Practice, Solo & Small Firm Division selected Aprile’s article, “Ghostwriter: The New Legal

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Superhero?” originally published in Criminal Justice, for inclusion in the “Best Articles Published by the ABA” in the March 2009 issue of GPSolo magazine. In August 2009, Aprile also concluded a three-year term as co-chair of the Criminal Justice Section’s Membership Committee.

Louisville attorney and author Carl Wedekind will receive a special recognition award from the National Coalition to Abolish the Death Penalty (NCADP) at its Annual Awards Dinner in January 2010 at the Seelbach Hilton in Louisville. The award will cite his lifetime of work as director of the Kentucky abolition campaign and his two books that have inspired others to work for abolition of the death penalty as a penal option. At the dinner, the Kentucky Department of Public Advocacy (DPA) will receive the Outstanding Legal Service Award from the NCADP. The award will honor the DPA for its tireless work, its excellent training program, and for giving a voice to Kentuckians who could not afford life-saving counsel without its help.

RELOCATIONS

Doug Morris and Lea Player of Morris & Player, PLLC are pleased to announce the relocation of their offices to the Westport Village at 1211 Herr Lane, Suite 205, in Louisville.

Bernard M. Faller and Rhoda Faller have relocated their law firm, Kentucky Elderlaw, PLLC, to 920 Dupont Road, Suite 200, in Louisville. They may be reached by telephone at (502) 581-1111.

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Please do your part to help the Kentucky Bar Association – and your own law practice – go green! Sign up today to have your CLE records sent to your email address on record with the Kentucky Bar Association.

This action will help eliminate excess paper in your office, create a convenient electronic record for your computer files, and help the KBA save countless trees and thousands of dollars currently allocated to mailing this paper file each year. According to KBA officials, substantial savings would be achieved if even one-third of our members made the move to electronic notification.

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

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

Thanks in advance for making this step forward with us!

Have an item for WHO, WHAT, WHEN & WHERE?

The Bench & Bar welcomes brief announcements about member placements, promotions, relocations and honors. Notices are printed at no cost and must be submitted in writing to: Managing Editor, Kentucky Bench & Bar, 514 West Main Street, Frankfort, KY 40601. There is a $10 fee per photograph appearing with announcements. Paid professional announcements are also available. Please make checks payable to the Kentucky Bar Association. The deadline for announcements appearing in the next edition of Who, What, When & Where is December 1st.
This holiday season, share the stories of 74 lawyers whose careers in communities large and small left indelible marks on the legal profession in the Commonwealth.

Funded by a generous grant from the Kentucky Bar Foundation, *Kentucky Lawyers Speak: Oral History From Those Who Lived It* presents a unique collection of one-on-one conversations with senior members of the Bar – all born between 1903 and 1933 – as they were interviewed over a 15-year period in a project directed by Gerald R. Toner, chairman of the Kentucky Bar Association’s Oral History Project.

The memories of courtrooms past, and the historic times to which these attorneys contributed, unfold in this attractive publication edited by Professor Les Abramson of the Louis D. Brandeis School of Law at the University of Louisville.

*Kentucky Lawyers Speak* preserves for generations to come the life stories and legacies of some of the Commonwealth’s most colorful lawyers, making it an ideal gift for students of history and the law.

**Featured Kentucky lawyers and their counties:**

- Norma Foster Adams, Pulaski
- Philip P. Ardery, Jefferson
- John T. Ballantine, Jefferson
- Ubel O. Barrickman, Barren
- Randolph A. Brown, Jefferson
- Rodney S. Bryson, Kenton
- Woodrow W. Burchett, Floyd
- A.R. Burnam, III, Madison
- James S. Chenault, Madison
- C. Klimer Combs, Fayette
- Charles R. Coy, Madison
- William P. Curtin, Jr., Franklin
- Gordon B. Davidson, Jefferson
- Wilbur Earl Dean, Mercer
- George E. Dudley, Jefferson
- Georgia Mae Nelson Dunn, McCracken
- Marshall P. Eldred, Sr., Jefferson
- James R. Ford, Boone
- Kelsey E. Friend, Sr., Pike
- Fred M. Goldberg, Jefferson
- T. Kennedy Helm, Jr., Jefferson
- Robert C. Hobson, Jefferson
- Elijah M. Hogge, Franklin
- Morton J. Holbrook, Jr., Daviess
- Alva A. Hollon, Perry
- William E. Johnson, Franklin
- Edward H. Johnstone, Caldwell
- David A. Jones, Jefferson
- Ben L. Kessinger, Jr., Fayette
- John H. Klette, Jr., Kenton
- James B. Lenihan, Jefferson
- Joseph L. Lenihan, Jefferson
- Pierce Lively, Boyle
- James Ashlin Logan, Kenton
- Nathan S. Lord, Jefferson
- John C. Lovett, Marshall
- Malcolm Y. Marshall, Jefferson
- Robert F. Matthews, Jr., Jefferson
- Romano L. Mazzoli, Jefferson
- William H. McCann, Sr., Fayette
- Henry Meigs II, Franklin
- Robert L. Milby, Laurel
- William A. Miller, Sr., Jefferson
- John M. Malliken, Warren
- Foster Ockerman, Fayette
- John J. O’Hara, Kenton
- Jo T. Orendorf, Warren
- John S. Palmore, Franklin
- John G. Prather, Sr., Pulaski
- Marvin C. Prince, Marshall
- H.W. Roberts, Jr., Hickman
- Barbara M. Rosenbaum, Fayette
- Samuel M. Rosenstein, Jefferson
- Herbert L. Segal, Jefferson
- Benjamin F. Shobe, Jefferson
- Herbert D. Sledd, Fayette
- Thomas B. Spain, Jr., Hopkins
- Robert M. Spragens, Sr., Marion
- Samuel J. Stalling, Jefferson
- Samuel Steinfeld, Jefferson
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- Joseph E. Stopher, Jefferson
- Rucker Todd, Jefferson
- Henry A. Triplett, Jefferson
- Robert J. Turley, Fayette
- Roy N. Vance, Jr., Franklin
- Cass R. Walden, Metcalfe
- Frank G. Ware, Boone
- John K. Wells, Johnson
- Henry O. Whitlow, McCracken
- Leonard E. Wilson, Russell
- Lively M. Wilson, Jefferson
- Natalie Steams Wilson, Fayette
- Wilson W. Wyatt, Sr., Jefferson

Copies of *Kentucky Lawyers Speak* are available from the publisher, Butler Books. The 552-page hardcover book is $24.95 plus shipping & handling and sales tax, if applicable. It may be purchased online at www.butlerbooks.com, by faxing your order to (502) 897-9797, by mailing your order to Butler Books, P.O. Box 7311, Louisville, KY 40207, or by contacting Butler Books at (502) 897-9393.
Legally Insane by Jim Herrick

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KBA ANNUAL CONVENTION

2010

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TARGETED ATTORNEYS
The University of Kentucky College of Law is inviting applications for two entry-level tenure-track faculty positions beginning in the fall of 2010 to fill curricular needs in tax and in civil procedure, evidence, and related courses. The College of Law is an important part of a major research university and offers a collegial and supportive atmosphere for its faculty, staff, and students. Applicants should have a J.D. or Ph.D. or equivalent degree and a record of high academic achievement and should demonstrate promise for excellence in teaching and in scholarly productivity. The College of Law is committed to enhancing the diversity of its faculty and particularly seeks applications from women, members of minority groups, and others whose background may add to that diversity. Applicants should send a letter of application and résumé to Eugene R. Gaetke, Chair, Faculty Appointments Committee, by mail at the University of Kentucky College of Law, Lexington, KY 40506-0048, or by email and attachment at ggaetke@email.uky.edu. The University of Kentucky is an Equal Opportunity University.
Login Instructions for KBA members:

• Go to the Kentucky Bar Association website http://www.kybar.org
• Click on the “Login” button on the far left of the menu bar
• Enter your KBA Attorney Number in the first field (Username)
• Enter your Password in the second field
  (Your password will either be your date of birth in the form 01/01/19xx or the password you have assigned yourself.)
• Click on the “Log In” button
  After you have logged in, you will notice that the button to the far left on the menu bar now says “Logout” and your name will be on the menu bar to the right
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KBA

Annual Convention

June 16-18, 2010

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