<table>
<thead>
<tr>
<th>Date</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>September 6-7</td>
<td>Bowling Green</td>
</tr>
<tr>
<td>September 19-20</td>
<td>Covington</td>
</tr>
<tr>
<td>September 25-26</td>
<td>Russell (Ashland)</td>
</tr>
<tr>
<td>October 2-3</td>
<td>Prestonsburg</td>
</tr>
<tr>
<td>October 9-10</td>
<td>Owensboro</td>
</tr>
<tr>
<td>October 23-24</td>
<td>Gilbertsville</td>
</tr>
<tr>
<td>October 30-31</td>
<td>Lexington</td>
</tr>
<tr>
<td>November 8-9</td>
<td>London</td>
</tr>
<tr>
<td>November 28-29</td>
<td>Louisville</td>
</tr>
</tbody>
</table>
© 2012 by the Kentucky Bar Association Continuing Legal Education Commission: Mary E. Cutter, Lori J. Alvey, Dianna L. Moore, Ben R. Swartz, Jennifer B. Keitz and Sarah M. Tate, Editors.
All rights reserved.
Published 2012.
Printed by Post Printing Company.

Editor's Note: The materials included in this Kentucky Law Update Handbook are intended to provide current and accurate information about the subject matter covered. The program materials were compiled for you by voluntary authors. No representation or warranty is made concerning the application of the legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how any particular judge or jury will interpret or apply such principles. The proper interpretation or application of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of Kentucky Law Update disclaim liability therefore. Attorneys using these materials, or information otherwise conveyed during the program, in dealing with a specific legal matter have a duty to research original and current sources of authority.
# 2012 Kentucky Law Update

## Table of Contents

For Your Information .................................................................................................................. iii

Program Schedule .................................................................................................................... vii

### Day One

- KBA News and Updates ....................................................................................................... 1-1
- Kentucky Supreme Court Update ...................................................................................... 1-13
- Legislative Update ........................................................................................................... 1-97
- KBA Mentoring Update ..................................................................................................... 1-157
- High-Functioning Impairment: Identification, Ethical Duties and Solutions ..................... 1-165
- Nuts & Bolts: Procedural Basics in Disciplinary Proceedings ............................................. 1-181
- Kentucky Court of Appeals Update ................................................................................... 1-191
- Federal Court Update ....................................................................................................... 1-283

### Day Two, Morning

**Money Matters**

- Foreclosure Defense: How Wall Street Messed up and What You Can Do about It ............. 2-1
- Bankruptcy: Planning Ahead to Pick up the Pieces ............................................................... 2-43
- The ABCs of IRS Audits, Appeals and Settlements ............................................................. 2-49

**2012 Technology Trends**

- Cost Effective Technology to Improve Your Practice ....................................................... 3-1
- The Ethics of Social Media: Is It Incompatible with Law Practice? .................................... 3-21
- E-Discovery Hot Topics for Kentucky Lawyers ................................................................. 3-35
Day Two, Afternoon

**Legal Potpourri**

Personal Injury Trial Fundamentals ................................................................. 4-1

Labor and Employment Law: Updates and Strategies ........................................ 4-11

Alphabet Soup? A Primer on Environmental Law (Understanding RCRA, CERCLA, TSCA, FIFRA, CWA, and the Clean Air Act) .................................................... 4-29

**Estate Planning and Elder Law**

Estate Planning and Probate: Update (Recent Developments and a Discussion of HB 155) and Kentucky Inheritance Tax and the Implications for Your Practice .................. 5-1

The “Real” Role of a GAL with a Brief Elder Law Legislative Update .................... 5-31

A Retirement Fund Primer ....................................................................................... 5-75

**Our Sponsors**

Kentucky IOLTA/Bar Foundation .............................................................................. A-1

Lawyers Mutual Insurance Company of Kentucky .................................................. A-2

National Insurance Agency, Inc. .............................................................................. A-3
FOR YOUR INFORMATION . . .

The Kentucky Law Update: Continuing Legal Education for All Kentucky Lawyers

The Supreme Court of Kentucky established the Kentucky Law Update Program as an element of the minimum continuing legal education system adopted by Kentucky attorneys in 1984. Each fall the Kentucky Bar Association presents the program in various locations around the Commonwealth -- at least one in each Supreme Court district. This program offers every Kentucky attorney the opportunity to meet the 12.5 credit CLE requirement, including the 2.0 credit ethics requirement -- close to home and at no additional cost! Judges can also earn continuing judicial education credits at the Kentucky Law Update program.

This program was designed as a service to all Kentucky attorneys, regardless of level of experience. This service is supported by membership dues and is, therefore, each member's program. The program is a survey of current issues, court decisions, ethical opinions, legislative and rule changes, and other legal topics of general interest that are faced by the Kentucky practitioner on a daily basis. As such, the program serves both the general practitioner and the practitioner who limits his or her practice to a particular field of the law. The Kentucky Law Update program is not intended, nor designed, to be an in-depth analysis of a particular topic. It is designed to alert the lawyers of Kentucky to changes in the law and rules of practice that impact the daily practice of law.

About the Handbooks and Presentations

Handbook materials are the result of the combined efforts of numerous dedicated professionals from around Kentucky and elsewhere. The KBA gratefully acknowledges the following individuals who graciously contributed to this publication:

Lori J. Alvey
Edward J. Buechel
Benjamin W. Carter
Jennifer J. Cave
Robbie Owen Clements
Robert M. Croft, Jr.
Amy D. Cubbage
Mary E. Cutter
Joshua R. Denton
Cathy W. Franck
Donna S. Harkness
P. Yvette Hourigan
Ellen Arvin Kennedy
Robert L. McClelland
Escum L. "Trey" Moore III
Walter R. Morris, Jr.
W. Douglas Myers
Jesse L. Robbins
Bradley J. Sayles
Philip J. Schworer
Jimmy A. Shaffer
Zoraida M. Vale
Misty Clark Vantrease
Robert C. Webb
James C. Worthington
Nicholas J. Ziepfel

Special Acknowledgments

Special thanks to the following KBA Sections, Committees and other organizations whose participation and assistance with the 2012 Kentucky Law Update programs have been invaluable:

KBA Elder Law Section
KBA Environment, Energy & Resources Law Section
KBA Office of Bar Counsel
KBA Probate & Trust Law Section
KBA Young Lawyers Division

Kentucky Administrative Office of the Courts
Kentucky Court of Appeals
Kentucky Lawyers Assistance Program
Legislative Research Commission
Supreme Court of Kentucky
Presentations are also made on a voluntary basis. To the over one hundred and fifty individuals who volunteer in this capacity, special gratitude is owed. Individuals contributing to this program are contributing to the professional development of all members of the Kentucky Bar Association. While at the time of printing this handbook all speakers are not yet identified, we wish to express our gratitude for those already committed to live presentations. Included are:

Justice Lisabeth Hughes Abramson
Chief Judge Glenn E. Acree
Paul Alley
E. Kenly Ames
Amy D. Cubbage
Allison Carroll Anderson
Judge William O. Bertelsman
Tiffany J. Bowman
Kelli E. Brown
Edward J. Buechel
Helen G. Bukulmez
Daniel E. Burke
Judge Michael O. Caperton
Benjamin W. Carter
Jennifer J. Cave
Mariani J. Clay
Judge Denise G. Clayton
Robbie Owen Clements
Judge Sara W. Combs
Vance W. Cook
Robert M. Croft, Jr.
Justice Bill Cunningham
Elizabeth A. Deener
Joshua R. Denton
Judge Donna L. Dixon
Amy E. Dougherty
Charles E. "Buzz" English, Jr.
Bernard M. Faller
Rhoda G. Faller
Representative Joseph M. Fischer
Cathy W. Franck
Lee P. Geiger
Kenneth J. Gish, Jr.
Representative Sara Beth Gregory
Charles F. Hoffman
Representative Jeff Hoover
Zachry A. Horn
P. Yvette Hourigan
Frederick G. Irzt II
J. Andrew Johnson
Margaret E. "Maggie" Keane
Judge Michelle M. Keller
Ellen Arvin Kennedy
Carolyn L. Kenton
Matthew S. Kirby
Judge James H. Lambert
Richard C. Larkin
Lynda H. Mathews
Judge Irvin G. Maze
Robert L. McCleland
Chief Justice John D. Minton, Jr.
Escum L. "Trey" Moore III
Kris D. Mullins
W. Douglas Myers
Senator Gerald A. Neal
Judge Christopher S. Nickell
Deputy Chief Justice Mary C. Noble
Shari Polur
Pamela H. Potter
John R. Potter
Julie R. Pugh
Ryan C. Reed
Henry C.T. Richmond III
Jesse L. Robbins
Thomas L. Rouse
Bradley J. Sayles
Justice Wil A. Schroder
Philip J. Schworer
Justice Will T. Scott
Elizabeth W. Sigler
Mark W. Starnes
Senator Kathy Stein
Judge Janet L. Stumbo
Judge Jeff S. Taylor
Robin B. Thomerson
Judge Kelly D. Thompson
Ronald R. Van Stockum, Jr.
Misty Clark Vantrease
Judge Lawrence B. VanMeter
Senator Robin L. Webb
Robert C. Webb
Whitney M. Wilson
James C. Worthington
Representative Brent Yonts
CLE and Ethics Credit

Attendance at all sessions qualifies attorneys for 12.5 credits of CLE, including up to 3.0 ethics credits. One credit is awarded for each sixty minutes of actual instruction as noted on the agenda provided at the program site. The presentations “High-Functioning Impairment: Identification, Ethical Duties and Solutions,” “Nuts & Bolts: Procedural Basics in Disciplinary Proceedings,” and “The Ethics of Social Media: Is It Incompatible with Law Practice?” are designated as ethics credits.

The Kentucky Bar Association 2012 Kentucky Law Update is an accredited CLE activity in numerous other jurisdictions. Credit categories and credit calculations vary from state-to-state. Please check with KBA staff at the registration desk for instructions regarding out-of-state CLE credit reporting. Attorneys reporting to the Ohio Supreme Court CLE Commission are especially encouraged to get specific instructions from the staff regarding Substance Abuse and Professionalism credits.

Kentucky Judges, don’t forget you can claim CJE credit for attending this program.

REMEMBER! It is very important that you complete the attendance form included in your materials, sign it, and leave it at the KBA registration desk before you leave the program. It is also important that you use your full name, your five-digit attorney ID number, and write legibly to assure proper credit to your attorney record. Credits cannot be registered without your KBA five-digit attorney ID number.

Special Note: Ethics Credit

The presentations “High-Functioning Impairment: Identification, Ethical Duties and Solutions,” “Nuts & Bolts: Procedural Basics in Disciplinary Proceedings,” and “The Ethics of Social Media: Is It Incompatible with Law Practice?” qualify for ethics credit. This program offers attending attorneys the opportunity to meet the annual two-credit ethics requirement at one program. Do not miss these presentations! Do not forget to report ethics credits on your attendance form!

Evaluations

The 2012 Kentucky Law Update is your program and your input is valued and needed. PLEASE take a few minutes to complete the evaluation questionnaire included in your materials and return it to the KBA registration desk before you leave the program. We appreciate your assistance in improving this service.
Kentucky Bar Association
2012-2013 Board of Governors

W. Douglas Myers
President
Hopkinsville

Thomas L. Rouse
President-Elect
Erlanger

William E. Johnson
Vice-President
Frankfort

Margaret E. “Maggie” Keane
Past President
Louisville

Jacqueline S. Wright
Chair, Young Lawyers Division
Maysville

Douglas C. Ballantine
Louisville

Anita M. Britton
Lexington

Douglass Farnsley
Louisville

Jonathan Freed
Paducah

William R. Garmer
Lexington

Richard W. Hay
Somerset

Sereti G. Jaggers
Princeton

Thomas N. Kerrick
Bowling Green

David V. Kramer
Crestview Hills

Earl M. “Mickey” McGuire
Prestonsburg

Robert A. "Bobby" Rowe, Jr.
Prestonsburg

J. Stephen Smith
Ft. Mitchell

R. Michael Sullivan
Owensboro

M. Gail Wilson
Jamestown

2012-2013 Continuing Legal Education Commission

Deborah B. Simon
First Supreme Court District

Matthew P. Cook
Second Supreme Court District

Julie Roberts Gillum
Third Supreme Court District

Janet Jakubowicz, Chair
Fourth Supreme Court District

Janis E. Clark
Fifth Supreme Court District

Shane C. Sidebottom
Sixth Supreme Court District

William Mitchell Hall, Jr.
Seventh Supreme Court District

Justice Wil A. Schroder
Supreme Court Liaison

Kentucky Bar Association CLE Staff

John D. Meyers
Executive Director

Mary E. Cutter
Director for CLE

Lori J. Alvey
Program & Publications Attorney

Coleen Kilgore
Attorney Records Coordinator

Leona Deleon
CLE Regulatory Coordinator

Jennifer B. Keitz
Program & Publications Coordinator

Dianna L. Moore
Program & Publications Coordinator

Ben Swartz
Program & Creative Services Coordinator

Clifford D. Timberlake
Accreditation Coordinator

Dianna L. Moore
Program & Publications Coordinator
Program Schedule
This program has been approved in Kentucky for 12.50 CLE credits including up to 3.00 ethics credits.

### DAY ONE

<table>
<thead>
<tr>
<th>TIME</th>
<th>UPDATES AND ETHICS</th>
<th>CLE CREDITS</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:00 a.m. - 8:15 a.m.</td>
<td>Registration &amp; Welcome</td>
<td></td>
</tr>
<tr>
<td>8:15 a.m. - 8:30 a.m.</td>
<td>KBA News and Updates</td>
<td>0.25 CLE Credits</td>
</tr>
<tr>
<td>8:30 a.m. - 9:45 a.m.</td>
<td>Kentucky Supreme Court Update</td>
<td>1.25 CLE Credits</td>
</tr>
<tr>
<td>9:45 a.m. - 10:00 a.m.</td>
<td>BREAK</td>
<td></td>
</tr>
<tr>
<td>10:00 a.m. - 10:30 a.m.</td>
<td>Legislative Update</td>
<td>0.50 CLE Credits</td>
</tr>
<tr>
<td>10:30 a.m. - 11:00 a.m.</td>
<td>KBA Mentoring Program Update</td>
<td>0.50 CLE Credits</td>
</tr>
<tr>
<td>11:00 a.m. - 12:00 p.m.</td>
<td>High-Functioning Impairment: Identification, Ethical Duties and Solutions</td>
<td>1.00 Ethics Credit</td>
</tr>
<tr>
<td>12:00 p.m. - 1:15 p.m.</td>
<td>LUNCH (on your own)</td>
<td></td>
</tr>
<tr>
<td>1:15 p.m. - 2:15 p.m.</td>
<td>Nuts &amp; Bolts: Procedural Basics in Disciplinary Proceedings</td>
<td>1.00 Ethics Credit</td>
</tr>
<tr>
<td>2:15 p.m. - 3:15 p.m.</td>
<td>Kentucky Court of Appeals Update</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>3:15 p.m. - 3:30 p.m.</td>
<td>BREAK</td>
<td></td>
</tr>
<tr>
<td>3:30 p.m. - 4:30 p.m.</td>
<td>Federal Court Update</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>4:30 p.m.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Day One Total: 6.5 CLE Credits including 2.0 Ethics Credits

### DAY TWO

**MORNING SESSIONS**

<table>
<thead>
<tr>
<th>TIME</th>
<th>MONEY MATTERS</th>
<th>CLE CREDITS</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:15 a.m. - 8:30 a.m.</td>
<td>Opening Remarks &amp; Announcements</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>8:30 a.m. - 9:30 a.m.</td>
<td>Foreclosure Defense: How Wall Street Messed up and What You Can Do about It</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>9:30 a.m. - 10:30 a.m.</td>
<td>Bankruptcy: Planning Ahead to Pick up the Pieces</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>10:30 a.m. - 10:45 a.m.</td>
<td>BREAK</td>
<td></td>
</tr>
<tr>
<td>10:45 a.m. - 11:45 a.m.</td>
<td>The ABCs of IRS Audits, Appeals and Settlements</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>11:45 a.m. - 1:00 p.m.</td>
<td>LUNCH (on your own)</td>
<td></td>
</tr>
</tbody>
</table>

Session Total: 3.0 CLE Credits
### DAY TWO

#### MORNING SESSIONS (CONT'D)

<table>
<thead>
<tr>
<th>TIME</th>
<th>2012 TECHNOLOGY TRENDS</th>
<th>CLE CREDITS</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:15 a.m. - 8:30 a.m.</td>
<td>Opening Remarks &amp; Announcements</td>
<td></td>
</tr>
<tr>
<td>8:30 a.m. - 9:30 a.m.</td>
<td>Cost Effective Technology to Improve Your Practice</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>9:30 a.m. - 10:30 a.m.</td>
<td>The Ethics of Social Media: Is It Incompatible with Law Practice?</td>
<td>1.00 Ethics Credit</td>
</tr>
<tr>
<td>10:30 a.m. - 10:45 a.m.</td>
<td>BREAK</td>
<td></td>
</tr>
<tr>
<td>10:45 a.m. - 11:45 a.m.</td>
<td>E-Discovery Hot Topics for Kentucky Lawyers</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>11:45 a.m. - 1:00 p.m.</td>
<td>LUNCH (on your own)</td>
<td></td>
</tr>
</tbody>
</table>

**Session Total: 3.0 CLE Credits including 1.0 Ethics Credit**

#### AFTERNOON SESSIONS

<table>
<thead>
<tr>
<th>TIME</th>
<th>LEGAL POTPOURRI</th>
<th>CLE CREDITS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1:00 p.m. - 2:00 p.m.</td>
<td>Personal Injury Trial Fundamentals</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>2:00 p.m. - 3:00 p.m.</td>
<td>Labor and Employment Law: Updates and Strategies</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>3:00 p.m. - 3:15 p.m.</td>
<td>BREAK</td>
<td></td>
</tr>
<tr>
<td>3:15 p.m. - 4:15 p.m.</td>
<td>Alphabet Soup? A Primer on Environmental Law (Understanding RCRA, CERCLA, TSCA, FIFRA, CWA, and the Clean Air Act)</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>4:15 p.m.</td>
<td>ADJOURN</td>
<td></td>
</tr>
</tbody>
</table>

**Session Total: 3.0 CLE Credits**

#### DAY TWO

#### AFTERNOON SESSIONS

<table>
<thead>
<tr>
<th>TIME</th>
<th>ESTATE PLANNING AND ELDER LAW</th>
<th>CLE CREDITS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1:00 p.m. - 2:00 p.m.</td>
<td>Estate Planning and Probate: Update (Recent Developments and a Discussion of HB 155) and Kentucky Inheritance Tax and the Implications for Your Practice</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>2:00 p.m. - 3:00 p.m.</td>
<td>The &quot;Real&quot; Role of a GAL with a Brief Elder Law Legislative Update</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>3:00 p.m. - 3:15 p.m.</td>
<td>BREAK</td>
<td></td>
</tr>
<tr>
<td>3:15 p.m. - 4:15 p.m.</td>
<td>A Retirement Fund Primer</td>
<td>1.00 CLE Credit</td>
</tr>
<tr>
<td>4:15 p.m.</td>
<td>ADJOURN</td>
<td></td>
</tr>
</tbody>
</table>

**Session Total: 3.0 CLE Credits**
I. WELCOME

I appreciate the opportunity you have given me to serve as president of the Kentucky Bar Association. With more than 17,200 members, the KBA carries forth a rich tradition of professionalism and service. I am excited to be a part of this.

Each of us comes to the practice of law with diverse experiences and varied interests. We may approach the practice of law differently, or manage the business of our offices differently, but I believe we all have one overriding concern that dictates the course of our lives and of our daily activities -- we care about those people for whom we have assumed a personal and professional responsibility, those who have asked us to be their lawyers.

My goal for this year is to ensure that the KBA works to assist each of you to carry out your mission as lawyers. I invite you to work with the KBA, on its committees and in its educational programs. I hope you will join in our efforts to “maintain a proper discipline of the members of the Bar,” “to ensure a continuing high standard of professional competence,” and to promote “the efficiency and improvement of the judicial system,” as directed by the Kentucky Supreme Court.

The KBA welcomes volunteers who would like to work in any number of areas, including Continuing Legal Education, Pro Bono service, monitoring advertising and promoting diversity, to name a few. We all have important roles to play in striving to reach these objectives. If you are interested in participating, please contact me or the KBA staff at the Kentucky Bar Center in Frankfort.

As members of this association, it is imperative that we focus on the reason for our professional existence -- the well-being of those we represent. This premise will guide each decision I make during my term as President, and I ask for your assistance in helping the KBA promote this crucial goal.

II. SCR 3.025: KENTUCKY BAR ASSOCIATION

"The mission and purpose of the association is to maintain a proper discipline of the members of the bar in accordance with these rules and with the principles of the legal profession as a public calling, to initiate and supervise, with the approval of the court, appropriate means to insure a continuing high standard of professional competence on the part of the members of the bar, and to bear a substantial and continuing responsibility for promoting the efficiency and improvement of the judicial system."

This rule of the Kentucky Supreme Court arises from its authority under the Kentucky Constitution to govern the practice of law. Section 116 states: “The

Author may be reached at dmyers@dmlfirm.com.

1-1
Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.” The KBA Board of Governors abides by the objectives set forth in the Rules.

The programs of the Bar and its commissions and committees are used to accomplish its goals and mission. The Board is also cognizant of its responsibility to the lawyers of Kentucky as set forth in the requirements of the United States Supreme Court in Keller v. State Bar of California, 496 U.S. 1 (1990) and its progeny. The Board governs the KBA in a manner consistent with those limitations. The guiding standard is whether the program or expenditure of the KBA is necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the Commonwealth. The discipline and education functions of the Bar as described below illustrate how the KBA accomplishes these goals.

III. ATTORNEY DISCIPLINE AND CONSUMER ASSISTANCE

The Office of Bar Counsel (OBC) is the investigative arm of the disciplinary process on behalf of the Kentucky Supreme Court. Over the last several years, there have been significant changes in the discipline system that have been supported by the Inquiry Commission, the KBA Board of Governors, and approved or implemented by the Kentucky Supreme Court.

These changes were undertaken to increase the responsiveness to complainants; increase the speed of resolution of many complaints; reduce backlog; increase help to lawyers who demonstrate a lack of understanding of how the rules apply; and to increase public confidence in regulation by the Supreme Court, the KBA and the Inquiry Commission.

- Enhancements to the Discipline System:

  1. Establishment of a “diversion” central intake system for certain types of bar complaints, providing informal warnings and referrals to resources for education or assistance.

Amendments to the Supreme Court Rules created a “diversion” alternative analogous to that available in some other states. This process is under the Direction of the Inquiry Commission and creates a set of more flexible options for resolution of what appear as “low level” violations. The process incorporates the previous stand-alone Client Assistance and includes informal “complaints” for review in the diversion process. Key components of the diversion review are:

  a. Inclusion of sworn and unsworn complaints in a centralized intake process with assignment of each matter stating a colorable violation to an OBC attorney.
b. Informal preliminary investigation through contact with the attorney to determine if the matter has been addressed or requires some follow up by the attorney. Such matters include return of client files, refund or clarification of unearned fees and/or the lawyer communicating with the client about a particular matter.

c. The available option of processing the matter through the formal process to the Inquiry Commission if more significant issues appear or the matter cannot be adequately addressed informally.

2. Providing the KBA Office of Bar Counsel the ability to investigate and try to resolve or close minor issues between the public and a lawyer. This is done under Inquiry Commission guidelines, but before the formal complaint/response system that submits a bar complaint to the Inquiry Commission.

3. Last fiscal year about fifty-six percent (56%) – over half of the complaints were processed through that informal resolution and diversion rule. The average time to conclusion in these complaints was twenty (20) work days.

4. Use of remedial education in ethics, in management or in a particular area that the lawyer needs to learn to avoid future difficulties.

5. Providing the Inquiry Commission with the ability to conditionally dismiss bar complaints it reviews to try to correct the problem, rather than relying solely on Private Admonitions or Charges.

6. Use of the resources of the Kentucky Lawyer Assistance Program (KYLAP) for disciplinary probation or referral in diversion. This is separate from its confidential mission.

7. Enhanced and more varied use of probation of suspensions with conditions to help the lawyer overcome the issues that caused the disciplinary issue and thus help future clients.

8. Amendment to the fee arbitration and legal negligence arbitration rules to streamline that process for use, not only in voluntary cases, but as a condition of discipline or diversion. Referral is available for resolution of issues arising in complaints, and for other members of the Bar.

9. The creation and use of a remedial ethics program for lawyers who could benefit from additional training on ethics issues that commonly arise. The Ethics Professionalism and Enhancement Program (EPEP) was initially developed and implemented, in part, through a grant from the Bar Foundation. EPEP is now funded by the fees of attendees. A total of 136 lawyers have completed the
course. Completion of EPEP results in the dismissal of the diverted complaint. The Supreme Court often refers lawyers to EPEP as part of discipline. This program focuses on the Rules of Professional Conduct.

10. Providing earlier information to the public about the pendency of disciplinary proceedings in serious cases related to temporary suspension, criminal charges, reciprocal discipline from other states, or adjudication of misconduct in civil cases. This was made possible by amendments to SCR 3.150 in early 2008.

11. Complaints referred to the Inquiry Commission for its review after written response now average nine months to be processed through the investigation stage. In addition there are often complaints opened which are held in abeyance due to pending criminal charges, which implicate the right of the Respondent under the Fifth Amendment. They can also be held in abeyance due to pending civil litigation on the same matter, which may result in findings relevant to or conclusive in the discipline case. In the event a charge is issued, of course, due process rights and the requirements of litigation and appeal result in substantially longer time periods to complete the case.

12. The median time for a charge to reach the Court after issuance to submission is twelve months. However, consistent averages indicate less than 1 percent of all licensed Kentucky lawyers have a charge lodged against them in a given year.

13. Amending the Rules of Professional Conduct, which the Court completed in July 2009, to be more in conformity with other states based in large part on the ABA Ethics 2000 Model Rules.

14. Reference to the ABA Model Standards of Discipline as another source to assist the Board and the Court in consistency of imposing discipline.

15. Use of “consensual” discipline, which is an agreed resolution where the lawyer and the KBA come to an agreement for appropriate discipline on a charge, and ask the Court to approve it. This assists respondents and former clients in getting the case resolved without hearings, appeals, and generally with less expense. Approximately thirty-nine percent (39%) of the charges were resolved in this manner in Fiscal Year 2011-2012.

16. Enhancing the ability of complainants to learn about and obtain applications to the Clients’ Security Fund (CSF), and reorganizing its procedures to assist victims of theft by their lawyer to recoup losses.
IV. CLIENTS’ SECURITY FUND

The Clients’ Security Fund (CSF) is “a special fund for the purpose of providing indemnification to clients who may suffer pecuniary loss by reason of fraudulent or dishonest acts on the part of a member of the Kentucky Bar Association.” SCR 3.820. A percentage of the annual KBA dues supports the Fund: ($7 per active members and $6 for judges.) The OBC is the processing agent for the Fund. Claims submitted to the Fund are adjudicated by five Trustees. These Trustees consist of lawyer and non-lawyer members, and are appointed by the Board of Governors.

The Trustees typically meet twice a year to consider claims but must first decide whether a claim meets jurisdictional requirements. Where jurisdiction is accepted, those claims are normally placed in abeyance pending the results of any concurrent disciplinary proceedings. Upon the conclusion of the disciplinary case, the Trustees will render a final decision. As a condition of reimbursement, the claimant must subrogate his or her claims against the lawyer to the Fund. The lawyer is liable to the Fund for restitution. The CSF has awarded a little over 1.2 million dollars in the last seven (7) fiscal years.

V. ATTORNEY ADVERTISING

The OBC also works to support the Attorneys’ Advertising Commission (AAC). The AAC consists of nine volunteer lawyers. SCR 3.130-7.03(4) requires the Commission be provided with sufficient administrative assistance from time to time as may be required. The Director and the Board of Governors have delegated this function to the OBC.

The Supreme Court Rules require that all advertisements of legal services directed to residents of Kentucky or which originate in Kentucky be submitted for review. Advertisements include billboards, brochures, print, radio, television, websites, and yellow pages, among others. Generally, all advertisements must be submitted simultaneous to their publication. There is also an Advisory Opinion option for submission which gives lawyers information about their advertisement’s compliance with the rules before it is published. The Commission is not required to review all advertisements that are submitted for review; rather, a certain number are selected for review each month.

The Commission meets in three panels of three members to review advertisements selected for review that were submitted in the prior month. At a minimum, there is one panel meeting per month to review print, radio and television advertisements. When necessary, a second teleconference call panel meeting is held in the month to discuss website advertisements. When possible, the two meetings are combined into a single in-person panel meeting.

The number of advertisements submitted to the Commission has increased significantly through the years, as the following table indicates:
The AAC, with the staff support of the OBC, assists lawyers by advising them if their advertisement complies with the Rules of Professional Conduct, SCR 3.130(7.01-7.50). The Commission strives to protect the public within the confines of the constraints imposed on it by the U.S. Supreme Court's interpretation of the First Amendment right of free speech, as applied to commercial speech. It pays particular attention to review of advertisements that may be false, misleading or deceptive.

VI. CONTINUING LEGAL EDUCATION AT THE KBA: ADVANCING THE PROFESSION THROUGH EDUCATION

A. Introduction

The mission of the CLE Commission is set by Supreme Court Rule: “To initiate and supervise, with the approval of the Court, appropriate means to insure a continuing high standard of professional competence on the part of the members of the Bar.” CLE efforts reflect this mission through commitment to the maintenance and improvement of each member's legal competency and professional values, and commitment to a lifetime of learning, reinforcement of professional values and skills development through CLE. These commitments are implemented through a comprehensive program of CLE regulatory activities, programming activities and special projects aimed at reaching all Kentucky lawyers.

B. Kentucky Law Update

The Kentucky Bar Association spends well over $200,000 annually to bring you a comprehensive survey of the changes in law and rules Kentucky practitioners need to be aware of for their daily practice. The Kentucky Law Update programs are offered at nine different locations across the state. This is the only mandatory state bar association in the country that offers a service whereby a member can attend a program, paid for as a member service through attorney dues with no additional registration fee, and earn the entire annual CLE requirement close to home. Not only does this program series provide the ethics credits and
important updates needed, it offers special programming options to allow members to focus on certain areas of practice that are of particular interest to them. This program depends on your dues dollars as well as thousands of volunteer hours.

C. New Lawyer Program

For more than a decade, the KBA has provided the New Lawyer Program, a mandatory two-day program for all new KBA members that must be completed within the first year of practice (SCR 3.652). This program was specifically designed to assist in the transition from academia to reality by focusing on practical tips and professional values for our newest members. The program is led by a volunteer faculty of leaders in the Kentucky legal profession. The program is offered twice annually, in January/February and in June in conjunction with our Annual Convention.

D. Online CLE Opportunities

The KBA CLE Commission has also taken advantage of national partnering opportunities with InReach, through which we now offer an extensive and ever-expanding online program catalog. This is an invaluable service, not only because of the convenience it offers, but also due to the very broad spectrum of timely and top quality CLE offerings made available to KBA members. Through online CLE, last-minute compliance becomes not only easier, but more meaningful to our members.

E. Teleseminars

Utilizing the telephone for live national CLE seminars is another service that the KBA continues to provide. Through yet another resource-protecting partnership with WebCredenza of Denver, Colorado, the KBA offered 191 teleseminars during the 2011-12 educational year. Keep an eye on your email and e-News for details on all teleseminar offerings or check them out at http://ky.webcredenza.com/. Registration for teleseminars is available online at the KBA website. Materials for the seminars are emailed once registration is completed and can be printed from or viewed on your own computer. Re-broadcasts of selected teleseminars are available as live or technological programs as well. It doesn’t get any easier than that!

F. Conclusion

The highest goal of the CLE Commission is to provide a useful and efficient service to members of the KBA; to truly have lawyers think of CLE as a close and valued partner for maintaining and improving their practice and their professionalism. This is undertaken by the programs above as well as through improved management and production efforts in the CLE office and through the CLE section of the KBA website. Recent website changes have included improvements to make CLE transcripts,
information and programs more accessible. New additions to the CLE section of the KBA website take place frequently, so bookmark the site and make us your partner in practice so we can serve you better. Don’t forget to send us ideas on how we can continue to improve service to all members.

VII. DIVERSITY IN THE PROFESSION

The Kentucky Bar Association continues its efforts to create a more diversified legal profession in the Commonwealth. Following its formation in 2010, the KBA’s Standing Committee on Diversity in the Profession met to identify the roadblocks in attaining diversity and equity in the legal profession and the Kentucky Bar Association. A new optional survey was added to the 2011-12 dues statement that produced important information regarding the ethnic makeup of the KBA. The committee is currently working to create an agenda to address key issues raised as a result of the survey.

Additionally, the Nathaniel R. Harper Award is presented each year to recognize those individuals or entities who have demonstrated a commitment to diversifying the Kentucky bar by promoting full and equal participation in the legal profession through the encouragement and inclusion of women, minorities, persons with disabilities, people of all sexual orientations and/or other under-represented groups. The award was created by the Young Lawyers Division of the Kentucky Bar Association (YLD) and is presented at the KBA’s Membership Luncheon during the Annual Convention. The award is named for the first African-American judge in Kentucky, who created the Harper Law School in his Louisville law office at a time when African-Americans were prohibited from attending Kentucky’s law schools. The YLD named the award for Harper in recognition of his efforts to create opportunities for others.

Created by the YLD in June, 2010, the “Why Choose Law: Diversity Matters” program encourages young people from diverse backgrounds to become lawyers and practice in Kentucky. The program identifies high school students from each Supreme Court District to participate in the day-long program focused on the varying functions of the state and federal court systems. The students also participate as a jury in a mock trial demonstration; eat lunch with the KBA’s Board of Governors and other attorneys; tour large and small law firms; and hear a panel of practitioners discuss what it is like to practice law. The “Why Choose Law: Diversity Matters” program was created to promote interest among students who belong to groups typically underrepresented in law school classes, including racial and ethnic minorities and those with varied religious, socio-economic, and sexual orientation backgrounds.

VIII. THE KENTUCKY LAWYER ASSISTANCE PROGRAM

The Kentucky Lawyer Assistance Program (KYLAP) is a program of the Kentucky Bar Association that offers help to the Kentucky legal community troubled by alcohol and drug abuse problems, compulsive gambling, other types of addictive disorders, stress, depression, and similar conditions which may impair these individuals’ ability to practice law in a competent and professional manner.
Referrals to KYLAP may be in one of four ways: self, third-party, agency (such as Office of Bar Counsel (OBC) and Office of Bar Admissions (OBA), and from the Supreme Court of Kentucky.

Because of the sensitive nature of addiction and psychological problems, lawyers are often reluctant to seek assistance or approach a fellow lawyer who is experiencing these problems. Recognizing this concern, and in order to foster early and totally confidential contact with KYLAP, Supreme Court Rule 3.990 guarantees strict confidentiality in all self and third-party referrals. Self and third-party referrals are solely designed to assist individuals who are experiencing problems with any mental, psychological or emotional condition including chemical dependency or addiction that impairs, or may foreseeably impair, their ability to practice law. Due mainly to the strict confidentiality requirements, KYLAP is allowed great flexibility and discretion in the handling of these cases.

Confidentiality does not apply to agency and Court referrals wherein KYLAP may be requested to interview the lawyer involved and give its assessment of the problem to the agency and/or monitor the lawyer’s participation in KYLAP which usually includes a Supervision Agreement. These agency and Court referrals are designed mainly for the protection of the public and to maintain the integrity of the profession and therefore are strictly monitored by KYLAP.

A summary of KYLAP files from 2012 indicates a total number of 774 referrals received in the following manner: 408 third party referrals; 290 self-referrals; seventeen Office of Bar Counsel/Supreme Court of Kentucky referrals; and fifty-nine Office of Bar Admissions referrals. By July 1, 2012, the number of referrals has almost matched the total number received for 2011, providing further evidence of the number of bar members affected negatively by the economic downturn.

KYLAP is fortunate to have more than 100 volunteer lawyers across the state who, when contacted, will go to any lengths to assist and carry the message of recovery to those suffering from impairment. These volunteers are the backbone of KYLAP.

Kentucky Lawyer Assistance Program
KBA Main Number (502) 564-3795
KYLAP Director Cell (502) 724-5904
P.O. Box 1437
Frankfort, KY  40602

IX. THE KBA WEBSITE: AN IMPORTANT TOOL FOR YOUR KENTUCKY PRACTICE

If you haven’t checked out the KBA website recently, you are ignoring one of the most important tools you have access to for your Kentucky practice. While the website has grown and changed over the past few years as greater resources became available to the KBA for upgrades and improvements, many members have still not recognized the rich resources available to them at their fingertips through http://www.kybar.org. Here’s a tip: Take some time to review its many
offerings and then BOOKMARK the site. If you do, you will have the answer to many of your daily questions at your fingertips.

Not only does the site include invaluable information about KBA programs and who to contact for assistance, it includes numerous forms needed for requesting information from, or reporting information to, the KBA. You can also find other KBA members through the “Lawyer Locator” service under the “Resources” tab. You can find Supreme Court Rules, Civil Rules, Criminal Rules, Rules of Evidence, Ethics Opinions and more on the site. Great reference links will take you to state and federal court sites, the Attorney General’s Office, the Legislature and all their activities, administrative regulations and more!

X. CASEMAKER

The KBA website is also a conduit to Casemaker, one of the fastest growing online legal research services available today. This outstanding research tool is offered to all KBA members through the website free of charge. Casemaker includes both state and federal research libraries.

The federal search library contains:

- United States Supreme, Circuit, District and Bankruptcy Court opinions
- Federal Court Rules
- United States Code
- Code of Federal Regulations
- USC Bankruptcy Reform Act
- Constitution
- Internal Revenue Service

The Kentucky search library contains:

- Administrative Regulations
- Attorney General Opinions
- Case Law
- Constitution
- Court Rules
- Federal Court Rules
- Session Laws
- Statutes
- Workers’ Compensation Decisions

All state search libraries are now available and contain at minimum:

- State Case Law
- State Constitution
- State Statutes

Depending on the individual state’s agreement with Casemaker, many state libraries include: local federal rules, reports, links to court forms, jury instructions, "unreported" opinions, bankruptcy decisions, ethics opinions, workers’ compen-
sation opinions, environmental decisions, Attorney General Opinions, court rules, and other legal information as specified by the individual bar's requests.

In the spring of 2010, Casemaker launched version 2.2 with several enhancements and optional services. The new Casemaker 2.2 features many advanced, high-definition search tools, including CASEcheck, a citation tool for use in the future treatment of a case, a vast federal library, access to all state libraries (including the District of Columbia), multistate search, and State and Administrative Codes, all in an aggregated search. In addition, Casemaker 2.2 unveils CASEknowledge, the latest tool available on Casemaker that links your case law searches to appropriate state and ABA publications, as well as law journals. CASEknowledge also includes CaseLink that links online case citations within the publications and journals back to primary case law within Casemaker.

For those just getting started or interested in the latest updates, Casemaker offers both recorded and live webinar training. It also offers recorded videos in various formats for your convenience.

Casemaker recently began offering the new Casemaker as a replacement for Casemaker 2.2. Among the enhanced features available are a Google-like search, and the ability to save search history, make notes, and create file folders. All of this is available to KBA members at no extra cost.

XI. COMMUNICATIONS

The Bench & Bar magazine, the official publication of the Kentucky Bar Association, is published to provide members of the KBA with information that will increase their knowledge of the law, improve the practice of law, and, in a format that both edifies and entertains the reader, keeps the Bar informed on current issues and events within the legal profession. It is a bi-monthly publication, published in January, March, May, July, September and November.

Within the Bench & Bar is a section called The Kentucky Bar News. Its purpose is to update members on committee and section events, local bar association events, news from Kentucky law schools, KBA sponsored CLE seminars and events, and features of potential interest to KBA members.

Additionally, the KBA distributes the monthly KBA e-News by email to provide members with up-to-date bulletins between regular publications of the Bench & Bar magazine.

You can also access timely information and photos by becoming a “fan” of the KBA's Facebook page.
I. ATTORNEYS

An Unnamed Attorney v. Kentucky Bar Ass’n., 345 S.W.3d 851 (Ky. 2011). Opinion and Order.

The Court privately reprimanded Attorney for violating SCR 3.130-1.15(b) during his representation of a client in a personal injury action. He received a document labeled "Assignment of Proceeds, Lien and Authorization" from a chiropractor who treated his client. When the case later settled for $4,000, Attorney deducted his fee and distributed the remaining $2,600 to the client without notifying the chiropractor of the settlement or distribution. Attorney admitted he violated the rule by failing to notify the chiropractor of the settlement and escrowing the balance for distribution to the client and the chiropractor.


The Court restored Attorney to the practice of law. He was previously suspended in December 2009 for nonpayment of bar dues.

Kentucky Bar Ass'n. v. Glidewell, 348 S.W.3d 759 (Ky. 2011). Opinion and Order.

The Court adopted the trial commissioner's recommendation and suspended Attorney for three years for violating SCR 3.130-4.4, 8.3(b), and 8.1(b) (two counts) in three separate disciplinary matters. The first resulted from Attorney's representation of a client in a divorce action. The client had entered into a postnuptial agreement disclaiming any interest, marital or otherwise, in a house that was his wife's premarital property. Attorney withdrew from the representation in November 2004, at which time the client still owed her $2,000 in fees. Attorney filed a Notice of Attorney's Lien against the former client's wife's property in February 2005. In the notice, she claimed she still represented the former client. The former client and his wife thereafter entered an agreement by which he would execute a quitclaim deed conveying any interest in the property he might have to her. The agreement was incorporated into the parties’ divorce decree. Attorney never represented the wife and no longer represented the husband when she filed the lien, and refused to remove it when asked by the wife. The wife filed suit against Attorney and received $12,500 in damages following mediation, at which time Attorney removed the lien. The Inquiry Commission charged Attorney with violating SCR 3.130-4.4 and 8.3(b). The Inquiry Commission dismissed substantive rules violations against Attorney in two other disciplinary matters, but charged her with violating SCR 3.130-8.1(b) in each for failure to respond to bar complaints. The trial commissioner found Attorney guilty of the charged violations, and no appeal was sought by the

1 Now codified at SCR 3.130-8.4(b).
Attorney or Bar Counsel. The matter was submitted directly to the Court without going before the Board of Governors. See SCR 3.360(4).

Kentucky Bar Ass'n. v. Mitchell, 348 S.W.3d 764 (Ky. 2011). Opinion and Order.

The Court suspended Attorney for one year due to disciplinary charges resulting in default cases under SCR 3.210. In the first, Attorney filed an estate's probate but thereafter failed to diligently proceed with the estate's settlement or to communicate with the executrix. Attorney also provided no written fee agreement and charged the estate almost $38,000 for his representation. The total estate was worth approximately $150,000. Counsel for Attorney thereafter negotiated a settlement agreement in which he agreed to repay the executrix $30,000. The agreement also included a clause which required the executrix to refuse to assist the KBA in its investigation of Attorney unless compelled by subpoena or court order. Attorney was charged with violating SCR 3.130-1.1, 1.3, 1.4(a), 1.5, 1.16(d) and 3.2, and the Board of Governors found him guilty of all charges. In the second matter, Attorney, while serving as executor, filed the decedent's will for probate. Decedent's heirs alleged Attorney took no further action on completing the estate. He paid himself $17,500 from the estate, which has not been paid back. The estate thereafter filed a Client Security Claim against Attorney. The Inquiry Commission charged him with violating SCR 3.130-1.1, 1.3, 1.5(a), 3.2, and 8.1(b). The Board of Governors found Attorney guilty of all charges. The Court adopted the Board's recommendation that Attorney serve concurrent one year suspensions for the above violations and that he be referred to KYLAP and required to pay $17,500 in restitution to the estate in the second matter.

Kentucky Bar Ass'n. v. Orr, 350 S.W.3d 427 (Ky. 2011). Opinion and Order.

The Inquiry Commission charged Attorney with violating SCR 3.130-3.3(a)(3), 3.3(a)(2) and 8.3(c)² during his representation of clients during a Chapter 13 bankruptcy action. Attorney knew his clients had not completed pre-filing credit counseling. After receiving certificates of completion for a financial management course that did not meet the requirements in 11 U.S.C. §109(h), Attorney prepared and filed fictitious credit counseling certificates without his clients' knowledge. He failed to disclose the certificates' fictitious nature to the U.S. Bankruptcy Court. The Trial Commissioner recommended a sixty-one day suspension, which the Court adopted pursuant to SCR 3.370(10).

Rampulla v. Kentucky Bar Ass'n., 345 S.W.3d 849 (Ky. 2011). Opinion and Order.

Attorney was charged with possession of drug paraphernalia and pleaded guilty to the offense in 2005. In 2007, he was stopped by police after running a red light. During a vehicle search, the officer found controlled substances and drug paraphernalia in Attorney's car. He was charged with first degree cocaine possession and possession of drug paraphernalia, second offense. Attorney thereafter pleaded guilty to an amended charge of first degree possession of drug paraphernalia. He admitted his conduct violated SCR 3.130-8.4(b) and

² Now codified at SCR 3.130-8.4(c).
agreed to a negotiated sanction with the KBA pursuant to SCR 3.480(2). The Court granted Attorney's motion and imposed a 181-day suspension, with ninety days probated for three years on the conditions that Attorney participates successfully in KYLAP, does not commit any misdemeanor or felony offenses, and does not receive any additional disciplinary charges.

Riley v. Kentucky Bar Ass'n., 349 S.W.3d 301 (Ky. 2011). Opinion and Order.

The Court publicly reprimanded Attorney for violating SCR 3.130-1.7(b) as it existed in November and December 2003 by engaging a client in sexually explicit telephone conversations and making a sexual advance toward the client while he represented her in a class action. Attorney and the KBA negotiated a sanction pursuant to SCR 3.480(2), and the Court granted Attorney's request for a public reprimand.

Kentucky Bar Ass'n. v. Ballard, 349 S.W.3d 922 (Ky. 2011). Opinion and Order.

While serving as Commonwealth's Attorney, Attorney represented a creditor that had filed suit against a debtor, who claimed partial payment of the debt to the creditor's manager. At the same time, Attorney obtained an indictment from the grand jury against the creditor's manager for possession of two forged checks on the creditor's account. He worked out a plea agreement with the creditor's manager, and the civil case against the debtor was dismissed for lack of prosecution. The Inquiry Commission charged Attorney with violating SCR 3.130-1.7(b). In a separate matter, Attorney was charged with violating SCR 3.130-1.1, 1.3, 3.2 and 1.16(d) in his mishandling of three cases in which he was appointed special prosecutor by the Attorney General. Attorney missed pretrial conferences, trial dates and a show cause hearing resulting in the three cases being dismissed with prejudice. He also ignored the Attorney General's request that the files be returned when his appointments were rescinded. Attorney admitted the above violations and negotiated a sanction with Bar Counsel pursuant to SCR 3.480(2) for a thirty-day suspension, probated for one year on the conditions of no further violations and his attendance at remedial ethics education. The Court rejected the negotiated sanction and remanded the case to the Board of Governors, which recommended a public reprimand. The Court held this sanction was inadequate and issued a notice of review pursuant to SCR 3.370(9). It held Attorney was guilty of violating SCR 3.130-1.7(b) in the first matter and SCR 3.130-1.1, 1.3, 3.2 and 1.16(d) in the second matter. The Court suspended Attorney for sixty days in each matter to run consecutively, for a total suspension of 120 days.

Kentucky Bar Ass'n. v. Helmers, 353 S.W.3d 599 (Ky. 2011). Opinion and Order.

Attorney worked for the firm Gallion, Baker and Bray as a clerk during law school and as an associate following his admission to the Bar in 1997 researching potential claims for injuries arising from the use of diet drug Fen-Phen. In 1998, a class action suit was filed in Boone Circuit Court by plaintiffs alleging they were injured by Fen-Phen. Contingent fee contracts signed by plaintiffs provided their attorneys were entitled to 30-33.3 percent of any recovery in addition to expenses. The final settlement agreement, which was contingent on decertification of the class action and signed by Attorney, gave plaintiffs an
award of $200 million. Attorney was responsible for preparing the scheduling order setting the monetary amount each of the settling plaintiffs would receive. In meeting with the plaintiffs, Attorney presented a proposed settlement amount and led the clients to believe the settlement award offer came straight from the defendant drug company. He did not inform them that their attorneys had decided how much their individual monetary award would be, that the individual client's cases were one of 440 that had been settled for the aggregate sum of $200 million, that the class action had been decertified and dismissed, or that $7.5 million of the settlement fund was being held to indemnify defendant against other claims. Attorney had also been instructed to offer each client an amount substantially below the amount assigned to that plaintiff in the predetermined allocations the defendant had approved. If the client refused the offer, he/she was presented with a larger offer at a later date, simulating settlement negotiations with the defendant. Attorney never told the clients they could refuse the offer entirely and did not provide them with copies of the documents they signed. He also told many of the clients that if they spoke to others regarding their settlement award, they could face a penalty assessment of $100,000. The Inquiry Commission charged Attorney with violating SCR 3.130-1.4(b), 1.8(g), 2.1, 5.2(a), 5.3(b), 8.3(a), 8.3(c), and 5.1(c)(1). The Board of Governors, by a vote of eleven to five, decided to consider the matter de novo instead of accepting the Trial Commissioner's recommendation. The Board found Attorney guilty of counts one, two, three, four, six and seven and not guilty of counts five and eight. By a vote of eleven to five, the Board recommended Attorney be permanently disbarred from the practice of law. The Court adopted the Board's recommendation under SCR 3.370(10) and permanently disbarred Attorney.

Kentucky Bar Ass'n. v. McDonner, 353 S.W.3d 612 (Ky. 2011). Opinion and Order.

Attorney was suspended from the practice of law in August 2009 for failure to complete his 2007-2008 CLE requirement. While suspended, Attorney sent a letter to an insurance company on firm letterhead indicating he represented a client on a claim for property damages and injuries received in a car accident. The Inquiry Commission charged him with violating SCR 3.130-3.4(c), 5.5(a), 5.5(b), 8.1(b) and SCR 3.175(1)(a). Attorney was hired by clients in March 2009 to investigate the possibility of bringing a claim against a hospital in Louisville. He failed to respond to their emails and phone calls or return their case file when requested. Attorney also continued to work on the matter after he was suspended in August 2009. The Inquiry Commission charged him with violating SCR 3.130-3.4(c), 5.5(a), 5.5(b), 8.1(b), and SCR 3.175(1)(a). Both matters were submitted to the Board as default cases. The Board found Attorney guilty of all five counts in each matter and recommended he be suspended for sixty days and required to complete remedial ethics education prior to being restored to practice. The Court adopted the Board's recommendations.

3 Now codified at SCR 3.130-8.4(c).
In 2002, Attorney began a romantic relationship with a woman incarcerated at the Pike County Jail. At the woman's request, he began providing her with medications by giving the pills to her cellmate, who was his client and on daily work release. Around the same time, he also began abusing alcohol and prescription medication. Attorney was later convicted of promoting contraband in the first degree and conspiracy to trafficking in a controlled substance in the second degree. He was sentenced to five years on each count, to run consecutively. The Inquiry Commission charged Attorney with violating former SCR 3.130-8.3(b). The Trial Commissioner concluded Attorney violated the rule and recommended he be suspended until he is fully released from probation and parole and for five years thereafter. The Trial Commissioner also recommended Attorney be required to enter into a five-year agreement with KYLAP and that his five-year suspension be probated upon his release from probation and parole and on the condition he follow the requirements in the KYLAP contract. The Court adopted the Trial Commissioner's conclusions and recommendations pursuant to SCR 3.370(10).

Attorney acted as the settlement agent for a home lending company. The loan closed in June 2002. It was discovered in March 2005 that the mortgage and other documentation could not be located by the local county clerk. After Attorney was informed of the missing documents, the mortgage and a related power of attorney were filed with the county clerk. Upon examination, it was determined the notary clause was insufficient because it did not include a date or county of execution. In May 2005, Attorney re-recorded the mortgage with corrections made to the notary's county and date of execution. The notary whose signature was included on the mortgage thereafter denied notarizing the document and stated the signature was not his. He did acknowledge that he and Attorney had formerly worked in the same law office. The Trial Commissioner charged Attorney with violating SCR 3.130-1.3 and 8.4(c) and recommended a five-year suspension in light of Attorney's prior discipline. Neither Attorney nor Bar Counsel appealed, and the matter proceeded directly to the Court pursuant to SCR 3.360(4). The Court held the Trial Commissioner's findings of fact and conclusions of law were supported by the record and law, and suspended Attorney for five years.

Attorney is the organizer, sole named member and registered agent for GNRW Properties, LLC. Over several years, GNRW engaged in several real estate transactions with one of Attorney's clients. In 2006, the client's company began to purchase a piece of property from GNRW. The sale was completed by execution of three warranty deeds. The first deed conveyed 50 percent of the property for $210,000 paid at the time of execution. The second deed conveyed 45 percent of the property for $183,200 paid at the time of execution, and the

---

4 Now codified at SCR 3.130-8.4(b).
third deed conveyed the remaining five percent for $15,000 paid at the time of execution. Despite being paid in full, Attorney failed to satisfy and release the $420,000 mortgage encumbering the property and retained the proceeds from the sale for his own personal use, forcing the client to pay an additional $284,446 to release the mortgage. In 2005, Attorney and his wife sold the same client an apartment complex for $175,000. The client paid $75,000 at closing and the remainder through a series of payments totaling $102,540. Attorney failed to release the property and it remains subject to three mortgages. The Inquiry Commission charged Attorney with violating SCR 3.130-1.8(a) (two counts), 8.3(b), 8.3(c), and 8.1(b). The matter was submitted to the Board as a default case under SCR 3.210(1). The Board found Attorney guilty of counts one through four and not guilty of count five. It found Attorney's failure to respond had already been addressed by a private admonition he received in October 2010. The Board voted unanimously that Attorney be permanently disbarred and required to pay costs. The Supreme Court agreed, noting Attorney's prior disciplinary record, which included a private admonition in 2003 for failing to pay a court reporter's bill and a sixty-day suspension in 2008 for engaging in real estate and business transactions with clients that violated the Rules of Professional Conduct and caused the clients harm.


Attorney was hired by a client and his siblings to probate their mother's estate and investigate real estate issues related to the estate. The clients paid her $10,000 for the representation. Attorney filed an entry of appearance in the case but did nothing further on the matter. Despite claiming to have completed work on the case, Attorney could produce no documentary evidence of that work. The Inquiry Commission charged Attorney with violating SCR 3.130-1.3, 1.5(a), and 1.16(d). Attorney represented another client prior to her death, drafting a revocable living trust in 1999 and a will in 2001. In 2002, the client executed a new will drafted by one of her sons, revoked the 1999 trust and transferred ownership of her home to her sons. She died a month later. In February 2003, Attorney filed an entry of appearance in the probate of the client's estate, claiming to be her attorney. She filed an objection to the pleadings filed by the attorney for the estate and a proposed settlement agreement. Attorney also filed a circuit court action seeking to set aside the deeds transferring property from the client to her sons. The Trial Commissioner found that Attorney was essentially trying to represent one of the client's daughters, who was represented by her own attorney. The Inquiry Commission charged her with violating SCR 3.130-1.1, 1.9(a), 3.7(a) and 8.1(b). It also charged her with violating SCR 3.130-3.4 for failing to respond to orders from the Court of Appeals in an unrelated matter and SCR 3.130-8.1(b) for failure to respond to the resulting disciplinary complaint. The Trial Commissioner found Attorney guilty of violating SCR 3.130-1.3, 1.16(d), 1.9(a), 8.1(b) and 3.4(c) and recommended she be suspended for 270 days in light of her disciplinary record. The Commissioner also recom-

---

5 Now codified at SCR 3.130-8.4(b).

6 Now codified at SCR 3.130-8.4(c).
mended she repay the $10,000 fee to the clients in the first matter with interest and audit a full semester course in professional responsibility at an ABA approved law school as conditions to any future reinstatement. The matter was submitted directly to the Court pursuant to SCR 3.360(4), which adopted the Trial Commissioner's recommendation pursuant to SCR 3.370(10).

Kentucky Bar Ass'n v. Bamberger, 354 S.W.3d 576 (Ky. 2011). Opinion and Order.

Respondent served as a circuit judge from 1992 until his retirement in 2004. The charges against him stemmed from his actions while presiding as judge in a class action lawsuit against the manufacturer of the diet drug Fen-Phen. The case was settled in May 2001 for a total lump-sum payment of $200 million. Under the terms of the agreement, Plaintiffs' attorneys were responsible for dividing the settlement funds amongst the plaintiffs and deducting their attorneys' fees. Attorneys and plaintiffs entered into contingency fee contracts at the outset of the representation that stated attorneys would receive 30-33 percent of any recovery. Despite this, plaintiffs' attorneys and their agents retained over $126 million, which constituted over 63 percent of the settlement funds, and an additional $20 million in "excess funds." Following settlement, the KBA began a disciplinary investigation into plaintiffs' attorneys' conduct. In February 2002, Respondent held an ex parte meeting with plaintiffs' attorneys. The defendant's counsel was not present at the meeting or advised that it was set to occur. Respondent thereafter signed an order finding the attorneys' fees and expenses paid were "reasonable and necessary." He admitted this order contained numerous false statements and acknowledged he had not read the settlement agreement or reviewed any accounting. His decision to approve the fees was based solely on the ex parte meeting with plaintiffs' attorneys. The order was not entered into the court record for almost four months, and Respondent instructed the circuit court clerk to provide copies of all future orders solely to plaintiffs' attorneys. The clerk was also ordered to seal all future orders entered by the court in the case. Defense counsel was not provided with copies of any of these orders.

Respondent thereafter entered an order authorizing plaintiffs' attorneys to establish a charitable entity with the $20 million they retained as "excess funds." The non-profit corporation Kentucky Fund for Healthy Living was established through a series of orders from June 2002 through December 2003. Despite statements in the orders to the contrary, the plaintiff class never consented to the corporation's creation with the settlement funds. Respondent appointed plaintiffs' attorneys as the initial directors for the corporation. Immediately prior to his retirement, Respondent entered an order relinquishing the court's continuing authority over the corporation which implied it had fulfilled its charitable purpose and oversight was no longer necessary. In reality, the entity never made any distributions for charitable purposes. Following his retirement, Respondent accepted plaintiffs' attorneys' invitation to become a paid director for the corporation and received a total of $48,150 in compensation. The Inquiry Commission charged him with violating SCR 3.130-8.3(a) and 8.3(c), and the trial commissioner found him guilty of both charges and recommended he be

---

7 Now codified at SCR 3.130-8.4(a) and 8.4(c).
permanently disbarred. The Board of Governors unanimously adopted the trial commissioner’s findings and recommendation. The Court adopted the Board’s recommendation and permanently disbarred Respondent.

**Kentucky Bar Ass’n. v. Gray,** 354 S.W.3d 580 (Ky. 2011). Opinion and Order.

Attorney was previously suspended from the practice of law for five years, with two years to serve followed by probation for the three remaining years conditioned on his participation in the KYLAP program with entry into a five-year monitoring program. **Kentucky Bar Ass’n. v. Gray,** 318 S.W.3d 94 (Ky. 2010). In June 2011, the KBA moved the Court to enter an order for Attorney to show cause why his probation should not be revoked and the remainder of the five year suspension should not be imposed. Attorney did not enter into a five-year KYLAP agreement following the Court’s 2010 order, but quarterly monitoring reports were filed pursuant to SCR 3.980(3)(b) and (c). Reports covering the third and fourth quarter of 2010 and the first quarter of 2011 showed Attorney was not in compliance with the terms of his Supervision Agreement. In response to the Court's show cause order, Attorney admitted he had not complied with its 2010 opinion and order. The Court revoked his probation and suspended Attorney for five years from August 26, 2010, the date of its prior Opinion and Order.

**Kentucky Bar Ass’n. v. Jackson-Rigg,** 354 S.W.3d 127 (Ky. 2011). Opinion and Order.

Attorney was suspended for non-payment of bar dues in December 2008. In March 2009, she began representing a client's son, who was a minor, in a personal injury action. In June 2009, Attorney advised the client the defendant had offered to settle the claim for $10,000 but that she rejected the offer because she thought the case was worth $12,000. Attorney thereafter failed to return the client's phone calls. The client learned Attorney was suspended and tried unsuccessfully to retrieve his case files. He was also informed by the defendant's representatives that their company had never been contacted by Attorney regarding his son's claim. Attorney was charged with violating SCR 3.130-1.4(a)(4), 1.4(b), 1.16(d), 5.5(a) and 8.4(c). Attorney was later evicted from her law office and failed to pick up the files that were left behind. The client files were sealed and moved to the office of the Mason District Court in June 2010. The Inquiry Commission issued a complaint charging her with failure to properly dispose of abandoned files. Attorney responded to the KBA, stating she would take possession of the files "upon a date and time with adequate notice." The KBA provided Attorney with the files' location and asked her to provide information on her arrangements to retrieve them. Attorney failed to file a response. The Inquiry Commission charged her with violating SCR 3.130-1.16(d), 3.4(c) for failing to maintain a current address with the KBA, and 8.1(b). In June 2010, Attorney pled guilty to seven felony counts of willfully failing to file state income tax returns and pay state income taxes from 2002-2008. She was automatically suspended from the practice of law pursuant to SCR 3.166(1) and has not been reinstated. Attorney was charged with violating SCR 3.130-3.4(c), 8.1(b) and 8.3(b). The cases were submitted to the Board pursuant to SCR

---

8 Now codified at SCR 3.130-8.4(b).
3.210(1), which found Attorney guilty of all charges and recommended she be permanently disbarred. The Board noted Attorney received three private admonitions between 2001 and 2008 and has been suspended from the practice of law three times since 2008. The Court adopted the Board's recommendations and permanently disbarred Attorney from the practice of law.

Kentucky Bar Ass'n. v. Thornsberry, 354 S.W.3d 526 (Ky. 2011). Opinion and Order.

Attorney agreed to represent a client in a civil action in Ohio. He was not authorized to practice in Ohio, but associated with another Kentucky attorney who was also licensed in Ohio. Both attorneys signed the complaint with Attorney listed as lead counsel, Motion Pro Hac Vice to be filed. Attorney went to the Hamilton County Court of Common Pleas, Alternative Dispute Resolution Office to schedule a mediation, and informed its director that he would be filing the motion pro hac vice as required by the local rules. Attorney failed to ever file the motion and failed to respond to the ADR Office’s attempts to contact him. Attorney also ignored the defense attorney's attempts to contact him regarding discovery in the case. The client thereafter discharged Attorney, who failed to return her case file upon request. In response to the resulting bar complaint, Attorney claimed he had submitted a motion pro hac vice to local counsel and that he would file it with the court when it was signed and scheduled. Local counsel never received the motion. The Inquiry Commission charged Attorney with violating SCR 3.130-1.3, 1.4(a)(3), 1.4(a)(4), 3.4(c), 5.5(a), 1.16(d), 8.1(a), and 8.4(c). The matter proceeded to the Board of Governors as a default case. The Board found Attorney guilty of all charges and recommended he receive a thirty-day suspension. It also recommended that he be required to attend remedial ethics education. The Court adopted the Board's decision and suspended Attorney for thirty days.

Sullivan v. Kentucky Bar Ass'n., 353 S.W.3d 342 (Ky. 2011). Opinion and Order.

Attorney moved the Court to impose a sixty-one day suspension with thirty-one days probated on the condition she returned unearned fees and attend remedial ethics training for her violations in four separate disciplinary matters. In the first, a client paid Attorney $2,500 to file a post-conviction motion to review the reasonableness of his sentence on a federal conviction. Over six months, Attorney promised the client the motion would be completed on different dates, but missed every deadline and failed to complete the motion. She also failed to return the $2,500 retainer after the client requested its return. She was charged with violating SCR 3.130-1.3, 1.16(d) and 8.1(b) for failing to respond to the resulting bar complaint. In the second matter, Attorney told a client she had negotiated a plea agreement that called for a ten-year prison sentence to run concurrently with the client's ten-year sentence on an earlier conviction for which she had been paroled. On the day the plea was to be entered, Attorney informed the client the agreement actually called for a fifteen-year sentence for the new charges. The client told the trial court she was rejecting the plea agreement, and the court granted Attorney's motion to withdraw from the representation. Attorney failed to return the client's file upon request. Attorney was charged with violating SCR 3.130-1.16(d) and 8.1(b) for failure to respond to the resulting bar complaint. In the third matter, a client paid Attorney $500 to file a supplemental
memorandum in support of his pro se CR 11.42 motions collaterally attacking his murder conviction and life sentence. Attorney did not file the memorandum, did not communicate with the client, and has not returned the $500 fee. She was charged with violating SCR 3.130-1.3, 1.4(a), 1.16(d), 8.1(b) and 8.3(c).9 In the final matter, Attorney agreed to represent a client in a Sixth Circuit appeal. The client began the appeal pro se, and Attorney agreed to file the appellate brief on his behalf on a pro bono basis. Although she told the client she had done so, Attorney never filed the brief despite being given an extension of time. The Sixth Circuit ultimately dismissed the appeal. Attorney also failed to return the client's file. She was charged with violating SCR 3.130-1.3, 1.4(a), 1.16(d), 8.1(b) and 8.3(c). The Court granted Attorney's motion and suspended her for sixty-one days, with thirty-one days probated on the condition that she complies with the remainder of its order.

Vavro v. Kentucky Bar Ass'n., 353 S.W.3d 347 (Ky. 2011). Opinion and Order.

Attorney was suspended in February 2007 for failure to comply with his annual CLE requirement. He continued to represent a client in her personal injury claim by sending a letter to Geico Insurance Company stating he was her attorney. He attempted to negotiate a settlement with Geico, but the client rejected the offer. The client thereafter tried to contact Attorney at his office about her case, but found he had moved. She filed a bar complaint, and Attorney was charged with violating SCR 3.130-3.4(c) (two counts) for failure to maintain a current roster address with the KBA and continuing to practice law following his suspension, 5.5(a) and 8.3(c). The Court accepted Attorney's negotiated settlement with the Office of Bar Counsel whereby he would admit the four counts as charged in exchange for a sixty-one day suspension and attendance at remedial ethics training.


Attorney was granted a Power of Attorney for a client and arranged for the sale of her principal asset, a 25 percent stock interest in a closely-held, family-owned corporation. The buyer conditioned the sale on receiving indication that the client's three children were aware of and agreeable to the sale. Attorney produced three affidavits confirming the children approved of the sale, and it was completed in 2009. The affidavits bore signatures from each of the three children. The client thereafter completed an affidavit in February 2010 which stated she did not receive the affidavits from Attorney or from her children. The client's daughter stated she and her brothers did not sign the affidavits and were unaware of the sale. Attorney admitted he notarized each affidavit even though he did not witness the signatures. His notary commission was also expired at the time. He loaned $58,500 of the sale proceeds to Robert H. Cowan, LHC Properties, LLC and provided the client with a promissory note and promissory note guarantee signed by Robert H. Cowan dated September 2008. Following the KBA's investigation, Attorney later admitted in September 2010 that Robert H. Cowan and LHC Properties are fictitious. He claimed he used personal funds to make all of the payments required under the note to repurchase the stock at a

---

9 Now codified at SCR 3.130-8.4(c).
premium price and to make five payments of $5,000, which equaled the quarterly dividend the client would have received if he was able to immediately repurchase her stock. The Inquiry Commission charged Attorney with violating SCR 3.130-8.1(a), 8.1(b), 8.3(b), and 8.3(c). Attorney tendered a Motion to Resign under Terms of Permanent Disbarment, admitting the violations as described in the Charge. The Court granted Attorney's motion and permanently disbarred him from the practice of law.

Boggs v. Kentucky Bar Ass'n., 349 S.W.3d 302 (Ky. 2011). Opinion and Order.

Attorney was appointed by the family court to represent M.S., a parent in an emergency juvenile custody proceeding. He appeared before the family court on the client's behalf on one occasion in 2007. Social workers and police had already conducted their investigation at that time, and the county attorney advised the court they were satisfied Attorney's client, M.S., and his wife had nothing to do with the alleged abuse of their baby. In 2008, three adults were indicted on sexual abuse charges in connection with the 2007 abuse allegations. Attorney was retained as defense counsel by two of the three adults charged in the criminal indictment. The case was dismissed several months later on the Commonwealth's motion for lack of sufficient proof. Shortly before the dismissal, Attorney's adult clients signed respective waivers of dual representation. He admitted that he should have obtained the waivers during the initial stages of the criminal proceeding, and that he did not obtain the waivers in a timely manner. He also admitted that he should have sought an express conflict waiver from M.S. before assuming representation of the defendants in the related criminal proceeding. Attorney admitted that his conduct violated SCR 3.130-1.4(b), 1.7(b)(2), and 1.9(a), and negotiated a thirty-day suspension with the KBA pursuant to SCR 3.480(2). The Court found the negotiated sanction to be appropriate in light of Attorney's prior disciplinary history and suspended him for thirty days.


Attorney represented a client in a workers' compensation claim and in the appeal of a Social Security disability finding. The workers' compensation claim was dismissed due to Attorney's incorrect filing of a medical document. After repeated attempts to contact Attorney, the client found out about the dismissal on her own. Attorney told the client she would file an appeal, but failed to do so. In the Social Security disability matter, the Social Security Administration denied the client's application, and she hired Attorney to file an appeal in federal court. Attorney was not a registered participant in the federal courts' electronic filing program for the Eastern District of Kentucky. The Court ordered her to become a registered user, but Attorney failed to comply. She then ignored two show cause orders. The Court eventually suspended Attorney from practicing law before it until she complied with its orders. The Court dismissed the client's appeal without prejudice. The client learned of the dismissal on her own, and wrote a letter to the Court concerning her case. The Court vacated the dismissal and, through the

10 Now codified at SCR 3.130-8.4(c).
assistance of the client's new counsel, reversed the Administration's finding, remanding the case for further proceedings. The Inquiry Commission charged Attorney with violating SCR 3.130-1.1, 1.3, 1.4, 1.16(d), 3.4(c), and 8.1(b). The case proceeded to the Board of Governors as a default case, and the Board voted unanimously to find Attorney guilty of all charges. The Court adopted the Board's recommendation, and suspended Attorney for thirty days.

Chappell v. Kentucky Bar Ass'n., 360 S.W.3d 245 (Ky. 2012). Opinion and Order.

As a result of the Court's opinion in Chappell v. Kuhlman Electric Corp., 304 S.W.3d 8 (Ky. 2009), Attorney admitted his conduct as described therein violated SCR 3.130-1.7. The Court publicly reprimanded Attorney for his misconduct.

Kentucky Bar Ass'n. v. Deters, 360 S.W.3d 224 (Ky. 2012). Opinion and Order.

The Inquiry Commission charged Attorney with nineteen counts of misconduct based on six KBA disciplinary files and issued an order consolidating the files in March 2009. The trial commissioner found Attorney guilty of violating sixteen of the nineteen counts and recommended a 181-day suspension. The Board of Governors rejected the commissioner's report and reviewed the files de novo. The Board recommended the Court find Attorney guilty of violating SCR 3.130-8.2(a), 3.3(a), 7.09(2) and 1.16(d) and suspended him for sixty-one days. The Court agreed with the Board's findings. It held Attorney violated SCR 3.130-8.2(a) when he alleged a judge knew he had contributed to the judge's opponent in a previous election and therefore ruled against him. Attorney also repeatedly claimed opposing counsel and the judge had ex parte contact concerning a summary judgment motion. He violated SCR 3.130-3.3(a) when he filed pleadings on behalf of a mother and father, who are divorced, requesting that they be appointed co-guardians of their son, even though the father had not hired Attorney and had never asked him to file the petition on his behalf. Attorney violated SCR 3.130-7.09(2) by repeatedly trying to contact the father via telephone, first at his son's bedside in the hospital and six to seven times thereafter even though his phone calls were never returned. He violated SCR 3.130-1.16(d) by failing to refund an unearned fee in a different case. The Court adopted the Board's recommendation, suspending Attorney for sixty-one days and ordering him to attend remedial ethics training.

Kentucky Bar Ass'n. v. Earhart, 360 S.W.3d 241 (Ky. 2012). Opinion and Order.

The KBA petitioned the Court for reciprocal discipline, pursuant to SCR 3.435, consisting of a thirty-day suspension consistent with the Indiana Supreme Court's disciplinary action against Attorney. Attorney was paid $10,000 to represent an Indiana client in a criminal case. Attorney sent a letter to the client acknowledging receipt of the money and advising that an additional $10,000 would be charged to represent him through trial if criminal charges were filed. The letter referred to the initial fee as a "non-refundable retainer." Attorney was notified of the client's suicide a few days later. He had performed no more than five hours of work on the case at that time. Attorney refused to refund the unearned portion of the $10,000 fee upon the client's widow's request. The Indiana Supreme Court held Attorney violated Indiana Professional Conduct Rules 1.5(a) and 1.16(d) and
suspended him for thirty days. The Supreme Court of Kentucky held that while our state is generally more tolerant of non-refundable retainers than Indiana, under the facts of this case, Attorney's fee could not be considered reasonable. It granted the KBA's petition for reciprocal discipline and suspended Attorney for thirty days.

Kentucky Bar Ass'n. v. Morehead, 361 S.W.3d 318 (Ky. 2012). Opinion and Order.

Attorney represented a client in a civil action in U.S. District Court for the Western District of Kentucky. The defendant in the action filed a motion for summary judgment on January 20, 2010. The response was due on February 22, 2010. Attorney failed to file the response by the deadline, even though he requested and received a ten-day extension. He also failed to inform the client that the deadline had passed. Attorney finally filed the response on April 23, 2010, without filing a motion for enlargement of time to do so. The District Court granted the defendant's motion for summary judgment in May 2010 and dismissed the action with prejudice. Attorney thereafter failed to respond to the client's emails. In July 2010, the client discovered Attorney was no longer at his office location and the case had been resolved against her. The Inquiry Commission charged Attorney with violating SCR 3.130-1.3, 1.4(a)(3), 1.4(a)(4) and 8.1(b). The Board unanimously found him guilty of all charges and recommended a sixty-one-day suspension. The Court adopted the Board's recommendation and suspended Attorney accordingly.

Kentucky Bar Ass'n. v. Richardson, 360 S.W.3d 236 (Ky. 2012). Opinion and Order.

Attorney operated a title company providing real estate closing services whereby he would receive and hold funds in escrow to be transferred as directed by Fifth Third Bank after closing were completed. In May 2010, he received over $1.1 million for five closings, but did not transfer the money. The bank paid an additional $1.1 million to honor the obligations and filed a civil action to recover the money from Attorney. The action resulted in a default judgment for the full amount entered in January 2011. Attorney was temporarily suspended from the practice of law in November 2010. See Inquiry Comm'n. v. Richardson, 324 S.W.3d 739, 740 (Ky. 2010). In January 2011, he was indicted in the U.S. District Court for the Southern District of Ohio for five counts of bank fraud. Attorney pled guilty in April 2011 and is currently awaiting sentencing. The Inquiry Commission charged him with violating SCR 3.130-3.4(c), 8.1(b), 8.4(b), and 8.4(c), and the Board voted unanimously to find him guilty of all charges. It recommended that Attorney be permanently disbarred from the practice of law. The Court adopted the Board's decision pursuant to SCR 3.370(1) and permanently disbarred Attorney.

Kentucky Bar Ass'n. v. Schilling, 361 S.W.3d 304 (Ky. 2012). Opinion and Order.

The bankruptcy court appointed Attorney to serve as the examiner in the Big Rivers Electric Corporation Chapter 11 bankruptcy case. He was responsible for helping Big Rivers and its creditors arrive at a consensual plan for reorganization. During a settlement conference, Attorney promoted an agreement between Rural
Utility Service and three major unsecured creditors. When RUS representatives were not present, he approached the three creditors with a proposal that they pay him a percentage fee for any "new value" brought to the estate. Neither the creditors nor Attorney disclosed these communications to the bankruptcy trustee or any other parties. When Big Rivers filed its proposed reorganization plan, Attorney allegedly requested and received approval from the court to negotiate a percentage-based fee with the three creditors. Attorney stated the court approved the request, but the Sixth Circuit Court of Appeals characterized the request as *ex parte* and held the bankruptcy court had not approved Attorney to seek a fee directly from the unsecured creditors. When he was unable to reach agreement with the creditors, Attorney stopped negotiating with them and filed a fee application with the bankruptcy court. Attorney was required to be a "disinterested person" as a prerequisite to any entitlement to recover a fee. He did not disclose the nature of his fee negotiations with the unsecured creditors to the court. Attorney later disclosed the fee negotiations, and following his final fee application requesting $4.41 million, the trustee filed a motion to compel Attorney to disgorge all fees based on his improper actions in negotiating side agreements related to his compensation. The bankruptcy court eventually ordered the disgorgement of Attorney's entire fee, holding he was not entitled to a fee because he was not "disinterested" as of the moment he began negotiating with the unsecured creditors. This disinterest prevented Attorney from being able to act as a neutral third party. The Sixth Circuit affirmed. The Inquiry Commission thereafter charged Attorney with violating SCR 3.130-1.5(a), 3.3(a), 3.4(c), 4.1 and 8.3(c).\(^{11}\) The Trial Commissioner recommended that all counts be dismissed, and the KBA appealed to the Board of Governors. The Board, reviewing the case *de novo*, found Attorney guilty on all counts and recommended he receive a public reprimand. The Court held Attorney violated SCR 3.130-3.3(a), 3.4(c), 4.1 and 8.3(c) and issued a public reprimand. McKinney v. Kentucky Bar Ass'n., 2012 WL 195511 (Ky. Jan. 4, 2012). Opinion and Order entered November 23, 2011 and designated "Confidential." A motion to reconsider was filed on November 29, 2011. The motion to reconsider was granted on January 4, 2012 in which the Opinion and Order was designated "To Be Published."

In February 2009, Attorney entered an *Alford* plea in district court to theft by unlawful taking of under $300 and received a ninety-day sentence, conditionally discharged for two years. The charge resulted after Attorney switched the price tags on an item at a store to change the price from $168 to $25. Attorney presented evidence that his behavior was influenced by failure to take prescription medication for mental health problems and excessive alcohol consumption. He thereafter joined KYLAP and paid restitution to the store. Attorney admitted violating SCR 3.130-8.3(b)\(^{12}\) and negotiated a thirty day suspension, probated for one year, with the KBA. The Court accepted the proposed negotiated sanction and suspended Attorney accordingly.

\(^{11}\) Now codified at SCR 3.130-8.4(c).

\(^{12}\) Now codified at SCR 3.130-8.4(b).
In October 2006, Attorney was retained to represent a client who was injured in a car accident. In March 2007, he sent two letters to the client's insurance company and to the other driver's insurance carrier to notify the adjusters he was representing the client. In May 2007, he requested copies of her medical and billing records, and in November 2007, he received a $5,000 settlement offer from the other driver's insurance carrier. He conveyed that offer to the client without explaining any details, and took no further action on the client's case. At the time of the representation, the client had not met any of the no-fault thresholds required by KRS 304.39-060 before a tort suit arising from an automobile accident may be filed. Attorney did not explain these threshold requirements to the client or why he had not filed suit. The client believed a suit had been filed on her behalf. She discharged him in April 2008, and he released her file to her at that time. The Inquiry Commission charged him with violating SCR 3.130-1.3, 1.4(a) and 1.4(b). In fall 2008, Attorney, a Covington City Commissioner, assisted with the election campaign of a candidate for a vacant seat on the commission. He contributed $100 toward the creation and distribution of an anonymous pamphlet advocating defeat of the candidate's opponent. In April 2009, Attorney pleaded guilty to conspiracy to fail to identify campaign contributors and advisors and entered an Alford plea to conspiracy to violate campaign finance restrictions. The Inquiry Commission charged him with violating SCR 3.130-8.3(b). Attorney admitted violating the rules, and the Court granted his motion for a public reprimand.

In October 2009, Attorney was paid $5,000 to represent a client in the appeal of his conviction to the Supreme Court of Kentucky. He completed preliminary work on the case, but did not timely file the appellate brief due to intervening hospitalization. Attorney did not notify the client that he failed to file the brief, withdraw from representation, or return the client's file or the unearned portion of his fee after the client terminated the representation. The Inquiry Commission charged him with violating SCR 3.130-1.15(a), 1.15(e), 1.16(a)(2), and 1.16(d). In September 2009, Attorney was paid $1,500 to represent a client in a criminal case in circuit court. He conducted preliminary work and entered an appearance in the case in March 2010, at which time the court set trial for September 2010 and a status conference for August 2010. The client was thereafter unable to reach Attorney. In June 2010, Attorney was arrested on an outstanding warrant based on his failure to comply with a court order concerning custody of his child. He was held in contempt and ordered to serve six months in jail but received shock probation. On June 30th, the client sent Attorney a certified letter terminating representation. Attorney appeared at the August 2010 status conference, but a public defender had been assigned to his former client's case. The Inquiry Commission charged him with violating SCR 3.130-1.3, 1.4(a), 1.4(b) and 1.16(d). Attorney and the KBA negotiated a sanction, and asked the Court to suspend him for sixty-one days, thirty-one of which will be probated for two years on the condition that Attorney returns $4,000 to the first client, returns $750 to the second client, participates in KYLAP, and attends remedial ethics training.
Bryant v. Kentucky Bar Ass’n., 363 S.W.3d 346 (Ky. 2012). Opinion and Order.

Attorney violated SCR 3.130-8.1(b), 1.4, 1.16(d), and SCR 3.175(1)(a) when he failed to keep clients reasonably informed, return their files, or respond to resulting bar complaints following his suspension from the practice of law for failure to pay bar dues. The Court suspended him for forty-five days.

Burgin v. Kentucky Bar Ass’n., 362 S.W.3d 331 (Ky. 2012). Opinion and Order.

Attorney was paid $3,000 to represent a client in a divorce proceeding. There was no written fee agreement, and Attorney did not deposit the money into his escrow account. Attorney failed to appear with his client at a child support hearing, and the client terminated the representation. Attorney continued to add charges to the client's bill against the $3,000 advance. The charges involved no substantive work on the client's behalf and provided him with no substantive benefit. After the former client contacted Attorney, he offered to refund $360 of the advance. Attorney admitted he violated SCR 3.130-1.3, 1.4(a), 1.15(a), 1.16(d), and 3.2. The Court suspended him for thirty days, probated for one year on the condition that he completes remedial ethics training.

Kentucky Bar Ass’n. v. Gee, 363 S.W.3d 343 (Ky. 2012). Opinion and Order.

Attorney was suspended in 2009 for failure to pay bar dues for the 2008-2009 bar year and for CLE non-compliance for the 2007-2008 educational year. She has not been reinstated to the practice of law. Attorney is also a member of the Ohio Bar, and her law firm website continued to represent that she is a member of the KBA. Following her suspension in 2009, Attorney represented a Kentucky resident involved in a car accident in Covington. She sent a letter on firm stationary to an insurance company that insured a vehicle involved in the accident claiming she was asserting a claim for the client to the insurance company. In 2010, Attorney was served with a letter from Bar Counsel informing her she had engaged in the unauthorized practice of law. She did not file a response and did not respond to the reminder letter that followed. The Inquiry Commission charged her with violating SCR 3.130-3.4(c), 5.5(a), 5.5(b)(2) and 8.1(b), and the case proceeded to the Board as a default case. The Board found her guilty of all charges and recommended a sixty-one day suspension to run consecutively to any other suspensions currently imposed. The Court adopted the Board's decision pursuant to SCR 3.450.

Crawford v. Kentucky Bar Ass’n., 364 S.W.3d 185 (Ky. 2012). Opinion and Order.

Attorney's misconduct stemmed from actions by his assistant and receptionist, who were accepting clients and working on cases without his knowledge or consent and concealing the existence of disciplinary actions against him. He was charged with violating SCR 3.130-1.3, 1.4(a), 8.1(b), 5.3(b), 1.16(a)(2), and 1.16(d). Attorney first learned of the pending disciplinary charges against him in April 2011, including a thirty-day suspension imposed in an earlier March 2011 disciplinary matter. See Kentucky Bar Ass’n. v. Crawford, 2010-SC-00813 (March 24, 2011). The Court granted his petition requesting a sixty-one day suspension, thirty-one days of which is probated for two years on the condition that he not
receive any further disciplinary charges and that he completes remedial ethics training.

In re Paniagua de Aponte, 364 S.W.3d 176 (Ky. 2012). Opinion and Order.

Applicant applied to take the Kentucky bar examination, but the Board of Bar Examiners denied her application because she did not meet the requirements of SCR 2.014, which governs the legal education requirements of domestic and foreign-based applicants. She received her legal education in the Dominican Republic, and received a LL.M. from Georgetown University Law Center. Applicant also passed the New York bar examination and is admitted to practice there and before the U.S. District Court for the Southern District of Indiana. The Court held she is not eligible to take the Kentucky bar examination under SCR 2.014(1) because her LL.M. degree is not an "equivalent professional degree" that would satisfy the basic legal educational requirement in Kentucky. In addition, she does not qualify to take the exam under SCR 2.014(3) because she does not have the required three years of legal practice experience. The Court also held Attorney failed to show she should be granted a waiver of SCR 2.014(3)'s requirements.

Friedman v. Kentucky Bar Ass'n., 365 S.W.3d 207 (Ky. 2012). Opinion and Order.

Attorney was charged with eight counts of misconduct, including violating SCR 3.130-1.15(b), 1.15(a), former 8.3(c), and 8.4(c), based on two disciplinary files that were consolidated in 2010. In the first matter, clients alleged Attorney failed to remit the entirety of their settlement award in a case against Louisville and Jefferson County MSD. Attorney later admitted he had spent the award to cover his personal financial obligations, and paid the balance owed to each client. In the second matter, a client hired Attorney to represent her in the defense of a lawsuit regarding a judicial election. The client paid attorney fees throughout the representation. When the lawsuit was ultimately dismissed, the opposing party was ordered to pay the client's attorney fees. Attorney failed to forward the funds to the client, but later paid her the balance due after his law firm noticed the accounting irregularity. The Court granted Attorney's request to grant him leave to resign from the KBA under terms of permanent disbarment.


A client hired Attorney to represent him in a wrongful termination action, which was later removed to federal court. The client and his wife thereafter filed a petition for bankruptcy in federal bankruptcy court. Attorney did not represent the client in the bankruptcy action. The bankruptcy trustee filed a motion requesting the bankruptcy court to order Attorney to give her the client's file pertaining to the wrongful termination lawsuit. Attorney did not comply with the order, and the court found him to be in contempt. He was found to be in contempt again two months later when he still had not given the file to the bankruptcy trustee. Attorney responded to the resulting Inquiry Commission Complaint against him, but failed to respond to the Commission's letter requesting additional information. He was charged with violating SCR 3.130-8.1(b) and 3.4(c). The Court issued a public reprimand and ordered Attorney to complete remedial ethics education.
Kentucky Bar Ass'n. v. Trainor, 364 S.W.3d 174 (Ky. 2012). Opinion and Order.

The Court imposed reciprocal discipline following Attorney's suspension by the Supreme Court of Ohio, retroactively suspending him from the practice of law in Kentucky for twenty-four months, effective June 7, 2011, with the last eighteen months stayed on the conditions that he complete eighteen months of probation and commit no further misconduct. Attorney was retained by a client in Ohio but failed to notify her that he did not have professional malpractice insurance. After obtaining a favorable result in her case, he also failed to return the $225 filing fee after the court clerk refunded it or respond to the client's phone calls regarding the refund.


Attorney represented two defendants in a criminal case. He did not inform the trial judge that he represented both defendants until the prosecutor brought it to the court's attention. The judge warned Attorney about a possible R.Cr. 8.30 issue requiring separate counsel, and Attorney told the judge he understood. He continued to represent both clients without obtaining a written waiver of a conflict of interest from either defendant. Attorney thereafter prepared an affidavit from defendant A stating he was solely responsible for the crime. After defendant A pleaded guilty, the Commonwealth subpoenaed him to testify at defendant B's trial. Attorney did not notify the judge of the possible conflict of interest until the pre-trial conference. The judge then ordered Attorney to withdraw as counsel. The Inquiry Commission charged him with violating SCR 3.130-1.7(b), 3.4(c), and 8.1(a). The Board found Attorney guilty of violating SCR 3.130-1.7(b) and 3.4(c). The Court adopted the Board's recommended sanction and publicly reprimanded Attorney, who must also complete remedial ethics education.


The Court reinstated Attorney to the practice of law. He had previously been suspended for two years, effective January 25, 2007. See Troutman v. Kentucky Bar Ass'n., 275 S.W.3d 175 (Ky. 2008).


Attorney represented a client in a matter concerning property damage to the client's vehicle following a traffic accident. Trial was set for February 2005, but rescheduled for September 2006 when Attorney requested more time to provide CR 26 expert witness information. Trial was continued to October 2006 after Attorney had issues with the expert witness. Two weeks prior to trial, Attorney served defense counsel with a supplemental answer to an interrogatory identifying a new expert witness. The defense filed a motion in limine to exclude the expert's testimony because Attorney failed to provide the expert's reports or notes. On the day of trial, the court granted the motion in limine. Attorney could not prove damages without the expert's testimony. The trial court denied his request for a continuance. Without the client's consent, Attorney moved to dismiss the case. When defense counsel requested the case be dismissed with
prejudice, Attorney did not object. The court granted the motion, and its order stated the plaintiff moved to dismiss the case with prejudice. Attorney did not try to have the judgment amended. The trial court denied his motion for a new trial. Attorney thereafter filed a notice of appeal with the Court of Appeals. Appellee filed a motion to dismiss on the basis that the plaintiff had requested the dismissal. The Court of Appeals denied the motion to dismiss, but notified Attorney that his brief was overdue and ordered him to file a motion for extension of time or to dismiss within ten days. Attorney did not inform his client that the brief was overdue or that he failed to comply with the Court of Appeals’ order. It ordered Attorney to show cause why he should not be fined for his failure to comply with the terms of the notice of overdue brief. Without informing his client, Attorney filed a motion to dismiss, which the Court of Appeals granted. Attorney did not inform his client of the dismissal. Attorney admitted his conduct violated SCR 3.130-1.3, 1.4(a), 1.4(b), 3.4(c), and 8.3(c). The Court approved the sanction negotiated between Attorney and the KBA, and suspended Attorney for thirty days, probated on the condition Attorney pays his client $3,000 in restitution.

Huffman v. Kentucky Bar Ass’n., 365 S.W.3d 927 (Ky. 2012). Opinion and Order.

Attorney was a state employee with the Department of Labor. While employed by the state, he obtained outside employment as co-counsel in a federal civil rights suit unrelated to his state employment. After being alerted to possible misconduct by Attorney in connection with his work on the civil rights case, the Executive Branch Ethics Committee began an investigation and found he had violated KRS 11A.020(1)(c) and (d) by claiming sick leave while he was actually working on the civil rights case. Attorney also used state equipment for work on the case. Attorney received a public reprimand and a $2,500 fine. The Franklin Circuit Court and Court of Appeals upheld the Ethics Committee’s decision and the Supreme Court denied discretionary review. The Inquiry Commission charged Attorney with violating SCR 3.130-8.3(c). Attorney admitted his conduct violated the Rule, and the Court granted his request for a public reprimand.

Kentucky Bar Ass’n. v. Ellis, 365 S.W.3d 548 (Ky. 2012). Opinion and Order.

The Court adopted the Trial Commissioner’s recommendation and report and suspended Attorney for thirty-seven months for his misconduct in six disciplinary files. The suspension is to run concurrently with a ninety-day suspension he received in 2010. See Kentucky Bar Ass’n. v. Ellis, 302 S.W.3d 75 (Ky. 2010). Attorney repeatedly accepted retainers from clients and then failed to diligently pursue their cases or return their files, resulting in multiple violations of SCR 3.130-1.3, 1.4(a) and 1.16(d), and single violations of SCR 3.130-8.3(c) and 8.1(b). Attorney was previously suspended in 2008 for failure to pay bar dues

13 Now codified at SCR 3.13-8.4(c).
14 Now codified at SCR 3.130-8.4(c).
15 Now codified at SCR 3.130-8.4(c).
and failure to complete his CLE requirement for the 2006-2007 educational year. He has remained suspended since that time. In 2009, he was privately admonished for failing to properly represent a client after agreeing to do so and accepting a fee. He received a second private admonishment in 2009 for failing to respond in a separate disciplinary matter.

*Kentucky Bar Ass’n v. Minamyer, 365 S.W.3d 546 (Ky. 2012)*. Opinion and Order.

Attorney was suspended for one year by the Supreme Court of Ohio. *Butler Cty. Bar Ass’n v. Minamyer, 953 N.E.2d 315, 320 (Ohio 2011)*. The entire suspension was probated for a period of one year on the condition that he 1) be supervised by a monitor; 2) limit his practice to domestic relations, general litigation and labor law; 3) continue to follow the recommendations of his treating professionals, including ongoing pharmacological management by his treating physician; and 4) commit no further misconduct. *Id.* at 320-21. The Court granted the KBA’s petition for reciprocal discipline pursuant to *SCR 3.435*, retroactive to the date it was imposed by the Supreme Court of Ohio in July 2011. The Court declined to impose the condition that Attorney be monitored by an attorney for his practice in Kentucky.

*Kentucky Bar Ass’n v. Morehead, 365 S.W.3d 552 (Ky. 2012)*. Opinion and Order.

The Board of Governors found Attorney guilty of violating *SCR 3.130-1.3, 1.16(d), 3.4(c), 8.1(b), 1.4(b), 1.5(a), 1.4(a)(4) and 8.4(c)* in four disciplinary matters that involved Attorney repeatedly agreeing to represent clients, accepting retainer fees, and then failing to complete the work or reply to the clients' requests for information and refunds of fees paid. The Court adopted the Board's decision pursuant to *SCR 3.370(9)* and suspended Attorney from the practice of law for five years. He was previously suspended in March 2011 for failure to pay bar dues and again in February 2012 for sixty-one days due to violations concerning diligence, communication and failure to respond to a bar complaint.

*Kentucky Bar Ass’n v. Thornsberry, 365 S.W.3d 559 (Ky. 2012)*. Opinion and Order.

In 2008, a client paid Attorney $500 to represent him in proceedings concerning visitation rights and termination of his parental rights. Attorney wrote a letter to the child’s mother in November 2008, but did not speak to his client about the case until after August 2009 despite the client's attempts to contact him. The client thereafter requested a refund of the $500 fee. Attorney ignored the request, and the client filed a bar complaint. The case came before the Board as a default case. It found Attorney guilty of violating *SCR 3.130-1.3, 1.4(a)(3), 1.4(a)(4), and 8.1(b)*. The Court adopted the Board’s decision and recommended sanction and suspended Attorney for sixty-one days, to run consecutively to all other suspensions currently imposed. Attorney was suspended in March 2011 for failure to pay bar dues, and suspended for thirty days in October 2011. *See Kentucky Bar Ass’n v. Thornsberry, 354 S.W.3d 526 (Ky. 2011).*
A client hired Attorney to represent her in divorce proceedings in circuit court. The court entered an interlocutory order granting the divorce, but retained jurisdiction of the action to determine the parties' rights and responsibilities regarding assignment of non-marital property, division of marital property, child custody and other issues. After obtaining the interlocutory order, Attorney failed to further pursue the case, inform the client of its status, or return her phone calls. He also failed to provide her with her files after she terminated the representation. The Trial Commissioner found Attorney guilty of violating SCR 3.130-1.3, 1.4(a)(3), 1.16(d), and 8.1(b), and recommended a thirty-day suspension. The Court adopted the Trial Commissioner's recommendation pursuant to SCR 3.370(10), and suspended Attorney from the practice of law for thirty days.

The Court reinstated Attorney to the practice of law in Kentucky. It had previously suspended him for sixty-one days in February 2012 for violating SCR 3.130-8.2(a), 3.3(a), 7.09(2) and 1.16(d). In March 2012, the Office of Bar Counsel filed an Objection to Attorney's automatic reinstatement pursuant to SCR 3.510. Following Attorney's application for reinstatement, the Kentucky Office of Bar Admissions' Character and Fitness Committee recommended approval of the application on the conditions he obtain anger management counseling, file an Affidavit of Compliance as required by SCR 3.510(2), and notify the KBA of any reciprocal discipline imposed by Florida or Ohio. In June 2012, the KBA Board of Governors filed a recommendation disapproving Attorney's application for reinstatement. The Court concurred with the Committee's recommendation and approved Attorney's application for reinstatement.

Attorney admitted violating the Rules of Professional Conduct and moved the Court to permanently disbar him from the practice of law. The Inquiry Commission charged Attorney with two counts of misconduct stemming from charges pending against him in Harlan Circuit Court. He pleaded guilty to the charge of theft by failure to make required disposition of property ($300 or more), a Class D felony. See KRS 514.070. The indictment alleged he took money from a client on behalf of her mother and converted it to his own use. Attorney was sentenced to two years in prison, probated for five years, and ordered to pay $37,861 in restitution. He admitted violating SCR 3.130-8.3(b) and (c). The Court held Attorney’s motion to withdraw his membership was appropriate under SCR 3.480(3) and permanently disbarred him from the practice of law.

---

16 Now codified at SCR 3.130-8.4(b) and (c).
From April-July, 2010, Attorney’s bank issued to the KBA twenty notices that there were insufficient funds in his IOLTA trust fund. The Office of Bar Counsel issued notices informing Attorney of the insufficiency and requested explanations from June-December 2010. It issued a Complaint against Attorney in April 2011 and sent him a reminder letter in May 2011. Attorney did not respond, and the Inquiry Commission charged him with violating SCR 3.130-1.15(a) and 8.1(b). The matter came before the Board as a default case. It found him guilty of both charges and recommended a 181-day suspension. Attorney is currently suspended from the practice of law for failing to fulfill his CLE requirements for the 2010-2011 educational year. The Court adopted the Board’s recommendation pursuant to SCR 3.370(9) and suspended Attorney accordingly.

The Inquiry Commission charged Attorney with violating SCR 3.130-1.1, 1.3, 1.4(b), 1.16(d), 8.1(b), 8.4(b) and 8.4(c). A client retained Attorney to represent him in a criminal trial in Indiana. Attorney is not licensed to practice in Indiana, but the trial court allowed her to represent the client under Indiana’s prior pro hac vice rule. When the client was convicted, Attorney agreed to represent him in the appeal, and the client’s father agreed to pay her $20,000 plus half the fees and costs for the appeal. The Indiana Supreme Court rejected Attorney’s Notice of Appeal because the filing fee was not paid and she was not licensed to practice there. She advised the client to file an appeal pro se, and requested he pay her $435 for the appeal and admission fee immediately. She prepared and filed a motion for him to proceed in forma pauperis and a motion for an extension of time to file his Notice of Appeal, which the Indiana Supreme Court granted. In December 2008, the client’s father paid Attorney $9,785 as an installment of the agreed-upon $20,000 fee. In July 2009, the Indiana Supreme Court dismissed the appeal with prejudice because no case summary, appellate brief or any other documents were filed to prosecute the appeal. Four months later, Attorney told the client’s father she had filed the appellate brief, and he paid her the remaining $10,000. He later discovered the case had been dismissed and no briefs had been filed. In July 2010, the client dismissed Attorney and requested a refund of the $20,000 fee. Attorney has not refunded any of the money paid to her for her representation in the appeal, including the temporary admission and appeal filing fees, which she never paid to the Indiana Supreme Court. The Court adopted the trial commissioner’s report and recommendation and permanently disbarred Attorney from the practice of law. She was previously suspended for ninety days in 2000 and received private admonitions in 2007 and 2009.

The Court suspended Attorney for 181 days to run consecutively to his current suspension for violating SCR 3.130-1.4(a) and (b), 3.4(c), 5.5(a), 5.5(b), 8.1(b) and SCR 3.175(1)(a). He was suspended in August 2009 for failure to complete his CLE requirement for the 2007-2008 educational year. He was also suspended from the practice of law by the U.S. District Court for the Western District of Kentucky at the same time. Due to the Office of Bar Counsel’s
objection to his automatic reinstatement, Attorney was never restored to practice. In September 2011, he was suspended for sixty days for misconduct occurring before and after his 2009 suspension. In August 2009, Attorney continued to practice law while suspended, sending letters on firm letterhead regarding a case pending in state court. He also continued to represent a client in several cases before the U.S. District Court for the Western District of Kentucky. In early 2010, he stopped communicating with the client in the federal case and failed to notify the client when he left his firm. The Board found Attorney guilty of all seven counts and recommended a 181-day suspension. The Court adopted the Board’s recommendation and suspended Attorney accordingly.


Attorney was hired to represent a client in a workers’ compensation claim in 2009. The client was thereafter unable to contact Attorney regarding his case. In 2011, the client filed a complaint, and the Office of Bar Counsel opened the matter for alternative dispute resolution pursuant to SCR 3.160(3)(C). Attorney failed to respond to OBC’s attempts to contact him via email or phone. In June 2011, the file was opened as a regular bar complaint. Attorney failed to respond to the complaint or reminder letter. The Inquiry Commission charged him with violating SCR 3.130-1.4(a), 1.16(d), and 8.1(b). The matter proceeded to the Board of Governors as a default case. The Board found Attorney guilty of each count and recommended a thirty-day suspension to run concurrently with his current suspension for failure to complete his annual CLE requirement. The Court adopted the Board’s recommendation pursuant to SCR 3.370(9) and suspended Attorney accordingly.

Myles v. Kentucky Bar Ass’n., 366 S.W.3d 919 (Ky. 2012). Opinion and Order.

In Myles v. Kentucky Bar Ass’n., 289 S.W.3d 561, 565 (Ky. 2009), Attorney admitted violating SCR 3.130-1.1, 1.15(a), 1.15(b), 1.16(d), 1.3, 1.4(a), 7.05(1) and 8.1(b). The Court suspended him for 181 days, with thirty days to serve and 151 days probated for five years on the condition he repay certain funds and receive no other disciplinary charges during his probation. Id. at 565-66. In February 2012, the KBA moved the Court to issue an order for Attorney to show cause why it should not revoke his probation and impose the full 181-day suspension. In April 2011, a bar complaint was filed against Attorney, who failed to respond. The Inquiry Commission thereafter filed charges against him. Attorney failed to respond to the Court’s show cause order and it granted the KBA’s motion and imposed the remainder of his probated suspension.

Smith v. Kentucky Bar Ass’n., 366 S.W.3d 925 (Ky. 2012). Opinion and Order.

Attorney admitted violating the Rules of Professional Conduct and moved the Court to permanently disbar him from the practice of law. Three disciplinary files against Attorney were placed in abeyance pending disposition of criminal charges against him. He was temporarily suspended from the practice of law in 2008. See Inquiry Com’n. v. Smith, 247 S.W.3d 533 (Ky. 2008). Attorney was provided a power of attorney to handle a client’s affairs in 1996. At that time, she owned an unencumbered home and $1 million in liquid assets. In 2006, the client’s daughter was informed her mother was $19,000 behind in payments to
her nursing home and that Attorney had informed the home’s director that the client was out of money and was receiving Medicaid. After obtaining a power of attorney, the daughter found out that from June 2002-September 2003, Attorney had written checks totaling $400,000 to a revocable trust he had set up for the client and directly to himself. He had also amended the trust agreement so that he would receive $95,000 from it upon the client’s death. The trust had a zero balance at the time the daughter discovered it existed. Attorney had also cashed in the client’s life insurance policy for almost $16,000. State criminal charges were filed against him for knowingly exploiting an adult and theft by failure to make required disposition. Those charges were dismissed when he was indicted in U.S. District Court for interstate transportation of stolen funds and wire fraud in connection with the events addressed in the three KBA disciplinary files pending against him. Attorney admitted violating SCR 3.130-1.15(b), 8.3(b) and 8.3(c).  

In spite of his temporary suspension in 2008, he continued to represent an executor of an estate in a probate matter concerning the estate. Following his indictment, he pleaded guilty to converting and diverting $467,000 from the estate. He admitted violating SCR 3.130-1.4(b), 5.5(a), 8.3(b) and 8.3(c). The Court granted Attorney’s motion to resign from the KBA under terms of permanent disbarment.


Attorney appealed the Court of Appeals’ decision affirming the circuit court’s decision to award him funds to cover calculated expenses from his representation of a client in a personal injury case with a contingency fee contract, but refusing his request for attorney fees based on a quantum meruit claim. The Supreme Court affirmed. The circuit court granted Attorney’s motion to withdraw as counsel in the case after he and the client could not agree on whether to accept a settlement offer. Their contract stated the client had final say in whether or not to accept such an offer. Attorney believed the offer made was adequate, but the client did not. In Baker v. Shapero, 203 S.W.3d 697 (Ky. 2006), the Court held an attorney discharged without cause under a contingency fee agreement can recover services rendered on a quantum meruit basis. The Court noted there is a prevailing view in the U.S. that allows attorneys to recover remuneration for services rendered under quantum meruit, based on a contingency fee contract, even if they withdraw from representation for good cause shown. What equals “just cause” or “good cause” to withdraw and still maintain a claim for quantum meruit compensation depends on the facts and circumstances of each case. 7A C.J.S. “Attorney & Client” §360 (2004). The Court held a disagreement with a client over whether to accept a settlement offer does not constitute “good and sufficient cause for an attorney to withdraw with expectation of a quantum meruit fee.” It refrained from defining what would constitute “good cause” in such a case, stating that determination would need to be made on a case-by-case basis.

17 Now codified at SCR 1.30-8.4(b) and (c).
II. CIVIL

Madison County Fiscal Court v. Kentucky Labor Cabinet, 352 S.W.3d 572 (Ky. 2011). Opinion by Justice Venters.

Appellants, Madison County Fiscal Court, Campbell County Fire District and ten municipal corporations, appealed from a Franklin County Circuit Court order that held the Kentucky Labor Cabinet had jurisdiction to pursue an administrative agency action against them to collect unpaid overtime compensation on behalf of firefighters employed by Appellants. The order also held Appellants are not entitled to governmental or sovereign immunity from those claims. The Supreme Court granted Appellants' motions to transfer the matter from the Court of Appeals pursuant to CR 74.02(2) and affirmed the circuit court's order. In Commonwealth ex rel. Labor Cabinet v. Hasken, 265 S.W.3d 215 (Ky. App. 2007), the Court of Appeals compelled a revision of the method for calculating overtime pay for firefighters receiving incentive training money under the Professional Firefighters Foundation Program Fund. The calculation approved in Hasken provides for more pay to firefighters, and the Labor Cabinet revised its regulations for calculating overtime pay for firefighters receiving incentive training pay. It also started administrative actions against Appellants on the firefighters' behalf to collect the unpaid portion of overtime pay using the Hasken formula. The Court held Appellants have no immunity against the claims in this case because the legislature waived the defense of immunity for claims brought under KRS Chapter 337 to enforce wages based on money earned under KRS Chapter 95A. In March 2009, KRS 95A.250 was amended to include a section addressing the calculation of overtime pay for firefighters compensated via the Firefighters Foundation Program Fund. The amendment reversed the effects of Hasken and restored the former method by which overtime pay was determined. The Court held the current version of KRS Chapter 95A rules out application of KRS Chapter 337 when determining such overtime pay after March 2009. The revisions do not apply retroactively, and the calculation of overtime pay prior to March 2009 is subject to the prior version of KRS Chapter 95A as interpreted by Hasken. There is no conflict between KRS Chapter 95A and KRS Chapter 337, and the Labor Cabinet is authorized to proceed with its action to recover the unpaid, pre-March 2009 portion of the firefighters' overtime pay pursuant to Hasken.


Mother petitioned the Court to reverse the Court of Appeals' opinion affirming the family court's order denying her motion for a change in timesharing of the parties' minor daughter to allow her to relocate to Paducah with the child. The parties were divorced in 2002, and the order entered by the court granting joint custody stated timesharing would be on an equal time basis as agreed by the parties. In 2009, Mother filed a motion to modify the timesharing schedule to allow her to relocate. The family court, which did not make specific findings of fact with separate conclusions of law, found it was not in the child's best interest to relocate to Paducah and denied the motion to modify timesharing. Mother appealed, asking that the case be remanded for specific findings of fact. The Court of Appeals affirmed, holding findings of fact were not necessary when the court denied the motion. See Burnett v. Burnett, 516 S.W.2d 330 (Ky. 1974).
The Supreme Court reversed. The intent of CR 52.01 is to direct judges in cases tried by the court without a jury to make separate findings of fact and conclusions of law whenever they render a judgment on the merits. The Court held the Rule's last sentence, which states findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or "any other motion except as provided in CR 41.02," does not apply to motions to modify custody or timesharing. Those motions for modification are a means for reopening the final divorce decree and ask for adjudication on the merits presented at a required hearing. "[F]amily courts must make findings of fact and conclusions of law, and must enter the appropriate order of judgment when hearing modification motions." CR 52.04 states final judgments may not be reversed or remanded because the trial court failed to make a finding of fact on an issue essential to the judgment unless the omission has been brought to the court's attention by a written request for the finding or by motion filed within ten days after entry of the judgment. The Court resolved the tension between the requirements in CR 52.04 and CR 52.01 by reading CR 52.01 as "creating a general duty for the trial court to find facts" and 52.04 "as applying only after the court has complied with its general duty." CR 52.01 requires that the judge engage in at least a good faith effort at fact-finding and that the found facts be included in a written order. Failure to do so allows an appellate court to remand the case for findings, even where the complaining party failed to bring the lack of specific findings to the trial court's attention." In the instant case, the family court's order included no findings of fact to support its conclusion that relocation would not be in the child's best interest, which violated CR 52.01. Mother's appeal was therefore properly before the Court because a request for findings is not necessary for purposes of review under CR 52.01. CR 52.04 was not implicated in this case because the trial court made no findings of fact. The Court remanded to the family court to make specific findings of fact and separate conclusions of law consistent with its opinion. It overruled Hollon v. Hollon, 623 S.W.2d 898 (Ky. 1981) and Burnett to the extent those cases differ from its holdings in the instant opinion.


The Court granted discretionary review to determine whether the Board of Claims had jurisdiction over Appellants' claims brought pursuant to the Kentucky Board of Claims Act, KRS 44.070, et seq. Appellants are a group of heirs entitled to receive the net proceeds from a judicial sale of four tracts of land. They never received the proceeds from the sale, and brought suit against Appellees in the Board of Claims. Appellees are the former master commissioner for the McCreary Circuit Court, Circuit Judge Winchester of the McCreary Circuit Court, and the Kentucky Administrative Office of the Courts (AOC). The Board of Claims dismissed the claim for lack of jurisdiction, and the Franklin Circuit Court and Court of Appeals affirmed. Judge Winchester appointed Charles E. King as the master commissioner in 1987 pursuant to KRS 31A.010. KRS 31A.010(3)(a) states master commissioners serve at the pleasure of the circuit court, and that no term of appointment may last longer than four years without reappointment by the circuit judge. KRS 31A.020 requires the master commissioner to execute a bond with surety approved by the court. At the time of his appointment, King executed a bond in the amount of $25,000 as ordered by Judge Winchester. At the end of his four year term, King was not reappointed yet continued to serve as
master commissioner until the events at issue occurred. He sold the property at issue at auction for $234,600 in September 2002. The Report of Sale was approved in October 2002, and the court approved an itemization of disbursements in January 2003. It also ordered King to distribute the proceeds of the sale in accordance with the itemization. No disbursement was ever made. Subsequent investigation ordered by the court showed King had misappropriated over $300,000 in proceeds from various sales by transferring the proceeds from the master commissioner's account to his personal account. Appellants filed their claims with the Board of Claims in August 2003, and the Board consolidated the claims into a single action in October 2003.

KRS 44.073(2) vests primary and exclusive jurisdiction of all claims based upon the negligent performance of ministerial acts against the Commonwealth, its cabinets, departments, agencies, officers, agents and employees in the Board of Claims. The Board of Claims Act creates vicarious liability on the part of the Commonwealth for the negligent performance of ministerial acts by state officers and employees. The waiver of the Commonwealth's sovereign immunity in KRS 44.073 includes all parts of the Commonwealth, including the executive, legislative and judicial branches of government. The Court held the Board did not have jurisdiction over the claims against King because his alleged conversion of the proceeds of the judicial sale constituted an intentional tort rather than negligence. The Board also did not have jurisdiction of the claims against AOC as it was not an actor in the situation at issue nor the employer of any actor involved in the claim. Circuit judges are elected and do not serve at the pleasure of the Chief Justice, and their compensation is fixed by the General Assembly pursuant to Section 120 of the Kentucky Constitution; as such, they are not AOC employees. The Court held Judge Winchester's continued use of a master commissioner, without reappointment, to perform actions in the circuit court without a bond and without surety as approved by him is grounds for a claim in the Board of Claims based upon alleged negligence in the performance of a ministerial duty by a state officer. It remanded Appellants' claims back to the Board of Claims for a determination, pursuant to KRS 44.120, whether they suffered damages as a proximate cause of any alleged negligence in the performance of those ministerial duties.


Mother and Father separated in December 2006, and the petition for dissolution of marriage was filed in February 2007. The parties agreed to share joint custody of their two minor children and signed an agreed order of custody that was incorporated into the decree of dissolution. The formal divorce decree was entered in July 2008. In 2009, Mother filed a pro se Notice-Motion-Order Regarding Visitation requesting a change in visitation and parenting schedule. Appellee, the family court judge, granted her motion to relocate with the children to Louisiana and entered an order modifying the parenting schedule. Father thereafter moved the Court of Appeals for a writ of prohibition and emergency relief under CR 76.36. The Court of Appeals denied the motion, holding Father failed to meet the threshold requirements for issuance of a writ. On appeal to the Supreme Court, Father argued the Court of Appeals erred in finding the family court had jurisdiction over Mother's motion to modify the parenting schedule. He
argued the motion should be construed as a motion to modify custody, which requires supporting affidavits before the trial court obtains jurisdiction over it. Crouch v. Crouch, 201 S.W.3d 463, 465 (Ky. 2006). The Supreme Court affirmed. Under Pennington v. Marcum, 266 S.W.3d 759 (Ky. 2008), a parent seeking to become a primary residential parent in a joint custody arrangement is seeking a change in timesharing, not a change in custody. Id. at 769. In the instant case, Mother was only seeking approval to relocate and change the amount of time the children spent with each parent. Her motion did not seek to alter the nature of the joint custody arrangement, and the family court properly construed it as a modification of timesharing and visitation. Because the motion did not affect the parties' joint custody, the family court did not need affidavits to acquire jurisdiction. The Court overruled Brockman v. Craig, 205 S.W.3d 244 (Ky. App. 2006) to the extent it is inconsistent with Pennington.


The Dreamers, LLC (Appellant) purchased materials to construct a home from Don's Lumber & Hardware (Appellee), but failed to pay Appellee for the materials once it completed construction. Appellee filed a materialman's lien on the property and filed suit against Appellant on the debt. It also filed a foreclosure action against the homeowner. Appellant's attorney failed to attend the summary judgment motion hearing due to a scheduling conflict, and the trial court granted summary judgment to Appellee and ordered the property sold. Appellant's attorney filed a motion claiming excusable neglect and asked the trial court to set aside the summary judgment and stop the sale. The trial court denied the motion, and the master commissioner set a date for the sale. Appellant filed a notice of appeal but did not post the supersedeas bond at that time. It instead filed a motion for a writ at the Court of Appeals and asked for temporary emergency relief stopping the sale, which was granted. The Court of Appeals thereafter denied the writ and ordered the sale reset. On November 19, 2009, Appellant paid the full judgment amount to Appellee on the day of the sale to stop it. In the direct appeal, all necessary steps had been taken for the case to be heard or submitted on the briefs to the Court of Appeals. It did not receive the trial court record until December 15, 2009. On December 9, Appellee filed a motion to dismiss the appeal as moot because the judgment had been paid. Appellant responded there had not been an agreement to dismiss the appeal, and it had specifically not included such language on the written receipt it provided to Appellee. The Court of Appeals entered an order stating Appellant had satisfied the judgment and dismissed the appeal. It made no specific findings regarding the arguments in Appellant's response. The Supreme Court granted discretionary review and held that paying a judgment in full, absent clear evidence of a settlement and compromise, does not extinguish the right to an appeal. Appellant could rightfully choose to pay the judgment in lieu of superseding by bond, and it had no obligation to reserve the right to appeal. Instead, the obligation is on the party seeking an end to the appeal to secure evidence that such was the parties' intent. Otherwise, there is no proof of settlement or satisfaction and accord. In the instant case, several facts were

18 See Madden v. Madden, 183 S.W. 931, 933 (1916).
disputed, including whether there was any intent to waive Appellant's right to appeal. The Court remanded the matter to the Court of Appeals with directions to proceed with the direct appeal that had previously been perfected.


Father was awarded sole custody of his minor child. Mother, who suffers from mental illness that impairs her ability to manage her affairs, was allowed only supervised visitation and ordered to pay $106 per month in child support. The court arrived at that figure by applying the child-support table in KRS 403.212 to the parents' combined monthly gross incomes, which included Mother's $637 monthly SSI benefit as her only income. When Mother fell behind in payments, the Cabinet moved the family court to hold her in contempt unless she could show cause for her failure to pay. At that time, she was in arrears in the amount of $1,125. The attorney who served as the guardian and/or payee for Mother's SSI benefits testified at the hearing. He stated that after deducting his administrative fee and Mother's rent and utilities, he gave any remaining funds (typically $25 to $50) to Mother to pay for her clothing, personal care items and other necessities. He also stated that under Social Security Administration regulations, he is required to use her award for shelter, maintenance and support and is precluded from using it to pay her child support. The trial court held Mother in contempt and ordered her to pay $5 per month toward the arrearage. It also granted Mother's motion to reduce her support obligation, lowering it to $60 per month. The family court did not state in open court or its written order how it arrived at this figure. It also found Mother "to be an able-bodied person capable of providing financial support to her child." It failed to indicate in open court or the written order what evidence it relied on to make that determination.

The Court of Appeals held the record did not support either a finding of contempt or imposition of a support obligation. The family court abused its discretion in finding Mother to be in contempt for failure to pay her support obligation and ordering her to pay support and arrears she did not have the ability to pay. The Supreme Court noted that under KRS 403.211 and 403.212, child support is to be determined by applying the guidelines to the parents' combined, adjusted gross income. Under KRS 403.212(2)(b), "gross income" is defined to include Supplemental Security Income. Pursuant to statute, Mother and Father were found to have a combined monthly income of $2,489.50, including Mother's SSI benefit of $637, which yielded a guidelines support obligation of $411.74. This amount was apportioned $305.74 to Father and $106 to Mother. Per KRS 403.211(2), this determination is presumed to be correct, but courts may deviate from the guidelines "where their application would be unjust or inappropriate." It affirmed the Court of Appeals' holding that a deviation from the guidelines in the present case was not an abuse of the family court's discretion. It vacated the modified support order and remanded to the family court for further proceedings. On remand, the family court is free to deviate from the guidelines upon a determination that the guidelines-derived obligation is unjust or inappropriate, but any deviation "should be supported by express reference to the pertinent evidence." The Court held Mother's inability to pay her child support precluded holding her in contempt for failure to do so. "An SSI recipient may be sanctioned for her failure to provide support only if it clearly appears that she was capable of
providing support in addition to providing for her own reasonable needs, and
evidence of that capability was lacking in this case." The Court also held neither
the assessment of child support nor proceedings to collect it violate federal law
pertaining to SSI benefits.

Interlock Industries, Inc. v. Rawlings, 358 S.W.3d 925 (Ky. 2011). Opinion by
Justice Schroder.

Plaintiff, a contract driver for a flatbed company, was injured delivering a load of
aluminum bundles. The bundles were loaded in the front and back of the trailer
in two three-layered stacks and secured with straps and chains. Upon arriving at
the delivery site, Plaintiff began releasing and rolling up the straps and chains
from the front half of the load. At the same time, a forklift operator began
unloading the bundles. One rolled down and struck Plaintiff, injuring him to the
point he was unable to work for six months. Plaintiff filed suit thirteen months
later. The trial court granted summary judgment for defendant and dismissed the
action based on the one year statute of limitations for personal injury claims in
KRS 413.140(1)(a). It held the two-year statute of limitations in the MVRA did
not apply because KRS 304.39-020(6)(b) excludes "conduct in the course of
loading and unloading the vehicle unless the conduct occurs while occupying,
entering into, or alighting from it" from the definition of "use of a motor vehicle."
The Court of Appeals reversed and applied the two-year statute of limitations. It
held rolling removed straps is not part of unloading; rather, it is part of the
process of preparing a tractor-trailer for a return to the roadway. The Supreme
Court reversed, holding Plaintiff's actions in removing the chains and straps from
the load and rolling the straps "was a continuous, integral part of the unloading
process." The trial court correctly applied the one-year personal injury statute of
limitations in KRS 413.140(1)(a).


Father and Mother had two children prior to their divorce. The family court
awarded joint custody of the children without designating either party as the
primary residential parent. The original decree stated Father was entitled to
"parenting time" in accordance with the standard "visitation schedule" used by
the court, with the effect that the children resided primarily with Mother, who was
a soldier in the U.S. Army. Mother was ordered to relocate to Texas, and filed a
motion in family court to modify the parties' parenting time. The court modified
the decree so that the children would reside primarily with Father, and Mother
would have parenting time in accordance with its visitation schedule. The court
orally referred to the factors in KRS 403.270(2) and stated its decision was based
on the children's "best interest." The Court of Appeals held the written order
entered by the family court failed to satisfy KRS 403.320(2)'s requirement that
the modification of a visitation order be based on the "best interest of the child."
It also held the order was erroneous because it modified the existing visitation
order without applying any of the factors in KRS 403.270(2). On appeal, the
Supreme Court held that CR 52.01 and the applicable sections of KRS Chapter
403 require written findings and admonished trial courts to include in all orders
affecting child custody the requisite findings of fact and conclusions of law
supporting their decisions. "A bare-bone, conclusory order such as the one
entered here, setting forth nothing but the final outcome, is inadequate and will

1-42
enjoy no presumption of validity on appeal." In the instant case, adequate findings were made from the bench at the conclusion of the hearing. However, pursuant to Anderson v. Johnson, 350 S.W.3d 453 (Ky. 2011), the Court remanded the case to the family court for entry of a new order setting forth in writing its findings of fact and conclusions of law.


Subtitle 13 of the Kentucky Business Corporation Act, KRS Chapter 271B, gives shareholders the right to dissent from certain significant corporate actions and to obtain "fair value" for their shares. The Court held "fair value" is the shareholder's proportionate interest in the value of the company as a whole and going concern. "Any valuation method generally recognized in the business appraisal field, including the net asset and capitalization of earnings methods employed in this case, can be appropriate in valuing a given business..." The Court of Appeals erred in categorically rejecting the net asset method. The Court rejected applying a marketability discount when valuing the dissenters' shares because "it is premised on fair market value principles which overlook the primary purpose of the dissenters' appraisal right – the right to receive the value of their stock in the company as a going concern, not its value in a hypothetical sale to a corporate outsider." (emphasis in original) Generally recognized entry-level discounts "where justified by the evidence are appropriate because these are factors that affect the intrinsic value of the corporate entity as a whole." The Court overruled Ford v. Courier-Journal Job Printing Co., 639 S.W.2d 553 (Ky. App. 1982), to the extent it endorsed shareholder-level discounts and required adherence to the "Delaware block" method of valuing the company as a going concern.


The Court granted discretionary review to determine whether an individual may bring a civil action for money damages under KRS 446.070 on the basis of an alleged violation of a provision of the state Constitution. Plaintiff made a claim for money damages based on an alleged violation of her substantive due process rights when hospital employees forcibly restrained her and extracted blood and urine samples without her consent, the consent of a parent or a court order. The Supreme Court held KRS 446.070 does not provide money damages for alleged violations of the state Constitution. KRS 446.070 states that "any person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." The Court held the word "statute" cannot be construed to mean "constitution" under KRS 446.070 because the Kentucky constitution is not a statute. The Court declined to exercise its authority to create a new cause of action in Kentucky to provide money damages for constitutional violations.
Plaintiff's wife died after suffering unexpected and substantial blood loss during surgery at Defendant hospital. Evidence showed that when surgeons realized a blood transfusion was necessary, they ordered a blood sample to be drawn and taken to the hospital blood bank so the blood needed for the transfusion could be ordered. In dire emergencies, universal donor blood could be obtained from the blood bank in ten minutes. More than twenty-five minutes elapsed before the nurse on duty transmitted the order to the blood bank. By the time the blood arrived, over an hour had elapsed from when it was first ordered. A jury found for Plaintiff, and the trial court awarded $5.3 million in compensatory damages and $3.75 million in punitive damages. Hospital staff members are instructed to prepare "occurrence reports" when significant events occur to document their experience and observations for review by the hospital's risk management staff in assessing legal liability issues. During depositions, the nurse testified she had not prepared an occurrence report. At trial, she testified she had prepared an occurrence report form at the charge nurse's direction and placed it as required in the front desk bin for distribution. The charge nurse denied asking her to prepare a report and denied ever seeing it. No one else testified to having any knowledge of the report's existence or content. The Court held the trial court did not err in giving a missing evidence instruction in connection with the unexplained disappearance of the occurrence report the nurse testified she prepared. It rejected the hospital's argument that direct and conclusive evidence of intentional and bad faith destruction as pre-determined by the trial court are absolute prerequisites for obtaining a missing evidence instruction. "[T]he better rule is that the requisite elements giving rise to the missing evidence inference may be proven, like virtually any other factual issue, by circumstantial evidence and reasonable inferences, much as would be required for any other type of instruction." "[W]hen it may be reasonably believed that material evidence within the exclusive possession and control of a party, or its agents or employees, was lost without explanation or is otherwise unaccountably missing, the trier of fact may find that the evidence was intentionally and in bad faith destroyed or concealed by the party possessing it and that the evidence, if available, would be adverse to that party or favorable to his opponent. When the trier of fact is a jury, the jury shall be so instructed." The trial court erred in giving a punitive damages instruction because there was insufficient evidence to demonstrate the hospital authorized, ratified, or reasonably could have anticipated its employees' conduct resulting in the delay of the delivery of blood to the operating room.


The Jefferson District Court judges and trial commissioners petitioned the Court pursuant to SCR 4.310(4) to review Judicial Ethics Opinion JE-121, dated March 29, 2011. The Ethics Committee held that a district judge's staff attorney or law clerk could not be appointed to the additional position of trial commissioner even if the two positions are kept separate and the staff attorney/law clerk did not work on anything he/she worked on as a trial commissioner. It held that Canon 3A requires a judge "to give first place to his or her judicial duties" and since the positions of staff attorney/law clerk are full-time, the trial commissioner would not
be able to comply with this ethical requirement. The Supreme Court disagreed and vacated Judicial Ethics Opinion JE-121, holding there is no violation of Canon 3A under the facts presented by the Jefferson District Court trial commissioners. The position of trial commissioner is part-time, and trial commissioners are permitted to devote time to another profession or occupation. SCR 4.300 Application of the Code of Judicial Conduct (A). The Jefferson District Court trial commissioners conduct business outside the normal working hours of the Jefferson Family Court, and the trial commissioners are able to comply with their duties under Canon 3A by limiting their work to the hours during which the Family Court is closed. Examining Canon 2, the Court disagreed with the Committee’s general finding that there is a potential appearance of impropriety where a district court trial commissioner also serves as a staff attorney for the circuit or family court of the same judicial district. It also disagreed with the Committee that the existence of certain limited situations in which an appearance of impropriety could arise justifies the blanket exclusion of all judicial staff attorneys from serving as trial commissioners. Instead, the trial commissioner’s duties may be limited to specifically designated judicial functions, and if the trial commissioner also serves as a staff attorney in another branch of the same judicial district, "careful attention" should be paid to the functions performed by the commissioner. A trial commissioner should not perform any judicial function on a matter previously worked on in his/her capacity as staff attorney. If a matter considered by a trial commissioner ends up before the judge for whom he/she works as a staff attorney, the judge must recuse from that case.


Appellant appealed from a Court of Appeals opinion affirming the Madison Circuit Court's entry of summary judgment that enjoined him from blocking a discontinued county road with a gate. In 2005, the Madison Fiscal Court voted to discontinue maintenance on the road pursuant to KRS 178.070 due to high maintenance costs. Appellant, who lives on the road, then erected a locked gate blocking the road and provided a key to each property owner on the road. Appellees filed suit against the fiscal court to challenge its decision to discontinue maintenance and against Appellant to force him to remove the gate. Appellees consist of an individual Madison County resident who does not live or own property on the road, and a non-profit organization which consists of various Madison County residents. Only one member owns property exclusively accessed by the road; the other members stated they want the road to remain open because it provides them a shortcut to other destinations and access to sites on the road that are important to their family histories. The circuit court granted summary judgment to the fiscal court, finding it properly followed statutory procedures to discontinue maintenance on the road. It also held that because proceedings under KRS 178.116 for reversion of the roadway to adjoining landowners had not been initiated, Appellant had no legal right or ownership to prohibit others from accessing the road. The Supreme Court affirmed. It held the non-profit organization had associational standing to file suit against Appellant for injunctive relief. The fiscal court’s discontinuance of maintenance of the road pursuant to KRS 178.070 did not affect any public easement rights. Under KRS 178.116(4), if a county road has been discontinued under KRS 178.070, then all private parties entitled to necessary access to it
may file a petition to close the road to public use or have the land under the road revert back to the original owners. No such petition was ever filed in this case, and the road must remain an open, public road. The Court held the county's refusal to maintain the road did not constitute an unconstitutional infringement of Appellant's right of access. There is no authority that allows a landowner to protect his right of access by impeding the right of others, even if their use contributes to the roadway's degradation.


After announcing her intention to seek election to the office of Russell County Clerk, Appellant was discharged from her position as deputy clerk by Appellee, the incumbent county clerk. Appellant brought a 42 USC §1983 action in state circuit court, alleging she was discharged in violation of her First and Fourteenth Amendment rights. The circuit court granted Appellee's motion for summary judgment and dismissed the complaint. It held the discharge of one employee was not the kind of policy decision that would support official capacity or county liability under §1983, and that under state law, counties and county officials in their official capacities are entitled to sovereign and official immunity, respectively. The court relied on Carver v. Dennis, 104 F.3d 847 (6th Cir. 1997), in holding Appellant's discharge did not implicate her constitutional rights. The Court of Appeals recognized that Carver is not binding authority, but found its reasoning to be persuasive and affirmed the summary judgment. It did not address the circuit court's ruling regarding immunity. The Supreme Court granted discretionary review and affirmed. It noted that while states and arms of the state are not subject to suit under §1983, counties, school districts and municipalities are "persons" for the statute's purposes and are not shielded from liability by state-created immunities. The Court overruled Clevinger v. Board of Ed. of Pike County, 789 S.W.2d 5, 12 (Ky. 1990), to the extent it holds otherwise. It held there is no per se First Amendment right to candidacy for political office, and Appellant failed to establish that her discharge in retaliation for her candidacy resulted in a violation of any constitutionally protected right under the First Amendment. The Court also noted that for tortious conduct to provide the basis for a government body's §1983 liability, the tort must have been committed pursuant to the government's body's official policy. Appellant failed to show Appellee had final authority to establish official county policy with the respect to the hiring of her deputy clerks.


At issue was whether the Kentucky Unemployment Insurance Commission correctly interpreted KRS 341.090, which designates the time period for determining the wages to be used to calculate unemployment benefits for a claimant who suffered a job-related injury. Generally, a claimant's benefit is based upon the wages received during a "base period," which is four of the last five calendar quarters of his/her employment. KRS 341.090 states that, if due to a work-related injury, the claimant's wages during the quarters which comprise the base period were not sufficient to entitle him/her to receive unemployment benefits, the calculation may instead be based upon four quarters of an
"extended base period" that includes the four quarters preceding the base period. In the instant case, the Commission held that KRS 341.090(2) requires that the extended base period may include only the four calendar quarters immediately preceding the base period. The Court held the Commission properly applied the statute's plain language in calculating Appellant's unemployment benefits.


Appellant's employment with the Jefferson Circuit Court Clerk's office was terminated in 2001. She thereafter filed suit in federal court alleging violation of her due process rights under the First and Fourteenth Amendments to the U.S. Constitution, violation of her free speech rights, and by pendant jurisdiction, violation of Kentucky's whistleblower statute, KRS 61.102 et seq. Original defendants included AOC, the Chief Court Administrator for the circuit court in his individual and official capacities, and Chief Judge of the circuit court, also in his individual and official capacities (his replacement for Chief Judge was also named in the suit in his official capacity). Following AOC's dismissal from the federal suit on Eleventh Amendment sovereign immunity grounds, Appellant filed a state court action against it alleging her termination violated her due process rights under §14 of the Kentucky Constitution and the whistleblower statute. The state court action was held in abeyance pending resolution of the federal claim. The federal district court dismissed the claims against the court administrator and chief judge in their official capacities on Eleventh Amendment grounds and in their individual capacities on the basis of qualified immunity, except to the extent prospective injunctive relief was sought. When the dismissal of the federal court claims became final, AOC moved for dismissal in state court of Appellant's whistleblower and due process claims based on the theory that res judicata barred the state court action. The circuit court sustained AOC's motion on grounds of res judicata, finding the federal court decisions dismissing Appellant's actions against AOC were grounded in the same facts as the state court action. The Supreme Court accepted transfer of the case from the Court of Appeals to determine if the trial court erred in holding res judicata and related doctrines barred the state court action.

Though Appellant's whistleblower claim was brought in the federal action, her state constitutional due process claim was not. The doctrine of claim preclusion's rule against splitting causes of action will not apply where "[t]he plaintiff was unable to rely on a certain theory of the case or seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts..." The federal court dismissed Appellant's claims against AOC for lack of subject matter jurisdiction under the Eleventh Amendment, and Appellant was unable to rely on a certain theory of her case or seek a certain remedy or form of relief in the first action. AOC cannot rely on claim preclusion to bar the instant claims. The Court held issue preclusion does not apply in the instant action. The federal court's decision addressed but did not rule on Appellant's federal due process claims. Its finding related only to the qualified immunity of the individual defendants and did not adjudicate the issue of whether a constitutional violation of a clearly established right occurred. Because the merits of the federal due process claim were not decided by the federal court, it made no decision that could have issue preclusive effect on Appellant's state due
process claim. The Court also held the doctrine of issue preclusion was improperly applied to bar Appellant's whistleblower claim in state court. It remanded the matter back to the circuit court for further proceedings in regard to whether Appellant was a tenured employee entitled to the due process protection afforded by AOC's administrative policies, and if so, whether those policies were followed during her termination, and whether Appellant reported information entitling her to protection under the whistleblower statute.

Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC, 360 S.W.3d 152 (Ky. 2012). Opinion by Justice Abramson.

Integrated Telecom Services Corp. (ITS) is a wholly-owned subsidiary of Inter-Tel Technologies, Inc. (Technologies), which in turn is a wholly-owned subsidiary of Inter-Tel, Inc. (Inter-Tel). ITS was the company's first retail branch in Kentucky selling telecommunications products from a building leased from Linn Station Properties, LLC (Linn Station). Linn Station obtained a default judgment against ITS after it breached the lease agreement but could not enforce the judgment because ITS was by then a defunct corporation without assets. Linn Station then sued ITS, Technologies, and Inter-Tel seeking to pierce the corporate veil and establish Technologies and Inter-Tel's liability for the judgment. The trial court granted summary judgment to Linn Station and the Court of Appeals affirmed. It held evidence showed ITS was "merely an instrumentality or alter ego of Technologies and Inter-Tel, operated by them to achieve tax benefits and avoid various liabilities." The Supreme Court granted discretionary review and affirmed. It noted the expanded list of factors to consider listed in Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 379 (7th Cir. 2008) (citing Fontana v. TLD Builders, Inc., 840 N.E.2d 767, 778 (Ill. App. 2 Dist. 2005), "is more reflective of the evolving considerations as to the so-called equities factors than the five simple factors" listed in White v. Winchester Land Development Corp., 584 S.W.2d 56 (Ky. App. 1979). The Court overruled White to the extent it can be read to require evidence of actual fraud before an entity's veil may be pierced. "We agree with the Seventh Circuit, however, that the injustice must be something beyond the mere inability to collect a debt from the corporation." "A Kentucky trial court may proceed under the traditional alter ego formulation or the instrumentality test because the tests are essentially interchangeable. Each resolves to two dispositive elements: 1) domination of the corporation resulting in a loss of corporate separateness and 2) circumstances under which continued recognition of the corporation would sanction fraud or promote injustice. In assessing the first element, the courts should look beyond the five factors enumerated in White to the more expansive list of factors discussed supra. As to the second element, the trial court should state specifically the fraud or injustice that would be sanctioned if the court declined to pierce the corporate veil." In the instant case, the Court held there was such unity of interest and ownership that ITS's separateness from Technologies and Inter-Tel ceased to exist. In addition, the injustice element was satisfied because the lease liability fell solely on ITS yet all of its assets were "squirreled" into Inter-Tel beyond a legitimate creditor's reach absent piercing of the corporate veil.

The parties' separation agreement stated Wife was to receive $3,000 per month in maintenance payments, and provided the amount of maintenance could be modified if she became more employable as a result of education she received from Husband's assistance. Husband filed a motion to modify after Wife received her degree in social work. Wife thereafter filed a motion pursuant to KRS 403.220 for attorney fees, expert fees and costs incurred as a result of defending Husband's motion. Following a hearing, the family court issued an order holding there were insufficient grounds to support Husband's motion. The order did not mention Wife's motion for fees and costs. Her attorney contacted the court clerk regarding the oversight. The judge's secretary thereafter informed Husband's attorney of the communication and stated Wife was going to file an affidavit concerning fees and that Husband would have one week to respond. She also stated there would be a hearing on the motion. At the hearing, Husband objected on grounds that the family court no longer had jurisdiction over Wife's motion. The family court granted the motion and awarded Wife attorney fees. The Court of Appeals reversed, holding the family court did not have jurisdiction to grant the motion. The Supreme Court granted discretionary review and reversed. The family court's order denying Husband's motion to modify maintenance did not divest that court of jurisdiction over Wife's motion for attorney fees. CR 52.02 only applies to the amendment of judgments, and the ten-day limit would have only divested the family court of jurisdiction if the order denying Husband's motion to modify was a final judgment. The finality of a judgment depends on whether the case involves a single claim or multiple claims. Cases involving multiple claims trigger CR 54.02(1), which states courts may grant a final judgment on less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment in the instant case did not recite that determination, and the Court held Wife's motion for fees constituted a separate claim. The family court retained jurisdiction over that claim, making its order regarding Husband's motion to modify maintenance interlocutory until it ruled upon the fees issue. CR 54.02(1).


The trial court granted Appellees a judgment on the pleadings and awarded them a $450,000 judgment against Schultz, the sole shareholder of Intra-Med Services, Inc. Based solely on the pleadings, the court pierced Intra-Med's corporate veil, allowing Appellees to obtain judgment against Schultz. The Supreme Court reversed the Court of Appeals decision affirming the trial court and remanded to the trial court for further proceedings. The Court adopted the reasoning in Daniels v. CDB Bell, LLC, 300 S.W.3d 204, 213 (Ky. App. 2009), and held the doctrine of piercing the corporate veil arises in equity. The trial court erred in piercing the corporate veil based only on the pleadings. On remand, the Court directed the trial court to resolve the issue "at a more appropriate juncture in the litigation" and advised it to consider its decision in Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC, supra.

The Court held KRS 337.550, the state's prevailing wage law, is constitutional. TECO Mechanical Contractor, Inc. (TECO) argued that the law is unconstitutional 1) because it fails to afford contractors a due process hearing before the Labor Cabinet assesses and attempts to collect back wages and civil penalties and 2) it fails to provide the Cabinet with appropriate guidance by defining each classification of construction workers covered by the law. The Court noted the Cabinet has no independent authority to collect any amount from contractors and must file a civil suit to enforce its claims. It held because the Cabinet's requests for payment did not deprive TECO of money or any other business assets, the Cabinet's actions did not deprive it of a protected property interest. In addition, TECO was not deprived of a liberty interest when the Cabinet sought payment from the prime contractors because TECO did not allege sufficient injury beyond harm to its business reputation to meet the "plus" element of the stigma plus test. See Paul v. Davis, 424 U.S. 693, 712 (1976). There are sufficient safeguards in place to prevent the Labor Cabinet from abusing any legislative or judicial authority granted to it under the prevailing wage law.


During litigation of Appellant's case, her initial counsel was appointed to the bench. Her current counsel filed a notice of substitution in July 2008. While the case was in discovery, Appellees moved for summary judgment, which was granted. Three months later, Appellant's counsel filed a motion for a status conference, claiming they had not received copies of the summary judgment orders and were unaware it had been granted. They filed a CR 60.02 motion to vacate the judgment. At the subsequent hearing, the court stated the clerk inadvertently left counsel off the mailing list. It granted defense counsel's motion, finding in its order that through clerical error, Appellant may not have received the final orders entered in the case granting summary judgment. They filed a CR 60.02 motion to vacate the judgment. At the subsequent hearing, the court stated the clerk inadvertently left counsel off the mailing list. It granted defense counsel's motion, finding in its order that through clerical error, Appellant may not have received the final orders entered in the case granting summary judgment. It set aside the original orders granting summary judgment and "re-granted" summary judgment in favor of all Appellees on February 26, 2009. Appellant filed a notice of appeal on March 3, 2009. Appellees moved to dismiss the direct appeal as being untimely under CR 73.02(1)(a). The Court of Appeals agreed and granted their motion to dismiss. It held the trial court improperly granted Appellant's CR 60.02 motion, and the appeal became untimely because the thirty-day time limit for filing a notice of appeal under CR 60.02(a) ran from the initial summary judgments rather than the judgment entered in February 2009. The Supreme Court granted discretionary review. It agreed with Appellees that a CR 60.02 order granted under subsections (a)-(e) may be considered in a motion to dismiss, but held the trial court did not abuse its discretion in granting CR 60.02 relief. Courts may grant relief pursuant to CR 60.02 upon the finding of "mistake, inadvertence, surprise or excusable neglect." The Court reversed and remanded to the Court of Appeals for consideration of the merits of the summary judgment rulings.

In 2010, Plaintiffs gave notice of their intent to sue Frasure Creek Mining, LLC pursuant to §505 of the Clean Water Act, which allows any "citizen" to bring suit to enforce any limitation in a NPDES permit. At the end of the sixty-day notice period, the Energy and Environment Cabinet brought the instant enforcement action against Frasure Creek, invoking the statutory bar to Plaintiffs' suit. The Cabinet filed a proposed consent judgment, and filed a joint motion with Frasure Creek to have the judgment entered. While the motion was pending, Plaintiffs moved to intervene. The trial court granted intervention to allow Plaintiffs an opportunity to voice objections to the proposed consent judgment. It held in abeyance any consideration of Plaintiffs' claims under the Clean Water Act. The Cabinet and Frasure Creek then petitioned the Court of Appeals for writs forbidding the intervention and compelling entry of the consent judgment. It denied extraordinary relief, and the Supreme Court affirmed. It held the trial court was proceeding within its jurisdiction. Even if the trial court's jurisdiction to hear and decide Plaintiffs' claims has been preempted by federal law, the limited intervention it allowed for purposes of citizen comment and objection is not preempted. Because the trial court held Plaintiffs' own claims in abeyance, the Court declined to decide whether it has jurisdiction to address those claims under the Clean Water Act. The Cabinet and Frasure Creek have an adequate remedy by appeal to challenge the trial court's actions in allowing the intervention, and the Court of Appeals correctly denied their petitions for extraordinary relief.


The Court held Prestonsburg Industrial Corporation, a private, non-profit corporation created to attract business and industry to the city, is not a charitable organization under Section 170 of the Kentucky Constitution, whereby it would be exempt from paying ad valorem taxes. The corporation is not a purely public charity and its property is not employed for a purely charitable purpose.


The Court held House Bill 1, which set forth a legislative redistricting plan, violated Section 33 of the Kentucky Constitution because it failed to divide the fewest number of counties possible and at least one House district and one Senate district had a population variance greater than 5 percent of the ideal districts. It also held the districts as enacted in the 2002 reapportionment plans codified at KRS 5.200, et seq. must remain in place for the 2012 elections.


Appellant was an employee at UK Chandler Medical Center, and parked his car in an employee lot at Commonwealth Stadium. He had a valid license to carry a concealed deadly weapon pursuant to KRS 237.110. His supervisors searched Appellant's work locker after co-workers complained they thought he kept a
weapon there. No weapon was found, but Appellant informed university police officers he had a concealed carry license and kept a firearm in his vehicle. The University suspended his employment pending an investigation. He was later terminated for violating the University's policy prohibiting possession of a deadly weapon on its property or while conducting University business. Appellant filed suit, alleging termination in violation of public policy, specifically his right to bear arms as set forth in the federal and state constitutions and state statute. The circuit court granted summary judgment for the University, holding it terminated Appellant pursuant to a policy authorized by law. After filing a notice of appeal, Appellant filed a motion to transfer the appeal from the Court of Appeals to the Supreme Court, which granted the motion. The Court reversed. **KRS 527.020(8)** forbids a public organization, like the University, from prohibiting the possession of a firearm in a vehicle's glove compartment. Because there was evidence to show Appellant also stored his firearm in the armrest of his car, the Court also considered the applicability of **KRS 527.020(4)**, which only applies to persons licensed to carry a concealed deadly weapon. **KRS 237.115(1)** allows universities the right to control the possession of deadly weapons on property under their control. However, this right is qualified by **KRS 527.020**. The Court held that to the extent the two statutes are in direct conflict, the conflict must be resolved in favor of **KRS 527.020(4)**. The Court stated this interpretation protects the right of concealed carry licensees to store weapons anywhere in their vehicle pursuant to **KRS 527.020(4)**, while allowing universities to control the possession of deadly weapons on all other property pursuant to **KRS 237.115(1)**, subject only to the general limitations in **KRS 527.020**. Appellant's discharge was contrary to **KRS 237.106(4)**, and the University was not entitled to judgment as a matter of law.


The Court accepted discretionary review to address whether the Court of Appeals erred in reversing the trial court's order denying the Cabinet's petition to terminate parental rights. The Court of Appeals held the trial court's findings of fact were clearly erroneous and the evidence overwhelmingly supported termination. The Supreme Court reversed and reinstated the trial court's judgment. It held the trial court's findings of fact were supported by substantial evidence and not clearly erroneous. At the termination hearing, the Cabinet offered testimony from four witnesses who stated they could not support reunification of the child and his parents because the parents failed to demonstrate an ability to meet the child's needs, they did not accept responsibility for his problems, and they did not believe there was a need to change their parenting behavior. The five witnesses who testified on the parents' behalf offered consistently positive testimony regarding the parents' involvement with the child. The trial court declined to terminate the parents' rights, finding the Cabinet had not met its burden of proving by clear and convincing evidence that termination was in the child's best interest, and that there was no evidence the child would be abused in the future. "Ultimately, this Court cannot overturn the trial court's decision, which was grounded in the evidence and was the result of an exercise of sound discretion, simply because it disagrees with that court's view of the evidence or might have ruled differently in the first instance."

The Court held Kentucky's Whistleblower Act, which applies to "the Commonwealth of Kentucky or any of its political subdivisions," does not apply to cities and offers no protection for city employees. See KRS 61.101, et seq.


Appellant served as the superintendent of Bourbon County public schools for eighteen months before transferring into a consultant position following his resignation. The details of his resignation and the terms of his consulting contract were determined during a closed session held during the school board's last regular meeting in 2002. Following the closed session, the board returned to open session and voted 3-2 to accept Appellant's resignation and appoint him as a consultant for one year at $133,063 plus $3,000 in moving expenses. Appellant performed only two weeks of consulting work in 2003, but received the monthly payments provided in the consulting contract for January and February 2003 totaling $20,536. Further payments were suspended following the circuit court's issuance of a temporary injunction after Appellee filed a complaint alleging the board violated the Kentucky Open Meetings Act (OMA), KRS 61.800-61.850. The circuit court granted summary judgment to Appellee, holding that KRS 61.810(1)(f) permitted the board's closed session discussions regarding Appellant's resignation but not its discussion of his consulting contract. The court voided the contract, held the board was not liable to Appellant for further payments under it, and ordered the funds held in escrow to be released to the board. The Court of Appeals affirmed, and the Supreme Court granted discretionary review. It held the trial court did not err in finding the board violated OMA when it discussed the consulting contract in closed session. However, it erred in holding the board was allowed to discuss his resignation in closed session. The OMA's litigation exception did not apply because there was insufficient threat of litigation at the time of the meeting. See KRS 61.810(1)(c). In addition, the personnel exception does not apply to discussions regarding an employee's resignation or contracts for independent contractors. See KRS 61.810(1)(f). The Court also held the board could not ratify actions taken in an improper closed session. The only way an agency may effectuate actions taken in an improper closed session is to start over again in open session. The board’s closed session was not authorized by any of the exceptions contained in OMA. Because it failed to substantially comply with the law, its actions are voidable by the court. See KRS 61.848. Appellant’s contract was valid until nullified by the circuit court, and he may retain the money paid to him under the contract for the work he has performed. He is not entitled to any additional payments, and the money held in escrow belongs to the Bourbon County public schools.


In August 2009, Appellant filed a petition for a Domestic Violence Order (DVO) in the Kenton County Family Court. Pursuant to KRS 403.740(1), the family court issued an Emergency Protective Order (EPO) to remain in effect until the date set for the full hearing on issuance of the DVO. Appellee requested that the hearing be postponed and consolidated with a related child custody issue so the
child’s GAL could be present. The court agreed to the postponement and stated it would reissue the EPO at fourteen-day intervals until the date of the combined DVO/custody hearing, which was rescheduled for November 2009. Neither party objected. In September, Appellee filed a motion to dismiss the EPO, citing KRS 403.740(1) to argue the family court lost jurisdiction when it failed to hold the DVO hearing within fourteen days after issuance of the original EPO. The family court took the motion under submission, and reissued the EPO until a hearing scheduled for October 7. On that date, the court issued another EPO. On October 21, the court dismissed Appellee’s motion to dismiss and held the full DVO hearing. It found an incident of domestic violence had occurred and granted the DVO. Appellee appealed to the Court of Appeals, which accepted his argument that KRS 403.740(4) required the DVO hearing to be held within fourteen days after the initial issuance of the EPO. Beyond that date, a DVO issued on the original petition could not be issued. Since the original EPO was issued on August 18, the family court lacked subject matter jurisdiction to issue the DVO. The Court of Appeals held Appellee’s agreement to the original continuance and failure to object to the EPO’s reissuance did not override “the statute’s jurisdictional time constraints for the entry of a DVO.” The Supreme Court reversed. It held the family court’s failure to issue the DVO within fourteen days of the initial EPO did not deprive it of subject matter jurisdiction. It also held the family court did not violate the time constraints in KRS 403.740 when it entered the DVO after re-issuing the EPO every fourteen days up until the hearing date. “While the statute in effect at the time did not expressly authorize extending the life of an EPO by re-issuing it in serial fashion every fourteen days until a hearing date, neither did it specifically bar that process.” The Court remanded to the Court of Appeals for consideration of Appellee’s argument that entry of the DVO was based on insufficient evidence.


The Court held equitable subrogation may not be used to reorder the priority of a mortgage lien where the mortgage holder had constructive but not actual knowledge of a pre-existing lien when it paid off an earlier mortgage as part of a refinancing deal and there was no fraud or misconduct that would have prevented discovery of the lien. It reaffirmed its holding in Wells Fargo Bank, Minnesota, N.A. v. Commonwealth, Finance and Administration, Department of Revenue, 345 S.W.3d 800, 804 (Ky. 2011), noting Wells Fargo applies equally to all lienholders.


Under KRS 258.095 and KRS 258.235, dog owners are strictly liable for damages caused by their dog. The Court held a landlord shall be deemed the owner of a tenant’s dog for the purposes of liability if the landowner permits the dog to remain on or about the premises he/she owns. The phrase “on or about” means on the property “or so close to it as to be within immediate physical reach,” which would include an attack that occurs immediately adjacent to the property but nothing further away. The landowners in the instant case were not owners of the dog in question and cannot be held liable under the dog bite
statute because the attack occurred across the street, outside the limited range of "on or about" their property. The Court noted that where ownership is premised upon permission for a dog to remain on the property, there must be an element of tenancy. Liability does not extend to temporary excursions onto another’s property, even when done with the landowner’s permission.


Appellant was injured in an automobile accident while riding as a passenger. The driver was using the car with the permission of the owners. Shelter issued the owners’ insurance policy, which stated on the declarations page that its bodily injury liability was limited to $250,000 per person and $500,000 per accident. After submitting her claim for the full $250,000, Shelter informed Appellant that the policy’s permissive user step-down provision limited her claim to $25,000, the statutory minimum required in Kentucky. See KRS 304.39-110. The policy’s declarations page made no mention of the coverage limitation for permissive users. Appellant filed for declaratory judgment, asking the trial court to declare the permissive user step-down provision unenforceable. She argued it was inconspicuous and ambiguous, making it unenforceable as a matter of law. The trial court ruled in Shelter’s favor, and the Court of Appeals affirmed in a split decision. The Supreme Court granted discretionary review and reversed. It noted the permissive user coverage was selectively omitted from the declarations page, and the step-down provision was mentioned in the policy in limited and confusing terms as the fifth of five definitions of “insured.” The Court held the step-down provision is insufficiently plain and clear to defeat the reasonable expectation of coverage created by the policy’s declarations page, and it is unenforceable as a matter of law. The Court noted it was “not prepared to hold in this instance that the permissive user step-down provision must appear on the Declarations page.” In addition, Shelter is free to phrase the provision “so as to limit its liability to the minimum required by whichever state’s law is applicable to the accident, so long as it is sufficiently conspicuous, plain and clear, to reasonably inform the insured.” (emphasis in original). “Thus, we do not hold that the $25,000 figure in KRS 304.39-110 must be included in the step-down provision, only that the insurer must clearly inform the insured how coverage for permissive users is limited.” (footnote omitted)


Plaintiffs filed an action in circuit court claiming severe emotional distress caused by the outrageous and intentional or reckless conduct of a doctor who made a misdiagnosis and told them that Wife had suffered a miscarriage when in fact she had not. After being informed her child had died, Wife took Methergine as prescribed by the doctor. An ultrasound later showed the fetus was alive, but the Methergine caused Wife to deliver five days later. The child died soon after birth. Plaintiffs first filed suit for medical negligence and the tort of outrage, but later amended the complaint to only seek damages based on outrageous conduct. The trial court denied Defendants’ first motion for summary judgment. Defendants filed a second motion for summary judgment stipulating that, for the sake of summary judgment alone, all the elements of the tort of outrage were met, but the claim of outrageous conduct could not be brought because all the
claims for emotional distress could properly be raised in a medical negligence claim. The trial court granted summary judgment for Defendants, and the Court of Appeals affirmed, citing Rigazio v. Archdiocese of Louisville, 853 S.W.2d 295 (Ky. App. 1993), which referred to the tort of outrageous conduct as a “‘gap-filler.’” The Court granted discretionary review and affirmed. Plaintiffs cannot maintain both a negligence claim and an intentional infliction of emotional distress claim based on a single set of facts. “The relevant inquiry is whether the facts support simple or gross negligence leading to a personal injury, some other specific intent tort, or a claim that conduct was intended or the actor should have known was likely to cause emotional distress with any physical results being consequential.” In order to prevail on their intentional infliction of emotional distress claim in the instant case, Appellants had to show the doctor acted outrageously with intent or reckless disregard to inflict severe emotional distress. The record failed to show the doctor failed to tell Wife her fetus was still alive because she wanted to inflict severe emotional distress, and the doctor could not act in reckless disregard of something she did not know. If the doctor did not act with intent or reckless disregard of Wife’s right to be free from outrageous conduct causing emotional distress, that distress is not compensable under this claim. If the doctor violated the standard of care in prescribing the drug which caused Wife’s miscarriage, the personal injury would be the miscarriage itself. “This cannot give rise to a claim for intentional infliction of emotional distress because the act complained of – giving the Methergine inappropriately – is an act of negligence causing personal injury, for which emotional distress is only compensable as an element of damages stemming from the injury.” The Court held regardless of the “misguided stipulations for the second summary judgment motion,” the facts established summary judgment was proper because the doctor’s conduct was properly the subject of a traditional tort claim.


The Court held Mortgage Electronic Registration Systems, Inc. (MERS) had good cause for failing to timely release a satisfied real estate lien it held on Appellants’ property. The trial court held Appellants were not entitled to statutory damages under KRS 382.365 because they provided insufficient notice to MERS of the release’s actual deficiency, which gave MERS good cause to not file a new release once it checked and found it had already filed one. The release that was filed contained a scrivener’s error stating the wrong mortgage book and page number of the mortgage to be released, which caused the release to be ineffective. When Appellants tried to obtain a second mortgage on the property, their mortgage with MERS still appeared in a title search. Appellants were aware there had been a problem with the MERS release, but the Court noted the record was silent as to how they became aware of it. Appellants’ attorney sent a letter to MERS informed it that the mortgage had not been released, but did not state there had been a scrivener’s error. When MERS personnel searched for the release and found it had been executed and recorded, it took no further action. Appellants also took no further action until filing the instant action alleging they were entitled to statutory damages because the lien was not timely released. The Court held that “in certain circumstances, human error can form the basis upon which ‘good cause’ exists for failure to timely release a lien under KRS
This good cause determination should be made on a case-by-case basis, under the totality of the circumstances.


The Court held, pursuant to KRS 387.520, district courts have exclusive jurisdiction to oversee the management and settlement of accounts in guardianship proceedings. The district court in the instant case did not act outside its jurisdiction when it issued an order requiring a guardian to provide all financial records related to a court-ordered accounting and to make restitution to the guardianship account. The Court of Appeals erred when it entered an order requiring the circuit court to enter a writ of prohibition preventing the district court from enforcing its orders requiring an accounting and restitution.


Husband and Wife were divorced in 2009. Judge George of the Jefferson Family Court presided over the parties’ trial in 2009 to determine custody and parenting issues and a trial in 2010 to determine property and debt distribution. Husband proceeded pro se for most of the proceedings, and filed thirty-six new motions between July 15, 2010 and January 10, 2011, most of which were baseless. In January 2011, Wife filed a motion to require Husband to post a bond prior to any future motions being called. The court agreed and issued an order requiring Husband to post a $7,500 bond before any further motions would be called or taken under submission. In April 2011, Husband filed a petition for a writ of mandamus or prohibition with the Court of Appeals, asking that it order Judge George to disqualify himself from further involvement in the case because of his bias against Husband. The Court of Appeals denied the petition, holding the issues of bias, fraud and conspiracy raised by Husband may be addressed on direct appeal. The Supreme Court affirmed. It held the family court has jurisdiction to hear divorce cases and issue and enforce orders related to those cases. Husband could not proceed under the first class of writ actions, which requires that the court be acting outside its jurisdiction. He cannot proceed under the second class of writ actions because he has the right to appeal all of the trial court’s final rulings on his bias, fraud and conspiracy claims. The Court also held Husband is not entitled to a writ regarding the bond order because he dropped his Eighth Amendment argument in his appeal to the Supreme Court, which was the only place where he argued the bond order should be vacated.


The circuit court granted Appellants’ motion for summary judgment on a partition action for the sale of jointly owned real estate pursuant to KRS 389A.030, holding the statute of frauds prevented enforcement of the parties’ oral buy/sell agreement. See KRS 371.010(6). The Court of Appeals reversed on the grounds that the party attempting to force the sale was impermissibly using the statute of frauds “as a ‘sword’ and not a ‘shield,’” and because no action was brought by the opposing party “which might trigger the application of the statute.” It remanded the case to the trial court to determine whether the oral buy/sell
agreement existed and its effect on the disposition of the property. The Supreme Court granted discretionary review and reversed. It was uncontroverted that there was no signed writing acknowledging the alleged buy/sell agreement, making it unenforceable absent fraud or an equitable claim. There was no evidence or allegation the agreement was not reduced to writing due to fraud at the time of the omission or that application of the statute of frauds would result in Appellants being unjustly enriched at the other co-tenants’ expense.

III. CRIMINAL


Defendant appealed his convictions for first-degree assault and PFO 2 as a matter of right. The Court held there was insufficient evidence to convict Defendant of first-degree assault because there was insufficient proof he caused a "serious physical injury" as defined by KRS 500.080(15). The trial court did not err in denying Defendant's motion to suppress because there was no violation of his Miranda rights. Voluntary statements will not be excluded on the basis of intoxication unless the accused is intoxicated to the point of mania or of being unable to understand the meaning of his/her statements. Britt v. Commonwealth, 512 S.W.2d 496 (Ky. 1974). Statements Defendant made voluntarily while talking on his cell phone before the interrogation began were also properly admitted. Miranda warnings are necessary only when a person in custody is subjected to interrogation. Rhode Island v. Innis, 446 U.S. 291 (1980); Miranda v. Arizona, 384 U.S. 436 (1966).


Defendant was convicted of first-degree rape and unlawful imprisonment, and the Court of Appeals affirmed the conviction. He thereafter filed a R.Cr. 11.42 motion with the trial court to set aside the conviction due to ineffective assistance of counsel at trial. He claimed defense counsel was ineffective for failing to object to jury instructions on the rape charge. Under the evidence, Defendant could have been charged with more than one count of rape, all of which occurred on the same day with the same victim. The Commonwealth only charged Defendant with one count of rape, but the instructions allowed the jury to choose between the rape that occurred in a car and the one that occurred in his home in finding him guilty. The trial court denied the motion, and the Court of Appeals reversed. The Supreme Court did not address whether the instructions constituted error. It instead held Defendant failed to meet the two-prong test in Strickland v. Washington, 466 U.S. 668 (1984), because he could not show prejudice. Under the instructions, the jury could not have found him guilty under both options, and Defendant was convicted of only one count of rape. The Commonwealth gave Defendant leniency by combining multiple crimes into one charge and one penalty.

The Court held when a trial court considers a motion to revoke probation for failure to comply with child support payment conditions, the court must "(1) consider whether the probationer has made sufficient bona fide efforts to pay but has been unable to pay through no fault of his own and (2) if so, consider whether alternative forms of punishment might serve the interests of punishment and deterrence." The Court also reconfirmed the trial court "must make clear findings on the record specifying the evidence relied upon and the reasons for revoking probation." The findings do not necessarily have to be in writing. These due process requirements apply regardless of whether the defendant agreed to the support payment conditions under a plea agreement or the conditions were imposed by the trial court. If the defendant agreed to payment conditions under a plea agreement, "the trial court may properly focus its inquiry on post-plea financial changes without revisiting whether the defendant was able to make payments at the time the guilty plea was entered." The Court noted its opinion applies equally to motions to revoke probation and motions to revoke conditional discharge.


The Court affirmed Defendant's convictions for second-degree manslaughter, first-degree fleeing or evading, and PFO 2, but reversed the trial court's imposition of court costs and fines because Defendant was determined to be indigent. The Court held the lab report indicating Defendant's blood tested positive for methamphetamine was a testimonial statement that should not have been admitted at trial in the absence of the lab technician who performed the testing. The error was unpreserved, however, because defense counsel failed to object to the technician's co-worker testifying to the report's contents. Defense counsel objected to the report's admission on the grounds it was cumulative of the technician's testimony, but not on Confrontation Clause grounds. The Court held there was no palpable error per R.Cr. 10.26 because other evidence aside from the lab report supported the inference Defendant was driving under the influence of methamphetamine.


Defendant was convicted of first-degree sexual abuse and incest and appealed to the Court as a matter of right. The Court reversed his conviction for sexual abuse due to an erroneous jury instruction. The jury instruction given accurately reflected the elements of first-degree sexual abuse under KRS 510.110(1)(d). However, the statute was not enacted until 2008 and did not become effective until July 15, 2008, at the end of the time span when the sexual abuse was alleged to have occurred. Until that time, first-degree sexual abuse applied only where a victim was incapable of consent because he/she was physically helpless or in instances of forcible compulsion. KRS 510.110 (2006). None of the elements actually described in the previous version of the statute were included in the sexual abuse instruction under which the jury convicted Defendant. The
Court noted that while it was possible Defendant committed first-degree sexual abuse under KRS 510.110(1)(d) after the statute was enacted but within the timeframe of the instruction, the instruction did not require the jury to find the crime to have occurred during that timeframe. Instead it allowed the jury to convict Defendant of first-degree sexual abuse for conduct committed during a three year period, mostly before such conduct was punishable as first-degree sexual abuse. The Court affirmed Defendant's conviction for first-degree incest.


In 2008, Defendant was charged with DUI, first offense. At her arraignment, defense counsel requested the presence of the arresting officer at the pretrial conference. The Commonwealth objected to producing the arresting officer. The district court ruled in Defendant's favor, holding it had discretion under R.Cr. 7.24 and 8.03 to enter orders to expedite cases and aid in their disposition. The Commonwealth requested a writ of prohibition from the circuit court, which was granted. The circuit court held the district court order was entered erroneously because there was no basis in the civil or criminal rules for such an order, and that the Commonwealth's prosecution would suffer from irreparable harm under the district court's order. The Court of Appeals overturned the writ, holding there was no substantial evidence to support the circuit court's finding the Commonwealth would suffer irreparable harm. It also held the district court acted within its discretion under R.Cr. 7.24(5). The Supreme Court reversed and reinstated the circuit court's writ. Because the district court's order compelled the Commonwealth to present the witness at a pretrial conference for the purpose of being interviewed for discovery purposes, the order exceeded what R.Cr. 7.24 and 8.03 allow. The Rules do not prohibit the court from ordering the witness's attendance so long as he/she is not subpoenaed to compel his/her testimony at the pretrial conference.


Defendant appealed his conviction of murder pursuant to a guilty but mentally ill verdict as a matter of right. He argued the trial court erred in giving a "no duty to retreat" instruction regarding the victim. The instruction, titled "Use of Defensive Force" and based on KRS 503.055(3), stated the victim had no duty to retreat and could use defensive force if he was on his own property and believed it was necessary to defend himself. Defendant argued the instruction negated his affirmative defense of self-defense and that KRS 503.055(3) was not intended to be asserted on the victim's behalf. The Court agreed, reversing his conviction and remanding for a new trial. It held KRS Chapter 503 as a whole was meant to apply to the conduct of the person subject to criminal prosecution as a result of the use of force, and not to the victim of that force. The trial court did not err in excluding evidence that Defendant believed he was being poisoned while in the county jail. To be relevant to a claim of insanity, the evidence must relate to a defendant's mental state at the time of the crime. See Cannon v. Commonwealth, 777 S.W.2d 591, 595 (Ky. 1989). The defense was also able to present abundant evidence to show Defendant was suffering from a delusional disorder at the time of the crime.
Machniak v. Commonwealth, 351 S.W.3d 648 (Ky. 2011). Opinion by Justice Abramson. The Supreme Court entered an order withdrawing the opinion that had originally been issued in this case on 12/16/10.

Defendant was indicated on twenty-nine criminal offenses, twelve of which were class D felonies and the rest misdemeanors and a violation. He agreed to a plea under which he would receive a three-year sentence for each felony, all to run concurrently and be probated for three years. In the event Defendant violated probation, the twelve three-year sentences would run consecutively. The trial court announced a sentence in accordance with the plea agreement in court, but the written judgment and sentence did not contain the provision stating the sentences would run consecutively if Defendant violated probation. Instead, it sentenced him to imprisonment for a maximum term of three years probated three years. When Defendant later violated probation, the trial court entered an order of probation revocation sentencing him to twenty years imprisonment.

Defendant appealed, and the Court of Appeals affirmed. It held the discrepancy between the court's oral statements at the sentencing hearing and the written judgment was clerical error, which could be corrected pursuant to R.Cr. 10.10. The trial court tried to correct the written judgment to correctly reflect the terms of the plea agreement by entering an amended order more than a year after the Court of Appeals rendered its opinion. Defendant's appeal of the amended order was transferred to the Supreme Court and consolidated with this discretionary review case.

The Court held the written judgment sentencing Defendant to three years imprisonment probated for three years prevails over the trial court's oral statements. See Commonwealth v. Taber, 941 S.W.2d 463 (Ky. 1997); Commonwealth v. Hicks, 869 S.W.2d 35 (Ky. 1994). The failure of the written judgment to reflect the intended sentence as stated at the sentencing hearing was clerical error subject to appropriate correction. "[A] discrepancy between a trial court's intended sentence and the final judgment is a clerical error where the intended sentence was explicitly expressed by the trial court and fully made known to the parties, and such is readily apparent from the record of the sentencing hearing, with no credible evidence to the contrary." Trial courts may correct clerical errors on their own before the appeal is perfected, or they may obtain leave of the appellate court and correct the error after the appeal is perfected but while appeal is pending. Perfection occurs in the first appellate court to which the case proceeds. Once it is perfected, it remains pending until such time as a final and non-appealable opinion is rendered. The trial court in the instant case erred by attempting to correct the error by unilaterally entering an amended order while Defendant's appeal was pending. The amended order was invalid and Defendant's sentence remains that which was written on the uncorrected final judgment. The Court noted that the intended sentence, which was designed to escalate if Defendant violated probation, was improper because trial courts are required to determine and set a defendant's punishment at the time of conviction. See KRS 532.030. Trial courts may not increase a defendant's punishment because of probation violations that result in revocation. Howard v. Ingram, 452 S.W.2d 410 (Ky. 1970) (quoting Hord v. Commonwealth, 450 S.W.2d 530 (Ky. 1970)).

Appellant petitioned the Court of Appeals for a writ prohibiting the Fayette County Attorney from referring a felony criminal complaint against him to a mediator before presenting the complaint to a district judge for review and issuance of a summons or warrant. In 2010, he had received two documents from the "Fayette County Court Annexed Mediator" stating the "Fayette County Court" received a complaint against him for a violation of KRS 514.030. Both documents were issued under the Court of Justice seal with "Administrative Office of the Courts" written at the top. Each stated the judge had referred the complaints to mediation in efforts to resolve the disputes prior to issuing formal charges against Appellant, and directed him to appear for mediation at "Fayette County Fayette District Court" with a warning that failure to appear could result in issuance of a summons or warrant. The Court of Appeals granted the County Attorney and mediator's motion to dismiss the petition, and Appellant appealed to the Supreme Court. The Court affirmed, but on different grounds. The Court of Appeals held that because original jurisdiction to consider actions arising from the district court is vested in the circuit court, the writ petition should have been filed in Fayette Circuit Court. The Supreme Court held the action did not arise from the district court as Appellant was not directed to attend mediation by order of the district court. Until the district court issues process or a defendant is presented to the court following a warrantless arrest, the district court has no jurisdiction over the persons involved in the dispute and there is no criminal case to be referred. However, writs of prohibition may only be issued against judicial officers, and the County Attorney and mediator are not judicial officers. The Court noted the relief Appellant seeks is in the nature of an injunction to prevent the County Attorney from operating the mediation program. The circuit court, and not the Court of Appeals, has original jurisdiction over declaratory judgment actions and suits for injunctive relief. The Court also stated "[t]he appropriation of the seal of the Court of Justice and the name of the 'Administrative Office of the Courts' to imply that the directive to attend mediation originates from, and will be enforced by, the judicial power of this Commonwealth will not be tolerated. We trust that it will immediately cease."


Defendant was convicted of murder, tampering with physical evidence and PFO I and appealed to the Supreme Court as a matter of right. The trial court did not err by instructing the jury on manslaughter in the first degree under a theory of intent to cause serious physical injury rather than manslaughter in the first degree under a theory of extreme emotional disturbance. The issue was not preserved by Defendant at trial, and he requested review for palpable error under R.Cr. 10.26. The Court held Defendant waived his right to appeal this issue. Defense counsel did not object to the instruction at trial, and stated at Defendant's request that his client did not want any lesser-included offense instructions. He also stated the evidence did not support an EED instruction. Statements made by the prosecutor during closing arguments regarding Defendant's failure to testify were not flagrant and did not meet the requirements for reversal under Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002). The trial court sufficiently admonished the jury, and evidence of Defendant's guilt
was overwhelming. The Court reversed Defendant's conviction for tampering with physical evidence. The evidence at trial concerning the gun used in the crime was enough for a jury to infer Defendant shot the victim with a gun and then carried that gun with him to get into a witness's car. The gun used in the crime was never found. Defendant's walking away from the scene with the gun was not enough to support a tampering charge under KRS 524.100 without additional evidence of another act demonstrating his intent to conceal. Cf. Commonwealth v. Henderson, 85 S.W.3d 618 (Ky. 2002).

Ordway v. Commonwealth, 352 S.W.3d 584 (Ky. 2011). Opinion of the Court.

Defendant was convicted of multiple counts of robbery, burglary, theft by unlawful taking, receiving stolen property and PFO 1. Defendant was previously tried separately and acquitted of a charge for possession of a handgun by a convicted felon. He argued on appeal that the Commonwealth was collaterally estopped from litigating whether he was armed during the robberies because of his acquittal on the possession of a handgun charge. The jury in the first trial determined that between May 26 and August 31, 2007, Defendant did not possess a gun found in his girlfriend's apartment. It did not determine that he never possessed a gun during that time period. The effect of the acquittal only bars retrial of the issue determined in the first trial – whether Defendant constructively possessed the handgun found in his girlfriend's apartment. The handgun evidence was not used to re-litigate that issue in Defendant's second trial, and that fact was not a necessary element of any other offense litigated in the second trial. The Court reversed Defendant's convictions for nine counts of third-degree burglary. The jury instructions relating to thefts from nine storage units at a mini storage facility were improper because they were identical and in no way distinguished or differentiated one count from the other. It also held one of Defendant's convictions for theft must be vacated. Evidence at trial showed he and an accomplice cut the fence at a sports equipment store and pushed two ATVs through the opening. The act of taking multiple items from one residence constitutes one theft. Jackson v. Commonwealth, 670 S.W.2d 828, 832 (Ky. 1984) (overruled on other grounds by Cooley v. Commonwealth, 821 S.W.2d 90 (Ky. 1991)). The fact Defendant had to abandon one of the ATVs during his escape was of no consequence because the theft had already occurred. Both vehicles were taken from the same place at the same time. See Fair v. Commonwealth, 652 S.W.2d 864, 867 (Ky. 1983).


Defendant appealed his convictions of first-degree rape and first-degree sodomy as a matter of right. He argued the trial court erred in refusing to suppress incriminating statements he made to police because the statements were coerced and involuntary. Defendant admitted to having sexual contact with his stepson after a social worker told him she would seek a court order to have his children removed from the family home if he did not cooperate with officials. The Court held Defendant's confession was not coerced and was properly admitted by the trial court. The trial court found the information was not delivered as a threat and accurately described what happens when a suspect in a child sexual abuse case refuses to cooperate and the children are deemed to be at risk. The
Court emphasized that existence of credible allegations of child sexual abuse alone will not justify immediately informing a suspect of the potential that children will be removed from the home if he/she does not cooperate. The suspect still has a Fifth Amendment right to remain silent and decline to cooperate with the investigation. However, in cases where the suspect and his/her spouse refuse to cooperate with the investigation and officials intend to seek a court order of removal, it is not inappropriate or coercive to inform the suspect of the intended next step. The warning in the instant case "was not a speculative threat of ultimate loss of [Defendant]'s children, but an accurate statement of what was apt to happen next in such cases, and as such it did not amount to overreaching by the state agents involved and did not pressure [Defendant] to such an extent as to impair his capacity to choose."


Defendant appealed his convictions of possession of a firearm by a convicted felon and PFO 1 as a matter of right. In 1999, Defendant pleaded guilty to DUI fourth offense, which is a felony, and was sentenced to eighteen months in prison. In 1993, he was convicted of felony theft by unlawful taking and sentenced to eighteen months in prison, and in 2004, he was sentenced to thirty months in prison for flagrant non-support. He argued his twenty-year sentence in the instant case was unconstitutionally excessive due to the remoteness of his two prior offenses, the minor nature of all his offenses, and the Commonwealth's recognition via its plea offer that a shorter sentence was appropriate. The Supreme Court affirmed his convictions. The twenty-year PFO sentence was not cruel and unusual punishment notwithstanding the fact that all of Defendant's other crimes were Class D felonies and can be classified as non-violent. The sentence imposed was within the range authorized by the General Assembly for three-time offenders. It is neither long enough to be deemed extreme nor harsh enough in the context of a third offense to be deemed grossly disproportionate.


The Court affirmed Defendant's convictions for murder, first-degree burglary, tampering with physical evidence, intimidating a participant in the legal process and tampering with a witness. It held the trial court's admission of Defendant's statements to a detective, including the detective's questions and comments, did not constitute palpable error. The detective's comments regarding his own personal life were meant to elicit responses from Defendant and helped give meaning to those responses. They were relevant in conjunction with Defendant's statements to show his state of mind before and at the time of the killing. Per Lanham v. Commonwealth, 171 S.W.3d 14 (Ky. 2005), Defendant was entitled to have the jury admonished that the detective's comments were offered only to provide context to Defendant's relevant responses. Id. at 28. The burden is on the Defendant to request such an admonition and failure to do so will be deemed a waiver. Id. Defendant failed to request an admonition in this case, and the Court held, given the totality of proof against him, he was not unduly prejudiced by the comments alone or in conjunction with the remainder of the recorded statement. It also held the trial court's opening remarks to the jury concerning
the assessment of witness credibility did not constitute palpable error. Although the court's comments "strained...the line judicial comment is not to breach," the Court noted the statements came before the witnesses testified rather than afterward and the trial court took care to state it intended no comment on the evidence. Given the lack of case law regarding this type of pre-opening instruction, the Court declined to address whether the trial court clearly or palpably abused its discretion. It also held the burglary instruction given at trial did not allow for a non-unanimous verdict.


Defendant appealed his convictions for trafficking in a controlled substance, tampering with physical evidence, possession of marijuana and PFO 1 as a matter of right. He argued that a member of the jury, whom he tried to have struck for cause, was biased by his friendship with a state trooper. The juror initially stated he believed he would remain impartial, but answered in the affirmative when asked whether there was "a possibility bias might creep in." The Court held the trial court did not abuse its discretion. "In denying [Defendant]'s motion to strike for cause, [the trial court] interpreted the juror's concession of a 'possibility' as equal to the 'possibility that it could snow today,' in the middle of May. This was insufficient to cause the court any concern." The Court reversed Defendant's convictions for trafficking in cocaine and tampering with physical evidence. The trial court allowed the Commonwealth to introduce a report from the state crime lab without live testimony from the report's author. The chemist who wrote the report identified the white powder in the bag Defendant tossed on the sidewalk prior to arrest as cocaine. He failed to appear in court due to illness, and the director of the lab testified regarding the report. The Court held the trial court erred in admitting the report into evidence pursuant to the U.S. Supreme Court's recent decision in Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011). The statements in the lab report were testimonial in nature and subject to the Confrontation Clause. Defendant was not afforded the opportunity to cross-examine the report's author, and the trial court erred in allowing its admission. This error was not harmless. Whether the substance Defendant was accused of trafficking was cocaine or not was an element of the offense, which was proven solely by the lab report at issue. The lab report played no role in Defendant's conviction for possession of marijuana, and testimony regarding his other bad acts, *i.e.*, cocaine trafficking, was harmless. Uncontroverted testimony was offered at trial that police found a bag of marijuana on Defendant's body at the time of arrest. The Court vacated Defendant's PFO conviction but noted it may be retried with the underlying crimes as long as the Commonwealth provides some evidence to support the PFO charge.


Defendant appealed his convictions of first-degree burglary, first-degree robbery and PFO 2 as a matter of right. The Supreme Court affirmed. It held his Fifth Amendment rights were not violated when he was required to a recite a neutral phrase before the jury so a witness could make an in-court identification of his
voice. The trial court did not err in denying Defendant's request for a mistrial. It ruled DNA testing results were inadmissible, but the fact the testing had occurred was admissible because it was integral to the evidence's chain of custody. The Court held a lab technician's brief and isolated reference to a swab created for DNA testing did not taint the jury or unduly prejudice Defendant. The testimony also did not fall outside the bounds of the trial court's ruling. During the penalty phase, a probation and parole employee testified erroneously regarding Defendant's prior criminal record. He inaccurately stated Defendant had been convicted of fourth-degree assault for spousal abuse, and the trial court admonished the jury that the conviction was actually for harassment and disorderly conduct. The witness later stated Defendant was found guilty of first-degree burglary, and the trial court admonished the jury that the conviction was actually for criminal trespassing. The Court held the trial court's admonitions adequately cured any prejudice resulting from the witness's misstatements.


Defendant was found guilty but mentally ill of first-degree manslaughter, and the jury recommended a twenty-year sentence. The trial court orally imposed the recommended sentence, and its order stated Defendant was entitled to credit for time spent in custody prior to sentencing as calculated by the Division of Probation and Parole per KRS 532.120. Probate and Parole calculated Defendant's presentencing custody credit at 3,086 days, which included credit for the time he had been involuntarily hospitalized for treatment although not then under indictment. Six years later, the Department of Corrections (DOC) determined Defendant had completed his sentence and released him from custody. Several days later, it asserted an error in Probation and Parole's calculation and found Defendant should not have been discharged. After Defendant's reincarceration, Probate and Parole submitted an amended time credit sheet reducing his presentencing custody credit to 1,499 days to the circuit court for approval. The circuit judge approved and signed the amended sheet and placed it in the court record. The trial court denied Defendant's motion requesting that it deem the judgment against him satisfied. The Court of Appeals affirmed, holding the trial court correctly denied the motion because Defendant failed to exhaust his administrative remedies with DOC. The Supreme Court reversed, holding the DOC did not have authority to modify the amount of presentencing custody credit awarded to Defendant in the trial court's sentence. Prior to its amendment in June 2011, KRS 532.120(3) provided that "a defendant's presentencing custody credit 'shall be credited by the court imposing sentence toward service of the maximum term of imprisonment.'" The DOC's role was only to assist the trial court in determining the proper amount of credit by providing its calculations. No statutory authority or case law gave it power to set or modify the presentencing custody credit. The Court noted the trial court also lacks the authority to correct any error in Defendant's presentencing custody credit. Trial courts lose jurisdiction to amend a judgment ten days after entry under CR 59.05, and neither R.Cr. 10.10 nor CR 60.02 can be used to correct judicial errors.
Defendant was convicted of manufacturing methamphetamine, receipt of stolen property and PFO 2. The Court held the trial court properly denied his motions to suppress evidence found following a traffic stop. Substantial evidence supported the trial court's finding the officer stopped Defendant for reckless driving and failure to wear a seatbelt. The officer had articulable, reasonable suspicion Defendant violated those traffic laws, and the stop was constitutional. Following the stop and Defendant's arrest for an unrelated outstanding warrant, the officer drove back to the home for-sale from which Defendant had come. A realtor provided a key, and a search of the house yielded a trespasser, who admitted to making methamphetamine in the home and stated Defendant had taken several items from the house including a laptop and a box of lights. Based on this information, police looked in Defendant's car and saw a laptop bag and a box of lights in plain view. After searching the vehicle, officers discovered other items stolen from the home and a mobile methamphetamine lab. The Court held the trial court properly denied Defendant's motion to suppress the search and seize under the plain-view and automobile exceptions to the warrant requirement. It emphasized that Kentucky law does not require inadvertent discovery of the evidence under the plain-view exception. The items were in plain view, and police had probable cause to believe the items were stolen from the home. Finding the laptop and lights in plain view gave police probable cause to believe Defendant's car contained other stolen items, allowing them to search the entire vehicle under the automobile exception and seize all evidence. The automobile exception applied in this case because Defendant's car was readily mobile and contained evidence of criminal activity. The trial court erred by allowing the introduction of amended and dismissed charges during the penalty phase. This issue was not preserved for appellate review. The Court held it did not rise to the level of palpable error and affirmed Defendant's convictions.

Defendant began serving a twelve-month sentence in the Fayette County Detention Center (FCDC) for criminal possession of a forged instrument in the third degree. The trial court later modified its order of incarceration, releasing Defendant from FCDC and allowing him to participate in the Home Incarceration Program (HIP) so that he could care for his mother. Shortly thereafter, his caseworker received an alert that the transmitter band on his ankle bracelet was open. Defendant remained at large for several weeks before being arrested. He was convicted of escape in the second degree and PFO 2. The Court of Appeals affirmed, finding Defendant had escaped from a detention facility under KRS 520.030. The Supreme Court held the trial court properly denied Defendant's motion for a directed verdict of acquittal on the second-degree escape charge. "[F]or an incarceree in HIP, leaving the specified home without permission, or failing to return to the home after a temporary, authorized leave, is escape from a detention facility under KRS 520.030(1). Escape from such a home can therefore constitute second-degree escape." At trial, the Commonwealth proved Defendant left his mother's home without permission, which was a detention facility as defined in KRS 520.010(4). It would not have been unreasonable for a jury to
find he committed second-degree escape. However, the Court reversed and remanded for a new trial, holding the jury instruction given at trial constituted palpable error because it did not include all of the necessary elements for second-degree escape under KRS 520.030(1). It held Defendant was not entitled to an instruction on third-degree escape.


Defendant appealed his convictions for murder, attempted murder, and PFO 1 as a matter of right. He argued the trial court erred by denying his general motion for a directed verdict, asserting the Commonwealth failed to present sufficient evidence to allow the jury to find him guilty of murder. Defendant argued the trial court should have directed a verdict on the question of guilt and instructed the jury solely on the question of whether he was guilty but mentally ill or not guilty by reason of insanity. This alleged error was not preserved for appeal. This type of limited directed verdict does not exist, and the Court held there was sufficient evidence for the jury to convict Defendant of murder under various theories of the crime. It also held the trial court did not abuse its discretion by including the language of KRS 504.020(2) in its insanity instruction. Defense counsel also requested an instruction on manslaughter based on extreme emotional disturbance (EED). Although the instruction incorrectly required Defendant to prove the existence of EED beyond a reasonable doubt, the Court held he could not seek reversal of his conviction on the basis of the improper jury instruction because the instruction given was the one Defendant requested. See **Mason v. Commonwealth**, 565 S.W.2d 140 (Ky. 1978). The Court also held that no prosecutorial misconduct occurred and affirmed Defendant's convictions.


Defendant appealed his convictions for murder and kidnapping as a matter of right, and the Supreme Court affirmed. He argued the trial court erred by failing to dismiss the kidnapping charge pursuant to the kidnapping exemption statute, KRS 509.050. The trial court refused to apply the exemption, holding that while there was evidence Defendant intended to murder the victim based on his comments before he returned to her home, evidence also showed he intended to "brutalize and demean her, with her death being incidental to the beating." A three-prong test determines when the kidnapping exemption applies: "first, the underlying criminal purpose must be the commission of a crime defined outside of KRS [Chapter] 509. Second, the interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime. Third, the interference...must not exceed that which is ordinarily incident to the commission of the underlying crime." In this case, the restraint of the victim exceeded that ordinarily incident to the commission of murder, as Defendant engaged in substantial detours from the ultimate deadly assault to humiliate and degrade the victim. The Court also held the trial court properly denied Defendant's request to remove his attorneys, and it did not err in allowing Defendant to represent himself with the court-appointed attorneys as standby/hybrid counsel. The trial court conducted a Faretta hearing and properly found Defendant's decision to waive his right to counsel was knowing and voluntary. The trial court also properly denied Defendant's request for an out-of-state
subpoena for the clinical psychologist who examined and tested him during his pretrial mental competency evaluations because he failed to show her testimony would have been material and necessary to the proceeding. KRS 421.250(1).

Finally, the Court held the Commonwealth's use, during cross-examination, of a letter written to Defendant by his prior counsel did not violate the attorney-client privilege. Defendant took positions at trial that placed the substance of the communication in issue and waived his attorney-client privilege regarding the letter.


When police detained Defendant, he was with a group of nine people, some of whom police witnessed engaging in illegal drug activity. Defendant argued that the group's actions did not create reasonable suspicion of criminal activity particularized to him to justify a detention under Terry v. Ohio, 392 U.S. 1 (1968). The trial court denied Defendant's motion to suppress the handgun seized during the pat down that followed the detention, holding Defendant "was part of a distinct group whose conduct aroused sufficient reasonable suspicion for the officers to detain" him. The Court of Appeals and Supreme Court affirmed. Unlike the defendant in Ybarra v. Illinois, 444 U.S. 85 (1979), Defendant was not a patron of a public establishment who happened to be there when police arrived. Instead, he was "in a distinct group of nine people gathered in front of a vacant house. Members of this group openly used drugs in this public place and possessed handguns. This gave police...reasonable, articulable suspicion of criminal activity among the group and justified an investigatory stop of its members." While mere association with a person who is independently engaged in criminal activity is not enough to support an investigatory stop and search, it can be considered in determining whether reasonable, articulable suspicion exists for a Terry stop.


Defendant was convicted of two counts of first-degree trafficking in a controlled substance and PFO 2, and appealed to the Court as a matter of right. She argued that her forty-year sentence violated the statutory maximum provided by law. The Court reviewed for palpable error under R.Cr. 10.26. The trial court sentenced Defendant to ten years' imprisonment for each trafficking count, enhanced each count to twenty years based on her PFO status, and ordered the sentences to run consecutively for a total sentence of forty years. When Defendant committed her offenses, first-degree trafficking in a controlled substance was a Class C felony with a maximum term of ten years' imprisonment. KRS 218A.1412(2) (2007). When that sentence is enhanced by second-degree PFO status, the maximum possible term becomes twenty years. KRS 532.080(5). Defendant argued her consecutive sentence exceeded the maximum aggregate duration allowed by KRS 532.110(1). The Commonwealth argued the Court should follow the holding in Devore v. Commonwealth, 662 S.W.2d 829 (Ky. 1984), which held KRS 533.060(2) modifies the maximum aggregate duration allowed by KRS 532.110(1) and all sentences must be run consecutively with one another when the offenses were committed while the
offender was on parole. The Court held KRS 533.060(2) does not modify KRS 532.110(1) so that subsequent offenses run consecutively may exceed the maximum aggregate duration allowed by KRS 532.110(1)(c). It overruled Devore to the extent it states otherwise. Because the maximum length authorized by KRS 532.080 for an enhanced Class C felony is twenty years, the aggregate of Defendant's consecutive sentences could not exceed that amount. The Court vacated the forty-year sentence and remanded for resentencing by the trial court.


Defendant was convicted of eight counts of first-degree rape and eight counts of incest and sentenced to life in prison. He challenged his convictions in the Supreme Court as a matter of right. At trial, the doctor who examined the child victim stated he had no reason to disbelieve what she told him and that her injuries were consistent with her having sex and the history of rape she described. On re-direct, the doctor stated the victim told him the only person she had had sex with was her father, and she had not had sex with any of her boyfriends. All of this information was included in the forensic examination report, which was admitted into evidence without redaction. Defendant argued the doctor was allowed to testify regarding inadmissible hearsay, and that his statement about believing the victim constituted impermissible bolstering of her testimony. The Court noted that some of the hearsay was admissible under KRE 803(4) because it was reasonably pertinent to diagnosis or treatment. In Edwards v. Commonwealth, 833 S.W.2d 842 (Ky. 1992), the Court recognized an exception to the general rule that the perpetrator's identity is seldom pertinent to diagnosis or treatment. The Edwards Court held that the identity of a perpetrator in a child sex abuse case was pertinent to diagnosis/treatment when the perpetrator was a family or household member. Id. at 844. This rule was recently reversed in Colvard v. Commonwealth, 309 S.W.3d 239, 243-47 (Ky. 2010), which was decided several weeks after the trial in the instant case. Colvard held that child sex abuse cases are subject to the same version of KRE 803(4) as other cases. Id. at 247. Defendant in the instant case can benefit from this new interpretation of KRE 803(4) because his case was still on direct appeal when it changed. The Court has also held that no expert, including medical doctors, may vouch for the truth of the victim's out-of-court statements in a child sex abuse case. See Hall v. Commonwealth, 862 S.W.2d 321, 322-23 (Ky. 1993); Bell v. Commonwealth, 245 S.W.3d 738, 744-45 (Ky. 2008), overruled on other grounds by Harp v. Commonwealth, 266 S.W.3d 813 (Ky. 2008). Because the physical evidence was inconclusive in this case, the most the doctor could say was that based on the victim's history, whether true or not, and the physical findings which were consistent with sexual penetration, there was a reasonable probability that sexual assault had occurred. The Court reversed Defendant's convictions, holding the extensive use of inadmissible hearsay and inadmissible bolstering of the victim's testimony was highly prejudicial and rose to the level of "manifest injustice."

Defendant pled guilty to third-degree rape and other charges, and the trial court imposed a twenty-year prison sentence and ordered him to pay $288,000 in restitution, $175 in court costs, and a jail fee of $5,126. He appealed to the Court as a matter of right to challenge the pecuniary aspect of this sentence, arguing the trial court's judgment with respect to restitution exceeded the $100,000 limit in KRS 533.030(3). He also argued the court costs and jail fee were assessed in violation of KRS 534.030(4) because he was before the court as an indigent person. The Court clarified that appellate review of a sentencing issue is not waived because a defendant failed to object at the trial court level. "[T]he imposition of an unauthorized sentence is an error correctable by appeal, by writ, or by motion pursuant to R.Cr. 11.42 or CR 60.02." Myers v. Commonwealth, 42 S.W.3d 594, 596 (Ky. 2001), overruled on other grounds by McClanahan v. Commonwealth, 308 S.W.3d 694 (Ky. 2010). It held that imposition of restitution violated Defendant's due process rights because the award of restitution was based only upon unsworn statements by the victim's mother who was not cross-examined. Her statements provided no certainty as to the actual medical expenses her daughter will bear over her lifetime as a result of Defendant's crime. The Court reversed the portion of the judgment imposing restitution and remanded to the trial court for further proceedings. It also outlined the measures necessary to satisfy KRS 532.032 and constitutional due process. It held KRS 533.030(3)'s $100,000 limitation on restitution does not apply in this case because, per the statute's plain language, that limit only applies to restitution that is imposed along with a sentence of probation or conditional discharge. Finally, the Court affirmed the portion of the judgment assessing a jail fee. KRS 534.030 does not apply to this case because the jail fee was not a "fine" as referenced in the statute. In addition, the jail reimbursement fee assessed under KRS 441.265(1) is not among the "costs" referred to in KRS 31.110(1). "Costs" as used in KRS 31.110(1) refers to those expenses more directly connected to the defense of the criminal charges."


In 2006, Defendant was convicted of possession of a controlled substance in the first degree and PFO 1, and received a twenty-year sentence. The Court found error on appeal, and remanded the case for a new penalty phase in which Defendant was again sentenced to twenty years in prison. Defendant appealed this sentence as a matter of right. The Court held the Commonwealth's introduction and discussion of Defendant's prior bad acts during the penalty phase did not constitute palpable error. Even though admission of the prior acts of uncharged misconduct was error, their introduction was not a fundamental error that threatened Defendant's entitlement to due process of law. The jury heard evidence of his three prior convictions on six counts of trafficking in a controlled substance in the first degree and evidence that he continued to participate in illegal drug activity each time he was paroled. The Court held the jury's recommended sentence was more likely due to Defendant's multiple felony convictions and repeated parole violations. It also held the presence of an armed corrections officer during the penalty phase did not violate Defendant's right to

1-71
due process and a fair trial. The trial court did not abuse its discretion in denying Defendant's motion to strike the jury for failure to represent a cross-section of the community where none of the thirty-seven people called for the voir dire panel was African American. Defendant failed to provide any evidence concerning past jury panels to show African Americans are unfairly and unreasonably underrepresented, or that any alleged underrepresentation is due to systematic exclusion.


Defendant was indicted on three counts of trafficking in a controlled substance in the first degree, second or subsequent offense; two counts of possession of drug paraphernalia; and PFO 2. In response to a discovery order, the Commonwealth stated it had a video of the drug buys and listed a confidential informant, whose identity remained unknown, as a known eyewitness. The Commonwealth offered Defendant a twelve-year sentence for all of the crimes charged, provided he agreed not to view the video. Defense counsel was permitted to view the video and disclose everything on it to Defendant except the informant's identity. The offer was withdrawn when Defendant insisted on viewing the video. The Commonwealth then offered twenty years for each trafficking charge and twelve months for each drug paraphernalia charge, all to run concurrently for a total sentence of twenty years for all charges. Defendant pleaded guilty, but later made a motion to withdraw his guilty plea. He claimed the condition attached to the first plea offer rendered his later plea unknowing and involuntary. The trial court denied Defendant's motion. He appealed his twenty-year sentence as a matter of right. The Supreme Court affirmed. "[W]e fail to see how the Commonwealth's condition in the first plea offer…could render [Defendant]'s later plea unknowing or involuntary, given that [Defendant] did receive the video five months prior to pleading guilty." It also held Defendant's discovery rights were not violated, and the Commonwealth did not violate his right to due process by conditioning the first plea offer on Defendant's waiver of his right to view the video personally. The Commonwealth was not required to disclose the informant's identity during pretrial proceedings, and Defendant did not have the right to receive impeachment information about the informant during plea bargaining. In addition, both Defendant and his attorney were aware of the evidence apart from the informant's identity and could evaluate the case and make an informed decision regarding whether or not to accept the plea. Conditioning the first plea offer on protecting the informant's identity was a proper exercise of the prosecutor's plea bargaining authority. The Court also held the prosecutor was not required to reoffer the previously rejected plea deal.


Defendant was convicted of first-degree sexual abuse and received a three year prison sentence. Based on the evidence, the trial court instructed the jury on sodomy and sexual abuse. After deliberating for four hours, the jury asked the trial court to tell them the penalty range for first-degree sexual abuse. Defendant objected, but the trial court informed the jury the penalty was one to five years' imprisonment. The jury then returned with a guilty verdict and recommended the three year sentence. The Court of Appeals affirmed the conviction in an
unpublished decision, and the Supreme Court granted Defendant's motion for
discretionary review. He argued the trial court erred by instructing the jury on the
penalty range for a lesser included offense during the trial's guilt phase. Commonwealth v. Philpott, 75 S.W.3d 209, 213 (Ky. 2002), specifically held that
in trials of felony cases, the jury shall not be instructed on the penalty ranges of
any offenses, including both the primary offense and any lesser included
offenses. The trial court in the instant case, relying on Fugate v. Commonwealth,
993 S.W.2d 931 (Ky. 1999), held that since the jury would have been entitled to
hear the penalty range during *voir dire*, he could answer the jury's question.
However, Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001), held the
defense counsel's *voir dire* on penalty range is limited to the range encompassed
by the indicted offenses. In this case, Defendant was indicted for sodomy. The
sexual abuse instruction arose as a result of evidence presented at trial, and the
parties would have erred by informing potential jurors of the penalty range for
sexual abuse during *voir dire*. The Court held the error in the instant case was
not harmless because it could not say it did not substantially influence the
verdict. It reversed Defendant's conviction and remanded the case for further
proceedings.


Defendant was convicted of five counts of first-degree sodomy and sentenced to
ten years' imprisonment on each count to run consecutively, for a total of fifty
years. He appealed his convictions as a matter of right, and the Supreme Court
affirmed. He argued the trial court erred in refusing to suppress a condom seized
from his property during a warrantless search of the wooded area around his
home. The Court held the trial court did not err because the area searched was
not within the curtilage of Defendant's home. The trial court did not err in failing
to order the Commonwealth to produce a bill of particulars. The seven counts of
sodomy charged in the indictment were identical and contained no specifics
about when or where the acts were allegedly committed. Defendant filed a
motion requesting a bill of particulars. During a pretrial hearing, the trial court
noted the prosecutor had an open file policy and defense counsel already had all
of the discoverable information in the Commonwealth's possession. Defense
counsel did not thereafter renew the motion or further pursue the issue. The
Court held Defendant waived his request. See Hampton v. Commonwealth, 666
S.W.2d 737, 740 (Ky. 1984). The trial court did not err in denying Defendant's
motion pursuant to KRE 412(c)(1) requesting the admission of evidence that the
victim had previously told a physician that his school janitor had tried to sexually
assault him. While it was appropriate for the trial judge to consider the evidence
under KRE 412, Defendant failed to make the preliminary showing that the
victim's allegation against the janitor was demonstrably false. See Dennis v.
Commonwealth, 306 S.W.3d 466, 475 (Ky. 2010). In the instant case, the trial
court reviewed the motions, held a KRE 104 hearing, and decided Defendant
failed to show the prior allegation was demonstrably false. A KRE 412(c)(2)
hearing was therefore unnecessary.

Defendant was convicted of first-degree rape, first-degree unlawful imprisonment, fourth-degree assault, violating a protective order and PFO. The Court affirmed his convictions. Defendant argued the trial court erred in failing to grant directed verdicts for the first-degree rape, first-degree sexual abuse and first-degree sodomy charges against him because the Commonwealth failed to satisfy the forcible compulsion element. The trial court granted a mistrial on the sexual abuse and sodomy charges because the jury could not reach a verdict, and the Supreme Court held Defendant's claim as to them is moot or at least not justiciable. It held the trial court did not err in denying Defendant's motion for directed verdict on the rape charge because a reasonable jury could find forcible compulsion from the evidence offered at trial. Defendant also argued statements made by the victim during pretrial investigation that she was not raped and initiated sex with him were exculpatory under Brady v. Maryland, 373 U.S. 83 (1963), and subject to disclosure by the prosecution. The Court noted the victim stated she consented to sex with Defendant in order to prevent him from continuing to beat her. The Court held Defendant never established the victim made such statements to the police or prosecution, and if they were made, the statements made prior to trial were substantially the same as those disclosed to the defense and those offered at trial and the post-trial hearing. Inadmissible hearsay that was included in the victim's medical records and improperly admitted into evidence constituted harmless error. The jury heard extensive testimony from the victim and the SANE nurse who examined her. The Court held it was unlikely the statements included in the medical records had substantial influence on the jury. Admission of the unredacted medical records did not violate Defendant's right to confront witnesses because the victim testified regarding statements she made to the SANE nurse and was cross-examined by defense counsel.


Defendant appealed his murder conviction as a matter of right. The Supreme Court affirmed. It held the trial court did not err in excluding evidence concerning a trial witness' prior conviction for a previous crime. While jailed on a trafficking charge, the witness made a phone call to someone she believed had informed against her and made a death threat. She pleaded guilty to retaliating against a participant in a legal proceeding. Defendant wanted to question the witness about the incident to impeach her testimony and show that she was violently inclined toward people who informed against her. The trial court ruled the evidence inadmissible, concluding it was only marginally relevant and its substantive value was substantially outweighed by its prejudicial effect. The Court held to the extent Defendant wanted to impeach the witness with the evidence, the trial court properly excluded it under KRE 609(a). In addition, the telephone threat had virtually no similarity to the victim's murder and gave rise to no inference that the two acts were committed by the same person. The Court held exclusion of this evidence did not violate Defendant's right to present a defense. The trial court also did not err by empaneling a second jury to recommend a sentence. Defendant argued he should not have been subjected
to the second jury, and the trial court should have determined the penalty when the first jury could not. The Court disagreed. In this case, the Commonwealth was seeking an enhanced sentence – either life without parole or life without parole for twenty-five years. Such a sentence is authorized for a capital crime under KRS 532.030, but only if the jury finds beyond a reasonable doubt that the crime was committed under one of the aggravating circumstances in KRS 532.025(2). Because additional jury fact-finding was necessary, KRS 532.055 did not apply to Defendant's sentencing. The statute only applies when the jury has made all the requisite findings but is unable to agree on a penalty.


Appellant was charged with first-degree assault, first-degree burglary, and tampering with physical evidence in a juvenile proceeding in district court. At the time, she was sixteen years old. The Commonwealth later amended the charges to complicity to commit assault in the first degree and attempted burglary in the first degree. The Commonwealth moved the district court to order transfer to the circuit court under KRS 635.020(4), which mandates transfer if the district court finds there was probable cause to believe a firearm was used in the commission of a felony. After hearing police testimony, the district court found there was probable cause for the charges for purposes of detention, but that there was no probable cause to believe Appellant had used a firearm during the crimes. There was no testimony Appellant wielded the gun, provided it, asked that the victim be shot, or knew in advance someone would be assaulted. The Commonwealth filed a petition for a writ of mandamus in the circuit court asking it to order the district court to transfer Appellant as a youthful offender. The circuit court granted the writ, and Appellant appealed. The Court of Appeals affirmed, and the Supreme Court granted discretionary review. It first held the writ of mandamus is an available remedy because the Commonwealth has no adequate remedy by appeal, and the district court's decision, if erroneous, threatens the sound administration of justice, placing the case within the "special cases" exception. The Court then affirmed, holding a juvenile charged as being complicit to a crime in which a firearm is used may be transferred to circuit court as a youthful offender under KRS 635.020(4)'s mandatory transfer provision. Under Kentucky law, a person who is complicit to an offense is treated as having committed the principal offense and occupies the same status as one guilty of the principal offense. See Wilson v. Commonwealth, 601 S.W.2d 280, 286 (Ky. 1980). The district court erred in finding no probable cause that a firearm was used during Appellant's offense. Appellant asked the shooter to help her reclaim her property, and she knew he had a gun. She also knew he was willing to fire it into an apartment because she was with him when he fired it into the wrong one and directed him to the correct address. The Court ordered the circuit court's writ of mandamus to take effect immediately.


Defendant argued the evidence seized from his home during the investigation of his wife's murder should have been suppressed because the affidavit supporting the warrant was not properly sworn pursuant to R.Cr. 2.02 and 13.10. The Rules require the affidavit to be sworn before a person authorized by a written order.
from the judge of the county to administer oaths to complaining parties. The affidavit in this case was sworn before a notary public and employee of the Commonwealth Attorney's office. Because no circuit court or district court judges or trial commissioners were available, the circuit court clerk reviewed the affidavit, found probable cause and issued the search warrant. The trial court dismissed Defendant's motion to suppress, holding that while the affidavit was not properly sworn under R.Cr. 2.02, the violation was technical, the officers acted in good faith, and Defendant was not prejudiced by the violation. Defendant thereafter pleaded guilty to murder. He appealed to the Court as a matter of right. The Supreme Court affirmed. "[W]hen a criminal procedure rule is violated but the defendant's constitutional rights are not affected, suppression may still be warranted if there is (1) prejudice to the defendant, in the sense that the search might not have occurred or been so abusive if the rule had been followed or (2) if there is evidence of deliberate disregard of the rule." Neither prong of this test was satisfied in the instant case. Defendant was not prejudiced by the violation because there was no allegation or proof the search would not have occurred absent the rule violation or that the search was abusive. There was also no evidence law enforcement officials deliberately disregarded the rules.


Defendant was convicted of first-degree assault and sentenced to fifteen years in prison. The Court of Appeals affirmed, and the Supreme Court granted discretionary review. The Commonwealth filed a pretrial notice pursuant to KRE 404(c) to introduce prior acts of violence Defendant had committed against his wife, the victim in the instant case, and his ex-wife. The trial court held the evidence was admissible under an exception to KRE 404(b) for the purpose of showing that the injuries the victim incurred were not as a result of mistake or accident, which she later claimed, but were a result of Defendant's intentional violent conduct. It limited introduction to conduct for which there had been an actual criminal conviction. Analyzing the evidence under the test described in Bell v. Commonwealth, 875 S.W.2d 882, 889-891 (Ky. 1994), the Supreme Court held the trial court properly exercised its discretion in holding evidence of Defendant's prior bad acts against his current wife, the victim in the instant case, was admissible to show absence of mistake or accident. The victim initially stated Defendant assaulted her, but subsequently stated her injuries were caused by accidents around their home. Because the evidence was substantially relevant and probative, its admission did not result in undue prejudice to Defendant. The trial court erred, however, in admitting evidence of prior acts of violence committed by Defendant against his ex-wife, which occurred twelve years before the incident at issue in this case. The Court held the error was not harmless, and reversed Defendant's conviction. It remanded to the trial court, noting that on retrial, if the evidence regarding Defendant's ex-wife is the same, it should be excluded. It also held the trial court did not err in denying Defendant's request for an instruction on assault under extreme emotional disturbance given the evidence presented at trial.

Defendant was charged by information in Hickman Circuit Court with three counts of criminal possession of a forged instrument in the second degree. He was also charged with related offenses in Carlisle County. Defendant reached a package plea deal agreement with the Commonwealth whereby he would plead guilty to the three Hickman County charges, and the Commonwealth would recommend one year on each count to be served consecutively. A similar offer applied to the Carlisle County offenses. At sentencing, Defendant asked the judge to grant probation rather than the recommended sentence. The trial court agreed to grant immediate probation to a drug treatment program if Defendant agreed to five years each on all counts, to run consecutively in the event of probation revocation, with the sentence probated for five years on the condition Defendant completed the drug treatment program. Defendant was thereafter charged with probation violations in both counties for failure to complete the program. At the revocation hearing for the Hickman County charges, Defendant's attorney stipulated to the violation. Rather than conducting the usual evidentiary hearing, defense counsel and the trial judge simply asked questions about the situation. When the trial judge stated he was considering running the Hickman County case consecutively with the Carlisle County case for a total of thirty years' imprisonment, Defendant became rude and insulting. The judge then ordered the Hickman County sentence to run consecutively with the Carlisle County sentence on which Defendant had previously been revoked from probation and sentenced to fifteen years, for a total of thirty years' imprisonment. Defendant appealed, arguing his sentence was unduly harsh and an abuse of discretion. The Court of Appeals affirmed, and the Supreme Court granted discretionary review. It held defendant was not denied due process at the revocation hearing even though no witnesses were called because he stipulated to the violation. The trial court did not abuse its discretion in revoking Defendant's probation. The Court reversed the portion of the Court of Appeals' opinion holding the trial court did not err in deciding to run the Hickman County case consecutively to the Carlisle County case at the probation revocation hearing. If a sentence is silent as to whether a term of imprisonment is to run consecutively to a term imposed in another case, by operation of law it must run concurrently. See KRS 532.110(2). The Hickman County judgment was silent as to whether the two cases were to run consecutively to each other, and the trial court lost jurisdiction to run the sentences in the two counties consecutively under CR 59. When the court has lost jurisdiction to modify the sentence, it cannot change whether the terms are to be served concurrently or consecutively. The trial court's sentence imposing five years on each count in the Hickman County case stands as the law of the case. The Court set aside the order requiring those sentences to run consecutively with the Carlisle County cases for a total of thirty years, and stated the two sentences shall run concurrently for a total of fifteen years.


Defendant was charged with felony drug trafficking and several misdemeanors, including possession of a handgun by a minor, in juvenile court. The district court certified him as a youthful offender and transferred him to circuit court,
where he entered a guilty plea. Shortly before Defendant's adult resentencing hearing under KRS 640.030(2), he made a motion under CR 60 and R.Cr. 11.42 to vacate his conviction on the ground he was improperly certified as a youthful offender and transferred from district court to circuit court, which lacked jurisdiction. The Court of Appeals held any complaints about the district court's findings should have been raised on direct appeal, the guilty plea waived any evidentiary defenses and subsequent claims of error, and that any evidentiary issues could only be raised in the context of a claim of ineffective assistance of counsel. It held the voluntariness of Defendant's plea was still in question and the circuit court erred in failing to address it, and remanded the case for a determination on the issue. The Supreme Court granted discretionary review of the jurisdiction issue. A defendant's failure to challenge the factual prerequisites to a circuit court's jurisdiction in a youthful offender case at the district and circuit courts is ordinarily a waiver. Commonwealth v. Davis, 80 S.W.3d 759, 760-61 (Ky. 2002); Commonwealth v. Thompson, 697 S.W.2d 143, 144 (Ky. 1985). Questions regarding the adequacy of transfer proceedings are due process questions, which are typically waived if raised for the first time on appeal. Thompson, 697 S.W.2d at 144; Davis, 80 S.W.3d at 760. Only claims regarding whether the transfer order was facially valid survive waiver. Thompson, 697 S.W.2d at 145; Davis, 80 S.W.3d at 760-61. The Court held the district court's findings were sufficient on their face to justify transfer, and the circuit court properly obtained jurisdiction. Transfer was proper under KRS 635.020(2) because Defendant was charged with a Class B felony based on the firearm enhancement in KRS 218A.992(1)(a).


Defendant entered Alford pleas to eight counts of second-degree robbery and was sentenced to a total of twenty years' imprisonment. As part of the plea agreement, the Commonwealth agreed to recommend a sentence of ten years' imprisonment on each of the eight counts, to run concurrently for a total of ten years. It also stated Defendant would be released on home incarceration, subject to the conditions of a "hammer clause." The clause stated that if Defendant failed to appear for final sentencing, incurred new criminal charges, or violated the conditions of home incarceration, his sentence would be twenty years. He was also required to abstain from using alcohol in any form. Prior to sentencing, Defendant's ankle monitor indicated he was out of range, and when a home incarceration officer visited his home, a portable breath test indicated Defendant's BAC was .042 percent. The trial court determined he had violated the conditions in the hammer clause by leaving his home for nine minutes and consuming enough medicinal alcohol to register a significant level on the breath test. The Supreme Court held the trial court abused its discretion by committing to the imposition of a specific sentence based solely on the hammer clause without considering the presentence report or making case-specific determinations that the sentence was appropriate for the offenses in question. See McClanahan v. Commonwealth, 308 S.W.3d 694 (Ky. 2010). It specifically stated that "upon entry of a guilty plea, the trial court shall not threaten to impose a specific sentence, or announce an intention to impose a specific sentence, or otherwise commit to a specific sentence...the sentencing court must simply accept the entry of the plea (assuming the guilty plea was made voluntarily,
intelligently, and knowingly), note the recommendation or agreement concerning sentence, and set a date and time for sentencing." While the Court stopped short of barring hammer clauses entirely, it held "a judge's commitment to impose a sentence based upon a defendant's breach of a hammer clause condition, coupled with the imposition of that sentence without proper consideration of the other relevant factors, is an abuse of judicial discretion." The Court reversed the sentence and remanded to circuit court for a new sentencing hearing.


Defendant was convicted of first-degree sodomy and sentenced to twenty years in prison. He appealed his conviction as a matter of right, and the Court affirmed. It held the trial court did not err by denying Defendant's motion to set aside the jury panel and set a new trial because he failed to establish a prima facie violation of the fair cross-section requirement. Defendant failed to provide any information to the trial court regarding the number of African Americans in McCracken County or to establish there had been systematic exclusion of that group in the jury selection process. The trial court also did not err in allowing the Commonwealth to use a peremptory strike against the only African American juror on the panel. The court conducted proper analysis under Batson v. Kentucky, 476 U.S. 79 (1986), and its decision was not clearly erroneous. The Commonwealth's reason for the strike was based on the juror's negative reaction to defense counsel's questions about Defendant's and the victim's races. The trial court determined the explanation for the strike was credible and not pretext. The prosecutor provided a detailed explanation, and showed the judge his strike sheet, which showed he had not intended to strike the juror until he saw her reaction. The prosecutor also appeared frequently before the trial judge, who believed he had no history or pattern of exclusion. The trial court did not err in refusing to grant Defendant's motion for a directed verdict because there was sufficient evidence to support the conviction. It also did not err in denying Defendant's request for an instruction on the lesser included offense of sexual abuse in the first-degree because there was no evidentiary foundation for the instruction.


The Court held that when a defendant is found to be indigent under KRS 31.110 and entitled to the services of a public defender, the trial court has authority at final sentencing under KRS 23A.205 to order him/her to pay court costs if it determines, under the facts of the case, that the defendant is able to pay those costs. In the instant case, Defendant was to be released from custody pursuant to a diversion agreement and could reasonably be expected to acquire the means to pay $130 in court costs in the near future.


Defendant was convicted of first-degree robbery, unauthorized use of a motor vehicle and PFO 2. He was sentenced to thirty years in prison and appealed to the Court as a matter of right. There was no violation of Defendant's right to a
speedy trial resulting from the trial court granting the Commonwealth’s motion for a continuance to allow for DNA testing. The Commonwealth requested DNA testing one month before the scheduled trial date and eight months after Defendant's arrest. Eight days following the hearing on the motion, police arrived at jail to obtain Defendant's DNA sample. He insisted on having his attorney present. When defense counsel could not be contacted, the officers left without obtaining the sample. The Commonwealth thereafter moved for the continuance, informing the trial court it could not obtain the DNA testing results by the July 6 trial date, due in part to the intervening holiday weekend. In November, Defendant’s bond was reduced and he was released with an order to appear for a pretrial conference on March 25. He was thereafter arrested and incarcerated in Ohio, which caused him to miss the pretrial conference and trial. The trial was rescheduled and in May, Defendant waived extradition and returned to Kentucky. A final court date was set for January 23, two years and four months following Defendant’s arrest. The Court conducted an analysis under the factors listed in Barker v. Wingo, 407 U.S. 514 (1972), and held Defendant's right to a speedy trial was not violated. While the delay in bringing the case to trial was presumptively prejudicial, Defendant was responsible for half of the delay and was not prejudiced by his incarceration. In light of its decision in Maynes v. Commonwealth, supra, the Court reversed the trial court's imposition of court costs and remanded for a determination of whether Defendant is (1) a "poor person" as defined by KRS 453.190(2) and (2) unable to pay court costs now and will be unable to pay them in the foreseeable future. It also held the trial court did not err in ordering Defendant to pay $500 in restitution.


Defendant was convicted of first-degree robbery and PFO 1 and appealed to the Court as a matter of right. The Court held that while the first-degree robbery instruction did include a theory unsupported by any evidence, the error was harmless because there was no possibility that any juror voted to convict Defendant under that theory. See Travis v. Commonwealth, 327 S.W.3d 456, 463 (Ky. 2010). Defendant also objected to the inclusion of the phrase "Defendant's court costs and fines are credit time served" in the final judgment. He argued the provision could be interpreted to mean the equivalent of the fines and costs were to be subtracted from the 261 jail time credits awarded at sentencing. The Court noted the phrase appeared to be "pointless surplus language that serves no apparent utility," and vacated the language, ordering that it be stricken from the judgment.


Defendant was convicted of first-degree trafficking in a controlled substance, trafficking in marijuana, eight ounces or more, possession of drug paraphernalia, second or subsequent offense, and PFO 1. He appealed to the Court as a matter of right. He argued the trial court erred in denying his motion to suppress evidence seized from his home, alleging the affidavit in support of the search warrant contained false and misleading information. Specifically, he argued the police officer's description of the confidential informant as "reliable" was false and misleading because she had only served one time as an informant on a
controlled buy. The Court affirmed, holding the trial court's factual findings were supported by substantial evidence, and its ruling on the motion was correct as a matter of law. The trial court did not err in denying Defendant's Batson motion objecting to the removal of an African American man from the jury pool. Although Defendant made a prima facie showing of racial discrimination, the prosecution met its burden of asserting a race-neutral explanation for the strike. The potential juror was on the same high school basketball team as Defendant, and had been on a jury the week before Defendant's trial that found the accused not guilty. Defendant also failed to prove intentional discrimination. The Court vacated Defendant's conviction for trafficking in marijuana, eight ounces or more, holding the trial court erred in allowing the Commonwealth to amend the indictment after it granted Defendant a directed verdict on a charge of trafficking in marijuana within 1,000 yards of a school. It also held introducing the original charges of Defendant's prior convictions constituted palpable error. It remanded to the trial court for a new penalty phase, with instructions that the Commonwealth should not be permitted to introduce prior amended charges for which Defendant was not convicted. In addition, Defendant's conviction for PFO 1 was invalid as to count one of the indictment because the evidence showed he only had one prior felony conviction at the time he committed the offense charged. The Court held this constituted palpable error and reversed the PFO 1 conviction. It vacated the sentence enhancement on that count and remanded to the trial court for a determination of whether Defendant is guilty of PFO 2.


Defendant entered a conditional guilty plea to four counts of first-degree rape which preserved her right to appeal the trial court's adverse ruling on her motion to suppress her written confession. The Court held Defendant's written confession was not admissible and should have been suppressed. Defendant's waiver of her rights was involuntary because police officers failed to respect the invocation of her right to silence. After Defendant was read her Miranda rights, she stated to the officer that she had nothing to say to him. The officer ceased questioning and called a social worker who had been working with Defendant in investigating allegations of abuse received by the Cabinet for Health and Family Services. The officer then approached Defendant to ask if she would like to speak to the social worker. She agreed, and the social worker talked to her alone for a half hour. Defendant then agreed to waive her Miranda rights and provided a written confession. Considering the totality of the circumstances in light of the factors in Michigan v. Moseley, 423 U.S. 96, 102 (1975), the Court held the police did not scrupulously honor Defendant's invocation of her right to silence. The Court vacated her convictions and remanded to the trial court for further proceedings consistent with its opinion.


Defendant was convicted of murder, tampering with physical evidence and PFO 1. He appealed to the Court as a matter of right, and the Court affirmed his convictions. He argued the trial court erred in admitting information that was allegedly protected from disclosure by KRE 410(4) as statements made in the course of plea discussions. However, statements Defendant made to a police
detective were not barred by KRE 410(4) because the statements were not made
"with an attorney for the prosecuting authority." The detective was not a
prosecutor, did not have the prosecutor's express authority to offer a plea deal,
and he never suggested Defendant's cooperation would be considered favorably
by the prosecution.

Justice Cunningham.

Defendant was indicted for three counts of first-degree criminal abuse. The
grand jury found he intentionally abused three children under the age of twelve
by placing them in a condition that could have caused physical injury or which
constituted cruel confinement or punishment. He was found guilty and sentenced
to a five-year term on each count, for a total of fifteen years. The Court of
Appeals reversed, holding the trial court should have directed a verdict of not
guilty because there was insufficient evidence that Defendant's criminal actions
were intentional. The Supreme Court reversed. It held the Court of Appeals
substituted its own fact-finding discretion for that of the jury, which had sufficient
evidence to reasonably conclude Defendant was guilty of first-degree criminal
abuse. It remanded to the trial court for reinstatement of the trial order and
judgment.

Davis v. Commonwealth, 365 S.W.3d 920 (Ky. 2012). Opinion by Chief Justice
Minton.

Defendant was convicted of first-degree manslaughter and first-degree attempted
manslaughter, and appealed to the Court as a matter of right. At the end of the
penalty phase of trial, the jury recommended the maximum sentences of twenty
years' imprisonment and ten years' imprisonment to run consecutively for a total
of thirty years. Before sentencing, the judge found an error in the verdict form
the jury used. It only gave jurors the option of running the sentences concurrently
or consecutively, and erroneously failed to offer the option of running the
sentences partially consecutively and partially concurrently (in whole or in part).
The judge empanelled a new jury for the limited purpose of recommending
whether the sentences should run concurrently or consecutively, in whole or in
part. The jury again recommended they run consecutively, and the trial court
sentenced Defendant accordingly. On appeal, Defendant argued that upon
finding the error, the trial court was required to run the sentences concurrently.
The Court affirmed, holding the trial court acted within its discretion by
empaneling a new jury before entering a final judgment of conviction. It also
acted within its discretion when it told Defendant and the Commonwealth it would
play the entire guilt phase of the trial on videotape for the second jury if they did
not provide a summary of the evidence.

Justice Schroder.

This case was before the Court on remand from the U.S. Supreme Court to
determine whether exigent circumstances existed when police made a
warrantless entry into an apartment occupied by Defendant. Kentucky v. King,
held the Commonwealth failed to present evidence establishing the imminent destruction of evidence, reversed the circuit court's original ruling and remanded. In Kentucky v. King, the U.S. Supreme Court held police may rely on exigent circumstances so long as they did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment. King, 131 S.Ct. at 1858. It held the police did not engage in such conduct in this case, and remanded to the state Supreme Court to address whether an exigency actually existed. Id. at 1863. The Court reaffirmed its holding there was no hot pursuit justifying warrantless entry into the apartment. King I, 302 S.W.3d at 654. The police officers' subjective belief that evidence was being, or about to be, destroyed was not supported by evidence, and the Court held it could not conclude the belief was objectively reasonable. It reversed the denial of Defendant's motion to suppress and vacated the judgment of conviction, remanding to the circuit court for further proceedings consistent with its opinion.


Defendant was convicted of murder and appealed to the Court as a matter of right. Before trial, the Commonwealth moved to exclude evidence of the victim's criminal history and his blood alcohol content at the time of his death. Defendant objected, arguing the evidence could be relevant to show someone else had motive to kill the victim. The trial court granted the Commonwealth's motion to the extent it required a showing of relevance before such evidence could be admitted. The Supreme Court affirmed. It also held the trial court did not err in denying Defendant's motion for a directed verdict because he was identified as the perpetrator by three eyewitnesses. The jury instructions did not compromise Defendant's right to a unanimous verdict. They gave the jury the option of finding him guilty of either intentional or wanton murder without requiring it to specify which theory it chose. "[I]f the evidence supports both theories, a combination instruction does not implicate unanimous verdict concerns." Benjamin v. Commonwealth, 266 S.W.3d 775 (Ky. 2008); Johnson v. Commonwealth, 12 S.W.3d 258 (Ky. 1999). Under the facts of the case, the jury could have believed either the killing was intentional or that it was done wantonly. Finally, the Court held Defendant's absence during the trial court's initial consideration of the deliberating jury's request for additional information did not entitle him to relief. Defense counsel was given an opportunity to be heard, and Defendant did not object to the trial court's responses to the jury's questions nor did he suggest that his presence might have been useful to the court or counsel. The failure to secure Defendant's presence was harmless error at worst.


The city of Liberty has an ordinance that requires persons living or working within city limits to purchase and display a sticker on their vehicles. The city police department set up a traffic checkpoint to catch people who had not purchased the sticker. Defendant was stopped in the checkpoint, and while he had displayed the required sticker, police noticed the smell of marijuana coming from his car. When questioned, Defendant admitted smoking marijuana earlier. He was removed from his car, and police conducted a warrantless search of the
vehicle that yielded a bag of marijuana, hand scales and clear plastic bags. Defendant was arrested and charged with DUI, trafficking in marijuana, eight ounces or less, and possession of drug paraphernalia. The trial court granted his motion to suppress the evidence, and the Commonwealth brought an interlocutory appeal to the Court of Appeals, which reversed. The Supreme Court granted Defendant's motion for discretionary review, reversed the Court of Appeals, and reinstated the trial court's order suppressing the evidence. The city's sticker ordinance is not related to border patrol or traffic safety, and it had no information-seeking function of the sort approved in Illinois v. Lidster, 540 U.S. 419 (2004). Its only purpose was to enforce a revenue-raising tax upon vehicles in the city. "Thus, the checkpoint ...comports with none of the purposes which the United States Supreme Court has found to be important enough to override the individual liberty interests secured by the Fourth Amendment."


Appellant appealed as a matter of right from a circuit court judgment dismissing his petition for a declaratory judgment challenging implementation of his two twenty-year-old death sentences upon the grounds he is mentally retarded. In Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005) (Bowling IV), the Court addressed this identical argument and held Appellant procedurally defaulted by waiver any challenge to his death sentence upon grounds of mental retardation because he failed to raise the issue at trial, on direct appeal, or in any of his subsequent collateral attacks on the judgment and sentence. It also held Appellant failed to demonstrate adequate cause as to excuse the default and that failure to consider his claim would not result in a fundamental miscarriage of justice because Appellant failed to demonstrate a prima facie showing of mental retardation. In 2007, the American Association on Mental Retardation (AAMR) revised the guidelines on how practitioners should interpret IQ scores which recommended they be interpreted in light of the Flynn Effect, the practice effect, and the margin of error effect. Appellant’s petition sought a holding from the circuit court that the mental retardation statutes in KRS Chapter 532 must now be interpreted in light of the new AAMR guidelines. The circuit court held the petition was an unlawful collateral attack on the Court’s 2005 Bowling IV decision. The Court held it is the law of the case pursuant to Bowling IV that Appellant has procedurally defaulted his claim that he is not subject to execution because he is mentally retarded; that the adequate cause exception to procedural default does not apply; and the actual innocence/fundamental miscarriage of justice exception does not apply upon application of the Flynn Effect and margin of error effect to Appellant’s historical IQ scores. The Court noted that Bowling IV did not specifically consider the practice effect and it is only because of that omission that Bowling IV does not establish “with full force” Appellant’s lack of mental retardation as the law of the case in the context of his present argument. It held consideration of the practice effect does not change the result it reached in Bowling IV, and again rejected Appellant’s claim that he has made a prima facie case of mental retardation, affirming the circuit court’s judgment.

Defendant appealed his convictions on three counts of murder, one count of first-degree burglary and retaliating against a participant in the legal process as a matter of right. The Court reversed his convictions and remanded to the Jefferson Circuit Court for a new trial, holding Defendant was deprived of a fair trial when one of the murder charges was improperly joined for trial with the other charges, and because admission of a materials witness' hearsay statements under the doctrine of forfeiture by wrongdoing was not based upon substantial evidence. In 2006, intruders unlawfully entered the home of Troya Scheckles and murdered Williams Sawyers. A few hours later, Terrell Cherry was found dead from a gunshot wound in a parked car. Two weeks later, Kerry Williams was shot dead on his porch. Defendant was charged with the Sawyers-Cherry murders in one indictment, and with the Williams murder in a separate indictment. After his trial for the Sawyers-Cherry murders ended in mistrial, the case was rescheduled for trial and consolidated with the Williams murder. A joint trial was held on all the charges, resulting in Defendant's conviction on all counts. Charges brought in separate indictments may be joined for trial only when the offenses are "of the same or similar character" or are "based on the same acts or transactions connected together or constituting parts of a common scheme or plan." R.Cr. 9.12; R.Cr. 6.18. In the instant case, the Williams murder was not connected to the other crimes, and the Court rejected the Commonwealth's argument that offenses are "of the same or similar character" because they involve conduct criminalized under the same chapter or section of the penal code. The Court held whatever chance Defendant had to present a defense to the Williams murder was undermined by unrelated evidence that he had committed the other murders. See Rearick v. Commonwealth, 858 S.W.2d 185, 188 (Ky. 1993).

The trial court also erred in admitting into evidence audio recordings of Troya Scheckles' statements to police. Ms. Scheckles was the only eyewitness to the Sawyers murder, but was unavailable as a witness at Defendant's trial because she was murdered before the trial began. The Commonwealth alleged Defendant had Scheckles murdered to prevent her from testifying, and filed a motion to have her out-of-court statement admitted into evidence under the forfeiture by wrongdoing exception to the hearsay rule. See KRE 804(b)(5). The Commonwealth presented the trial court with an eighty-four page set of documents pertaining to the investigation, and outlined its theory of how Defendant orchestrated the murder. No live witnesses testified to establish the verity of the documents, there was no formal evidentiary hearing, and no stipulation of facts or evidence. "Because the trial court's findings with respect to the forfeiture by wrongdoing doctrine were based exclusively on the unauthenticated documents tendered by the Commonwealth without any evidentiary foundation," the Court held they were not supported by substantial evidence as required by Young v. Commonwealth, 50 S.W.3d 148, 167 (Ky. 2001).
The Court affirmed Defendant's conviction for two counts of first-degree sodomy and one count of attempted first-degree sodomy, but vacated his life sentences and remanded for a new penalty phase because the jury was improperly instructed as to the sentencing range. During discussion of the penalty phase instructions, defense counsel objected to the instructions pertaining to the first-degree sodomy convictions because they provided the jury with the Class A range (twenty-fifty years, or life) instead of the Class B range (ten-twenty years). Defense counsel argued that because Defendant was found guilty of sodomy under forcible compulsion (a Class B felony) rather than sodomy of a person under twelve (a Class A felony), the Class B sentencing range applied. The trial court overruled the objection, and the jury sentenced Defendant to life for each of the sodomy convictions. The Court noted while the instructions in this case erroneously included both age and forcible compulsion, the jury's only finding was that both counts were by forcible compulsion, Class B felonies under KRS 510.070. Although the victim’s age was uncontroversial at trial, the jury did not find beyond a reasonable doubt that the victim was less than twelve years old. See Apprendi v. New Jersey, 530 U.S. 466, 467 (2000). Defendant's punishment could not exceed the maximum he would receive if punished according to the facts reflected in the jury verdict alone. See Ring v. Arizona, 536 U.S. 602 (2002). Defendant was improperly sentenced under the Class A guidelines, and the Court remanded for sentencing under the Class B guidelines.


Defendant was convicted of two counts of trafficking in a controlled substance, second offense under KRS 218A.1412(2)(b), one count of possessing a controlled substance, second offense under KRS 218A.1415(2)(b), and PFO 1. He appealed to the Court as a matter of right. The Court held the trial court did not err by denying Defendant's motion to suppress evidence taken during a search of his home and garage. The lead detective testified he obtained a search warrant from the trial court on the afternoon of September 9, 2009. He stated the search began at 4:50 p.m. the same day. In issuing the warrant, the trial court had acknowledged the detective's affidavit by signing the jurat, according to a note on the document, at 4:50 p.m. The detective noted the discrepancy, and the trial court stated it could have mistakenly entered the wrong time on the jurat. Based on court records and videotape of courtroom proceedings on the day in question, the trial court found in its written order that it was mistaken as to the time the warrant was issued, finding it was actually signed at 3:50 p.m. and not 4:50 p.m. The Court held the trial court did not violate KRE 201 when it took judicial notice of the record in an unrelated hearing on September 9th for the sole purpose of establishing it was involved in that hearing at 4:50 p.m. and unavailable to sign the warrant at issue in the instant case at that time. The trial court's error in noting the time was a clerical error, not judicial error, which may be corrected under R.Cr. 10.10. Its finding of fact that the warrant was issued prior to the search was not clearly erroneous, and the search was lawful, justifying the trial court's denial of Defendant's suppression motion. The trial court also did not err in limiting Defendant's cross-examination of the forensic chemist who analyzed the white powdery substance sold to the confidential informant and
found in Defendant's garage. The chemist had earlier testified by avowal that she had been accused of theft. Although felony criminal charges against her were dismissed, the chemist was placed on a sixty-day administrative leave from work. Defendant sought to impeach the chemist by asking if she had been accused of stealing a controlled substance, but the trial court limited questioning to whether she had a pending charge of theft and whether the charge had resulted in a period of administrative leave. The chemist answered each question in the affirmative. The Court also held Defendant is not entitled to resentencing under House Bill 463 (2011).


Appellant was convicted and sentenced to death in 1988. In 2010, he moved the trial court to prohibit execution of the death sentence due to his mental retardation and to compel DNA testing of hairs and semen found in the victim's car and used by the prosecution during his trial. The trial court denied both motions in a single order without holding an evidentiary hearing on either. Appellant appealed to the Supreme Court as a matter of right. The Court held Appellant's mental retardation claim was timely because KRS 532.130-140 did not apply to his trial, and he has not had an opportunity to adjudicate his claim. KRS 532.130-140 apply post-conviction to capital offenders tried before the statutes' effective date of July 13, 1990. Appellant is entitled to an evidentiary hearing on his mental retardation motion because he produced some evidence that he is mentally retarded. The Court reversed the trial court's order and remanded the mental retardation motion to the trial court for an evidentiary hearing. The Court also held Kentucky's procedures for adjudicating mental retardation claims does not violate Appellant's due process rights. It affirmed the trial court's order denying DNA testing of the hairs and held Appellant is not entitled to an evidentiary hearing to determine if the hairs are in existence or if they were destroyed after a 1996 preservation order. Comparison testing of the hairs found in the victim's car showed some of them matched Appellant's hair, but the examiner could not positively identify the hair as his. Numerous other hairs collected did not match Appellant, his co-defendant, or the victim. The car was abandoned for days before it was discovered in a scrap yard, and it was evident other people had been inside it during that time. Even if DNA testing showed the hair was not Appellant's, there is no reasonable probability that he would not have been prosecuted or convicted, that the evidence would lead to a more favorable verdict or sentence, or be otherwise exculpatory. The jury heard substantial evidence to convict Appellant of murder, kidnapping and first-degree robbery. The Court held the trial court's order erroneously failed to address Appellant's request for DNA testing of the semen found on the victim's car seat. It remanded to the trial court to hold a hearing to determine whether DNA testing of the semen is appropriate under KRS 422.285. Upon remand, the trial court must assume the DNA results would be quasi-exculpatory and determine whether reasonable probability exists that the evidence would result in a more favorable verdict or sentence, especially with respect to Appellant's rape conviction.

Defendant was convicted of murder, tampering with physical evidence and violating a protective order and appealed to the Supreme Court as a matter of right. The Court affirmed. Defendant claimed statements he made to police concerning another possible murder he committed were improperly admitted at trial. No evidence of the crime was ever found, and it appeared it may in fact have never occurred. Defense counsel moved to suppress the statements on KRE 404(b), R.Cr. 9.60 and constitutional due process grounds. The Commonwealth agreed to not introduce the statements, and a redacted version was played for the jury. Despite the redactions, some of the statements were played for the jury and others were left in the transcripts. The Court held the error was harmless because the importance of the statements as admitted was not apparent without knowledge of the more explicit statements that were redacted. Defendant also argued the trial court erred in including the existence of extreme emotional disturbance as an element of manslaughter. Baze v. Commonwealth, 965 S.W.2d 817, 823 (Ky. 1997), held the type of instructions used in the instant case, which required a finding of the lack of EED beyond a reasonable doubt to convict of murder and the finding of the existence of EED beyond a reasonable doubt to convict of the lesser-included offense of manslaughter, was error. Id. at 823. However, the error was not prejudicial to Defendant because it placed a higher burden of proof on the Commonwealth than what is required by the law. The Court noted the best way to address the issue of how to properly instruct on murder and its lesser-included offenses when EED is at issue is to include EED in the murder instruction and make no mention of it in the manslaughter instruction. The Court held KRS 189A.104’s bar on the admission of PBT results in some circumstances does not bar a defendant who seeks to admit the test result as part of a defense in a non-DUI prosecution. The trial court’s error in barring Defendant’s PBT results in the instant case was harmless because the statements he made to police in Indiana while intoxicated were consistent with those he made later to police in Kentucky while sober. The trial court did not err in granting the Commonwealth’s motion to strike a juror for cause after the juror admitted he was acquainted with a detective in the case and was seen patting the detective on the shoulder on his way out of the courtroom. The trial court’s error in allowing the victim’s cousin to provide victim impact testimony during the penalty phase did not constitute palpable error.


A neighbor reported that Defendant was dealing drugs and engaging in prostitution from her apartment. Officers went there to conduct a “knock and talk” at 1:00 a.m., and Defendant’s boyfriend answered the door. Once officers were in the apartment, they observed a blanket tacked up over a wide doorway. Defendant stated no one else was in the apartment besides her and her boyfriend, but an officer proceeded to conduct a protective sweep of the apartment. In the kitchen, the officer found a burned spoon with white residue on it. Defendant denied knowledge of the spoon, but consented to a further search after officers informed her they would detain her in the apartment while they sought a warrant if she refused. Cocaine and drug paraphernalia were found.
The trial court denied Defendant’s motion to suppress, and she entered a conditional guilty plea reserving the right to appeal. The Court of Appeals affirmed, and the Supreme Court granted discretionary review. For the first time, it adopted the holding in Maryland v. Buie, 494 U.S. 325, 334 (1990), which held law enforcement officers may conduct a protective sweep for their own safety. Objects found and seized are admissible at trial as an exception to the warrant requirement. The motion to suppress in the instant case should have been granted because the protective sweep was illegal and the items discovered were fruit of the poisonous tree. Police were in Defendant’s apartment without either probable cause or exigent circumstances. No evidence of criminal wrongdoing was observed in the living room, and Defendant told police no one else was in the apartment. “In absence of consent, the police may not conduct a warrantless search or seizure without both probable cause and exigent circumstances.” Kirk v. Louisiana, 536 U.S. 635, 638 (2002).


Defendant appealed from his conviction of murder as an accomplice as a matter of right. The jury was instructed on the crimes of intentional murder by complicity and wanton murder by complicity in the victim’s death. Evidence showed Defendant lured the victim to a remote area and then remained in the car while two other men killed her. The trial court did not err in refusing to instruct on the lesser homicide offenses of first-degree manslaughter, second-degree manslaughter, and reckless homicide. Under Defendant’s tendered first-degree manslaughter instruction, upon application of KRS 507.030, the jury could have convicted him only if it believed he believed his accomplices did not intend to kill the victim but intended to cause her serious physical harm. Defendant admitted he knew “something” would happen to the victim if he lured her to the woods, but denied knowing the other men would kill her. The Court held the cited statements were too ambiguous for an accurate determination of what Defendant meant, and provided no basis to show that “something” meant he intended for the victim to suffer serious physical injury but not death, which is a prerequisite to the first-degree manslaughter instruction. The Court also held under the facts of the case, a rational jury could not have found Defendant’s participation in the crime to be simple wantonness as required for a second-degree manslaughter instruction. His conduct in luring the victim to the scene was “so obviously accompanied by a risk that [she] would be killed that it necessarily included the element of acting ‘under circumstances manifesting extreme indifference to human life.’” The trial court did not err in introducing evidence relating to the shooting of another victim in Tennessee. Defendant was charged with murder under a theory of complicity. In order to get a conviction, the Commonwealth had to prove the other two men at the scene killed the victim. They were each identified as being involved in the Tennessee shooting, where police found bullet casings that matched the casings found at the scene of the shooting at issue in the instant case. The evidence was not unduly prejudicial to Defendant because it tended to show the other two men were violent people, and Defendant portrayed them as such as part of his trial strategy. Evidence of gang activity was also relevant to explain the context and motive for murdering the victim, who had implicated one of the alleged killers in a burglary.
Defendant was convicted of first-degree manslaughter and unlawful possession of a weapon on school property after he shot and killed a fellow janitor in the faculty lounge. He was tried for murder, but convicted of the lesser included charge of first-degree manslaughter based on the defense he committed the act while acting under extreme emotional distress (EED). On appeal, he argued he was denied his right to present a defense by the school board and its general counsel, who interfered with defense counsel's attempt to interview witnesses employed by the school system. The Court held any possible interference was harmless beyond a reasonable doubt because it was “inconceivable” Defendant could have had a more favorable result in the guilt phase of his trial. No lesser-included offense instructions were available, and there was “no possibility that the venire was going to engage in jury nullification under the facts of this case so as to return a verdict of absolute acquittal.” Because a witness has a right to refuse to be interviewed, the school system did not act inappropriately by informing them of their right to decline to speak to the prosecution or defense. However, the school system had no right to control either the witnesses or the trial counsel’s access to them during non-working hours. It also did not have authority to direct employees to not talk to defense counsel, to tell them to defer defense counsel to the school’s legal staff, or to threaten any of the employees with discharge if they spoke to defense counsel. The trial court did not err in permitting the Commonwealth to introduce evidence concerning Defendant’s stressful home life during its case-in-chief. The evidence was relevant to show Defendant struggled in his personal life and may have been envious of the victim’s more affluent lifestyle, which suggested a motive for the killing. The trial court did not commit palpable error when it allowed the victim’s friend to provide victim impact evidence during the penalty phase. While KRS 532.055(a)(7) and KRS 421.500(1)(b) do not permit victim impact evidence from a friend, the error did not result in manifest injustice so as to require reversal for a new sentencing proceeding. During the guilt phase of trial, Defendant’s father remained in the courtroom. The trial court’s exclusion of Defendant’s father’s testimony during the penalty phase was consistent with KRE 615. Defendant failed to object to exclusion of his father’s testimony. Because he also failed to make a proper offer of proof pursuant to KRE 103, the Court had no way of knowing what the evidence would have been to determine whether its exclusion was prejudicial. Exclusion of the testimony did not result in manifest injustice under R.Cr. 10.26. In addition, the replaying of a portion of witness testimony to the jury when Defendant was not present did not constitute palpable error.

Defendant appealed his convictions for first-degree burglary by complicity, first-degree robbery by complicity, and second-degree assault by complicity as a matter of right. His claims of instructional error were not preserved for appeal, and the Court held the jury was adequately instructed upon the necessary elements of accomplice liability so that no palpable error occurred. The trial court erred in assessing court costs against him upon its sua sponte determination that Defendant’s jail account of $1 meant he was no longer indigent. The Court
reversed the assessment of court costs and remanded to the trial court for a
determination of whether Defendant is a “poor person” as defined in KRS 453.190(2). See Maynes v. Commonwealth, 361 S.W.3d 922 (Ky. 2012).

IV. WORKERS’ COMPENSATION

Abel Verdon Const. v. Rivera, 348 S.W.3d 749 (Ky. 2011). Opinion of the Court.

Claimant, an unauthorized alien, sought workers' compensation benefits from Verdon Construction after he fell through a hole in the second floor of a home the company was building. The ALJ found claimant was Verdon's employee and his average weekly wage was $150, awarded TTD benefits from July 2005 to December 2006 and awarded triple permanent partial disability benefits based on a permanent impairment rating of 44 percent. The ALJ refused to admit a safety expert's testimony regarding Verdon's alleged safety violation and held no violation was applicable. The Board affirmed the findings supporting claimant's partial disability award but remanded with instructions for the ALJ to admit testimony from claimant's safety expert. The Court of Appeals reinstated the ALJ's refusal to admit the testimony and affirmed otherwise. It also rejected Verdon's argument that Chapter 342 violates the Immigration Reform and Control Act of 1986 (IRCA) by authorizing workers' compensation benefits without regard to the legality of the claimant's immigration status. The Supreme Court affirmed. The ALJ's finding claimant was Verdon's employee was reasonable and supported by substantial evidence. IRCA does not preempt application of KRS Chapter 342 to claims for workers' compensation benefits by unauthorized aliens. Chapter 342 does not conflict with IRCA's objective in deterring employers from hiring unauthorized aliens and deterring aliens from entering the U.S. illegally to obtain employment. The Court of Appeals did not err in remanding to the ALJ for further consideration of the alleged safety violation. On remand, the ALJ must determine which regulations governed the facts, whether the regulation required the employer to have fall protection in place at the time of claimant's accident, and if so, whether the failure helped cause the accident.

Graham v. TSL, Ltd., 350 S.W.3d 430 (Ky. 2011). Opinion of the Court.

The ALJ dismissed claimant's application for benefits due to an out-of-state injury, holding Kentucky lacked jurisdiction over the claim because claimant's employment was not principally located in any state and his contract for hire was not made in Kentucky. The Workers' Compensation Board, Court of Appeals and Supreme Court affirmed. Claimant, who resides in Kentucky, worked for TSL, Ltd. as a tractor/trailer driver hauling automobiles. TSL has corporate offices in Missouri and Ohio, but none in Kentucky. Claimant injured his foot during a fall while unloading a truck in New Jersey. TSL denied the claim on the basis Kentucky lacked extraterritorial jurisdiction under KRS 342.670 because the employment was not principally localized in any state and the contract for hire was made in Missouri. Claimant alleged he was hired by TSL over the phone, but was required to complete paperwork and a training program in Missouri before TSL would issue a letter for hire. The ALJ found while claimant may have been assured of employment over the phone, the parties entered into the actual contract for hire in Missouri. "A contract is made at the time the last act necessary for its formation is complete and at the place where that act is

Doctors' Associates, Inc. (DAI) owns the "Subway" trademark and franchises the right to operate Subway restaurants worldwide. The ALJ dismissed the Uninsured Employers' Fund's (UEF) claim against DAI for benefits paid to an employee of an uninsured DAI franchisee located in Kentucky, ruling that KRS 342.610(2) does not encompass a franchisor-franchisee relationship. The Workers' Comp Board affirmed. The Court of Appeals reversed, holding that business opportunity relationships and franchise relationships must be considered under KRS 342.610(2) on a case-by-case basis. It remanded for further consideration of whether the work the uninsured franchisee performed was a regular or recurrent part of DAI's business. DAI appealed, and the Supreme Court reversed. "Nothing in Chapter 342 precludes a franchisor who meets the definition in KRS 342.610(2) from also being considered a contractor." Cases must be analyzed individually under KRS 342.610(2)(b) based on the particulars of the relationship at issue, and contractually-required payments from the franchisee to the franchisor do not alone preclude a finding that the franchisor is a contractor under KRS 342.610(2)(b). Although the ALJ in this case erroneously interpreted the statute as excluding all franchisors, the ALJ properly held, under the particular facts of this case, that DAI was not a contractor. Substantial evidence supported the ALJ's and Board's findings that DAI was in the business of franchising, and the franchisee did not perform a regular or recurrent part of DAI's business.


The Court held the "consensus procedure" required by KRS 342.316 for proving the existence of coal workers' pneumoconiosis and the "clear and convincing" standard the statute requires to rebut a consensus are unconstitutional because they violate the rights of coal workers to equal protection under the law. "KRS 342.316(3), along with the relevant subsections of KRS 342.315 and KRS 342.794, treat coal workers' pneumoconiosis claimants more stringently than all other pneumoconiosis claimants. However, even though the disease is given different names depending upon the source of the dust, there is no 'natural' or 'real' distinction between coal workers' pneumoconiosis and other forms of the disease." "Because we consider the classification of coal workers' pneumoconiosis claimants to be arbitrary in regard to the more stringent proof or procedures required and believe that the disparate treatment afforded such workers lacks a rational basis or substantial justification, we hold that the consensus procedure and the clear and convincing evidentiary standard are unconstitutional."

The Court held the maximum benefit allowed pursuant to KRS 342.730(1) applies to both benefits payable under individual disability awards and to benefits payable simultaneously under multiple partial disability awards.


The ALJ determined in claimant's post-award reopening that a surgery the employer failed to pre-authorize was reasonable and necessary and it must pay for the procedure and related expenses, but the parties' settlement precluded any claim for TTD benefits related to the surgery. The ALJ also held the employer's failure to pre-authorize or contest the surgery within thirty days did not warrant sanctions. The Workers' Compensation Board reversed to the extent it interpreted the settlement agreement as not precluding future TTD benefits but affirmed otherwise. The Court of Appeals reversed as to TTD benefits and reinstated the ALJ's decision. The Supreme Court affirmed insofar as the settlement barred a future TTD award but reversed and remanded with respect to the issue of sanctions. The ALJ denied sanctions based on a conclusion that the employer had no obligation to file a medical dispute and motion to reopen. Kentucky Associated General Contractors Self-Insurance Fund v. Lowther, 330 S.W.3d 456 (Ky. 2010), was decided while the instant case was pending and held employers have such an obligation. The claimant in the instant case raised the same argument concerning an employer's obligation and preserved it on appeal. The Court remanded the case to the ALJ to reconsider the question of sanctions based on a correct understanding of the employer's obligations and any other considerations relevant to the reasonableness of its actions under KRS 342.310(1) and 803 KAR 25:012, §2(1)(a).


The Court of Appeals affirmed a decision by the Workers' Compensation Board vacating the average weekly wage calculations because the record contained insufficient evidence to properly apply KRS 342.140(1)(e). The Board then remanded the claim for further proceedings, including the taking of additional proof. The Supreme Court reversed, holding the Board exceeded its authority under KRS 342.285(2)(c) by remanding the claim to allow the claimant a second chance to meet his burden of proof. Because the claimant failed to offer evidence of all the required elements under KRS 342.140(1)(e), he failed to meet his burden of proving his average weekly wage and was not entitled to a second opportunity to offer such proof.


The Workers’ Compensation Board affirmed the ALJ's decision to triple the income benefits awarded for the claimant's injury and hearing loss claims, but reversed the maximum combined weekly benefit sua sponte and remanded with instructions to correct the amount. The Court of Appeals and Supreme Court affirmed. Substantial evidence showed the claimant's hearing loss caused him to
lack the physical capacity to perform the kind of work performed at the time of injury. The Board did not exceed its authority under KRS 342.285(2)(c) by ordering the ALJ's miscalculation to be corrected. Benefits payable under KRS 342.730(1)(c)(1) are limited to 100 percent of the state's average weekly wage rather than 75 percent. The ALJ erred by limiting the claimant's weekly benefits to 75 percent of the state's average weekly wage, which was "a patent error in applying the law to the facts as found." The claimant's failure to file a petition for reconsideration or to appeal would not have limited the ALJ from correcting the error *sua sponte* had it been discovered. See *Wheatley v. Bryant Auto Service*, 860 S.W.2d 767 (Ky. 1993).


The ALJ held claimant's injuries sustained during an automobile accident while returning to Kentucky from yearling sales in New York came within the course and scope of his employment with Gaines Gentry. The Workers' Compensation Board, Court of Appeals, and Supreme Court affirmed. The ALJ reasonably found that Gaines Gentry instructed the claimant to travel to New York in a van with its yearlings in order to attend to them. The injuries occurred during claimant's "necessary and inevitable" act of completing the journey that Gaines Gentry initiated. Claimant's work with another entity while in New York "was not inconsistent with and did not conflict with the expectations, instructions or interests of Gaines Gentry," who left the claimant on his own to find transportation back to Kentucky. A trip is work-related "if it would have been made regardless of [a claimant's] private purpose, because the service to be performed for the employer would have caused the journey to be made by someone even if it had not coincided with the employee's personal journey." "Having neither provided nor specified a means of return transportation to Kentucky, Gaines Gentry cannot complain that it had no control over the means the claimant selected."


The Court held KRS 342.730(6) does not entitle UPS Airlines to receive a dollar for dollar credit against its liability under KRS 342.730(1) for payment of loss of license benefits that are part of a collective bargaining agreement between UPS and the Independent Pilots Association. Reversing the ALJ, the Workers' Compensation Board held KRS 342.730(6) did not entitle UPS to a dollar for dollar credit against claimant's past due and future income benefits paid under a loss of license insurance plan. Relying on *GAF Corp. v. Barnes*, 906 S.W.2d 353 (Ky. 1995), the Board determined that loss of license benefits were the product of a collective bargaining agreement and were not funded exclusively by the employer as required by KRS 342.730(6). The Court of Appeals affirmed. The Supreme Court affirmed to the extent UPS is not entitled to a dollar for dollar credit, but reversed with respect to the Board's conclusion that loss of license benefits were not funded exclusively by the employer for the purposes of the statute because they were bargained-for benefits. KRS 342.730(6) allows UPS to credit its liability for past due or future income benefits based on its payment of loss of license benefits only to the extent those benefits duplicate/overlap...
workers’ compensation benefits.  **KRS 342.730(6)** does not allow UPS to credit the overpayment of voluntary income benefits against future income benefits.


In calculating the income benefit for the claimant’s injury, the ALJ apportioned 63 percent of the 21 percent permanent impairment rating that existed at maximum medical improvement (MMI) to a pre-existing active condition that was non-compensable. The ALJ found the remaining 37 percent of the 21 percent impairment rating to be compensable for the purpose of awarding income benefits. The Workers’ Compensation Board held the ALJ erred as a matter of law by relying on a doctor’s apportionment of causation to base income benefits on a permanent impairment rating that was not assigned using the AMA Guides. The only impairment rating assigned at MMI following surgery was 21 percent and two experts assigned a 5 percent pre-accident impairment rating. The Board held the evidence compelled the claimant’s award to be based on a 16 percent impairment rating. The Court of Appeals affirmed the Board’s decision to vacate the calculation on the ground the ALJ should have subtracted the pre-existing active impairment rating that existed immediately before the injury from the impairment rating that existed at MMI and based the income benefit on the remainder. The Supreme Court affirmed. “The impairment rating that a pre-existing, active condition warrants must be excluded from the impairment rating upon which benefits are based because only work-related impairment is compensable.” The Board and Court of Appeals correctly determined the ALJ erred by failing to subtract the 5 percent impairment rating assigned based on the back condition existing immediately before the work-related injury from the 21 percent impairment rating that existed when claimant reached MMI after his surgery. The ALJ must award income benefits based on the 16 percent impairment rating that remains.
Summaries contained herein do not represent all of the legislation passed by the 2012 Kentucky General Assembly in Regular Session.

For a summary of all legislation from the Regular Session, please consult the General Assembly Action, Regular Session 2012, which is available without charge from the Legislative Research Commission.

Copies of bills mentioned may be obtained from the Public Bill Room at:

Legislative Research Commission
State Capitol
700 Capital Avenue
Frankfort, KY 40601-3486

They may also be obtained from the Legislative Research Commission website at www.lrc.ky.gov.

INSTRUCTIONS FOR DOWNLOADING A BILL FROM THE LRC WEB PAGE

The LRC web page is located at www.lrc.ky.gov. When you reach the LRC web page, click on "Legislation and Legislative Record." Click on the appropriate session, for instance, "2012 Regular Session." You will be taken to the Legislative Record Online. Look for "Bill Status Information." This will allow for several choices: Bills by Senate Bill number or House Bill number; "Bills & Amendments by Sponsor"; "Bill & Amendment Index – Headings"; and "BR to Bill Conversion List."

After you have done the above, and if you know the House Bill or Senate Bill number:

Click on the bill number under the appropriate Senate Bill or House Bill list. This will bring up the summary of the bill, which shows the history of the bill, the sponsors of the bill, and related information. When you get to the summary, click on the bill number. This will open the latest version of the bill. If the bill passed and was not vetoed by the Governor or the bill became law without the signature of the Governor, you will have the text of the bill as enacted by the General Assembly.

After you have done the above, and if you do not know the House Bill or Senate Bill number but you know the name of the sponsor:

Check the "Bills & Amendments by Sponsor" list, which shows all of the bills for which the particular legislator was either the primary sponsor or a co-sponsor. This list only shows bill numbers, so you will need to click on each bill number to see the summary, which includes the bill's topic. This will provide you with the summary of the bill. You can then proceed as above.
After you have done the above, and if you do not know the House Bill or Senate Bill number or the name of the sponsor, you may search for a bill in the Index by topic:

Click on "Bill & Amendment Index – Headings" to find the bills on the topic of your choice. You will find a list of bill numbers. Click on the bill numbers until you find the summary of interest.

If you know only the “BR” (Bill Request) number:

Click on the "BR to Bill Conversion List." This will give you the bill number for the bill upon introduction. The hyperlink for the bill number will take you to the summary and other related information for the bill.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Category</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADMINISTRATIVE REGULATIONS</td>
<td>1-101</td>
</tr>
<tr>
<td>ALCOHOL</td>
<td>1-101</td>
</tr>
<tr>
<td>BANKING</td>
<td>1-102</td>
</tr>
<tr>
<td>BOATING</td>
<td>1-102</td>
</tr>
<tr>
<td>BUSINESS ENTITIES</td>
<td>1-102</td>
</tr>
<tr>
<td>CIVIL ACTIONS</td>
<td>1-102</td>
</tr>
<tr>
<td>CRIMINAL LAW</td>
<td>1-103</td>
</tr>
<tr>
<td>CRIMES AND PUNISHMENTS</td>
<td>1-103</td>
</tr>
<tr>
<td>DOMESTIC RELATIONS</td>
<td>1-104</td>
</tr>
<tr>
<td>DRUGS</td>
<td>1-104</td>
</tr>
<tr>
<td>ELECTIONS</td>
<td>1-106</td>
</tr>
<tr>
<td>EMERGENCIES</td>
<td>1-107</td>
</tr>
<tr>
<td>FEES</td>
<td>1-107</td>
</tr>
<tr>
<td>FIREARMS</td>
<td>1-107</td>
</tr>
<tr>
<td>FORECLOSURE</td>
<td>1-108</td>
</tr>
<tr>
<td>HEALTH CARE</td>
<td>1-108</td>
</tr>
<tr>
<td>INSURANCE</td>
<td>1-110</td>
</tr>
<tr>
<td>INVESTMENTS</td>
<td>1-114</td>
</tr>
<tr>
<td>JAILS</td>
<td>1-114</td>
</tr>
<tr>
<td>JUDICIAL SALES</td>
<td>1-114</td>
</tr>
<tr>
<td>JUVENILE LAW</td>
<td>1-114</td>
</tr>
<tr>
<td>LICENSING AND OCCUPATIONS</td>
<td>1-115</td>
</tr>
<tr>
<td>LIENS</td>
<td>1-117</td>
</tr>
<tr>
<td>LOCAL GOVERNMENT</td>
<td>1-118</td>
</tr>
<tr>
<td>LONG TERM CARE</td>
<td>1-120</td>
</tr>
<tr>
<td>MOTOR VEHICLES</td>
<td>1-121</td>
</tr>
<tr>
<td>NOTICES</td>
<td>1-123</td>
</tr>
<tr>
<td>OPEN RECORDS</td>
<td>1-123</td>
</tr>
<tr>
<td>POLICE</td>
<td>1-124</td>
</tr>
<tr>
<td>PROBATE</td>
<td>1-124</td>
</tr>
<tr>
<td>PROPERTY</td>
<td>1-124</td>
</tr>
<tr>
<td>PUBLIC ADVOCACY</td>
<td>1-126</td>
</tr>
<tr>
<td>PUBLIC SAFETY</td>
<td>1-126</td>
</tr>
<tr>
<td>RETIREMENT</td>
<td>1-128</td>
</tr>
<tr>
<td>STATE GOVERNMENT</td>
<td>1-129</td>
</tr>
<tr>
<td>TAXATION</td>
<td>1-129</td>
</tr>
<tr>
<td>TRUSTS AND ESTATES</td>
<td>1-131</td>
</tr>
<tr>
<td>UNEMPLOYMENT COMPENSATION</td>
<td>1-131</td>
</tr>
<tr>
<td>UNIFORM COMMERCIAL CODE</td>
<td>1-132</td>
</tr>
<tr>
<td>UTILITIES</td>
<td>1-133</td>
</tr>
<tr>
<td>2012 REGULAR SESSION CODIFICATION TABLES</td>
<td>1-135</td>
</tr>
<tr>
<td>Acts Disposition Table</td>
<td>1-137</td>
</tr>
<tr>
<td>Table of KRS Sections Affected</td>
<td>1-145</td>
</tr>
</tbody>
</table>

1-99
I. ADMINISTRATIVE REGULATIONS

SB 157

AN ACT relating to administrative regulations. Specifies that the administrative regulations compiler shall not accept for filing administrative regulations that do not conform to specified provisions, rather than to all of KRS Chapter 13A. Requires LRC to maintain the official version of the administrative regulations in an electronic database and to permit the Administrative Register to be published rather than printed. Requires that an electronic version be filed with the paper copy of an administrative regulation and to specify that, if there are differences between the paper and electronic version, the electronic version controls. Clarifies that an administrative body may incorporate by reference a code or uniform standard required or authorized, rather than merely required, by federal or state law. Requires that a copy of amended material incorporated by reference developed by the promulgating administrative body be filed with the changes marked and specify that the regulations compiler shall not be required to keep those marked copies once the administrative regulation has been adopted or withdrawn. Clarifies that the fiscal note on state or local government is required for all administrative regulations. Authorizes an administrative body to e-mail the required notice regarding a fee establishment or increase. Specifies what constitutes a comment period and clarifies that administrative bodies are not required to send copies of an amended-after-comments administrative regulation to its initial notification list. Requires that changes in an amended-after-comments version be typed in bold and require the administrative body to send copies of the amended-after-comments version with the statement of consideration to those who specifically request a copy from the administrative body rather than to those persons attending the hearing or who submitted comments. Provides that an administrative regulation shall not be deferred more than twelve consecutive months. Requires that amendments initiated by an administrative body be filed at least three days, rather than five days, prior to a subcommittee meeting. Permits amendments drafted by subcommittee staff on behalf of a subcommittee to be in a committee substitute format and authorizes a subcommittee to make an amendment orally at a meeting; and repeals KRS 13A.080 and 13A.160.

II. ALCOHOL

SB 40

AN ACT relating to alcoholic beverages. Relates to sales of alcohol at “qualified historic site.” Removes the lodging requirement and specifies that restaurants must receive at least 50 percent of their food and beverage income from the sale of food. Rescinds the requirement that a retail alcohol licensee premises have a street-level entrance in a business center or on a main thoroughfare. Clarifies that qualified historic site licenses may be issued to any qualifying property in a wet territory or in a precinct that has voted to authorize qualified historic sites under KRS 242.1242.
III. BANKING

HB 309

AN ACT relating to banking. Establishes requirements for determining the indebtedness of a person to a bank to include partnership liabilities. Includes the extent of a person's credit exposure to a bank through a variety of transactions. Defines "derivative transaction" for the purpose of assessing credit exposure. Deletes the current requirements for computing indebtedness of a person.

IV. BOATING

HB 93

AN ACT relating to personal watercraft. Clarifies that the Rules of the Road for personal watercraft are part of the federal Inland Navigation Rules, 33 C.F.R. pt. 83.

V. BUSINESS ENTITIES

HB 441

AN ACT relating to business entities. Creates the Kentucky Uniform Limited Cooperative Association Act. Authorizes the creation of limited cooperative associations; describes the characteristics of uniform limited cooperative associations in terms of membership, ownership, profit-making status, and duration of existence. Identifies the powers of the limited cooperative association and states that the laws of the Commonwealth govern its internal affairs and liability. Establishes rights, penalties, and other matters in organic rules and makes the rules govern relations between members, directors, and assignees in the limited cooperative association. Makes the limited cooperative association a limited liability pass-through entity for tax purposes. Identifies the items that may be contained in the articles of association and which of those items may be varied in the organic rules. Allows a limited cooperative association to have patron members and investor members with rules that govern the interests and prerogatives of those members.

VI. CIVIL ACTIONS

SB 110

AN ACT relating to community use of school facilities and property. Provides limited civil immunity to school districts and personnel who make school property available for recreational use by members of the community during non-school hours.
VII. CRIMINAL LAW

HB 54

AN ACT relating to the criminal justice system. Amends KRS 431.066, relating to pretrial release and bail options, to define verified and eligible defendants and clarify how bail credit is to be earned. Amends KRS 431.520, relating to release on personal recognizance or unsecured bail bond, to allow a court to deny release if a person is a flight risk or danger and to specify how bail credit is to be applied. Amends KRS 431.530, relating to deposit of bail security, to specify that a defendant who earns full credit toward bail is not required to make a deposit with the clerk. Amends KRS 534.070, relating to incarceration for failure to pay fines or court costs, to specify how credit earned against the fines and costs is to be applied. Amends KRS 218A.1413, relating to trafficking in the second degree, to clarify the mens rea for lesser amounts. Amends KRS 218A.275 to include the possibility of voiding convictions for possession of controlled substances first degree under certain circumstances and prohibit eligibility if a previous charge has been dismissed under deferred prosecution. Amends KRS 26A.400, relating to drug court, to clarify the types of grants to be evaluated. Amends KRS 27A.097, relating to judicial support agencies, to apply the use of evidence-based practices to supervision and intervention programs for defendants. Amends KRS 439.335 to clarify how an inmate's risk and needs assessment is to be used for purposes of parole. Amends KRS 439.3406, relating to mandatory reentry supervision, to clarify supervision requirements and procedures. Amends local jail construction statutes to modify construction requirements. Relating to the corrections impact statement required for legislation involving corrections, modifies required elements and processes. Requires the Criminal Justice Council to oversee the implementation of the Public Safety and Offender Accountability Act. Adds judges and witnesses to the list of persons to be notified upon the release or escape of an involuntarily committed person. Requires sentence credit for time served in pretrial home incarceration and applies home incarceration credit to defendants sentenced on or after the effective date of the Act.

VIII. CRIMES AND PUNISHMENTS

A. SB 58

AN ACT relating to crimes and punishments. Permits a peace officer to make an arrest or issue a citation for a misdemeanor assault in the fourth degree if the officer did not view the commission of the offense but has probable cause to make the arrest, and if the assault occurred in the emergency room of a hospital.

B. HB 390

AN ACT relating to metal. Establishes a registration system for secondary metal recyclers to be administered by the Office of Occupations and Professions Public Protection Cabinet. Requires a background check for each secondary metal recycler by the Kentucky State Police. Limits payment for restricted metal items to check-only. Requires secondary metal recyclers to keep records of restricted metal item purchases.
Requires secondary metal recyclers to be able to receive notices about restricted metal thefts from law enforcement. Recommends creation of a Recyclable Metals Theft Prevention Working Group to begin meeting no later than August 15, 2012. Establishes the crime of unlawful acts relating to acquiring metals with penalties up to a Class D felony depending on value of damage to property.

C. HB 519

AN ACT relating to public protection. Broadens the definition of child abuse to include acts of sexual abuse and sexual exploitation committed by persons in a position of authority or special trust. Changes the age of persons who may be victims of rape in the third degree and sodomy in the third degree from less than sixteen to less than eighteen, when the offense is committed by a person in a position of authority or special trust. Includes aunt, uncle, step-grandparent, and step-grandchild within the proscribed incest relationships.

IX. DOMESTIC RELATIONS

SB 57

AN ACT relating to public records. Requires the Cabinet for Health and Family Services to provide on its website downloadable forms pertaining to divorces by January 1, 2013. Exempts the Kentucky Cancer Registry from the Open Records Act and permits it to release some information at its discretion for public health purposes.

X. DRUGS

A. SB 3

AN ACT relating to drugs. Requires the use of the pseudoephedrine electronic sales logging system. Limits the maximum dispensing amount of an ephedrine-related drug without a prescription to 7.2 grams per month and twenty-four grams per year. Requires the system to block sales to certain purchasers who commit methamphetamine-related offenses. Requires the Administrative Office of the Courts to provide relevant conviction data to the administrator of the electronic sales logging system. Requires annual statistical reporting.

B. SB 114

AN ACT relating to step therapy. In the insurance code, defines "step therapy," "fail-first protocol," and "override of the restriction" as they relate to prescription drug restrictions. Establishes step therapy or fail-first protocol limitations. Requires the prescribing practitioner to have access to a clear and convenient process to request an override of the restriction from the insurer. Requires an override of the restriction from the insurer to be granted within forty-eight hours if it is established that all necessary information to perform the override review has been provided by the
prescribing practitioner documenting that the preferred treatment has
been ineffective in treatment of the insured’s disease or medical
condition, that the preferred treatment is expected or likely to be
ineffective based on characteristics of the insured and of the drug
regimen, or that the preferred treatment will likely cause an adverse
reaction or other physical harm to the insured. Requires that duration of
any step therapy or fail-first therapy not be longer than a period of thirty
days if deemed and documented as clinically ineffective. Permits an
extension up to seven additional days if the prescribing practitioner can
demonstrate through sound clinical evidence that any relief or
amelioration to the insured is likely to require more than thirty days.

C. SB 144

AN ACT relating to electronic prescribing. Provides that electronic
documenting shall not interfere with a patient's freedom to select a
pharmacy. Permits the use of clinical messaging and pop-up windows in
electronic prescription software, if the information is consistent with FDA
information. Permits the software to show information about a payor's
formulary, copayment, or benefit plan only if it does not preclude a
practitioner from selecting any pharmacy, drug, device, or controlled
substance. Requires the Commonwealth to consider electronic
prescribing and electronic prior authorization standards developed by the
National Council for Prescription Drug Programs.

D. HB 349

AN ACT relating to pharmacy audits. Prohibits an auditing entity from
requiring a pharmacy to keep records longer than two years or longer
than required by state or federal law or regulation. Prohibits an auditing
entity from receiving payment based on the total amount recovered in an
audit. Allows a pharmacy to be subject to recoupment of funds by an
auditing entity if the wrong medication was dispensed to a patient, if the
auditing entity can provide proof of intent to commit fraud, or if an error
results in an actual overpayment to the pharmacy. Permits a pharmacy to
submit an amended claim within thirty days of the discovery of an error in
lieu of recoupment. Limits the recoupment to the amount of the correct
medication. Directs clean claims to be paid per the claims payment
timelines established in KRS 304.17A-702. Subjects Medicaid managed
care organizations to pharmacy audits conducted by the Department of
Insurance.

E. HB 481

AN ACT relating to controlled substances and declaring an emergency.
Prohibits trafficking in or possession of synthetic drugs and establishes a
maximum fine of double the gain from the commission of the offense,
consolidating several existing statutes into a single comprehensive
offense. Expands the definitions of "synthetic cannabinoids or
piperazines," "synthetic cathinones," and "synthetic drugs" to reflect entire
classes of substances rather than individual chemicals. Permits the Office
of Drug Control Policy to make recommendations to the Cabinet for Health and Family Services regarding controlled substances scheduling. Requires offenders to pay any environmental cleanup costs for trafficking in synthetic drugs. Relating to trafficking in counterfeit drugs, creates a penalty structure mirroring the structure established for trafficking in synthetic drugs. Includes synthetic drugs in the trafficking in the vicinity of a school statute. Subjects trafficking in synthetic drugs to forfeiture. Includes trafficking in synthetic drugs as an offense triggering a penalty increase when committed while in possession of a firearm. Includes synthetic drugs among the causes for which a liquor license may be revoked. Emergency.

XI. ELECTIONS

A. HB 90

AN ACT relating to election reports. Requires electronic filing of election finance reports for candidates and slates of candidates running for statewide office, and for campaign committees of those candidates and slates, beginning with the elections in 2015. Allows electronic filing on the Internet or on optical or magnetic disk. Requires the Kentucky Registry of Election Finance, if funds are available, to offer the option of electronic reporting to candidates, committees, fundraisers, and persons making independent expenditures.

B. HB 112

AN ACT relating to the minimum age requirements for mayors and members of local legislative bodies and councils. Lowers the age at which a person is eligible to hold the office of council member to eighteen years and for the office of mayor to twenty-one years.

C. HB 293

AN ACT relating to elections and declaring an emergency. Requires a declaration of intent to be a write-in candidate to be filed at least twenty-eight days before the day of an election for a special election for a vacancy in either house of the General Assembly. Provides that if a writ of election has been issued to fill a vacancy in either house of the General Assembly and only one candidate has qualified for the vacancy, the county clerks in the territory in which the election is to be held shall conduct voting in the county clerk’s office or other place or places designated by the county board of elections and approved by the State Board of Elections. Exempts this section from applying when the writ of election calls for the special election to be held on the day of a primary or general election or the same day as any other special election, except for an uncontested special election to fill a vacancy in either house of the General Assembly. Requires that the sheriff of each county in which a special election is to be held shall give notice at least twenty-eight days before the day of the election. Requires that, for a special election to fill a vacancy in either house of the General Assembly for which only one
candidate qualifies for the vacancy, the notice shall include the location of
the election. Provides that, when a writ of election or proclamation is
issued to fill a vacancy, independent, political organization, or political
group petitions and certificates of nomination shall be filed at least twenty-
eight days before the day of the election. Emergency.

XII. EMERGENCIES

SB 55

AN ACT relating to emergencies. Permits interstate mutual aid agreements for
emergency responses during declarations of emergency. Recognizes the
credentials of emergency responders from other states. Establishes parameters
for immunity from liability. Specifies that all benefits that emergency responders
have within their jurisdiction will extend to them when providing services outside
of their jurisdiction. Requires mutual aid agreements to be approved by each
political subdivision involved.

XIII. FEES

A. HB 71

AN ACT relating to probate fees. Includes metropolitan and urban-county
correctional officers with peace officer powers, jailers, and deputy jailers
as individuals eligible to receive in the line of duty death benefits. Exempts the estate of anyone who is eligible for state death gratuity
benefits, and the estate of any regular member of the Armed Forces, from
probate fees.

B. HB 232

AN ACT relating to sheriff's collection fees for volunteer fire department
membership charges or subscriber fees. Authorizes the sheriff to retain
an amount not to exceed 4.25 percent of the collected volunteer fire
department membership charges or subscriber fees.

XIV. FIREARMS

A. HB 72

AN ACT relating to concealed deadly weapons. Relating to retired peace
officers who wish to carry concealed weapons, deletes reference to the
2004 version of the federal Law Enforcement Officer Safety Act and
retains reference to the Law Enforcement Officer Safety Act, and requires
the Department of Kentucky State Police to promulgate administrative
regulations.

B. HB 171

AN ACT relating to deadly weapons. Permits a retired Commonwealth's
or county attorney and retired assistant Commonwealth's or county
attorney to carry a concealed deadly weapon statewide with a concealed deadly weapon license.

C. **HB 484**

AN ACT relating to concealed deadly weapons. Allows a person to carry a concealed deadly weapon without a concealed deadly weapon license on his or her own property or on property of named relatives with their permission. Permits a sole proprietor of a business to carry a concealed deadly weapon without a license on property owned or leased by the sole proprietor.

D. **HB 500**

AN ACT relating to the regulation of firearms, firearm parts and accessories, ammunition, and ammunition components. Regarding the limitations on firearms ordinances by cities and counties, clarifies and expands the units of government and public agencies subject to the limitations, expands the limitations, and permits adversely affected persons or organizations to seek injunctive relief.

E. **HB 563**

AN ACT relating to crimes and punishments. Creates the crime of fraudulent firearm transaction when a person knowingly and fraudulently informs a firearms dealer or a private person that the proposed firearms transaction is illegal when it is legal or that is legal when it is illegal. Establishes violation as a Class D felony.

**XV. FORECLOSURE**

**HB 62**

AN ACT relating to filing deeds in lieu of foreclosure in the county clerk's office. Relating to the recording of deeds and instruments, requires a mortgage holder to file a deed in lieu of foreclosure with the county clerk within forty-five days of the date of the instrument's execution. Assesses a penalty in the form of a violation of law for any mortgage holder who fails to file a deed in lieu of foreclosure. Relating to the assessment of a transfer tax on property, exempts the filing of deeds in lieu of foreclosure from the transfer tax.

**XVI. HEALTH CARE**

A. **HB 282**

AN ACT relating to home medical equipment and services providers and making an appropriation therefor. Licenses home medical equipment and services providers under the Kentucky Board of Pharmacy. Mandates that equipment services shall be funded through a third-party payor. Prohibits providing home medical equipment and services without a license. Exempts persons engaging in a profession for which they are
licensed or registered, including health care practitioners and establishes other exemptions for home health agencies, hospitals, manufacturers and wholesale distributors, pharmacies, employees of a licensed entity, hospice programs, skilled nursing facilities, and government agencies. Requires a licensed person to provide home medical equipment and services if medical equipment carries a legend, or requires a medical order from a licensed health care practitioner. Sets licensure fees for applicants not to exceed $200 initially per year nor to increase more than $25 per year up to a maximum of $400. Requires providers to maintain adequate records of all home medical equipment and services provided and periodically report to the board as established in administrative regulation. Sanctions failure to report to the board or willful submission of inaccurate information as grounds for disciplinary action under KRS 315.121. Directs the board to establish qualifications for applicants for licensure through promulgation of an administrative regulation. Prohibits disclosure under KRS 61.878 of information provided by an applicant to any person or entity other than the board. Instructs that a separate license shall be required for each location of a home medical equipment and services provider. Obligates a provider to display its license at its place of business. Prescribes a renewal fee not to exceed $200 initially per year nor to increase more than $25 per year up to a maximum of $400. Directs that a license is issued only for the premises and persons named in an application and shall not be transferrable. Authorizes the board to grant reciprocity to an out-of-state provider physically located in one of the bordering states. Sets penalty for providing home medical equipment and services without a license as a Class A misdemeanor with each day of violation as a separate offense. Includes home medical equipment and services provider under the definition for "health care provider" or "provider." Designates what unprofessional and unethical conduct includes for a provider. Authorizes the board to oversee and administer the licensure of home medical equipment and service providers and to include on the advisory council individuals representative of the profession of providing home medical equipment and services. Authorizes the board to collect and deposit all fees, charges, and fines, and other moneys owed into the State Treasury to the credit of a non-lapsing trust and agency fund used to carry out and be appropriated for these purposes.

B. HB 458

AN ACT relating to ambulatory surgical centers. Defines ambulatory surgical center. Requires a physician's office operating as ambulatory surgical centers to be licensed. Requires ambulatory surgical centers to obtain a certificate of need unless otherwise exempt or in operation on the effective date of this Act. Requires the Cabinet for Health and Family Services to grant a nonsubstantive review for ambulatory surgical centers that meet specific criteria.
XVII. INSURANCE

A. HB 42

AN ACT relating to motor vehicle personal injury reparation benefits. Authorizes an insured to explicitly direct the payment of motor vehicle reparation benefits for incurred medical expenses arising from a covered loss to a health benefit plan, a limited health service benefit plan, Medicaid, Medicare, or a Medicare supplement provider that has paid related medical expenses.

B. HB 135

AN ACT relating to unclaimed life insurance benefits. Requires insurers to compare in-force life insurance policies against the Death Master File to determine potential matches of their insureds. Requires escheatment of policy proceeds after the expiration of the fee statutory time period only if no claim for the policy's proceeds has been made and if good faith efforts to contact the retained asset holder and any beneficiary are unsuccessful. Exempts life insurance policies provided under a governmental plan, a church plan, or a federal employee benefit plan, those used to fund a preneed funeral contract or prearrangement, and policies issued to a creditor to insure the lives of debtors in connection with a specific loan or other credit transaction. Effective date of January 1, 2013.

C. HB 207

AN ACT relating to insurance. Defines "commercial property and casualty," "loss run statement," and "provide." Requires an insurer to provide a loss run statement within twenty days of a written request from an insured or an agent. Requires the receiving insurer to provide the statement to the insured within five calendar days of receipt. Provides that a loss run statement shall be for a five-year loss run history or a complete history of the insured if less than five years. Prohibits the receiving insurance agent from divulging confidential consumer information to a third person. Prohibits an insurer from charging a fee for preparing and furnishing a loss run statement. Amends KRS 304.48-035, relating to liability self-insurance groups, and KRS 304.50-155, relating to group self-insurance funds, references and applies the loss run requirements and penalties for failure to comply. Provides that an agent who fails to provide a loss run statement as requested within the specified time frame to an insured or an agent shall be fined not less than $100 nor more than $250 for each day the agent fails to provide the statement. Requires insurers to inform claimants upon notification of a motor vehicle damage claim that the claimant has a right to choose a repair facility and provides that appraisals for motor vehicle damage claims shall include a notice so stating. Exempts the repair or replacement of automobile glass from the notice requirement. Provides that persons who fail to give the required notice for selecting a repair facility shall be subject to a civil fine in an amount not less than $250 and not more than $5,000.
D. **HB 295**

AN ACT relating to insurance. Establishes a new expiration date for a certificate of authority and requires payment of a fine for reinstatement of an expired certificate of authority. Deletes the requirement that agents file proof of financial responsibility with the Department of Insurance. Deletes the substitution of other special experience, education or training for the five-year experience requirement as a licensed agent. Deletes the bond filing requirement for consultants. Deletes the requirement that consultants file proof of financial responsibility with the commissioner of insurance. Deletes the requirement that adjusters file proof of financial responsibility with the department. Clarifies that a diligent search shall be performed by a licensed agent with a property and casualty line of authority and clarifies that a diligent search is not required for an exempt commercial purchaser. Clarifies the requirements for surplus lines insurers including minimum capital and surplus requirements, and a listing on the quarterly National Association of Insurance Commissioners alien insurer listing if the insurer is a nonadmitted insurer domiciled outside the United States. Clarifies that an agent license with a property and casualty line of authority is not required for licensure as a surplus lines broker. Deletes the requirement that life settlement brokers file proof of financial responsibility with the department. Authorizes the commissioner to participate in a supervisory college for any domestic insurer that is part of an insurance holding company system with international operations. Adopts the updates to the National Association of Insurance Commissioners Holding Company Act, primarily relating to recognition of enterprise risk. Establishes the insurance code subtitles to which an industrial insured captive insurer is subject. Provides that all captive insurers, except those formed as a risk retention group, are not required to file an actuarial opinion summary if a certification of loss and loss expense reserves and opinion of reserve adequacy is filed with the department. Establishes a fine of $100 for reinstatement of an expired certificate of authority. Establishes a penalty of $100 for a broker who fails to file an affidavit as provided by KRS 304.10-050. Establishes a penalty of $1,000 to $5,000 for a broker who exhibits a pattern of failing to file affidavits as provided by KRS 304.10-050. Establishes a penalty of $500 for a broker who fails to file a quarterly statement as required by KRS 304.10-170. Allows the commissioner to disapprove a dividend or distribution or place an insurer under supervision in accordance with Subtitle 33 of KRS Chapter 304. Effective, in part, July 15, 2014.

E. **HB 324**

AN ACT relating to payments for firefighters permanently and totally disabled in the line of duty and making an appropriation. Increases monthly payments to firefighters permanently and totally disabled in the line of duty from $2 to $300 each for the costs of life and health insurance.
F. **HB 338**

AN ACT relating to delaying the effective date of insurance premium surcharge increases. Provides that the insurance premium surcharge rate calculated by the commissioner of revenue and related to the commissioner of insurance for the purpose of informing the affected insurers shall take effect no earlier than six months from the date that the commissioner of insurance notifies the affected insurers. Deletes the requirement that the commissioner of revenue calculate the appropriate rate no later than January 1 of each year. Deletes the requirement that the adjustment process shall continue on a biennial basis.

G. **HB 392**

AN ACT relating to limited lines insurance. Defines "portable electronics," "portable electronics insurance," "portable electronics insurance supervising entity," and "portable electronics retailer." Defines "limited lines travel insurance producer," "travel retailer," and "offering and disseminating." Establishes the requirements for a travel retailer and its employees to offer and disseminate travel insurance on behalf of and under the control of a limited lines travel insurance producer without obtaining an agent license. Prohibits a travel retailer or its employees or representatives from offering and disseminating travel insurance and prohibiting an insurer from accepting travel insurance for which a limited lines travel insurance producer does not hold a license. Establishes requirements for and to authorize a portable electronics retailer license to allow a portable electronics retailer or its employees and authorized representatives to offer and disseminate portable electronic insurance by the licensee at each retail location where the retailer does business in the state. Establishes the necessary minimum requirements for a portable electronics insurance retailer license written application form to be prescribed by the commissioner. Establishes requirements for maintaining a register of each business location. Requires supervision by a portable electronics insurance supervising entity. Establishes certain civil penalties to be imposed by the Commissioner of Insurance. Requires that brochures or other written materials relating to portable electronics insurance be made available to a prospective customer at every location and to establish the requirements for the information to be included in the brochures or other written materials, including disclosure that the coverage may duplicate the customer's other insurance, that enrollment is not required to purchase or lease the devices or services, receive a summary of the material terms of the insurance coverage as specified, receive a summary of the process for filing claims, provide that a customer may cancel the coverage at any time and receive a refund of any applicable unearned premium. Requires the policy to establish eligibility and underwriting standards for customers to enroll. Permits charges for the insurance coverage to be billed and collected by the retailer and to be separately itemized on the customer's bill. Authorizes the retailer to maintain the insurance funds in a segregated account in a fiduciary capacity and to remit the amounts retained to the portable electronics insurance supervising entity within sixty days of receipt.
Authorizes the portable electronics retailer to receive compensation for billing and collection services. Requires that terms for termination or modification of a policy of portable electronics insurance be governed by the terms of the policy.

H. HB 421

AN ACT relating to insurance claims for residential roof repairs. Creates a homeowner’s right to cancel a contract for the repair or replacement of a roof system upon a determination that the damage is not covered under applicable policies of insurance. Provides that nothing shall prohibit a roofing contractor from providing an estimate for work on residential property of the owner or conferring with insurance representatives about damage to property after a claim has been submitted by the owner of residential real property. Establishes restrictions that apply to services for which payment is expected from the owner's insurer. Requires roofing contractors to include conspicuous notice of cancellation rights and procedures in roofing contracts. Prohibits roofing contractors from requiring deposits or advance payment except for emergency repairs necessary to protect the property from further damage. Provides that a roofing contractor who performs services authorized by the owner, including services to prevent further damage, shall be entitled to collect a reasonable and customary amount for the work performed pending insurance claim determination. Prohibits a roofing contractor from paying an owner of real property for whom any services have been performed for any reason in any form of compensation in excess of $100 including a bonus, gift, prize or other specified forms of compensation. Prohibits roofing contractors from offering or providing financial offsets or incentives against insurance policy deductibles or proceeds for use of their services.

I. HB 497

AN ACT relating to insurance. Sets exceptions to an insurer’s use of credit information with regard to rates, rating classifications, tier placement, and underwriting guidelines for specific life events. Permits insureds to contribute to the cost of their group life insurance. Changes the definition of dependent, as it relates to group life insurance, to permit dependent coverage for certain disabled dependents beyond age eighteen. Prohibits an insurer from canceling, nonrenewing, or increasing the premium based on an inquiry that does not reasonably apprise the insurer of a claim. Requires fourteen days’ notice for cancellation of a personal automobile policy that has been in effect for less than sixty days, to address cancellations or nonrenewals of property and casualty coverage based solely on a specific life event that influences a person’s credit information, and to require insurers to respond to a request for information from the Department of Insurance regarding the nonrenewal of a personal automobile policy within seven days. Addresses cancellations or nonrenewal of property and casualty coverage based on a specific life event that influenced a person’s credit information. Includes
as an unfair trade practice any requirements that restrict, reduce, or negate benefits covered under a health benefit plan.

XVIII. INVESTMENTS

HB 227

AN ACT relating to money transmitter permissible investments. Relating to money transmitter licensees’ permissible investments, defines and limits past due or doubtful receivables and authorizes investment in a share or certificate issued by a registered open-end management investment company whose portfolio is restricted to current permissible investments for a licensee.

XIX. JAILS

SB 90

AN ACT relating to unclaimed funds in the possession of jailers. Establishes a process for the return of money remaining in an inmate account or prisoner canteen account after the release of a prisoner and for the transfer of unclaimed money to the jail's canteen account. Declares that the unclaimed funds are not subject to escheat under KRS Chapter 393.

XX. JUDICIAL SALES

HB 23

AN ACT relating to judicial sales. Requires in judicially ordered land sales that any appraisals of the land made pursuant to the court-ordered sale process be publicly available prior to the sale.

XXI. JUVENILE LAW

A. SB 213

AN ACT relating to transitional living support for persons committed to the custody of the Commonwealth. Establishes new definitions for "eligible youth," "transitional living support," and “transition plan.” Establishes that a youth may choose, prior to attaining the age of nineteen, to extend or reinstate his or her commitment to the Cabinet for Health and Family Services to the age of twenty-one years old and to establish duties of the Cabinet for Health and Family Services related to the youth’s extension or reinstatement of commitment.

B. HCR 129

A CONCURRENT RESOLUTION relating to the study of the Unified Juvenile Code and related statutes. Establishes the Unified Juvenile Code Task Force. Provides that the task force may study issues related to status offenders, the use of community resources, alternatives to detention, reinvestment of savings to create community-based treatment
programs, feasibility of establishing an age of criminal responsibility, issues related to domestic violence and its impact on children exposed to domestic violence, issues related to special needs children, and use of validated risk and needs assessments. Permits the task force to provide a draft of recommended changes to the Unified Juvenile Code and related statutes in its report to the Legislative Research Commission no later than January 7, 2013.

XXII. LICENSING AND OCCUPATIONS

A. SB 92

AN ACT relating to agriculture. Requires cattle buying stations to be licensed, to require stockyards to annually identify dealers that conduct business with the stockyards, and to verify that dealers are properly licensed and bonded. Requires buying stations to file monthly reports to the department regarding the number of livestock received and sold. Requires buying stations to permit the department to inspect their business records. Requires buying stations to be bonded and to require each facility to show independent proof of creditworthiness. Requires buying stations to use certified weigh scales. Prohibits buying stations from misweighing livestock. Imposes additional fines and penalties to stockyards and buying stations. Requires market agencies to be licensed by the department.

B. SB 162

AN ACT relating to registered geologists. Removes definition of "qualified geologist." Authorizes the state geologist to designate a person to represent him or her at meetings of the board. Grants the board specific investigatory powers so that it may enforce the chapter, investigate complaints or suspected violations, and notify law enforcement. Establishes jurisdiction for Kentucky resident appeals of board actions in the Circuit Court of the county where the person resides or where the person has his or her principal office. Establishes jurisdiction for an out-of-state resident's appeal of a board action in Franklin Circuit Court. Allows a local or state government geologist to become a registered geologist by meeting the education, experience, and examination requirements by July 31, 2015. Establishes biennial registration renewal rather than annual registration renewal. Ends the registration exemption for local or state government geologists after July 31, 2015. Allows the board to discipline a licensee by imposing an administrative fine of up to $1,000 per violation. Permits discipline against a licensee who is convicted of a felony involving sexual misconduct or a crime where dishonesty is a necessary element.

C. SB 163

AN ACT relating to courtesy cards issued by the Kentucky Board of Embalmers and Funeral Directors. Outlines the conditions a person licensed in another state or federal district as an embalmer or funeral
director shall meet to obtain a courtesy card, including the completion of an application for a courtesy card on a form provided by the board, and paying a fee that shall not exceed the amount of the fee for renewal for a funeral director or embalmer licensed under the chapter. Mandates that the board promulgate administrative regulations necessary for administration and enforcement. Adds the expiration date for a courtesy card of July 31 of each year. Prescribes what the holder of a courtesy card may undertake as to acts of funeral directing. Mandates that a courtesy card holder shall comply with all laws in Kentucky when engaging in funeral directing in the state. Directs the board to report any disciplinary measure taken by the board against a courtesy card holder to the state board or agency that issued the courtesy card holder’s embalmer or funeral director license or certification. Prohibits various acts by a courtesy card holder.

D. **SB 198**

AN ACT relating to diabetes educators. Defines “practice of diabetes education.” Prohibit persons from engaging in the practice of diabetes education or holding themselves out to be a diabetes educator without a license. Establishes that the practice of diabetes education without a license shall be a Class A misdemeanor.

E. **HB 137**

AN ACT relating to the licensure of health care professionals who use radiation for imaging and therapy and making an appropriation therefor. Creates the Kentucky Board for Medical Imaging and Radiation Therapy to license and regulate advanced imaging professionals, medical imaging technologists, radiographers, radiation therapists, nuclear medicine technologists, and limited X-ray machine operators. Establishes board membership and procedural requirements; establishes board powers and duties. Establishes minimum qualifications and powers of the board’s executive director. Requires the board to recognize and enforce the standards of the national organizations for the medical imaging and radiation therapy professions. Prohibits practice of the regulated professions without a license from the board. Exempts practitioners of the healing arts, students, and federal government employees from the chapter. Exempts any licensed health care practitioner or provider who is working within the license for that person's profession, training, or services from these requirements. Authorizes the board to establish the qualifications for acquiring and maintaining licensure, with the power to identify other specialties or categories of duties consistent with KRS Chapter 311B. Directs the board to set licensing fees and reasonable fines. Establishes a trust and agency fund from licensing and other fees for use by the board. Waives fees and sets special procedures for licensees serving in the United States Armed Forces. Allows only licensees to act as a licensee, employ an imaging or radiation professional, manipulate ionizing radiation equipment, or administer radiopharmaceuticals. Requires any person to alert the board when a licensee has committed certain acts or has become unfit or incompetent.
to practice. Lists reasons the board may deny, revoke, or suspend a license. Describes procedures for administrative hearings for licensee discipline. Defines conditions for instituting civil penalties.

F. **HB 311**

AN ACT relating to activities regulated by the Kentucky Board of Hairdressers and Cosmetologists. Allows the board to electronically distribute administrative regulations. Requires high school diploma or equivalent. Makes license fee consistent with other statutes. Provides for out-of-state verification. Establishes fees and requirements for threading and threading facility licenses. Provides permit to practice outside a licensed facility. Deletes provision for board to establish the number of licenses for schools. Adds fee for change of manager of a school of cosmetology and deletes inactive licensure and continuing education provider license. Requires licensees to request a hearing within thirty days of notice. Stipulates that teacher-student ratio applies only to students present for instruction. Provides licensure requirements for persons from other states. Allows exams to be given more frequently than every thirty days. Removes restriction against practicing while having an infectious or communicable disease. Includes fines in penalties board may assess; deletes provision to pay fine in lieu of suspension. Deletes specific complaint recording requirements. Permits apprentices to work for funeral establishments. Expands options for removing facial hair. Amends various statutes to delete provisions for written admonishments. Repeals KRS 317A.110, which required the Office of Occupations and Professions to give advice and assistance to the board.

**XXIII. LIENS**

**HB 417**

AN ACT relating to motor vehicle liens. Redefines "retail installment contract" to include a bailment or lease with an option to become the owner of the motor vehicle for nominal or no additional consideration beyond the contract. Redefines "cash sale price" to include charges for goods or services related to the sale and any processing fee. Provides that a retail installment contract need not appear on a single page and to authorize agreements that appear after the buyer's signature including on the back or on subsequent pages. Deletes the requirement that a retail installment contract that includes title to or a lien on a motor vehicle not include accessories, special, or auxiliary equipment. Deletes the provision that a retail installment contract determined by a pre-computed method authorize collection of a delinquency and collection charge. Adjusts the permissible delinquency and collection charge on an installment in arrears for a period of ten or more days to the greater of 5 percent of each installment or $15 rather than 5 percent or $5, whichever is less, and authorizes reasonable attorneys' fees rather than a maximum of 15 percent of the amount due under the contract. Requires that the retail installment contract contain any separately itemized items in the cash price. Provides that a retail installment contract is in compliance with the contract requirements of this Act if it satisfies the requirements of the Truth in Lending Act which apply to a retail installment contract.
contact regardless of whether the Act applies to the subject sale. Authorizes a finance charge for a retail installment sale that is precomputed by using an add-on method subject to maximum charges based on the motor vehicle class. Provides that a precomputed installment sale contract that provides for successive monthly payments of substantially equal amounts shall be prorated for a partial year based on the number of months in the partial year. Requires a precomputed finance charge applicable to a retail installment sale to be at the maximum finance rate of the finance charge or alternatively the interest on a retail installment sale may be on a simple interest basis taking into account the number of days between payments using a fixed or variable rate subject to the maximum allowed by a precomputed add-on method. Requires the effective rate of a finance charge permitted by the precomputed add-on method to be the rate computed in accordance with the actuarial method or the United States Rule. Requires a refund of the finance charge for prepayment in full of a contract determined by a precomputed method to be not less than the refund computed pursuant to the Rule of 78s.

XXIV. LOCAL GOVERNMENT

A. **SB 123**

AN ACT relating to referendum. Requires that a referendum petition include the petitioner's printed name, signature, year of birth, and residential address, and the date the petitioner signed the petition. Requires that, to be eligible to sign the petition, a person must live in the district or jurisdiction subject to the referendum and be a registered voter.

B. **HB 123**

AN ACT relating to land use. Allows a city of the second class within a county containing a consolidated local government to establish an independent board of zoning adjustment with exclusive jurisdiction within the city's territorial jurisdiction. Regarding exemptions from the requirements to obtain a permit for trailer, mobile home, or recreational vehicle parks, exempts the temporary parking of recreational vehicles, for no more than thirty days, in association with publicly advertised events such as fairs, festivals, sporting events, or yard sales, from the need to obtain a permit.

C. **HB 189**

AN ACT relating to local government. Establishes criteria for the filing of a petition for a charter county commission, including committee membership, criteria of affidavit, clerk's obligations for petition committee, sufficiency of petition, number of signatures, and clerk's requirements for determining and reporting sufficiency or insufficiency. Establishes procedures for amendment to a petition in the event of insufficient signatures; makes final determination of sufficiency the purview of Circuit Court. Requires the continued honoring of any contracts, franchises, obligations, or bonds, to include collective bargaining, by a charter county government. Requires any conflicts to be resolved in a manner that does
not impair any rights of parties to contracts. Prevents a vote to adopt a charter county government in a county containing a unified local government. Establishes petition requirements. Permits elected or appointed officials to serve and vote on charter commissions, and allows mayors, subject to legislative approval, to make appointments to charter commissions. Requires that the charter commission include within its comprehensive plan a provision for modification of the plan if certain planned localities do not participate, a time frame for modification, local governments responsible for modification, and the process for and criteria for modification. Clarifies voting procedures for acceptance of the comprehensive plan, and requires that a majority of the unincorporated area and the largest city, or 50 percent of the urban population, vote for the comprehensive plan. Requires procedures for dissolution in the plan of the charter county government. Prohibits dissolution for a period of at least five years. Requires that any charter plan be presented within four years. Permits extension of the commission for six months, if two-thirds of members agree. Allows any city whose voters do not approve of the plan to opt out of any charter county government. Prohibits a plan from being presented for five years after the failure of a charter county plan. Amends publication requirements to conform to the provisions of KRS 424.120. Requires the unification plan to include procedures for dissolution of plan, and requires that the unification commission include within its unification plan a provision for modification of the plan if certain planned localities do not participate, a time frame for modification, local governments responsible for modification, and the process for and criteria for modification. Clarifies voting procedures for acceptance of the unification plan, establishes requirements for dissolution of the plan, and prohibits dissolution for five years. Requires a majority of the unincorporated area and the largest city, or 50 percent of the urban population, to vote for the unification plan. Allows a local government to classify a violation of KRS 512.070 to a civil offense. Effective January 1, 2013.

D. HB 277

AN ACT relating to local occupational license tax forms. Requires each local tax district in the Commonwealth that imposes occupational license taxes to submit copies of its tax return forms to the Secretary of State for inclusion on the one-stop business portal. Requires the Secretary to prescribe a standard form which shall be accepted by all local tax districts, unless a tax district chooses to opt out of this requirement or is granted an exemption by the Secretary. Establishes provisions that must be met for a tax district to either opt out of the requirement or be granted an exemption. Requires that the Secretary of State provide a written report to the Interim Joint Committee on Local Government to update the members on the form development process. Requires the Secretary to send a copy of the proposed form to all members of the Interim Joint Committee on Local Government when it is filed with the Legislative Research Commission. Provides that during the regulation review process the proposed form shall be assigned to the Interim Joint Committee on Local Government for consideration. Provides that nothing
in this Act shall be interpreted as altering or preempting tax collection requirements of a tax district. Provides that tax districts shall make forms available to business entities. Imposes a penalty on a local tax district that fails to comply with certain provisions of this Act.

E. HB 502

AN ACT relating to pension plans for second class cities. Permits cities of a second class to provide a cost of living adjustment to members of their closed Policemen's and Firefighters' Retirement Fund not to exceed the lesser of the annual average increase in the Consumer Price Index or 5 percent. Requires approval by the city's legislative body for each cost of living adjustment provided and permit the city to repeal, suspend, or reduce any cost of living approved by the city as the city deems necessary.

XXV. LONG TERM CARE

A. SB 82

AN ACT relating to long-term care facility administrators. Changes "nursing home" to "long-term care" in various statutes. Prohibits a person who has been disciplined within the last five years from serving on the board. Allows the board to establish an exception to the general requirement that a long-term care facility shall operate under the supervision of a long-term care administrator. Reworks board requirements relating to terms, meeting frequency, and compensation. Permits online applications. Deletes a private admonishment as a disciplinary measure. Adds a disciplinary penalty of up to $2,000 per violation. Allows the board to place conditions on a license issued to a long-term care administrator that has been disciplined by another state's board. Permits board refusal to issue license to an administrator disciplined in another state in the last five years. Makes misdemeanor violations punishable by a fine of not more than $100.

B. SB 115

AN ACT relating to personal-care homes. Requires a medical examination prior to admission to a personal-care home that includes a medical history, physical examination, and diagnosis. Permits the medical evaluation to include a discharge summary or health and physical report from a physician, hospital, or other health care facility if completed within fourteen days prior to admission. Prohibits the admission of a person under the age of eighteen to a personal-care home. Includes individuals with other brain disorders in assisted living communities. Provides that the new section be known as "Larry's Law."

C. HB 122

AN ACT relating to local ordinances concerning residential care facilities. Prevents local governments from imposing additional licensing or other
requirements on private agencies that receive public funding or on government agencies that provide group home services for the disabled. Allows local governments to request information on facilities within their jurisdictions. Requires additional updates yearly and in certain conditions. Exempts information from Open Records Act. Clarifies that this exemption applies only to the local government.

D. HB 388

AN ACT relating to continuing care retirement communities. Permits a continuing care retirement community to provide home health services to on-campus residents. Exempts continuing care retirement communities from a certificate of need if providing home health services to on-campus residents.

XXVI. MOTOR VEHICLES

A. SB 75

AN ACT relating to slow-moving vehicles and declaring an emergency. Provides an alternative means of marking motorless, slow-moving vehicles with reflective tape rather than using the slow-moving vehicle emblem. Emergency.

B. SB 89

AN ACT relating to seat belts. Applies seat belt requirements to vehicles designed to carry fifteen or fewer passengers, rather than ten or fewer.

C. SB 124

AN ACT relating to motor vehicle operator's licenses. Provides that motor vehicle instruction permit holders are not required to be accompanied by a person who is at least twenty-one years of age when being supervised by a driver training instructor on a multiple-vehicle driving range. Defines multiple-vehicle driving range.

D. HB 221

AN ACT relating to veteran's designations on operator's licenses. Permits a veteran to request, at the time of application or renewal, that a personal identification card or an operator's license issued under KRS 186.412 bear a designation denoting the applicant's status as a veteran. Requires that the word "veteran" be on the face or the back of the license or personal identification card. Requires applicant to present an original or copy of his or her DD-214 form. Exempts circuit clerk from any liability for misread or fraudulent DD-214 forms.
E. **HB 328**

AN ACT relating to the operation of a motorcycle. Allows a person who has received an intermediate operator's license to apply for a motorcycle instruction permit. Makes a motorcycle instruction permit good for one year, with the ability to renew the permit one time. Allows a person whose motorcycle instruction permit has expired to apply for a motorcycle operator's license if the person can present proof of successful completion of a motorcycle safety education course in accordance with [KRS 15A.352(5)](http://www.lrc.ky.gov/Act/15a-352section5.html).

F. **HB 347**

AN ACT relating to defective new motor vehicles. Regarding time limits to repair new defective motor vehicles, permits reasonable extensions in cases where parts or supplies are unavailable due to civil unrest or natural disaster.

G. **HB 371**

AN ACT relating to motor vehicle registration. Establishes a new effective date for 2011 Ky. Acts ch. 5, relating to procedures for transferring motor vehicles, by repealing Section 7 of the Act, which contained the original effective date, and by making the rest of the Act effective January 1, 2014.

H. **HB 480**

AN ACT relating to county attorney-operated traffic programs. Permits county attorneys to operate traffic safety programs, except for DUI offenders, holders of commercial drivers' licenses, and persons charged with driving without insurance. Permits assessment of a reasonable fee. Requires data reporting to the Prosecutors Advisory Council and the Legislative Research Commission. Requires a participating offender to pay an additional $25 fee to the circuit clerk to be used for hiring additional deputy clerks and enhancing salaries of deputy clerks.

I. **HB 509**

AN ACT relating to the transportation of steel. Amends [KRS 189.2715](http://www.lrc.ky.gov/Act/189-2715.html), relating to overweight permits for the transportation of steel products or materials, to extend the allowable distance for the permits from thirty-five to 150 miles.

J. **HB 511**

AN ACT relating to motor vehicle titles. Requires vehicle titles to contain space exclusively reserved for a minimum of two dealer assignments. Clarifies the procedures for recording and printing titles for vehicles with more than two owners. Effective January 1, 2014.
K. **HB 518**

AN ACT relating to vehicles and declaring an emergency. Adds a member to the Waste Tire Working Group who is a county judge/executive, to be appointed by the Governor from a list of three nominees submitted by the Kentucky County Judge/Executive Association. Adds a member to the working group who is a mayor, to be appointed by the Governor from a list of three nominees submitted by the Kentucky League of Cities. Adds a member to the working group who is a representative of private industry engaged in the business of retail tire sales. Sets maximum standards for Transportation Cabinet regulations for escort vehicle requirements for overdimensional farm implements. Emergency.

**XXVII. NOTICES**

**SB 160**

AN ACT relating to communication. Regarding notices of application for certificates of operating authority for motor carriers, eliminates requirement that Transportation Cabinet provide notices of new applications to current certificate holders. Requires applicants to publicly advertise their intentions to apply. Allows that, in addition to other advertisement requirements, notice of intent to apply can be given by email to existing certificate holders, and sets forth the style and manner of notice. Requires state agencies to use certified mail or registered mail only for correspondence or notifications that the Finance and Administration Cabinet determines regulation warrants proof of receipt that those methods of delivery provide. Allows agencies of state government to use any method of governmental, commercial, or electronic delivery for any other correspondence or notifications upon approval of the administrative regulation. Defines "certified mail" as any governmental, commercial, or electronic method of delivery that allows a document or package to have proof of sending, delivery, and signature, and to define "registered mail" as any governmental, commercial, or electronic method of delivery that allows a document or package to have proof of chain of custody, insurance, and signature of recipient. Makes law relating to I Support Veterans special license plates effective July 12, 2012.

**XXVIII. OPEN RECORDS**

**HB 496**

AN ACT relating to open records. Amends the Open Records Act to exclude funds derived from a state or local authority in compensation for goods or services provided by a contract obtained through a public competitive procurement process from the determination of whether an entity is a public agency under the public records statutes. Changes the requirement that the company derive at least 25 percent of its funds expended by it in the Commonwealth within the current fiscal year be expended to within any fiscal year.
XXIX. POLICE

A. **SB 32**

AN ACT creating the Kentucky Blue Alert System. Requires the Department of Kentucky State Police to operate a Kentucky Blue Alert Network to provide public notification through the use of the news media and highway signs when a peace officer is killed or seriously injured, and an offender who is being sought has been identified. Designates Act as the "Trooper Jonathan K. Leonard Kentucky Blue Alert System Act."

B. **HB 369**

AN ACT relating to the Kentucky Law Enforcement Foundation Program Fund. Amends KRS 15.460 and 15.470 to require that police officers receiving the KLEFP fund salary supplement continue to receive the supplement when called to active duty with the United States Armed Forces.

XXX. PROBATE

A. **HB 155**

AN ACT relating to the creation and administration of trusts and estates. Amends the Kentucky Principal and Income Act to permit a trustee to reallocate principal to income without court approval under named circumstances. Defines "unitrust," and explains duties of fiduciary. Establishes rules for conversion of a trust to a unitrust. Creates Kentucky "decanting" statutes that permit creation of a new trust. Requires that notice provided by the trustee to a beneficiary be delivered to the beneficiary by certified mail, restricted delivery, and with a return receipt. Permits the trustee to seek court approval to effectuate the purpose behind the notice if delivery cannot be made. Clarifies the effective date of the Kentucky Uniform Principal and Income Act. Permits a trustee to deal with Medicare surtax issues. Includes new provisions relating to spendthrift trusts to deal with federal income tax and related issues. Allows creation of a self-settled special needs "Pay Back" trust.

B. **HB 156**

AN ACT relating to probate. Permits periodic settlement of informal estates.

XXXI. PROPERTY

A. **SB 178**

AN ACT relating to the office of county surveyor. Prohibits any person from filing for the office of county surveyor unless he or she produces to the county clerk evidence of having a Kentucky license as a professional land surveyor in accordance with KRS 322.020 and 322.045.
B. **HB 396**

AN ACT relating to secured property. Creates an expedited sale mechanism for foreclosures of vacant and abandoned real property. Relating to the offense of defrauding a secured creditor, includes situations where collateral is intentionally damaged and increases the penalties for the offense.

C. **HB 409**

AN ACT relating to real estate professionals. Relating to property forfeitures in the case of unlawful deaths, removes the requirement that real estate professionals provide advice to the clients on the statute's provisions and deletes the requirement relating to the mandatory rendering of professional advice in affected transactions. Provides an exemption to most laws and regulations applicable to mortgage loan companies and brokers for persons providing four or fewer mortgage loans per calendar year.

D. **HB 433**

AN ACT relating to condominiums and declaring an emergency. Provides that a joinder of condo units does not alter the method of valuation. Establishes a fee structure for the issuance of a certificate necessary for the sale of a condominium. Provides an alternative method for making emergency assessments. Reduces the number of owners necessary to establish a quorum for the association to conduct business. Deletes the requirement that an insurer of the association provide certificates of insurance related to common elements to every unit owner. Requires associations to prepare annual financial reports in accordance with standards based upon the income level of the association and requires that financial statements, if necessary, be prepared by certified public accountants. Exempts specified transfers from the sale certificate requirements. Identifies the required contents of a sale certificate. Establishes ethical standards for association board members and officers. Emergency.

E. **HB 533**

AN ACT relating to private transfer fee obligations and declaring an emergency. Prohibits the inclusion of private transfer fees in real property transactions, these being a new type of fee included in an initial developer's deed that purports to require that all subsequent sales of the property include payment of a fee to the original developer of the property. Requires conspicuous notice of all fees and obligations in contracts for the purchase of real estate. Emergency.
XXXII. PUBLIC ADVOCACY

HB 378

AN ACT relating to the Department of Public Advocacy. Creates the Division of Conflict Services within the Department of Public Advocacy. Authorizes the position of general counsel and establishes duties, and designates the public advocate as an appointing authority. Requires the public advocate to determine necessary personnel within the Department of Public Advocacy, subject to available funding. Excludes family divisions of a Circuit Court from the calculation that determines whether a county is responsible for providing public advocacy services. Excludes department agreements employing attorneys to represent indigent clients in conflict cases from the definition of a "personal service contract."

XXXIII. PUBLIC SAFETY

A. SB 152

AN ACT relating to underground facility damage protection. Relates to 811 "Call before you dig" by including timber harvesting with mechanized equipment within the activities potentially damaging to underground utilities. Creates three types of locate requests with response times for each and requires new underground facilities to be installed with the means to locate them from the surface. Allows excavators to begin work before the two-day time period has elapsed if all utilities have responded. Specifies the makeup of the board of a one-call center and directs the board to determine the cost for the center's services. Includes in the list of exempted activities hand probing and nonintrusive excavating done to locate underground facilities. Amends KRS 367.4917 to create a penalty for making a false report of an emergency.

B. HB 148

AN ACT relating to gas pipeline safety. Deletes the $25,000 maximum penalty and replaces it with civil penalties contained in federal code.

C. HB 344

AN ACT relating to swine. Prohibits the release of all hogs or pigs from the family Suidae into the wild. Prohibits the importation, possession, or transportation of any wild or feral pig or boar in Kentucky. Allows exception for the accidental escape of animals of the porcine species raised as livestock. Sets the penalty as a Class A misdemeanor and to prohibit licensure for hunting, fishing, trapping, or being a commercial guide for a period of ten years.

D. HB 385

AN ACT relating to coal mine safety. Amends KRS 351.010, relating to mine safety, to add definitions for "probation" and "final order of the
commission." Establishes notification requirements for failure of an alcohol or drug test that is required for mining certification or licensing. Establishes notice requirements for the right to appeal a certification or licensing revocation for medical treatment. Establishes consequences for failure to appeal or complete the deferral program. Requires the commissioner of the Department for Natural Resources to impose analogous sanctions against the Kentucky licenses or certifications of a miner who has violated corresponding drug and alcohol testing requirements of states with reciprocal requirements in Kentucky. Replaces methaqualone with buprenorphine in the panel urine test required to establish drug-free status. Allows the Mine Safety Review Commission to set additional panels for the urine test by order. Establishes the rights of appeal or deferral for certification denial for failure of a drug or alcohol test. Establishes consequences for failure to appeal or successfully complete deferral. Establishes penalties for first, second, and third offenses for failure of a drug or alcohol test required for a mining certification or license.

E. **HB 461**

AN ACT relating to fire protection sprinkler system design and installation. Amends KRS 198B.550 to augment the definition of "fire protection sprinkler system." Prohibits a person other than a certificate holder or an employee of a certificate holder from preparing technical drawings, installing, repairing, altering, extending, maintaining, or inspecting a fire protection sprinkler system except for persons otherwise exempted. Stipulates that a violation of KRS 198B.550 to 198B.630 or 198B.6401 to 198B.6417 shall be subject to a $100 to $1,000 fine, with each day being a separate offense. Effective January 1, 2013.

F. **HJR 11**

A JOINT RESOLUTION regarding the criteria for selection and approval of Clean Water Act 404 mitigation plans for out-of-kind water quality improvements. Expresses a need to undertake stream restoration to improve the chemical and biological characteristics of the water. Identifies improvements to sewer infrastructure and straight pipes as a method of undertaking stream restoration via mitigation. Expresses concern that the Appalachian region is subjected to a more rigorous conductivity standard that reduces the eligible waters in that region for mitigation awards. Encourages Section 404 permittees that engage in permittee responsible mitigation to utilize the 25 percent set aside for sewer infrastructure and straight pipes. Requires the Energy and Environment Cabinet to work with the University of Kentucky and University of Louisville to develop a method of evaluating the value of straight pipes and sewer projects to the overall mitigation requirement. Requires that a report be sent to the Legislative Research Commission by June 15, 2013, and every year thereafter. Requires that a copy be sent to the US Army Corps of Engineers, the Energy and Environment Cabinet, and members of the Kentucky congressional delegation.
HB 300

AN ACT relating to retirement and declaring an emergency. Requires the Kentucky Teachers' Retirement System board of trustees to be subject to the executive branch code of ethics. Requires placement agents involved with Kentucky Retirement Systems and Kentucky Teachers' Retirement System investments to register as lobbyists and to define placement agents and unregulated placement agents. Exempts placement agents from the contingent fee prohibition in the Executive Branch Code of Ethics as long as the placement agent is not prohibited by federal securities laws from receiving compensation from a government agency. Requires the audit of the Judicial Form Retirement System be performed by the Auditor of Public Accounts at least once every five years and to require the systems to pay all costs of the audit. Requires the Judicial Form Retirement System board to establish ethics policies and procedures, including annual financial and conflict of interest disclosures for members, and to make this information available to the public. Prohibits members of the Judicial Form Retirement System from serving more than three consecutive terms of office on the board and to prohibit the board chairman from serving more than four consecutive years as chairman. Prohibits assets of the Judicial Form Retirement System from being used to pay unregulated placement agents, requires the Judicial Form Retirement System to make system expenditures and employee salaries available on a website, and establishes conflict of interest provisions applicable to trustees and employees of the System. Applies the term limits applicable to elected trustees of the Kentucky Retirement Systems board to appointed trustees and provides that terms served prior to July 1, 2012, shall be used to determine if a trustee has exceeded the term limits prescribed in this section. Limits requirements for a member's social security number to the last four digits for board nominations made by membership petition. Requires members desiring to be elected to the board to submit an application and a resume and to complete a background check. Prohibits the chair and vice chair of the KRS board from serving more than four consecutive years as chair or vice chair. Requires the Kentucky Retirement Systems audit shall be completed by the Auditor of Public Accounts at least once every five years and to require the systems to pay all costs of the audit. Requires the Kentucky Retirement Systems to make system expenditures and employee salaries available on a website. Prohibits assets of the Kentucky Retirement Systems from being used to pay unregulated placement agents. Includes employees of the Kentucky Retirement Systems in conflict of interest provisions regarding their service to the systems and to include additional restrictions to the conflict of interest provisions applicable to employees and trustees of the board. Provides that terms served prior to July 1, 2012, shall be used to determine if an elective trustee of the Kentucky Teachers' Retirement System has exceeded term limits established under the section and requires the system to make system expenditures and employee salaries available on a website. Prohibits the chair and vice chair of the Kentucky Teachers' Retirement System board from serving more than four consecutive years as chair and vice chair. Requires that the Kentucky Teachers' Retirement System audit be completed by the Auditor of Public Accounts at least once every five years and
requires the system to pay all costs of the audit. Prohibits assets of the Kentucky Teachers' Retirement System from being used to pay unregulated placement agents. Includes additional restrictions to the conflict of interest provisions applicable to employees and trustees of the Kentucky Teachers' Retirement System. Allows trustees of the Kentucky Retirement Systems, Kentucky Teachers' Retirement System, and the Judicial Form Retirement System who are currently serving more than three four-year terms on the effective date of this Act to complete their remaining term of office. Applies years served as chair or vice chair of a board prior to the effective date of this Act towards determining whether a board chair or vice chair has exceeded term limits for the office. Sets July 1, 2011, as the beginning date for the five-year period in which the Auditor of Public Accounts must audit the systems. Applies the ban on unregulated placement agents to contracts established or renewed on or after July 1, 2012. Emergency.

XXXV. STATE GOVERNMENT

HB 402

AN ACT relating to interagency cooperation. Allows the Executive Branch Ethics Commission to share evidence with the Personnel Board or the Auditor of Public Accounts that may be used by those agencies for investigative purposes. Includes the Executive Branch Ethics Commission as an agency to which an employee may report actual or suspected violations of any law or any information related to actual or suspected mismanagement, waste, fraud, abuse of authority, or danger to public health or safety. Permits an employee to leave his or her assigned work area if requested by the Executive Branch Ethics Commission to appear before the commission.

XXXVI. TAXATION

A. HB 255

AN ACT relating to disaster recovery and declaring an emergency. Provides a sales tax refund for the purchase of building materials to repair or replace a building damaged or destroyed during a disaster. Requires the Commissioner of Education to waive up to ten instructional days for a school district located in a county in which a disaster has been declared. Allows a school district located in a county in which a disaster has been declared to substitute attendance data for school year 2010-2011 for attendance data for school year 2011-2012 for the purpose of calculating Support Education Excellence in Kentucky funds. Requires certified and classified personnel of a school district located in a county in which a disaster has been declared to make up any student instructional days waived by participating in instructional activities or professional development or by being assigned additional work responsibilities. Applies retroactively to the disaster occurring on February 29 to March 3, 2012. Emergency.
B. HB 398

AN ACT relating to property valuation. Allows property valuation administrators to use a variety of identified valuation methods to determine fair cash value. Provides that appraisals for tract and subdivision developments shall meet the minimum standards for appraisal established by the Kentucky Department of Revenue or the International Association of Assessing Officers.

C. HB 444

AN ACT relating to taxation and declaring an emergency. Clarifies that a qualified air freight forwarder is not subject to the public service property tax. Defines the terms of “affiliated airline” and “qualified air freight forwarder” and clarifies that freight forwarding revenues are included in the numerator of the sales factor by a ratio of miles operated in Kentucky over total miles operated; and applies to taxable years beginning on or after January 1, 2010. Emergency.

D. HB 499

AN ACT relating to fiscal matters and declaring an emergency. Provides for a tax amnesty program to be held during fiscal year 2012-2013. Allows the Office of Attorney General to recover reasonable costs of litigation. Extends the sunset date to June 30, 2014, for the waste tire fee. Removes the $19 million distribution of coal severance revenues for the Workers’ Compensation Funding Commission. Provides a one-half of one percent administrative fee for projects administered by the Kentucky Infrastructure Authority during the biennium. Allows the Office of Attorney General to submit proposals to a state agency specifying legal work that is presently accomplished through personal services contracts. Allows the State Auditor to charge an audited government or agency for any additional expenses incurred in audits unrelated to an audit of the statewide systems. Requires the insurance surcharge rate to be set at a sufficient rate to fund the Firefighters Foundation Program Fund and the Kentucky Law Enforcement Foundation Program Fund. Allows the Department of the Treasury to sell unclaimed securities at a time to be determined by the Finance and Administration Cabinet. Requires the Transportation Cabinet to transfer abandoned cash bonds related to the weight distance tax. Requires the insurance premium and retaliatory taxes be credited to the general fund. Defines terms and set the maximum ad valorem tax rate that may be levied by any special taxing district on drugs held by a pharmaceutical manufacturer in a warehouse for the purpose of shipment to an out-of-state destination at three cents upon each $100 of value. Requires underwriters or bond counsel firms be chosen for the Kentucky Public Transportation Infrastructure Authority. Requires any set-off or credit of city license fees against county license fees that exist between a city and county as of March 15, 2012, to remain in effect as it is on March 15, 2012. Prohibits the provisions of KRS 68.197(7) from applying to a city and county unless both the city and the
county have both levied and are collecting license fees on March 15, 2012. Emergency.

E. **HB 545**

AN ACT relating to governmental revenue functions and declaring an emergency. Allows county clerks to discharge notices when delinquent property taxes are paid to the county clerk. Revises the sale process for certificates of delinquency. Require registration with the Department of Revenue for persons paying more than five certificates of delinquency statewide or more than three certificates of delinquency in any county. Clarifies the process for refund of filing fee when tax bill is exonerated, and requires appeal of a denial of an application for refund to be made to the Kentucky Board of Tax Appeals. Restores language regarding responsibility for payment of the *ad valorem* tax. Allows county clerks to impose a fee of up to fifty cents per page for copies. Emergency.

XXXVII. TRUSTS AND ESTATES

**HB 341**

AN ACT relating to business organizations. Establishes the Kentucky Uniform Statutory Trust Act to codify provisions for the use of the business trust as an allowable form of business organization in the Commonwealth. Establishes definitions, general provisions, formation, certificates of trust and other filings, legal process, governing law, authority, duration, powers, series trusts, trustees and trust management, beneficiaries and beneficial rights, conversion and merger, dissolution and winding up, foreign statutory trusts, and other transitional and miscellaneous provisions. Amends various business entity statutes to enable an LLC to convert directly to an LLP. Requires a foreign business entity to be qualified to do business in Kentucky before receiving a state contract. Provides express statutory direction that any director, officer, manager, etc., of a Kentucky business entity is subject to the jurisdiction of Kentucky courts. Provides express statutory direction that a business may properly enter into agreements to settle creditor claims in the course of its dissolution. Prevents the inadvertent loss of limited liability after the dissolution of partnership having limited liability attributes. Provides that a corporation or LLC’s sole shareholder or member status is insufficient standing alone to pierce the veil of the entity. Provides uniformity for judicial dissolution procedures across various forms of business entities. Codifies the common law rule that “fairness” is not a defense to expropriating a partnership or LLC asset.

XXXVIII. UNEMPLOYMENT COMPENSATION

**HB 495**

AN ACT relating to unemployment insurance and declaring an emergency. Relating to the unemployment compensation administration fund, authorizes the secretary to obtain funding through commercially reasonable means to pay interest on federal unemployment loans and to pledge proceeds from a surcharge on contributing employers as security. Requires the Governor to
make application in 2013 and subsequent years for a cap on federal unemployment tax credit reductions. Requires that interest on federal unemployment loans be paid from the unemployment compensation administration fund and to assess a surcharge on contributing employers to pay interest. Establishes an annual surcharge, beginning on January 1, 2014, on contributing employers if there are insufficient funds to pay interest and costs relating to federal unemployment loans. Requires annual adjustment of surcharge, beginning in January 2015, based on increase in the taxable wage base. Permits the secretary to reduce or suspend the annual surcharge. Imposes penalties, including liens, on delinquent surcharge payments. Provides that the balance remaining in the interest payment fund be credited to employers' reserve accounts. Requires suspension of the taxable wage base increase when the trust fund balance reaches $200 million. Limits suspension to the number of years that employers paid additional federal unemployment taxes. Permits taxable wage base to increase if trust fund balance is within $20 million of a lower rate schedule trigger amount. Provides that increases in maximum weekly benefit amount shall not be limited by suspension of the taxable wage base. Prohibits suspension of the increase in taxable wage base if the trust fund balance is less than $200 million or if suspension would violate federal unemployment laws. Requires the secretary to report to the Legislative Research Commission on July 1, 2012, and quarterly thereafter on the status of the financing provision, unemployment trust fund, and efforts to obtain a federal tax reduction cap. Emergency.

XXXIX. UNIFORM COMMERCIAL CODE

SB 97

AN ACT relating to property. Repeals and reenacts various sections of Article 7 of KRS Chapter 355 and creates several new sections of Article 7 of KRS Chapter 355 to adopt the 2003 amendments to Article 7 of the Uniform Commercial Code, relating to Documents of Title. Updates and modernizes Article 7 to provide a domestic legal framework for documents of title to conform to international standards, including recognition of electronic documents of title, in addition to tangible documents of title. Establishes requirements for negotiable and nonnegotiable documents of title. Establishes the forms to be used for recording a financing statement, addendum, or amendment in the form and format set forth in the official text of the 2010 amendment to Article 9 of the Uniform Commercial Code. Prohibits filing of a financing statement if not authorized under KRS 355.9-509 or 355.9-708 or if the financing statement is not related to a valid or potential commercial or financial transaction, and which is filed with an intent to harass, hinder, or defraud a qualified person identified in the financing statement. Authorizes a qualified person to file an affidavit, in a form to be developed by the Secretary of State, asserting that the individual who filed a financing statement was not authorized or permitted to file the statement with the Secretary of State under penalty of perjury. Requires the Secretary of State to promptly transmit a financing statement which is required by KRS 355.9-501 to the office designated for the filing or recording of a record of a mortgage on real property including an affidavit, and to promptly file a termination statement with respect to the financing statement identified in the affidavit and advise the secured party of record of the termination statement filing. Permits
the secured party of record to request administrative review of the filing or bring
an action in Circuit Court against the individual who filed the affidavit, and
requires the Secretary of State to comply with the order of the court with respect
to filing the termination or noting that an action has been filed. Implements
transitional provisions as to effective dates and prior filed documents. Amends
KRS 382.430 to require a mortgage or other evidence of indebtedness filed for
record with any county clerk to include the mailing address of the lienholder.
Deletes the provision that failure to record an assignment of a debt shall result in
the original holder or owner being liable for the taxes and provides that any
mortgage that has been recorded by the county clerk shall not be deemed invalid
or ineffective for failure to include the principal place of business of the
mortgagee or holder of the note or other evidence of indebtedness. Creates a
new section of KRS Chapter 186A to provide that a lease transaction does not
create a sale or security interest in a motor vehicle or trailer because of a lease
clause for terminal rental adjustment.

XL. UTILITIES

HB 399

AN ACT relating to utility interest rates. Requires the Public Service Commission
to determine the interest rates on deposits paid by utilities, including electric
cooperatives organized under KRS Chapter 279, on an annual basis. Requires
that interest rates on deposits are calculated by averaging the one-year constant
maturity treasury rate from September, October, and November of each
preceding year. Requires the commission to notify utilities of the following year's
rate each December.
Acts Disposition Table – Each bill that becomes a law is assigned a sequential chapter number in the Kentucky Acts. Thus, HB 1 became 2012 Ky. Acts ch. 1. Use this table if you wish to find the KRS numbers assigned to the individual sections of a specific bill.

Table of KRS Sections Affected – This table lists all of the statutes that were amended, created, or repealed during the past session, and references the bill making the change. This table is particularly useful in allowing a practitioner to quickly ascertain if there were legislative changes in a specific area of the KRS, such as in the Penal Code.

**Action Codes:**
a = amended
app = appropriation
c = created
cc = construction clause
ch. = chapter
ec = emergency clause or specified effective date
eo = executive order
HB = House Bill
HCR = House Concurrent Resolution
HJR = House Joint Resolution
nc = not codified
r = repealed
re = repealed and reenacted
re-a = repealed, reenacted, and amended
SB = Senate Bill
sec. = section
t = temporary
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>HB 1</td>
<td>1-137</td>
<td>1</td>
<td>HB 1</td>
<td>1-137</td>
<td>1</td>
<td>HB 1</td>
<td>1-137</td>
</tr>
</tbody>
</table>

1. Acts refer to different sections of the Kentucky Revised Statutes (KRS) and sections of bills (Bill of Bill).
2. The table lists various acts and their corresponding bills, followed by references to specific sections of the KRS.
3. The acts are sorted in ascending order, and the bills and KRS sections are in descending order.
4. The page number indicated at the bottom, 1-137, refers to the page number where this section of the document is located.
29
30
31
32

SB
SB
SB
SB

131
150
163
90

33

HB

348

34

HB

402

35

HCR

29

36

HCR

53

37

HCR 129

38

HCR 155

39

HB

23

40

HB

37

41
42
43
44

HB
HB
HB
HB

42
50
56
62

45

HB

69

46
47

HB
HB

71
85

48

HB

90

49

HB

112

50

HB

137

9
10
1
1
1
1
2
1
2
1
2
1
2
1
2
3
1
2
3
4
5
6
1
2
3
4
1
2
1
2
1
1
1
1
2
3
1
2
1
1
1

1
2
1
2
3
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

261.235c
261.370a
164.295a
74.407a
316.140a
441.137c
393.010a
nc-eo
nc-t
11A.080a
61.102a
nc-t
nc-t
nc-t
nc-t
nc-cc
nc-t
nc-t
nc-t
nc-t
nc-t
nc-cc
nc-t
nc-t
nc-t
nc-cc
426.200a
426.520a
156.108c
160.107c
304.39-241a
56.063c
154.32-090a
382.110a
382.990a
142.050a
158.305c
157.200a
61.315a
206.010r
206.020r
206.030r
206.040r
206.050r
206.060r
206.070r
206.080r
206.090r
206.100r
206.110r
206.120r
206.130r
206.140r
206.150r
206.160r
206.170r
206.990r
121.120a
121.180a
67C.103a
67C.105a
83A.040a
311B.010c
311B.020c
311B.030c
311B.040c
311B.050c
311B.060c
311B.070c
311B.080c
311B.090c
311B.100c
311B.110c
311B.120c
311B.130c
311B.140c
311B.150c
311B.160c
311B.170c
311B.180c
311B.190c

20

51

HB

232

52

HB

495

53

SB

75

54
55
56

SB
HB
HB

123
122
123

57

HB

128

58

HB

135

59

HB

155

60
61

HB
HB

156
168

62
63

HB
HB

171
189

64

HB

207

65
66
67

HB
HB
HB

215
227
256

68
69

HB
HB

269
276

21
1
2
1
2
3
4
5
6
7
8
9
1
2
3
4
1
1
1
2
1
2
1
2
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
1
1
2
3
4
1
1
2
3
4
5
6
7
8
9
10
1
2
3
4
5
6
1
1
1
2
1
1
2
3
4
5
6
7
8
9

1-138

211.870r
211.890r
211.993r
nc-cc
75.450a
273.401a
341.240a
341.295a
341.490a
341.595a
341.611a
341.612a
341.614c
341.030a
nc-ec
189.050a
189.820a
189.830a
nc-ec
65.012c
65.879c
100.217a
219.410a
219.011a
247.4015a
304.15-420c
nc-ec
386.450a
386.454a
386.502a
386.175c
386.810a
395.195a
381.180a
387.855c
387.860c
387.865c
387.870c
387.875c
387.880c
387.885c
387.890c
387.895c
387.900c
387.910c
395.605a
160.380a
160.346a
160.990a
161.044a
527.020a
67.832c
67.852c
67.825a
67.830a
67.845a
67.855a
67.910a
67.918a
512.070a
nc-ec
304.20-100c
304.99-082c
304.48-035a
304.50-155a
304.12-275c
304.99-112c
nc-t
286.11-015a
148.580c
148.582c
nc-app
131.083c
42.0651re-a
42.0174a
42.0201a
42.560a
42.566a
42.650a
42.724a
42.726a

70

HB

277

71

HB

278

72

HB

281

73

HB

282

74

HB

295

75

HB

300

76

HB

308

10
11
12
13
14
15
16
17
1
2
3
4
1
2
3
4
1
2
3
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
1
2
3

42.740a
42.742a
42.744a
116.200a
131.020a
nc-t
nc-cc
nc-eo
67.766c
67.767c
67.768a
67.790a
12.020a
12.023a
158.796a
nc-eo
160.445a
156.070a
nc-ec
315.510c
315.512c
315.514c
315.516c
315.518c
315.520c
315.522c
315.524c
304.17A-005a
315.005a
315.121a
315.125a
315.191a
315.195a
315.220a
nc-t
304.3-180a
304.9-105a
304.9-320a
304.9-330a
304.9-430a
304.10-030a
304.10-040a
304.10-070a
304.10-120a
304.10-140a
304.15-700a
304.37-055c
304.37-010a
304.37-020a
304.37-030a
304.37-040a
304.37-120a
304.37-565a
304.49-150a
304.49-070a
304.99-154c
304.99-085a
304.99-152a
nc-ec
11A.010a
11A.201a
11A.236a
21.440a
21.450a
21.530a
21.540a
61.645a
61.655a
161.250a
161.340a
161.370a
161.430a
161.460a
nc-cc
nc-cc
nc-cc
nc-cc
nc-ec
165A.310a
165A.320a
165A.330a


104 HB 461  1  4  216B.095a  115 HB 429  1  316.130a  13  355.7-207re
  5  304.17A-147a  116 HB 497  1  304.16-030a  14  355.7-208re
  6  304.17A-1473a  2  304.16-090a  15  355.7-209re

105 HB 465  1  212.1415c  2  304.16-115c  17  355.7-301re
  3  122.4-030a  7  304.20-047c  19  355.7-302re

106 HB 467  1  211.570c  3  304.17A-150a  22  355.7-305re
  2  39F.010a  117 HB 500  10  304.17C-085c  23  355.7-307re
  3  39F.020a  118 HB 533  1  382.792c  25  355.7-309re
  4  39F.100a  119 HB 539  2  382.794c  26  355.7-401re
  5  39F.220c  3  382.796c  27  355.7-402re

107 HB 480  1  186.574a  119 HB 559  1  154.26-010a  29  355.7-404re
  2  15.720a  2  154.26-080a  30  355.7-501re

108 HB 481  1  216A.1430c  3  154.26-090a  31  355.7-502re
  2  217.065a  4  nc-cc  32  355.7-503re

109 HB 484  1  216A.010a  120 HB 559  1  278.605a  33  355.7-504re
  2  216A.020a  121 HB 563  1  527.090c  34  355.7-505re
  3  216A.050a  122 SB 3  1  218A.1446a  35  355.7-506re

110 HB 499  1  216A.141a  3  218A.1440c  36  355.7-507re
  2  216A.141a  3  nc-c  37  355.7-508re
  3  216A.141a  123 SB 24  1  158.003a  38  355.7-509re
  4  216A.141a  124 SB 32  1  16.177c  39  355.7-510re

111 HB 502  1  212.1415c  2  214.010a  40  355.7-512re

112 HB 509  1  186.060a  1  216A.020a  4  242.129a  43  355.7-604re

113 HB 511  1  186A.170a  4  243.220a  45  355.7-606re

114 HB 518  1  224.50-855a  10  355.7-204re  91  355.7-801re
  2  189.270a  11  355.7-205re  92  355.7-802c
  3  nc-cc  12  355.7-206re  93  355.7-803c

1-140
<table>
<thead>
<tr>
<th>133</th>
<th>SB 110</th>
<th>1</th>
<th>162.055</th>
<th>169.100</th>
<th>107</th>
<th>216.180</th>
<th>108</th>
<th>216.457</th>
<th>109</th>
<th>216.517</th>
</tr>
</thead>
<tbody>
<tr>
<td>134</td>
<td>SB 114</td>
<td>1</td>
<td>304.174</td>
<td>163.050</td>
<td>107</td>
<td>216.180</td>
<td>108</td>
<td>216.457</td>
<td>109</td>
<td>216.517</td>
</tr>
<tr>
<td>135</td>
<td>SB 115</td>
<td>1</td>
<td>216.765</td>
<td>179.410</td>
<td>109</td>
<td>222.005</td>
<td>110</td>
<td>222.231</td>
<td>111</td>
<td>281.014</td>
</tr>
<tr>
<td>136</td>
<td>SB 144</td>
<td>1</td>
<td>217.211</td>
<td>200.662</td>
<td>112</td>
<td>314.011</td>
<td>113</td>
<td>387.540</td>
<td>114</td>
<td>388.350</td>
</tr>
<tr>
<td>137</td>
<td>SB 152</td>
<td>1</td>
<td>367.490</td>
<td>202.028</td>
<td>115</td>
<td>413.650</td>
<td>116</td>
<td>439.267</td>
<td>117</td>
<td>439.510</td>
</tr>
<tr>
<td>138</td>
<td>SB 157</td>
<td>1</td>
<td>130.010</td>
<td>202.030</td>
<td>118</td>
<td>504.060</td>
<td>119</td>
<td>541.048</td>
<td>120</td>
<td>594.020</td>
</tr>
<tr>
<td>139</td>
<td>SB 160</td>
<td>1</td>
<td>12.145</td>
<td>46.010</td>
<td>121</td>
<td>530.080</td>
<td>122</td>
<td>532.025</td>
<td>123</td>
<td>610.127</td>
</tr>
<tr>
<td>140</td>
<td>SB 162</td>
<td>1</td>
<td>322A.010</td>
<td>205.590</td>
<td>124</td>
<td>610.127</td>
<td>125</td>
<td>635.110</td>
<td>126</td>
<td>635.505</td>
</tr>
<tr>
<td>141</td>
<td>SB 178</td>
<td>1</td>
<td>73.020</td>
<td>322A.020</td>
<td>127</td>
<td>650.020</td>
<td>128</td>
<td>650.020</td>
<td>129</td>
<td>650.020</td>
</tr>
<tr>
<td>142</td>
<td>SB 198</td>
<td>1</td>
<td>322A.030</td>
<td>205.633</td>
<td>130</td>
<td>652.025</td>
<td>131</td>
<td>652.025</td>
<td>132</td>
<td>652.025</td>
</tr>
<tr>
<td>143</td>
<td>SB 213</td>
<td>1</td>
<td>600.020</td>
<td>205.055</td>
<td>133</td>
<td>652.025</td>
<td>134</td>
<td>652.025</td>
<td>135</td>
<td>652.025</td>
</tr>
<tr>
<td>144</td>
<td>HB 265</td>
<td>1</td>
<td>nc-app</td>
<td>205.105</td>
<td>136</td>
<td>652.025</td>
<td>137</td>
<td>652.025</td>
<td>138</td>
<td>652.025</td>
</tr>
<tr>
<td>145</td>
<td>HB 255</td>
<td>1</td>
<td>139.519</td>
<td>149</td>
<td>216.060</td>
<td>140</td>
<td>216.060</td>
<td>141</td>
<td>216.060</td>
<td></td>
</tr>
<tr>
<td>146</td>
<td>HB 485</td>
<td>1</td>
<td>nc-t</td>
<td>210.055</td>
<td>142</td>
<td>216.060</td>
<td>143</td>
<td>216.060</td>
<td>144</td>
<td>216.060</td>
</tr>
</tbody>
</table>

**Note:** The table contains data that may require specific interpretation or context not provided in the image.
<table>
<thead>
<tr>
<th>KRS Section</th>
<th>Bill No.</th>
<th>Acts Chap.</th>
<th>Section of Bill</th>
<th>KRS Section</th>
<th>Bill No.</th>
<th>Acts Chap.</th>
<th>Section of Bill</th>
<th>KRS Section</th>
<th>Bill No.</th>
<th>Acts Chap.</th>
<th>Section of Bill</th>
</tr>
</thead>
</table>
Summaries contained herein do not represent all of the legislation passed by the 2012 extraordinary Session of the Kentucky General Assembly.

Copies of bills mentioned may be obtained from the Public Bill Room at:

Legislative Research Commission
State Capitol
700 Capital Avenue
Frankfort, KY 40601-3486

They can also be obtained from the Legislative Research Commission website at www.lrc.ky.gov.

DRUGS

2012 SS HB 1

AN ACT relating to controlled substances and making an appropriation therefor. Establishes ownership, operational, and educational standards for, and regulatory authority over, pain clinics. Requires sharing of reports of illegal controlled substance prescribing or dispensing activity. Requires that boards that regulate prescribers and dispensers of controlled substances to have mandatory prescribing and dispensing standards, limitation caps on the amount of certain controlled substances that can be dispensed, processes for expedited action on controlled substance related complaints against their licensees, sharing and retrieving mechanisms for interstate disciplinary data on licensees, mandatory disciplinary standards for in-state and out-of-state controlled substance misconduct by licensees, continuing education requirements for licensees, access to expert advice when reviewing complaints, and the ability to accept anonymous complaints. Requires the boards cooperate with each other and with the boards of other states. Establishes statutory practice requirements for those who prescribe any schedule II drug or a schedule III drug containing hydrocodone. Sets requirements for KASPER registration, usage, and access. Establishes new standards for the proactive use of KASPER data. Facilitates the linkage of KASPER data to the prescription monitoring programs of other states.

Requires blood testing for controlled substances in certain coroners cases. Expands the contents of the annual drug overdose statewide report. Requires the Governor to place persons from different specialties on the Kentucky Board of Medical licensure and the Board of Nursing. Requires reporting of lost or stolen deliveries of controlled substances. Adopts the Prescription Monitoring Program Compact. Creates a legislative oversight committee during the 2012 interim. Allows KASPER funding through National Mortgage Settlement proceeds and as a necessary governmental expense.
2012 Extraordinary Session
Codification Tables

Acts Disposition Table – Each bill that becomes a law is assigned a sequential chapter number in the Kentucky Acts. Thus, HB 1 became 2012 (1st Extra. Sess.) Ky. Acts ch. 1. Use this table if you wish to find the KRS numbers assigned to the individual sections of a specific bill.

Table of KRS Sections Affected – This table lists all of the statutes that were amended, created, or repealed during the past session, and references the bill making the change. This table is particularly useful in allowing a practitioner to quickly ascertain if there were legislative changes in a specific area of the KRS, such as in the Penal Code.

**Action Codes:**
- a = amended
- app = appropriation
- c = created
- cc = construction clause
- ch. = chapter
- ec = emergency clause or specified effective date
- eo = executive order
- HB = House Bill
- HCR = House Concurrent Resolution
- HJR = House Joint Resolution
- nc = not codified
- r = repealed
- re = repealed and reenacted
- re-a = repealed, reenacted, and amended
- SB = Senate Bill
- sec. = section
- t = temporary
<table>
<thead>
<tr>
<th>Acts Chap</th>
<th>Bill</th>
<th>Section of Bill</th>
<th>KRS Section</th>
<th>KRS Section</th>
<th>Bill No.</th>
<th>Acts Chap</th>
<th>Section of Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>HB</td>
<td>1</td>
<td>218A.175c</td>
<td>72.026c</td>
<td>HB 1</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>2</td>
<td></td>
<td>2</td>
<td>218A.205c</td>
<td>72.280a</td>
<td>HB 1</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>3</td>
<td></td>
<td>3</td>
<td>218A.172c</td>
<td>218A.172c</td>
<td>HB 1</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>4</td>
<td></td>
<td>4</td>
<td>218A.202a</td>
<td>218A.175c</td>
<td>HB 1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>5</td>
<td></td>
<td>5</td>
<td>218A.240a</td>
<td>218A.202a</td>
<td>HB 1</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>6</td>
<td></td>
<td>6</td>
<td>218A.245a</td>
<td>218A.205c</td>
<td>HB 1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>7</td>
<td></td>
<td>7</td>
<td>72.026c</td>
<td>218A.240a</td>
<td>HB 1</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>8</td>
<td></td>
<td>8</td>
<td>72.280a</td>
<td>218A.245a</td>
<td>HB 1</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>9</td>
<td></td>
<td>9</td>
<td>311.530a</td>
<td>218A.390c</td>
<td>HB 1</td>
<td>1</td>
<td>12</td>
</tr>
<tr>
<td>10</td>
<td></td>
<td>10</td>
<td>314.121a</td>
<td>218A.391c</td>
<td>HB 1</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>11</td>
<td></td>
<td>11</td>
<td>315.335c</td>
<td>311.530a</td>
<td>HB 1</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>12</td>
<td></td>
<td>12</td>
<td>218A.390c</td>
<td>314.121a</td>
<td>HB 1</td>
<td>1</td>
<td>10</td>
</tr>
<tr>
<td>13</td>
<td></td>
<td>13</td>
<td>218A.391c</td>
<td>315.335c</td>
<td>HB 1</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>14</td>
<td></td>
<td>14</td>
<td>no-t</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>15</td>
<td></td>
<td>15</td>
<td>no-app</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>HB</td>
<td>2</td>
<td>1</td>
<td>no-app</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
I. BACKGROUND AND INTRODUCTION

It is generally accepted that there is a need for efforts to be made to ease the transition from the study of the law to its practice, thereby promoting professionalism and competence in new attorneys and increasing client satisfaction and confidence in newly licensed lawyers. In the past, as was the case in many professions and trades, an apprentice-type relationship would be utilized to train new attorneys and provide them with the lessons and knowledge hard learned by those who had gone before them in their chosen profession. This is still often the method of training utilized by law firms. However, opportunities for mentorship do not arise as naturally as in past years. The recession and corresponding lack of jobs have forced many new lawyers to establish solo practices. In addition, the growth in the legal profession and the specialized nature of law practice today can make it more challenging to introduce new attorneys to the legal community and guide them through the transition to law practice.

In an attempt to address this situation and facilitate mentoring within Kentucky, a Pilot Mentoring Program was created by Supreme Court Order dated August 14, 2007, and funded by a grant from the Bar Foundation. This program was successful and taught us many lessons. First and foremost, we learned that in order for a mandatory, one-to-one mentoring program to be successful, there would need to be staff and resources dedicated solely to administering the mentoring program. The benefits of mentoring are undeniable and well-proven, and so the next inquiry became whether or not it is possible and/or desirable to devote the time and resources needed to achieve a successful, mandatory, one-to-one mentoring program.

During the Mentoring in the Legal Profession Roundtable in Atlanta, Georgia, which took place in February 2011 and was attended by KBA Executive Director John Meyers, these issues were discussed at length. Current thinking is that the one-to-one mentoring model is not the most effective advisory relationship, and that there should be multiple mentors for each mentee. Many programs have found that their results are more positive when mentees choose their own mentor as opposed to having one assigned. Even more interesting, there are clear indications that virtual mentoring might be more effective than actual face-to-face meetings in today’s world.

Given the above, the KBA has undertaken the development of a modern, effective information and advisory hub for our new lawyers, administered by existing KBA staff. The website is called Great Place to Start Resource Center for New Attorneys in Kentucky, or “KBA GPS.” The URL for the website is http://www.kbagps.org.
II. OVERVIEW

A. Main

The main page for the GPS site provides a description of the resources and services available through the site. The site is also searchable. Many of the resources offered through the site are links and information found elsewhere. The benefit of the GPS site is that these useful resources and links may all be accessed through one central location, thus making the site a “Great Place to Start” for young attorneys looking for information and assistance.

B. Services

The services offered through the site are the “Lawyer to Lawyer” service and the “Find a Mentor” service. Both are only available to KBA member attorneys who have been admitted to the KBA for five years or less. In order to utilize these services, a new attorney creates an account by completing the online registration form providing his/her year of admission and KBA ID number. Once completed, the form is submitted to CLE staff, who verify his/her information and send a personal login name and password. KBA member attorneys of five years or more will be asked to contact the Director for CLE and request an exception to utilize the service.
1. Lawyer to Lawyer.

The Lawyer to Lawyer service is a means through which new attorneys are able to call or email properly vetted, volunteer "Attorney Advisors" to seek advice or guidance in the practice of law in Kentucky. This list of volunteers is comprised of practicing attorneys in Kentucky with KBA membership of at least five years who are willing to serve in this capacity. Volunteer attorneys complete an online form which includes practice areas of interest as well as practice location. All volunteer forms are reviewed to ensure that the attorney is in good standing with the KBA and does not have pending disciplinary issues. The volunteer attorney list is available in three sortable formats: alphabetical by name and Supreme Court District; alphabetical by name and area(s) of practice; and alphabetical by name and practice counties. Other links included in this area are links to the Attorney Advertising Commission and Ethics Hotline Committee which are also available on the main KBA website at www.kybar.org.

If you are an experienced lawyer interested in sharing your wisdom and guidance with young attorneys just joining the legal profession, but don’t have the time or ability to meet in person, then this part of the program is perfect for you! It’s a great way to help young legal professionals without the commitment of appointments and in person meetings.
If interested in becoming a volunteer, visit www.kbagps.org and fill out the **Become a Volunteer Form**. Your name and information (only as indicated on the form) will be added to the list of volunteers made available. **Note:** Volunteers must be KBA members with five or more years of practice experience. Please refer to the **Volunteer Disclaimer and Release** information for other eligibility details.

2. **Find a Mentor.**

The Find a Mentor service allows new attorneys to choose a Mentor from a pool of properly vetted Kentucky attorneys with at least five years of experience, who have volunteered to go beyond answering a few email and telephone inquiries. Volunteer Mentors are willing to meet with and advise mentees on an on-going basis if requested to do so. The scope and duration of this Mentor/Mentee relationship will be entirely flexible and determined by the needs and requests of the Mentees. The main list of Mentors is also available in three sortable formats: alphabetical by name and Supreme Court District; alphabetical by name and area(s) of practice; and alphabetical by name and practice counties.
This program allows you to assist new attorneys seeking answers, advice, and for some, an ongoing professional relationship as they navigate through entering the practice of law. It's a great way to help new and young attorneys and to give back to the legal profession. If you are interested in becoming a Mentor, visit www.kbagps.org and fill out the Mentor Signup Form and your name and information (only as indicated on the form) will be added to the list of Mentors made available. Note: Mentors must be KBA members with five or more years of practice experience. Please refer to the Mentor Disclaimer and Release information for other eligibility details.

C. Resources

The resources listed below are available to the public without having to become a registered user.
1. Online resources.

The GPS site provides shortcuts to “Online Resources.” These include the KBA website, “Helpful Links” to Ethics Opinions, Unauthorized Practice Opinions, the Federal Code, Supreme Court Rules, etc., Kentucky State Government websites, Federal Government websites, research websites, local bar association sites, and much more.

2. Kentucky courts.

There is a separate tab for “Kentucky Courts,” which provides useful information regarding the District and Circuit Courts, the Court of Appeals and the Supreme Court. There is also a link to the AOC website and forms.

3. Banner listings.

At the bottom of the GPS web pages, there are banner links to the Young Lawyers Division website, Casemaker, and the KBA e-News. Note: The banners may change periodically to suit the needs of users.

D. Contact and Other Information

Information is continually added and updated on the GPS website. If you have a suggestion for content, a question about current listings or a
general comment, feel free to contact the KBA staff listed under the Contact tab. They are happy to assist or find the answers you seek.
I. IDENTIFICATION OF HIGH-FUNCTIONING IMPAIRMENT: WHAT IS HIGH-FUNCTIONING IMPAIRMENT AND WHAT DOES IT LOOK LIKE?

What is impairment? For purposes of this article, the term “impairment” includes mental health issues such as depression or bi-polar disorder, alcohol and drug abuse, stress, compulsive gambling or any other condition that may adversely impact the individual's personal or professional life. But what is High-Functioning Impairment (or HFI) and how does it impact the practice of law? A high-functioning impaired attorney, judge or law student is one who is able to maintain his or her outside life, such as a job, home family and friendships, all while drinking alcoholically, abusing drugs, or suffering from severe mental health issues. The high percentage of addicts and alcoholics who are high-functioning is shocking to most people. The stereotypical homeless man under the bridge drinking from a brown paper bag is nearly everyone's first thought when the words “alcoholic” or “drug addict” or even worse, when the term “crazy” is used. Remarkably, that stereotype only applies to a very small percentage (less than 10 percent) of alcoholics, addicts or severely mentally ill individuals.

The truth is that most of the alcoholics, addicts and mentally ill people around us are going to work every day, and taking care of themselves and their families (to the extent they are able to do so). This is especially true when those alcoholics, addicts and mentally ill individuals are lawyers.

Many impaired but high-functioning individuals (not just lawyers) are able to perform at a very high level – a level some of us couldn't imagine being able to maintain while impaired. As author Pete Hamill said in his memoir, A Drinking Life, “If I was able to function, to get the work done, there was no reason to worry about drinking. It was part of living, one of the rewards.”

Many legal professionals espouse the same rule.

There's an old joke told in many Kentucky counties, with only the names of the lawyer changed by county. The story is told of a man whose son gets into a lot of trouble, and the father wants to hire someone to represent his boy, who is looking at significant time if he's convicted. The father runs into his local judge at church and asks him: “Who’s the best lawyer in town?” The judge answers: “Bubba, when he's sober.” “Well,” says the father, “who's the second best lawyer in town?” To which the judge answers: “Bubba when he's drunk.” That's High Functioning Impairment. And, that is predominantly what we see in the legal profession.

An intense retrospective study performed in 2002 of the clinical case files of chemically dependent lawyers, judges and law school graduates at a rehabilitation facility in Florida gives great insight into the picture of the impaired

---

1 Hamill, Pete, A Drinking Life: A Memoir, 1993, page 244.
attorney. Based upon this research, the typical attorney entering treatment is a successful male trial lawyer in his early forties, often with a polysubstance addiction (often alcohol and cocaine), who also has a co-occurring mood disorder (in addition to addiction, 60 percent also suffered from either depression, bi-polar disorder or anxiety, in that order), as well as a personality disorder complicating treatment. About 60 percent used alcohol as their drug of choice; 25 percent chose cocaine. Opiates and benzodiazepines were farther down the list; followed by methamphetamine and marijuana. Despite its prevalence in Kentucky, marijuana was at the bottom of the list (only 1 percent). It is presumed that with the surge in the use of oxycodone and other opiates throughout the United States that opiates would be much higher on the list in today's study, especially in Kentucky which leads the nation in abuse of narcotic medication for non-medical purposes.

Of course, active alcoholics love hearing about the worst cases; we cling to stories about them. Those are the true alcoholics: the unstable and the lunatic; the bum in the subway drinking from the bottle; the red-faced salesman slugging it down in a cheap hotel. Those alcoholics are always a good ten or twenty steps farther down the line than we are, and no matter how many private pangs of worry we harbor about our own drinking, they always serve to remind us that we're okay, safe, in sufficient control. Caroline Knapp, Drinking: A Love Story.

II. QUALITIES WHICH MAY BE EXHIBITED IN THE HIGH-FUNCTIONING ALCOHOLIC OR ADDICT

In her informative book, Understanding the High-Functioning Alcoholic, Sarah Allen Benton provides an extensive list of qualities which may be exhibited in the high-functioning alcoholic or addict. These are separated into nine different areas in which the attributes may be observed. They are as follows:

A. Denial

1. Have difficulty viewing themselves as alcoholics or addicts because they don't fit the stereotypical image.

2. Believe they are not alcoholics or addicts because their lives are still manageable and/or successful.

3. Avoid recovery help.

---


3 Id.


4. Label their drinking as “a habit,” “a problem,” “a vice,” or as “abuse.”

5. Compare themselves to alcoholics or addicts who have had more wreckage in their lives to justify their drinking.

6. Make excuses for drinking or using or feel entitled to drink or use because they have worked or studied hard (use alcohol or drugs as a reward).

7. Think drinking expensive brands of alcohol or at sophisticated events implies they are not alcoholic.

8. Experience strong and lasting denial by themselves, their loved ones, and their social set.

B. Double Life

1. Appear to the outside world to be managing life well.

2. Skilled at living a compartmentalized life.

3. Set up lifestyles in such a way that negative feedback from others can be avoided (they leave the firm).

4. Appearances contradict the alcoholic or addict stereotype (e.g., fashionable, physically attractive, elegant, refined mannerisms).

5. Hide alcohol consumption or use by methods such as drinking or using alone or sneaking alcohol or drugs before/after a social event.

C. Drinking/Using Habits and Behaviors

1. Experience cravings for alcohol or drugs.

2. Have immediate or increased levels of tolerance.

3. Drink or use despite adverse consequences (emotional, physical).

4. Experience blackouts (memory lapses).

5. Feel shame and remorse from drunken or high behavior.

6. Attempts to control drinking or drug use.

7. Have the ability to abstain for month(s)/year(s).

8. Lack of interest or ability to drink or use moderately.

9. Compulsion to finish alcoholic drinks, even someone else’s.
10. Deceiving themselves and/or others about the portion and alcohol content of their drinks.

11. Increased sex drive and promiscuity when drinking or using.

D. Employment and Academics

1. Capable of showing up for work and/or school and having above average attendance.

2. Able to maintain consistent employment and/or gain education.

3. May excel at job and/or school.

4. Succeed financially and academically.


E. Financial Status

1. Pay bills on time (e.g., rent, mortgage, car lease, utilities).

2. Do not have significant debt.

3. Have not filed for bankruptcy.

4. Avoid financial problems because of obtaining money from job, inheritance, marriage, or luck.

5. May have above-average credit.

F. Interpersonal Relationships

1. Sustain friendships and family relationships.

2. Have romantic relationships (but may struggle to stay faithful because of drunken or high behavior).

3. Can maintain a social life.

4. Are involved in the community.

5. Have difficulty being sexually intimate without the use of alcohol.

G. Legal Matters

1. Often break the law but do not get caught.

2. Drive drunk or high and may have DUIs.
3. May get stopped for drunk driving or high, but through connections, luck, social status, or appearance, are treated more leniently.

4. Can afford proper legal representation, and charges are often dismissed (when cited).

5. Often given second and third chances by the legal system.

H. Hitting Bottom

*Hitting bottom* is defined as the point to which an alcoholic's or addict's life and/or emotions must sink before he or she is willing and able to admit that he or she has a problem and is receptive to getting help.

1. Their lives depart from their personal standards in terms of emotional losses, loss of dignity, loss of moral standards, and negative effect on relationships.

2. Their lives are negatively impacted by drinking or using.

3. Experience few tangible losses and consequences from their drinking (again, by luck).

4. Often hit bottom(s) and are unable to recognize it.

5. Experience recurrent thoughts that because they have not “lost everything,” they have not hit bottom.

I. Level of Functioning

1. Able to function in society.

2. Engage in some self-care; eat healthily and regularly, exercise, sleep, maintain personal hygiene.

3. Appear physically well-groomed (sometimes meticulous).  

A combination of many of these characteristics must certainly evoke thoughts of an attorney that you know – maybe she practices on the same floor as you – who seems to be “getting a little frayed”; is “acting a little strange”; seems to be “a little out of it” lately; or who “isn't herself lately.” What you may be seeing is high-functioning impairment.

III. HIGH-FUNCTIONING IMPAIRMENT CHARACTERISTIC TRAITS

An area where we also see a high level of high functioning impairment is in the law school or other graduate school experience. Certain personality traits and characteristics allow law school students or new professionals to drink

---

alcoholically or abuse drugs while still functioning academically in a professional graduate program, or professionally, early in their careers. Some of these characteristic traits are as follows:

A. Attachment to External Success
B. Need to Prove Themselves
C. Desire to Exceed Parental Levels of Success
D. Good Communication Skills
E. Outgoing and Gregarious Personality
F. Ability to Function in “Survival Mode”
G. People Skills
H. People-pleasing Tendencies
I. Large Amounts of Physical Energy
J. Meticulous Work Ethic
K. “Workaholic” Characteristics
L. Likeability
M. Strong Physical Constitution
N. Desire to Succeed Materially
O. Competitive Nature
P. High Professional/Academic Skill Sets
Q. Ability to Compartmentalize Professional and/or Academic Life from Drinking Life.

IV. LOW-RISK VERSUS HIGH-RISK DRINKING

What is the difference between low-risk drinking and high-risk drinking? The National Institute on Alcohol Abuse and Alcoholism, a Division of the National Institutes of Health, defines low-risk drinking, for men, as consuming no more than four (4) drinks on any day and no more than fourteen (14) drinks a week. For women, the limit is three (3) drinks on any day and no more than seven (7) drinks a week. Drinking more than these amounts in a day or during a week is

---

considered “at-risk.” Remember that “low-risk” is not “no-risk.” Even within these limits, some people can have problems with alcohol, especially those with health problems and people over sixty-five. Older men and women are advised to consume no more than three drinks a day and seven a week.

Why are women’s low-risk drinking limits different from men’s? Research shows that women start to have alcohol-related problems at lower drinking levels than men do. One reason is that, on average, women weigh less than men. In addition, alcohol disperses in body water, and pound for pound, women have less water in their bodies than men do. So after a man and woman of the same weight drink the same amount of alcohol, the woman’s blood alcohol concentration will tend to be higher, putting her at greater risk for harm. For more information, see Alcohol: A Women’s Health Issue.

V. ETHICAL CONSIDERATIONS WITH THE HIGH-FUNCTIONING IMPAIRED ATTORNEY

The statistics show that there is a very high prevalence of impairment in the legal community. Some of the more staggering facts are as follows:

- Eighteen percent to 24 percent of lawyers suffer from alcoholism (Compilation of studies).
- The incidence of depression within the legal profession is the highest for any other profession (105 professions surveyed); 3.6 times higher than the number two profession.
- Thirty-three percent of lawyers suffer from significant mental health issues (Washington State Study).
- Nineteen percent to 37 percent of lawyers suffer from depression (Washington State and North Carolina Studies).

There have been a number of studies which link impairment to breaches of ethical duties, and the resultant disciplinary actions. “It has been estimated that between 40 and 75 percent of the disciplinary actions taken against lawyers involve practitioners who are chemically dependent or mentally ill.” Studies prepared in Oregon and in Louisiana both found that 80 percent of their states' Client Security Fund (Escrow) Cases involved chemical dependency, gambling or mental health issues. In 2005, the Illinois Attorney Registration and Disciplinary

---


9 *Id.*

10 *Id.*


Commission reported that (all) impairments accounted for a disproportionate share of program awards. And finally, in Illinois, between 1998 and 2005, 28 percent of all attorneys disciplined were found to be impaired, and 37 percent of claims against the Illinois Security Fund stemmed from attorneys with impairment.

A. Where Impairment becomes Evident (at Least to the Client)

The areas in which Kentucky and other bar associations see the highest level of complaints are not coincidentally the three areas in which the impaired attorney will have the greatest struggle. Refer to the identifying traits, supra. Specifically: communication, competency and diligence.

B. Pursuant to Supreme Court Rule 3.130(1.4) Communication:

(a) A lawyer should keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

C. Pursuant to Supreme Court Rule 3.130(1.1) Competence:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comments:

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.
D. And, Pursuant to **Supreme Court Rule 3.130(1.3)** Diligence:

A lawyer shall act with reasonable diligence and promptness in representing a client.

E. How Can You Tell Whether You or Another Attorney Is on the Verge of Crossing or May Have Already Crossed Ethical Lines and Possibly Opened Yourself or Themselves Up (or Your/Their Firm) to a Disciplinary Action or Legal Malpractice Claim? A wonderful resource and starting point is to take the Ethics At-Risk II Quiz for Lawyers, prepared by Gregory Brock, Ph.D. See Appendix for a copy of the test. Take this self-test, and see what your risk factors are.

F. Your Duty To Report

The duty to report unethical behavior, as set forth in **Supreme Court Rule 3.130(8.3)**, also known as the “snitch rule,” requires a lawyer “who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Association's Bar Counsel.” The same rule requires attorneys to report judges to the Judicial Conduct Commission for misconduct. However, before you report an attorney for unethical conduct, it is prudent to first call your local Ethics Hotline attorney, and run the scenario, in hypothetical format, through the Ethics Hotline. Each Supreme Court District has at least two representatives. The current representatives may be found on the Kentucky Bar Association website under Ethics Hotline Committee Members. The information discussed with the Ethics Hotline is not subject to disclosure nor does it fall under the reporting requirement. That is, the Ethics Hotline attorney is excluded from the reporting requirement, just as KYLAP is excluded from a reporting requirement when unethical or illegal conduct is reported to us or our volunteers while seeking or obtaining assistance from KYLAP.

VI. SOLUTIONS

While it might be difficult to identify high-functioning impairment, it is usually even more difficult for the friend or colleague of the impaired attorney to confront the attorney about whom they have suspicions of impairment. That's where KYLAP can step in to help you. Some services which KYLAP can offer the individual in need of their support are:

A. Assessment and Referral: A trained member of the KYLAP staff will meet with the affected attorney, to discuss the problem and recommend available treatment and rehabilitation options.

---


14 **Supreme Court Rule 3.130(8.3)(c)**. A lawyer is not required to report information that is protected by **Rule 1.6** or by other law. Further, a lawyer or a judge does not have a duty to report or disclose information that is received in the course of participating in the Kentucky Lawyer Assistance Program or Ethics Hotline.
B. Interventions: In appropriate situations, a member of the KYLAP staff may make arrangements for, and participate in, a formal intervention to assist an impaired attorney.

C. Peer Support Network: The affected attorneys may be paired with a recovering lawyer in their area to act as a mentor and assist with their recovery.

D. Education and Prevention: KYLAP works with law firms, the courts and bar associations to provide training and education concerning attorney impairment and recovery. In addition, KYLAP makes regular presentations at Kentucky’s law schools regarding impairments and the bar admission process.

E. Structured Rehabilitation Program: In cases involving attorney discipline or admissions problems, KYLAP will implement a structured rehabilitation program to document a participant’s recovery. If the individual chooses, this documentation may be taken into consideration by the KBA, the Office of Bar Admissions and/or the Kentucky Supreme Court when determining discipline or recommendations for admission or readmission.

F. Recovery Group Meetings: At present, there are three weekly and one monthly recovery group meetings sponsored by KYLAP for lawyers, law students and judges. These meetings provide a terrific support and recovery network for the suffering lawyer. The weekly meetings are as follows: Tuesdays in Erlanger at Lakeside Christian Church, at 7:30 a.m.; Wednesdays in Lexington at Alano Club, 370 East Second Street, at 7:30 a.m.; and Thursdays in Louisville at Dish on Market (formerly the Delta Bar & Lounge) at 434 West Market Street at 7:30 a.m. Paducah currently has a monthly meeting.15

G. Students with Bar Application Issues: All applicants seeking admission to the Kentucky Bar are expected to fully disclose any physical or psychological issue that may impair his or her ability to practice law. KYLAP is available to discuss any law student’s or applicant’s situation in a confidential setting prior to submission of the Bar Application. In addition, when appropriate, KYLAP can implement a structured rehabilitation program for each individual that documents his or her efforts to address the issues in question.

H. Lawyers with Depression Group: Beginning in the fall of 2012, KYLAP has partnered with Bradford Health Services in Louisville to provide a weekly therapeutic group for Lawyers with Depression. More details about this opportunity will be discussed at the Kentucky Law Updates.

15 For more detail, see the KYLAP website at www.KYLAP.org.
VII. TWENTY WAYS TO BE A GOOD LAWYER:

1. Behave yourself.
2. Answer the phone.
3. Return your phone calls.
4. Pay your bills.
5. Keep your hands off your clients' money.
6. Tell the truth.
7. Admit ignorance.
8. Be honorable.
9. Defend the honor of your fellow attorneys.
10. Be gracious and thoughtful.
11. Value the time of your fellow attorneys.
13. Avoid the need to go to court.
14. Think first.
15. Remember: You are first a professional and then a businessman. If you seek riches, become a businessman and hire an attorney.
16. Remember: There is no such thing as billing 3,000 hours a year.
17. Tell your clients how to behave. If they can't, they don't deserve you as an attorney.
18. Solve problems – don't become one.
19. Have ideals you believe in.
20. Don't do anything you wouldn't be proud to tell your mother about.

VIII. CONCLUSION

Whatever you do, if you are an impaired attorney, or you have a close friend or colleague who may be impaired, reach out to get or to give help. Call KYLAP, we can talk you through the process. All calls are confidential, and sometimes you just need a sounding board to explore the facts with some objectivity. We surely have a volunteer who has experienced the circumstances you describe and who
will be willing to discuss it with you. Just don't ignore the problem. Please. The results may be fatal.

Sometimes we make things harder than they really are. There is a wonderful set of rules on how to be a good lawyer that reduce all of these competency questions and ethical considerations to their lowest common denominator. While the impaired practitioner may be unable to perform all of these duties, for the rest of us, they're terrific guidelines to follow in our daily practice.
Ethics At-Risk Test II – Lawyers
Gregory Brock, Ph.D.

Ever wonder how close you are to blundering over the ethics edge and possibly harming your clients, yourself, and/or the profession? This test may help. Check (√) the items below that are true about you. Add the number checked and use the key for Group I to estimate your level of pile-up risk. Work on the items you checked so you can lower your level of risk. Any of the items checked in Group II pose high risk.

None of the items in either group are in themselves unethical, but all may lead to harm.

**Group I - Risks that may pile-up and result in trouble:**

___1. You have never taken an academic course emphasizing practice ethics.

___2. Honestly, you are unfamiliar with some parts of the latest additions to the Ethics Rules.

___3. The Ethics Rules interfere somewhat with the quality of your legal or judicial work.

___4. You have considered sending a false bill or a padded expense report.

___5. You are asked to provide legal services to those who work closely with you including clerks and employees.

___6. You have considered falsifying a CLE report.

___7. You do not know the position of the Bar Association on …???

___8. Your job and/or personal financial situation cross your mind when making case management decisions.

___9. You or those close to you consider your drinking, drug use, or gambling an issue of concern.

___10. You are presently taking medication that may interfere with your legal work.

___11. A client has given you an expensive gift or frequently gives you inexpensive gifts.

___12. You are behind on your work.

___13. You gossip a little about clients with close friends and/or family.

___14. You sometimes fail to review clients’ court documents (custody, divorce, parole).

___15. Client family members or associates tell you secrets that compromise you.
16. You don’t always follow through on reporting incidents of violence or abuse of others.

17. Unresolved tension exists in your work group.

18. You sometimes take off jewelry, remove shoes, loosen your tie, or become more informal during appointments.

19. The office environment where you practice communicates a tone of informality.

20. You are considering a business proposition that may create a conflict of interest.

21. You have stopped attending workshops and/or staying up-to-date with advances in the field.

22. You are considering doing work in addition to your full time responsibilities.

23. You have plagiarized in the past (used others’ words or ideas without credit).

24. You think reporting a Rules violation could be harmful to your career or more hassle than you are willing to endure.

25. You think the Ethics Rules on conflict of interest are unnecessarily restrictive.

26. You think the Ethics Rules on confidentiality create too many artificial boundaries.

27. You are sure you have violated the Rules on confidentiality or conflict of interest at some time.

<table>
<thead>
<tr>
<th>Score</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>Excellent, you are nearly risk free.</td>
</tr>
<tr>
<td>0-2</td>
<td>Re-read the Ethics Rules. Look for CLE opportunities on ethics.</td>
</tr>
<tr>
<td>2-3</td>
<td>Review your practice and personal life for problem areas. Consider needed changes.</td>
</tr>
<tr>
<td>3-4</td>
<td>Seek consultation. Risks are piling to an unmanageable level.</td>
</tr>
<tr>
<td>4+</td>
<td>You are in a high-risk style of practice. Make immediate changes!</td>
</tr>
</tbody>
</table>

**Group II – Risks that by themselves may result in trouble:**

A. You fantasize about a present client.

B. You think about borrowing money from a client escrow account.

C. You are tempted to romance an ex-client.

D. Presently, you socialize more than casually with a client.

E. Presently, you are struggling with a personal, family, or legal crisis.

F. You consider going ahead with providing professional services when you are hung over from alcohol or other drugs, even if only a little.
___G. You need to seek consultation about your practice with a colleague or supervisor but fear doing so will be harmful or embarrassing to you.

___H. If colleagues knew all of what goes on in your practice or personal life, they would worry that you are so vulnerable to risk that you might harm clients, yourself, or the profession.

___I. You feel angry, frustrated, and/or manipulated by a current client.

If you checked (✓) any of the items in Group II, seek supervision immediately!

*Send comments and questions to Gregory Brock, Ph.D. (gwbrock@uky.edu).
Disciplinary proceedings are different creatures than either criminal or civil proceedings, and are considered by many attorneys something to be avoided at any cost. Statistically speaking, most Kentucky lawyers will not find themselves the subject of a bar complaint. In the 2010-2011 fiscal year, only 4.4 percent of the lawyers licensed in Kentucky received bar complaints against them. An even smaller percentage of Kentucky lawyers, 0.53 percent, had disciplinary charges pending against them during that same period. Sometimes, however, a trip through the disciplinary system cannot be avoided. If that day comes, one of the first things you should do is familiarize yourself with the Rules of Professional Conduct.

The Supreme Court promulgates the Kentucky Rules of Professional Conduct and the procedures for enforcing them. It is important to become familiar with those rules as early as possible in the process.

I. THE FRAMEWORK OF THE DISCIPLINARY SYSTEM

A. Constitutional Authority

The Supreme Court of Kentucky has exclusive authority to discipline lawyers in the Commonwealth pursuant to Section 116 of the Kentucky Constitution, which provides in part: “The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.”

The Supreme Court has adopted Supreme Court Rules which establish both the substantive rules by which a lawyer’s conduct is to be measured and the procedures to be followed in determining whether the substantive rules have been violated.

Supreme Court Rule (SCR) 3.130 and its various subparts contain the Kentucky Rules of Professional Conduct (KRPC), which is currently the substantive law of professional responsibility for lawyers practicing in Kentucky. SCR 3.140 through SCR 3.530 create the system of procedures by which the Rules of Professional Conduct are enforced.

In these Rules, the Court has chosen to delegate certain functions in connection with the disciplinary process to the Inquiry Commission, the Office of Bar Counsel (OBC), the Trial Commissioner, and the Board of Governors of the Kentucky Bar Association (KBA). These entities are discussed below.

Specifically, the KBA acts as an agent of the Supreme Court in the disciplinary process. It performs this function pursuant to SCR 3.025, which provides in part: “The mission and purpose of the Association is to maintain a proper discipline of the members of the bar in accordance with
these Rules and with the principles of the legal profession as a public calling. . .”

B. Inquisitorial Original Proceeding

A disciplinary proceeding is inquisitorial, but civil in nature, not criminal or even quasi-criminal. Kentucky Bar Association v. Signer, 558 S.W.2d 582 (Ky. 1977). It is an inquiry into what may have constituted unethical and unprofessional conduct. Generally, the function of the OBC, the Trial Commissioner, and the Board of Governors is to prepare the case for review by the Court, and make appropriate recommendations to it through the Findings of Fact and Conclusions of Law determined by the Trial Commissioner and by the Board of Governors. The action is an original action in the Supreme Court. The Trial Commissioner has the unique opportunity to consider the witnesses and the testimony of the attorney-respondent. The Board has the unique opportunity to provide viewpoints from all the Supreme Court districts and the members’ varied backgrounds before making its recommendations.

“A disciplinary matter is one involving the investigative process between the KBA and the lawyer, not an adversarial proceeding… There is no rule permitting an appeal of that decision (dismissal by the Inquiry Commission). Consequently, [the complainant] has no standing to appeal to this Court.” Woodard v. Kentucky Bar Association, 156 S.W.3d 256 (Ky. 2004) (parentheses added).

C. Immunity of Participants

Supreme Court Rule 3.160(4) provides:

“Neither the Association, the Board, the Director, the Inquiry Commission, the Trial Commission, the Office of Bar Counsel, nor their officers, employees, agents, delegates or members shall be liable, to any person or entity being charged or investigated by, or at the direction of, the Inquiry Commission, for any damages incident to such investigation or any complaint, charge, prosecution, proceeding or trial.”

D. Confidentiality

Initial proceedings are confidential. SCR 3.150 makes discipline matters confidential prior to a rendition of a finding of a violation of the Rules by the Trial Commissioner or the Board and the recommendation of the imposition of a public sanction. After that point, the matter is public. There are some exceptions to confidentiality, which are spelled out in the Rule itself.
II. ALTERNATIVE DISPOSITION AND COMPLAINT STAGE

A. Persons and Entities Involved

1. Complainant.

When a disciplinary case commences with a sworn written complaint by a private person (SCR 3.160(1)), the person who filed the complaint is identified as the complainant, and remains so throughout the investigation phase. This designation merely describes the person’s role as a complaining witness, and does not mean he or she is a party at any phase of the proceeding.

If the case begins with an Inquiry Commission complaint (SCR 3.160(2)), the Inquiry Commission is identified as the complainant during the investigation phase.

If a charge is issued, the Kentucky Bar Association is officially identified as Complainant and continues to be so identified throughout the remainder of the case. The person who filed the complaint may continue to be involved as a witness, but is neither legally obligated, nor entitled, to participate.

2. Respondent.

The attorney sought to be disciplined is identified as Respondent. At the complaint stage, it is Respondent’s responsibility to file a written response to the bar complaint, providing whatever information Respondent believes is necessary to support that Response, and to answer any further inquiries from the OBC.

SCR 3.130-8.1(b) states: “[A] lawyer...in connection with a disciplinary matter, shall not... fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.” This rule creates an obligation for lawyers to respond to inquiries from the disciplinary authority, in this instance the OBC acting on behalf of the Inquiry Commission. The Supreme Court has found that this violation alone warrants a public reprimand. Kentucky Bar Association v. Beal, 169 S.W.3d 860 (Ky. 2005). So, it is important to timely submit your written Response, where one is required.

3. Office of Bar Counsel (OBC).

The attorneys in the Office of Bar Counsel (OBC) are given the authority and direction by the Supreme Court to investigate and prosecute all disciplinary cases (SCR 3.155). They are appointed by, and serve at the pleasure of, the Board of Governors (SCR
The OBC is presently staffed with nine full-time attorneys. Each file is assigned to one of those attorneys.

4. Inquiry Commission.

The Inquiry Commission consists of nine persons appointed by the Chief Justice with the consent of the Supreme Court. (SCR 3.140). Six of these persons are lawyers who possess the qualifications of a circuit judge; the other three are citizens of Kentucky who are at least thirty (30) years of age and are not lawyers.

The Inquiry Commission is divided into three panels, each comprised of two lawyers and one non-lawyer. It has adopted administrative regulations to ensure consistent treatment of cases by and among the three panels, and provide for overall coordination with the OBC. Each disciplinary case will be assigned to one of the three panels after the lawyer in the OBC completes the initial investigation (SCR 3.160).

B. Alternative Disposition Process

Not all bar complaints must be responded to in writing – at least not initially. SCR 3.160(3)(A) allows the OBC to determine, under the direction of the Inquiry Commission, whether the Complaint is suitable for alternative disposition. Some forms of alternative disposition include informal resolution, fee or legal negligence arbitration, legal or office management education programs, remedial ethics education programs, referral to KYLAP, and receipt of a warning letter. Complaints typically addressed through the alternative disposition track are those alleging relatively minor rule violations, such as failure to return a file or failure to return calls, or other matters which may be addressed in short order through a preliminary investigation. These files are resolved within, on average, twenty days.

Under this rule, attorneys will receive a letter, informing them they may be contacted by the OBC attorney to whom the file has been assigned. In some instances, the OBC attorney may be able to address the issues raised in the Complaint without even contacting the attorney, but generally, it is necessary to contact the attorney. Such contact will usually be by phone, provided you have a working number on file with the KBA Membership Department. If you receive such a letter, review your file and be ready for the contact, which is likely to come soon after you receive the letter. Many issues can be resolved by simply faxing a fee agreement, a pleading, or other document. Other issues may be addressed in a telephone call alone, so do not ignore a telephone message from the OBC attorney. You may also take the initiative and call the OBC attorney yourself. Pursuant to SCR 3.160(3)(C), after its review and preliminary investigation, the OBC may attempt informal resolution and close the Complaint. A warning letter may be issued, or a referral to arbitration or KYLAP, or to some form of education program, may be made, upon successful completion of which the file would be closed.
C. Complaint Proceedings

Not all bar complaints are suitable for the alternative disposition process. Some must be addressed by attorneys through the more formal complaint process, whether because of the nature of the complaint, or because the attorney would not consent to or complete the alternative disposition process. (SCR 3.160(3)(D)). When a formal written response is required, the letter accompanying the Complaint Form will indicate that one must be filed and will detail the steps to follow in filing your Response. The Response should be filed within the time frame spelled out in your letter. If you need additional time to respond, it can be made available by agreement with the OBC attorney or, if a substantial extension (i.e., more than twenty days) is needed, by motion to the Inquiry Commission.

Contacting the individual complainant directly and reaching some settlement of the Complaint (refunding all or part of fee, for example) does not negate the need to file a written response, when you have been notified that one is required. While that information would certainly be important to the Inquiry Commission in its evaluation of the Complaint, it should be included in the Response you file. Do not assume complainants will share that information with the OBC. Also, do not assume satisfied complainants will withdraw Complaints and obviate the need to respond. Under the Rules, as previously stated, complainants are witnesses, not parties, and have no ability to do so.

1. What to include in your Response.

   a. Full and complete information.

      Responses should focus on the allegations raised in the Complaint and provide a clear, objective narrative of the facts relevant to those allegations. Responses should be carefully reviewed to avoid any factual inconsistencies which might give rise to questions when reviewed by the OBC. Candor and honesty are critical. You may include any information which might be considered a mitigating factor, such as a drug or alcohol problem which might be addressed through KYLAP. If you have such an issue, consultation with counsel is highly recommended.

   b. Copies of relevant documents from file or court.

      Often, Responses can and should be supported by documents to paint the most complete picture of the attorney’s position. Such records may include, but are in no way limited to, court records or docket sheets, time records, copies of correspondence, and even affidavits from other parties. If there is a lawsuit pending between you and Complainant, such as for the collection of Complainant’s bill, it is important to provide information about that suit as well.
c. Relevant background on Complainant.

While Responses should not focus too heavily on Complainants, some facts may be important to any evaluation of the Complaint. Past history with Complainant, issues with collecting Complainant’s account, or difficulties working with Complainant during the representation are all factors to be considered in reviewing the case. The fact that Complainant is difficult or is lying, however, may not be enough to resolve the real issue. For example, if no written contingency fee agreement exists, and that fact is uncovered, Complainant’s other issues may not be relevant.

d. Seek independent review of your response.

At a minimum, have a partner or colleague review your response before submitting it. The decision on whether to retain counsel is, of course, entirely yours. You are not required to do so. If, however, you are concerned that a serious violation may have occurred, or you are uncomfortable handling the matter on your own, you may wish to consider seeking counsel.

2. What not to argue in your Response.

a. Standing.

Bar Complaints may be filed by anyone; the ability to do so is not restricted to clients or former clients alone. Complaints are often filed by opposing parties, judges or other attorneys, or they may be Inquiry Commission Complaints. Under the Supreme Court Rules, attorneys owe certain duties to their clients, as well as duties to other parties and to the profession.

b. Statute of limitations.

There is no statute of limitations contained in the Supreme Court Rules. Delay in bringing the Complaint is worth noting in the Response, particularly if the passage of time has resulted in loss of information. However, a claim that a Complaint is time-barred is not supported by the Rules.

c. Character attacks on Complainant.

While relevant information regarding Complainant is helpful, demonizing Complainant is not. Your Response should not simply be “Complainant is crazy, so I shouldn’t have to respond to his ridiculous complaint.” The better approach is to focus on your alleged conduct.
d. Motions to dismiss complaint.

While a motion to dismiss for failure to state a claim may be appropriate in a civil action, such is not the case here. There is no provision for a motion to dismiss at the complaint stage of the process. Making such a motion as opposed to simply responding to the Complaint may make the Inquiry Commission wonder what you might be trying not to tell them. The better course of action is to use the Response to show why the Complaint should be dismissed.

e. Personal consequences.

Arguing that the malpractice judgment you’ve already paid or the criminal sentence you are about to serve should be punishment enough do not address the alleged conduct. Ethical violations are independent of any civil or criminal remedies. Likewise, arguing the financial consequences of suspension as a reason to dismiss the Complaint does not address the important issues. Any attorney who has been through a suspension could make that same argument, but it does not go to the real issue. The better tack is always to address the merits of the Complaint itself.

The Complaint, Response, and other investigative materials are presented by the OBC attorney to the Inquiry Commission. The Inquiry Commission is primarily a “probable-cause panel.” Respondent does not appear before the Inquiry Commission. The Commission considers all this information and determines whether probable cause exists for a charge to be filed against a respondent (SCR 3.190). The Commission may issue a warning letter or a conditional dismissal letter to the attorney. (SCR 3.185). The Commission may direct a private admonition, with or without conditions, to the attorney, if the conduct does not warrant a greater degree of discipline. (SCR 3.185). If a charge is authorized, the Commission then causes it to be prepared, and it will be filed with the Disciplinary Clerk. The Charge outlines the conduct and specifies the Rule(s) the Commission believes there is probable cause Respondent has violated. It is a notice pleading.

D. Post Charge Hearing Proceedings

1. Disciplinary Clerk.

The Disciplinary Clerk is created by SCR 3.157 to function as the records custodian of all charge case files until they are sent to the Court. The Disciplinary Clerk is an employee of the Kentucky Bar Association, and is separate from the Office of Bar Counsel.

In addition to the duty of a custodian under SCR 3.290, and unlike typical Circuit Court Clerks or Clerks of the Appellate Courts, the
Disciplinary Clerk actually serves the pleadings. After a Charge is authorized, all pleadings are filed with the Disciplinary Clerk, and the Clerk forwards copies to Respondent and, later, the Trial Commissioner. Thus, the typical certificate of service will state that the pleading was filed with the Disciplinary Clerk with sufficient copies for distribution to the Respondent and the Trial Commissioner.

It is also the Disciplinary Clerk who appoints the “next available member” of the Trial Commission to serve as commissioner in each case, subject to the approval of the Chief Justice. The selected member of the Trial Commission cannot reside in the same Supreme Court district as Respondent.

The Disciplinary Clerk will receive, receipt for, and serve any orders or reports issued by the Trial Commissioner in each case. In the event a Motion to Dismiss or Amend the Charge is filed, however, only the Inquiry Commission can rule upon it under SCR 3.285(1). The Disciplinary Clerk will not forward a copy of these types of Motions to the Trial Commissioner, but will instead forward a copy to the Inquiry Commission for its determination.

2. Trial Commissioners.

The Trial Commission is appointed by the Supreme Court under SCR 3.225 and consists of volunteer members of the Bar who hold the evidentiary hearings in discipline cases. The Disciplinary Clerk appoints the next available member of the Commission to serve as Trial Commissioner when the Inquiry Commission authorizes a Charge and Respondent files an Answer which raises issues of fact. The Trial Commissioner’s function is to conduct an evidentiary hearing (SCR 3.230 and SCR 3.240), and to determine and regulate the order of proceedings at that hearing. Prehearing discovery is also conducted as directed by the Trial Commissioner, consistent with SCR 3.330 rather than the civil rules.

At the conclusion of the hearing, and after the matter has been finally submitted, the Trial Commissioner must submit a written report containing findings of fact and conclusions of law and, if a violation of the Rules of Professional Conduct has been found, recommending an appropriate sanction. Available sanctions include private or public reprimands, suspensions, and permanent disbarment, along with any appropriate conditions. This report is advisory only (SCR 3.360). If either side disagrees with the Trial Commissioner’s report, an appeal may be made to the Board of Governors (SCR 3.365).
E. Appellate Proceedings

1. Board of Governors of the Kentucky Bar Association.

   The members of the Board who vote on discipline matters consist of: the President; the President-Elect; the Vice President; the fourteen elected members of the Board, two from each of the Supreme Court districts; and four lay members who are appointed directly by the Chief Justice. Eleven of those members constitute a quorum (SCR 3.370(4)).

   If Respondent fails to file an answer, admits the violation, or agrees that the answer raises only issues of law, the case is submitted directly to the Board of Governors (SCR 3.210). The absence of a factual dispute alleviates the need for a Trial Commissioner.

   In a case heard by a Trial Commissioner, either the Respondent or the OBC may appeal to the Board of Governors by filing a notice of appeal from the Trial Commissioner’s report. If no notice of appeal is timely filed, the case proceeds directly to the Supreme Court (SCR 3.360). Appeals are routinely filed.

   The case is heard by the Board of Governors through briefs and oral arguments (SCR 3.370(2) and (3)). No new evidence is taken, but the Board may remand the case for additional evidence if appropriate. The Board may determine whether the decision of the Trial Commissioner is supported by substantial evidence or is clearly erroneous as a matter of law. However, it may also conduct a de novo review of the evidence presented at the hearing held by the Trial Commissioner (SCR 3.370(5)).

   The Board issues a written decision which is advisory in nature (SCR 3.370(6)). The Disciplinary Clerk sends it, along with the record of proceeding, to the Court.

2. Supreme Court.

   A disciplinary case reaches the Supreme Court in one of five ways:

   a. For entry of an order adopting the decision of the Trial Commissioner, if no appeal has been taken to the Board of Governors (SCR 3.370(9));

   b. For entry of an order adopting the decision of the Board of Governors, if no request for review has been made (SCR 3.370(9));

   c. For review of the decision of the Board of Governors on a notice of review filed by one of the parties (SCR 3.370(7));
d. For review of a decision of the Board of Governors, based on a *sua sponte* notice of review by the Supreme Court itself (SCR 3.370(8)); or

e. On a motion for consensual discipline (*i.e.*, a motion to resign under terms of disbarment) by the Respondent (SCR 3.480(2) and (3));

Regardless of the scenario, the Supreme Court has plenary authority to review the evidence, decide the case and impose discipline as it deems appropriate. It is not constrained by any concept of limited appellate review, because a disciplinary proceeding is an original proceeding in the Supreme Court.

It is important to know that most disciplinary cases are now resolved at, or even before, the Inquiry Commission level. Of the 1,115 disciplinary files closed during the 2010-2011 fiscal year, 860 were dismissed, either by the Inquiry Commission or pursuant to SCR 3.160(3), which provides an informal diversion method for addressing less serious alleged violations. Private admonitions were the result in thirty-one other complaint cases. So, statistically speaking, if you receive a bar complaint, you are likely to fall into one of those categories. The best way to avoid panic, however, is to know what you are facing – educate yourself about the disciplinary system and the process.
I. ADMINISTRATIVE LAW


Opinion by Judge Combs; Judge Nickell and Senior Judge Lambert concurred. The Court vacated and remanded an order of the circuit court dismissing for lack of jurisdiction the Transportation Cabinet’s petition for declaratory rights wherein it argued that KRS 13B.030 allowed it to outsource an administrative hearing to the Division of Administrative Hearings at the Office of the Attorney General (OAG). The Court held that the trial court erroneously applied KRS 12.100. The statute was inapplicable because the matter did not involve a conflict between the OAG and the Cabinet but rather, involved a conflict between KRS 281.640 and KRS 13B.030. While KRS 281.640 unequivocally provided that a hearing officer was required to be a full-time employee of the Cabinet, KRS 13B.030 expressly permitted a hearing officer from the OAG to preside over Cabinet hearings. Because KRS 13B.020, provided that KRS Chapter 13B superseded all other relevant statutes, unless exempted, and KRS 281.640 contained no such exemption, its provision must yield to KRS 13B.030.


Opinion by Judge VanMeter; Judges Acree and Moore concurred. The Court affirmed an order of the circuit court denying appellant’s petition for a writ of mandamus and motion for summary judgment and granting summary judgment in favor of appellees. The appellant manufacturer of a plumbing device, which it claimed minimized the need for vent piping, sought a writ ordering appellees to amend the Plumbing Code to permit the use of the device in Kentucky. The Court held that appellees’ actions were not arbitrary or capricious and that appellant was afforded procedural due process. Appellant was provided with the opportunity to present evidence and an unfavorable outcome did not equate to a denial of due process; appellees’ actions were supported by substantial evidence; appellees were not required to present evidence in rebuttal or in opposition to appellant’s evidence; and whether the device was evaluated under the “equal to or better than” standard under 815 KAR 20:020, rather than the “best known method” standard under KRS.
appellees properly exercised their discretion in declining to amend the Code or otherwise approve the product.

II. APPEALS


Opinion and order by Judge Keller; Judges Combs and VanMeter concurred. The Court dismissed an appeal for appellant’s failure to timely tender the notice of appeal with a motion to proceed *in forma pauperis*. The Court held that the prison mailbox rule, **RCr 12.04(5)**, did not apply to civil appeals. Therefore, appellant’s appeal was untimely when the motion was filed and the notice tendered outside the thirty-day time limit of **CR 73.02(1)(a)**.

III. ARBITRATION


Opinion by Judge Acree; Judge Stumbo and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court denying appellant’s motion to dismiss in favor of arbitration on the grounds that it lacked jurisdiction under **KRS 417.200** to enforce the parties’ arbitration agreement because the agreement did not explicitly require that arbitration occur in Kentucky. The Court first held that it had jurisdiction to hear the appeal. Although the motion was styled as a motion to dismiss in favor of arbitration, as opposed to a motion to compel arbitration, the Court construed the order as an order denying a motion to compel arbitration, which was appealable under **KRS 417.220(1)(a)**. The Court then held that because the arbitration clause failed to explicitly require arbitration in Kentucky, the circuit court correctly found that it lacked jurisdiction to enforce arbitration pursuant to **KRS 417.200**.

IV. ATTORNEY AND CLIENT


Opinion by Judge Wine; Chief Judge Taylor and Judge Moore concurred. The Court reversed and remanded a summary judgment in favor of appellees on appellants’ professional negligence claims springing from a prior action in which the appellee attorney filed suit on behalf of the appellants’ father’s estate for wrongful death. The Court first held that the trial court erred in granting summary judgment to appellees because there was a genuine issue of material fact as to whether the attorney was in privity with the minor children and whether he was representing the Estate and the children’s mother personally, as well as next friend of the children. The Court then held that even if the attorney was found not to be in privity with the children, he still owed duties to the children as intended beneficiaries of the wrongful death action. Whether the attorney’s performance was actually negligent or otherwise deficient was
a matter that must first be considered by the trial court but the question survived summary judgment.


Opinion by Judge Acree; Judge Dixon and Senior Judge Lambert concurred. The Court vacated and remanded an order of the circuit court awarding one-third of oil and gas royalties to the appellee estate pursuant to a contingency fee agreement between the deceased attorney and individuals who jointly owned an interest in the mineral rights of real property. The Court held that the attorney, who withdrew from representing the appellants, was limited to recovery on a quantum meruit basis and not under the original contingency fee agreement.


Opinion by Judge Combs; Judges Keller and Stumbo concurred. The Court affirmed an order of the circuit court denying appellant’s motion for attorney fees brought pursuant to KRS 412.070. The Court held that the circuit court did not err in finding that appellant’s cause of action did not result in a recovery that benefitted the appellee burial fund or the other members of the fund. The settlement reached in the lawsuit did not result in a common benefit – the fund did not recover any proceeds from a third-party source; the settlement allowed members to withdraw from the fund, which worked as a detriment to the fund; and the members who withdrew were far short of a majority of the fund members.

V. CIVIL PROCEDURE


Opinion by Judge Combs; Chief Judge Taylor concurred; Judge Nickell dissented by separate opinion. The Court affirmed a summary judgment in favor of appellee in a declaratory judgment action wherein the appellee sought a determination that she was the biological child of and an heir at law to a deceased’s estate through intestacy. The Court held that the trial court did not err in granting summary judgment and in failing to find that the paternity claim was barred by res judicata. Intestacy was a significant new issue never before considered in prior actions, the issue of paternity had never ultimately been adjudicated in the prior actions, paternity in the context of intestacy had never ripened into a justiciable cause of action in the previous litigation, and the estate and other heirs had never been parties to any litigation. Thus, reliance on issue and claim preclusion was wholly misplaced, despite the similarity of the facts.

Opinion by Judge Acree; Judges Dixon and Nickell concurred. The Court affirmed in part, reversed in part and remanded an opinion and order of the circuit court dismissing the claims of an unincorporated association against the appellee union alleging the union breached a contract to construct and demolish barns. The Court first held that the circuit court did not lack subject matter jurisdiction, as it acquired jurisdiction when the complaint was filed and summons issued. The Court then held that the union irrevocably waived the defense of lack of subject matter jurisdiction because it never raised the defense in its pre-answer motion to dismiss the original complaint, in its answer to that complaint, or in a matter-of-course amendment to the answer. The Court finally held that the union also waived the lack-of-capacity defense. While the defense was not irrevocably waivable like the lack-of-personal-jurisdiction defense and the union could have asserted it for the first time in a response to a second amended complaint, its failure to do so was a waiver of the defense.


Opinion by Judge Acree; Judges Caperton and Clayton concurred. The Court affirmed an order of the circuit court dismissing appellant’s claims against the appellee Tennessee medical providers after she was prescribed an incorrect dosage of medication administered by a nursing home in Kentucky. The Court held that the circuit court did not err in dismissing the claims. In reaching that conclusion, the Court held that controlling law was clear that appellees’ contacts, ordering care upon discharge, to be implemented upon admission to a Kentucky nursing home, were insufficient to invoke personal jurisdiction over the nonresident defendants in Kentucky. Further, the fact that appellees were aware that the services they performed in Tennessee would impact the patient’s follow-up care was insufficient to exercise personal jurisdiction. Finally, the fact that it was inconvenient for appellant to file suit in Tennessee was not dispositive of the personal jurisdiction issue.


Opinion by Judge Moore; Judges Nickell and Thompson concurred. The Court vacated and remanded an order of the circuit court granting appellee’s motion for summary judgment on its complaint alleging that appellant owed it a credit card debt. The Court first rejected appellee’s argument that the appeal should be dismissed as untimely filed pursuant to **CR 73.02(1)(a)**. The appeal was timely when it was filed within thirty days of the date the circuit court overruled a timely-filed **CR 59.05** motion. The Court next rejected appellee’s argument that the appeal should be dismissed pursuant to **CR 73.03(1)** for failure to identify the judgment from which the appeal was taken, when appellant only identified the order
overruling the CR 59.05 motion. Appellant substantially complied with the rule, the judgment appealed was obvious to the Court and appellee could not demonstrate any substantial harm or prejudice. The Court then held that the trial court erred in granting summary judgment before appellee proved an assignment from the demonstrated owner of the debt for the purpose of collection or the demonstrated owner’s specific authorization to its agent to collect the debt on its behalf. Appellee’s assertion that it had standing to sue on behalf of Discover Bank, relying exclusively on its pleadings, was insufficient to establish standing as a real party in interest per CR 17.01.


Opinion by Chief Judge Taylor; Judges Caperton and Wine concurred. The Court affirmed in part, reversed in part and remanded an order of the circuit court dismissing appellant’s complaint seeking to enjoin the appellee city from paying a promissory note and a declaration that the real estate transaction between the appellees was void. The Court first held that the circuit court properly dismissed the complaint to the extent it sought to challenge the purchase of the property. Appellant did not have standing to challenge the official acts of the city regarding expenditures for the property because he did not allege an injury distinct from the general public. Appellant’s reliance on KRS 92.340 to confer standing was misplaced because no officer, agent, employee or member of the legislative body was a party to the action. The Court then held that the trial court erred in finding that appellant did not have standing to challenge the imposition of the tax imposed by an ordinance, a portion of which was to be combined with funds from the general fund to pay the outstanding note indebtedness related to the purchase of the property.


Opinion by Judge VanMeter; Judges Dixon and Keller concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of appellee on appellant’s claim seeking reimbursement for Medicaid overpayments. The Court held that the trial court did not err by finding the present action to be barred by res judicata. In reaching its conclusion, the Court held that the language of the Supreme Court opinion in prior litigation did not implicitly reserve the present claims but merely narrowed its holding to the limited issue before it. The Court then held that the Cabinet was obligated to assert all claims it had related to the recoupment dispute in the previous administrative appeal wherein appellee disputed the amount of overpayments and argued that recoupment was barred by the statute of limitations.

Opinion by Judge Wine for the Court sitting en banc; all Judges concurred. The Court reversed and remanded orders of the circuit courts dismissing as time-barred under KRS 44.110, appellants’ claims that individual employees of the Kentucky Department of Transportation were negligent in their maintenance of certain roadways. The Court held that the trial courts erred in dismissing the claims. KRS 44.110 was inapplicable because it applied only to causes arising within the Board of Claims against the Commonwealth or its immune agents or employees but not to actions originating in the circuit court against non-immune agents or employees of the Commonwealth. The Court overruled Wagoner v. Bradley, 294 S.W.3d 467 (Ky. App. 2009), to the extent that it purported to apply the one-year limitations period in KRS 44.110 to an action brought in circuit court. The Court further held that the claims raised by the estate for wrongful death and by the minor children for personal injury were covered under the two-year limitations period set forth in KRS 304.39-230(6), which began to run upon the date of the last basic or added reparation payment. The Court also held that the children’s loss of consortium claim was subject to the one-year statute of limitations under KRS 413.140(1)(a) but that the limitations period was tolled due to the children’s infancy, which also tolled their personal injury claims. The Court finally held that the trial court did not err in finding that the two-year limitations period in KRS 304.39-230 was equitably tolled to allow the estate’s claims to proceed when the one-day-late filing was caused by the clerk of the court.


Opinion by Chief Judge Taylor; Judge Acree concurred; Judge VanMeter dissented by separate opinion. The Court affirmed an order and amended order of the circuit court dismissing appellants’ action pursuant to CR 41.02(a) for failure to prosecute. The Court held that the circuit court did not abuse its discretion by dismissing the action. More than seven years had lapsed between the finality of an appeal for which the underlying action was held in abeyance and appellants’ motion to remove the action from abeyance advanced no good cause for appellants’ dilatoriness and the finding of prejudice to appellees could not be considered clearly erroneous.


Opinion by Judge Wine; Judges Acree and Clayton concurred. The Court reversed and remanded an order of the circuit court certifying a class for a class action lawsuit initiated by appellee. The Court held that class certification was inappropriate and therefore, the circuit court abused its discretion by entering a certification order. The claims of fraudulent
misrepresentation, negligent misrepresentation and unjust enrichment required more individualized proof and thus, common questions did not predominate. The Court rejected appellant’s argument that individualized proof would be minimal under a “fraud-on-the-market” approach.


Opinion by Judge Wine; Judge Acree and Senior Judge Lambert concurred. The Court affirmed a judgment and order of the circuit court finding that appellant had breached a loan agreement and addendum with appellee and awarding appellee damages plus interest and attorneys’ fees and costs. The Court first held that no jurisdictional questions were raised by the trial court amending the summary judgment order to include the award of damages and attorneys’ fees. The order granting summary judgment on the issue of liability was not a final judgment because it did not adjudicate the entirety of the claim. Moreover, it was not made final under CR 54.02, even though it included the finality recitations of that rule. The Court next held that appellant was not entitled to reversal because he did not receive notice of the amended judgment order until after the ten-day period for challenging a final judgment under CR 59.05 had expired because appellant failed to show any reversible prejudice. Any objection to appellee’s calculation of damages clearly could have and should have been presented to the circuit court before entry of the amended judgment and order. Moreover, the validity of the judgment was not affected by the failure of appellant to receive notice of entry of the judgment and order. Appellant was able to file a timely Notice of Appeal to challenge the amended judgment and order, CR 60.02 afforded him an avenue to seek relief on the ground asserted, and the record did not contain any notice of a substitution of counsel or a notice of change of address advising the circuit court and appellee that counsel wished to be served at another address. The Court finally held that the circuit court did not err in dismissing appellant’s counterclaim for breach of contract, which was predicated on an assertion that appellee was required to pursue alternative dispute resolution. While the parties’ employment agreement required disputes to be submitted to arbitration, the loan agreement, which was the subject of the breach of contract claim, did not contain an arbitration clause, the loan agreement was not expressly incorporated into the employment agreement, and by the language of the employment agreement, the loan agreement and addendum remained in effect according to their original terms.


Opinion by Judge Nickell; Chief Judge Taylor and Judge Combs concurred. The Court reversed and remanded orders of the circuit court mandating that guardian ad litem fees be paid from a court-ordered escrow account. In a case of first impression, the Court held that the trial court judgment was unsupported by sound legal principles. KRS 453.050
required that the plaintiff directly bear the cost of any awarded GAL fees. Furthermore, CR 67.03 implied that the escrow should be withdrawn only to satisfy the trial court’s final judgment, not for other costs and fees.


Opinion by Judge Lambert; Judges Clayton and Dixon concurred. The Court affirmed an opinion and order of the circuit court granting summary judgment to appellee and dismissing appellant’s complaint alleging fraud, intentional infliction of emotional distress and conspiracy, based on misrepresentations appellee made in a prior personal injury lawsuit brought by appellant. The Court held that the circuit court properly granted summary judgment and dismissed the complaint on the basis of res judicata. Although the causes of action alleged in the second complaint were not actually pled in the first complaint, the subject matter of the second suit was raised in the prior suit and appellant was successful in obtaining a reversal of the dismissal of the first complaint based on the misrepresentations.


Opinion by Judge Acree; Judges Dixon and Keller concurred. The Court affirmed a default judgment entered against the corporate appellants and a summary judgment entered against the individual appellants as makers and guarantors on a single note in favor of the appellee bank. The Court first held the standard of review articulated in Jeffrey v. Jeffrey, 153 S.W.3d 849, 851 (Ky. App. 2004), was applicable on a default judgment when a party failed to move the circuit court to set it aside but instead appealed the default judgment directly. The Court was limited to determining whether the pleadings were sufficient to uphold the judgment and whether appellants were actually in default. The Court rejected the corporate appellants’ argument that the standard of review in PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, Inc., 139 S.W.3d 527 (Ky. App. 2003), was applicable. The Court then held that under Jeffrey the pleadings were sufficient to uphold the judgment when the pleadings stated all the elements of a cause of action for the collection of a note. The Court next held that the corporate appellants were actually in default, concluding that the corporations were not deprived of the opportunity to correct their deficient pleadings or to try to set aside the default judgments. Once the corporate appellants’ deficient answers were stricken, the default judgment was properly entered under CR 55.01. The Court next held that the circuit court properly entered summary judgment against the individual appellants when the individual appellants offered no opposition to the summary judgment motions and the allegations in the complaint averred a proper claim.
2010CA000055

Opinion by Judge Acree; Judges Dixon and Nickell concurred. The Court affirmed a trial order and judgment of the circuit court entered upon a jury finding in favor of the appellee executor of an estate on her nuisance and trespass claims against appellant for constructing a berm encroaching on property included in an estate. The Court first held that the circuit court did not abuse its discretion in allowing appellee to testify regarding the value of the property. Appellee was not testifying as an expert witness and the requirements set forth in Commonwealth, Department of Highways v. Slusher, 371 S.W.2d 851 (Ky. 1963) were met. The Court rejected appellant’s argument that KRE 701 did not make Slusher obsolete and held that the lay opinion testimony satisfied both Slusher and the requirements of KRE 701. Reviewing the issues for manifest injustice, the Court next held that the jury’s damage award was not contrary to the manifest weight of the evidence nor did appellee fail to present evidence of damages caused by the nuisance or trespass.

2009CA001973

Opinion by Judge Combs; Judges Moore and Nickell concurred. In an opinion and order, the Court granted appellee’s motion to dismiss appellants’ appeal as moot. The Court held that because the Public Service Commission (PSC) closed its administrative action against the appellant communications company, wherein it was investigating whether the company was charging unreasonably high intrastate switched-access rates, the controversy was moot and no longer justiciable. The Court also held that the exception to the mootness doctrine did not apply. Although the disputed issue was capable of repetition, it most likely could not evade future review. However, the Court explained that appellant was entitled to vacatur, since the PSC by its own actions caused the case to become moot pending appeal. The PSC could not unilaterally seek to deprive the appellant of an opportunity for review while preserving for itself the benefit of the judgment.

2009CA001759

Opinion by Judge Acree; Judge Stumbo and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court denying sua sponte relief from a foreclosure judgment and order of sale as not satisfying the requirements of CR 60.02. The Court first held that while the circuit court retained the authority to enforce the original judgment, it lost jurisdiction to modify either the order of sale or the order confirming the master commissioner’s report ten days after entry, absent a timely appeal. While the court also retained limited authority under CR 60.02, neither party filed a CR 60.02 motion, which was a necessary prerequisite
to the grant of CR 60.02 relief. Therefore, the orders entered more than ten days after the order confirming sale, other than an order enforcing the judgment, were void *ab initio*. The Court also held that the denial of appellants’ motion to stay execution of a writ of possession was moot and the Court lacked jurisdiction to consider it because appellants no longer occupied the premises.

VI. CONSTITUTIONAL LAW


Opinion by Judge VanMeter; Judge Wine concurred; Senior Judge Shake concurred in part and dissented in part by separate opinion. On appeal and cross-appeal, the Court affirmed in part, reversed in part and remanded an order of the circuit court finding that KRS 39A.285 and KRS 39G.010 violated the First and Fourteenth Amendments to the United States Constitution and Section 5 of the Kentucky Constitution and that the American Atheists lacked standing in the underlying action. The Court first held that the circuit court erred in finding that the challenged statutes violated the United States and Kentucky Constitutions. The Kentucky legislature made legislative findings in KRS 39A.285(3), which referenced the Commonwealth being protected by an “Almighty God” and required such findings to be publicized in Kentucky Office of Homeland Security training materials and posted at the State Emergency Center. KRS 39G.010(2)(a) required the executive director of the Kentucky Office of Homeland Security to publicize those findings. Because the legislative findings neither mandated exclusive reliance on Almighty God nor belief in a particular deity but rather, made reference to historic instances where American leaders prayed for Divine protection in trying times, the statute did not violate the Establishment Clause. Similarly, viewed against the historical background, the statutory references to God, like the other constitutional references to God, did not violate the prohibition of Section 5 of the Kentucky Constitution, or impinge on the freedom to believe or disbelieve. The Court also held that the trial court did not err by finding that the America Atheists lacked standing to bring the action on behalf of its members. Because the association sought damages on behalf of its members, alleging its members suffered physical and emotional damages, without participation of the members, a court would have no way to determine the appropriateness of any award.

VII. CONTRACTS


Opinion by Senior Judge Shake; Judges Moore and VanMeter concurred. The Court affirmed a summary judgment granted in favor of appellees on appellants’ claims alleging appellees breached a merger agreement, breached a settlement agreement and breached their obligations under a promissory note. The Court held that the circuit court correctly applied the doctrine of accord and satisfaction. While, pursuant to KRS 355.3-
appellants could have rejected the instrument tendered in full satisfaction of the claim, their failure to repay the amount within ninety days resulted in accord and satisfaction. The Court further held that because the claim had been discharged by accord and satisfaction prior to the summary judgment motion, any disputed issues that may have been deemed admitted by unanswered requests for admissions dissolved upon the occurrence of the accord and satisfaction.


Opinion by Judge VanMeter; Judges Keller and Stumbo concurred. The Court affirmed a summary judgment in favor of appellee on his claim that appellants breached their contractual obligation under a release liquidating the outstanding balance owed under an oral agreement and specifying a payment plan. The Court held that the circuit court did not err in granting summary judgment to appellee. In reaching that conclusion, the Court held that the terms of the original agreement and its intent were irrelevant to appellee’s claim that appellants breached the terms of the release. Therefore, the parties’ dispute regarding the terms of the original agreement did not constitute a genuine issue of material fact. The Court next held that the release was based upon valid consideration giving appellants an additional opportunity to meet their obligation and make payments over time and that this determination was a legal question for the court.


Opinion by Judge Keller; Judges Stumbo and VanMeter concurred. The Court reversed and remanded a judgment of the circuit court entered upon a jury verdict in favor of appellee on its claim to collect a consulting fee based on a promissory note and consulting agreement. The Court held that although the issue of whether the trial court erred in allowing a jury instruction on unjust enrichment was not properly preserved, the jury instruction for unjust enrichment resulted in a manifest injustice. Because unjust enrichment was an equitable doctrine, it was a question to be decided by the trial court, not the jury. The Court also held that unjust enrichment was not an available remedy to the corporate entities because any recovery to them must be under the express terms of the contract. The Court finally held that unjust enrichment, as used in this case, improperly imposed personal liability on appellant, thereby piercing the corporate veil. Appellant could not be held personally liable until the trial court determined that the corporate veil could be pierced and absent such a finding, the unjust enrichment instruction allowing the jury to hold appellant personally liable resulted in a manifest injustice. If the trial court determined that the corporate veil could be pierced, appellant could be personally and contractually liable but the equitable remedy of unjust enrichment was not available.

Opinion by Judge Acree; Judge Stumbo and Senior Judge Lambert concurred. The Court affirmed a summary declaratory judgment interpreting a letter of credit, affirmed an order denying appellants’ motion filed pursuant to "CR 60.02" and reversed and remanded an order granting appellee’s motion for attorney fees. The Court first held that the circuit court did not err in determining the date the letter of credit expired independently from an amendment to the purchase and sale agreement between the parties. The Court next held that the circuit court did not err in concluding that appellee was entitled to draw on the letter of credit. The issuer was duty-bound to pay when appellee presented the documents specified in the letter of credit, not when it complied with the underlying agreement. If appellee improperly certified to the issuer that it complied with the underlying agreement, appellants were not precluded from bringing a breach of contract claim against appellee. The Court then held that the circuit court properly refused to grant appellants’ motion seeking relief pursuant to "CR 60.02." The issue raised in the motion was the proper subject of a "CR 59.05" motion. Failure to timely file a "CR 59.05" motion was a waiver of the arguments presented in the "CR 60.02" motion. The Court finally held that the circuit court erred in awarding attorney fees to appellee. Because the circuit court confined its interpretation to the letter of credit, the attorney fees provision of the purchase and sale agreement did not provide a basis for the award. As there was no contractual or statutory authority for the award, or any justifiable equitable grounds, the award was made in error.


Opinion by Judge Thompson; Judge VanMeter and Senior Judge Isaac concurred. The Court affirmed a summary judgment in favor of a commercial and residential construction company on its claim to collect an outstanding debt on a construction contract. The Court held that the trial court did not err in finding that the individual company owners’ conduct following their company’s dissolution created personal liability for paying the outstanding debt. Appellant’s agreement to pay the final payment on the construction project constituted a new debt. Before the company was dissolved it contracted to construct a gas station and the company was solely liable to pay upon completion of the project. However, when the company was dissolved, appellant requested and obtained the construction company’s waiver of its right to file a lien upon the property for the purpose of securing its right to collect the final payment on the project. The agreement became enforceable as a new contract and debt obligation of the individual owners. The Court also held that the grant of summary judgment was not premature. In the two and one-half years between appellant’s answer and the summary judgment, appellant had ample opportunity to obtain discovery and failed to produce evidence of a genuine issue of material fact to preclude summary judgment. The Court also held that the record clearly demonstrated that
the corporation was dissolved and thus, appellant could not be shielded from personal liability because his authority was limited by KRS 14A.7-020(3). The Court also held that appellant was not shielded from personal liability by KRS 271B.14-050 and 271B.6-220(2). Appellant continued to reach agreements in the years following the company’s dissolution and established a ten-year payment plan and produced no affirmative evidence as to how that conduct constituted winding up the business. The Court declined to consider appellant’s argument that he could not be individually liable in an amount in excess of his equity in the corporation at the time his ownership terminated because appellant failed to cite where he preserved the argument for review. The Court finally held that any error in the circuit clerk’s failure to timely mail appellant’s counsel a copy of the summary judgment, thus precluding appellant from filing a motion to reconsider pursuant to CR 59.05, was harmless when appellant failed to show what he would have presented to the trial court which could not have been previously presented.

The corporation was dissolved and thus, appellant could not be shielded from personal liability because his authority was limited by KRS 14A.7-020(3). The Court also held that appellant was not shielded from personal liability by KRS 271B.14-050 and 271B.6-220(2). Appellant continued to reach agreements in the years following the company’s dissolution and established a ten-year payment plan and produced no affirmative evidence as to how that conduct constituted winding up the business. The Court declined to consider appellant’s argument that he could not be individually liable in an amount in excess of his equity in the corporation at the time his ownership terminated because appellant failed to cite where he preserved the argument for review. The Court finally held that any error in the circuit clerk’s failure to timely mail appellant’s counsel a copy of the summary judgment, thus precluding appellant from filing a motion to reconsider pursuant to CR 59.05, was harmless when appellant failed to show what he would have presented to the trial court which could not have been previously presented.


Opinion by Senior Judge Lambert; Judges Caperton and Thompson concurred. The Court affirmed a summary judgment dismissing appellants’ claims for breach of fiduciary duty, interference with contractual relations and interference with prospective business advantage. Appellant alleged that the individual acting as both president of the appellee bank and as a member of the board for the county industrial development authority convinced the industrial authority to loan money set aside for appellant to another company at the same time appellant was attempting to secure funds for its business. The Court first held that the trial court did not err in finding that the bank did not breach a fiduciary duty to appellant, nor did it interfere with appellant’s prospective contractual and business relationship with the industrial authority. The availability of low-interest loans to local business through the industrial authority was not confidential or secret information and there was no evidence of record that the loan appellant applied for years earlier was turned down at the bank president’s insistence or that the money loaned to the other company five to six years later was from the same pool of money from which the earlier loan was slated to be drawn. The Court next held that the trial court did not err in finding that the bank did not tortiously interfere with contract. Appellant did not allege that a formal contract existed but only that there was an informal agreement. Therefore, the elements for tortious interference with contract were not met. The Court finally held that the trial court did not err in finding that the bank did not interfere with prospective business advantage. Even assuming that applying for a loan created a valid business expectancy, there was no evidence that the bank president interfered with such expectancy or that such interference was improper.

Opinion by Judge Combs; Judges Caperton and Thompson concurred. The Court affirmed in part, reversed in part and remanded a judgment of the circuit court determining that appellees were entitled to possession of the premises they leased to appellant, that appellees were entitled to keep the entirety of a substantial security deposit, and dissolving a notice of *lis pendens* filed by appellant. The Court first held that appellees were not precluded by the resolution of district court proceedings from denying appellant had acquired an equitable interest in the hotel property beyond the lease term because the district court lacked subject matter jurisdiction and therefore, there had not been an adjudication on the merits. The Court next then held that under the particular circumstances, the trial court erred in allowing appellees to keep the entirety of the $500,000.00 non-refundable security deposit. Because the amount was grossly disproportionate to any anticipated loss flowing from a breach of the parties’ lease agreement it must be construed as an impermissible penalty or forfeiture rather than as valid liquidated damages. The Court also held that the trial court did not err by concluding that appellees were entitled to possession of the premises pursuant to the plain language of the lease agreement. The Court finally held that the trial court erred in dissolving the notice of *lis pendens*. Appellant had the right to maintain its notice of *lis pendens* throughout the pendency of the action, which remained pending while the appeal was being prosecuted.


Opinion by Judge Stumbo; Judge Clayton concurred; Judge Thompson concurred in result only. The Court reversed and remanded an order and judgment of the circuit court sustaining a summary judgment motion in favor of the appellee physicians and healthcare system on the appellant clinic’s claim that the physicians, while serving as clinic board members, breached their fiduciary duties to the clinic by executing a plan to take their employment and support staff elsewhere and that the healthcare system defendants tortiously interfered with the clinic’s employment contracts by facilitating and promoting the relocation. The Court first held that although the circuit court correctly determined that KRS 271B.8-300 supplanted the common-law claim of breach of fiduciary duty, appellant asserted a claim of breach of fiduciary duty in its complaint and therefore, summary judgment was premature. Aside from the heightened burden of proof, KRS 271B.8-300(5) tracked the common law very closely and did not evince the intent to abrogate the common-law claim entirely. Because appellant prosecuted a claim for monetary damages arising from the former directors’ alleged breach of fiduciary duty, it fell within the express scope and purpose of the statute. While appellant’s claim did not refer to KRS Chapter 271B specifically, the complaints fell well within the liberal policy related to notice pleadings. When viewed in a light most favorable to appellant and resolving all doubts in its favor, appellant
prosecuted a claim for breach of fiduciary duty and genuine issues of material fact remained for adjudication.

VIII. CRIMINAL LAW


Opinion by Judge Wine; Chief Judge Taylor and Judge Caperton concurred. The Court affirmed a judgment of the circuit court entered after appellant entered a guilty plea following the court’s denial of her motion to suppress evidence seized following a stop by police. The Court first held that the duration of appellant’s detention did not exceed the scope of a reasonable Terry stop and therefore, the trial court did not clearly err in finding that the search of appellant’s backpack was incident to her arrest for public intoxication. The Court then held that the search of appellant’s backpack did not exceed the scope of a permissible search incident to her arrest. Although the backpack was not on appellant’s person at the time of her arrest, she was holding the backpack at the time she was stopped, it was in the open only a few feet away and she exercised sufficient control over it to deny an earlier request to search it. Further, there was no evidence that appellant was handcuffed, fully restrained or moved to the police cruiser at the time the officers searched her backpack. The Court finally held that the officers had probable cause to arrest appellant. Although the officers could have exercised discretion in deciding whether to arrest appellant, they did not lack any reasonable, objective basis for concluding that she had committed the offense of public intoxication.


Opinion by Judge Lambert; Judges Caperton and Keller concurred. The Court affirmed appellant’s conviction for first-degree sexual abuse entered pursuant to a guilty plea wherein appellant reserved the right to appeal whether first-degree sexual abuse was a probation-eligible charge. The Court held that the trial court did not abuse its discretion in finding that the minor victim was greatly affected by the crime and that probation would unduly depreciate the serious nature of the crime. The Court also held that the issue of whether probation was permissible, because appellant was statutorily a violent offender under KRS 532.080, KRS 439.3401 or KRS 533.060, was moot because even if she was eligible, the trial court had already ruled it would not grant probation.


Opinion by Judge Wine; Judges Moore and Stumbo concurred. The Court affirmed a judgment of the circuit court entered after appellant entered a conditional guilty plea, reserving the right to appeal the denial
of a motion to suppress evidence. The Court held that the trial court was correct as a matter of law in finding that although the search was illegal under the precedent set by Arizona v. Gant, 556 U.S. 332, (2009), the “good faith” exception to the exclusionary rule was applicable. Pursuant to Davis v. U.S., 131 S.Ct. 2419 (2011), the “good faith” exception applied to the pre-Gant search incident to arrest. The Court rejected appellant's argument that the search was unconstitutional on state law grounds, as the Kentucky Constitution provided no greater protection than the Fourth Amendment to the federal constitution.


Opinion by Judge Acree; Judges Moore and Nickell concurred. The Court reversed and remanded appellant’s conviction of five counts of failure to file a tax return. The Court held that the circuit court’s failure to conduct a hearing mandated by Faretta v. California, 422 U.S. 806 (1975), rendered the conviction invalid. The fact that appellant was an attorney who represented criminal defendants was not dispositive of the issue. Further, Faretta violations were not subject to harmless error analysis.


Opinion by Judge Lambert; Judges Dixon and VanMeter concurred. The Court affirmed a circuit court order denying appellant’s motion for relief pursuant to RCr 11.42. The Court first held that the circuit court did not err in finding that trial counsel provided appellant with effective assistance. Because appellant entered a guilty plea, he was precluded from raising any of the issues he raised on appeal. He was bound by the terms of his plea agreement with the Commonwealth, which included waiver of his right to appeal. Appellant was limited to contesting the validity of his guilty plea, which he did not argue in his brief.


Opinion by Chief Judge Taylor; Judges Lambert and Thompson concurred. The Court reversed and remanded a judgment of the circuit court entered upon appellant’s conditional guilty plea to receiving stolen property over $300. The Court held that the circuit court erred in denying appellant’s motion to remand to district court or, in the alternative, to amend the indictment. Appellant consented to retroactive application of KRS 514.110 by filing a motion in circuit court requesting same and the amendment certainly operated to mitigate his punishment (increasing the value of property from $300 to $500 to constitute a Class D felony, with property valued under $500 constituting a Class A misdemeanor) when the value of the property was approximately $300.

Opinion by Judge Lambert; Judge Caperton concurred; Judge Keller concurred in result only. The Court denied a motion to dismiss the appeal as moot and vacated and remanded an order of the circuit court revoking appellant’s conditional discharge and imposing a five-year sentence for appellant’s conviction for flagrant nonsupport. The Court first held that even though appellant was released from prison on shock probation, he was still entitled to seek review of whether his conditional discharge was properly revoked. Even if the appeal were rendered moot by appellant’s shock probation, the case fell squarely within the exception to the mootness doctrine. The Court then held that, based upon the holding in Commonwealth v. Marshall, 345 S.W.3d 822 (Ky. 2011), the trial court abused its discretion in revoking appellant’s conditional discharge without making findings relative to the factors in Bearden v. Georgia, 461 U.S. 660 (1983).


Opinion by Judge VanMeter; Judge Nickell concurred; Senior Judge Lambert concurred in result only. The Court affirmed a judgment of the circuit court convicting appellant of criminal possession of a forged instrument in the first degree, possession of drug paraphernalia and of being a persistent felony offender in the second degree. The Court first held that, pursuant to RCr 10.26, there was no palpable error in the trial court’s denial of appellant’s motion to suppress counterfeit bills found in her purse when officers searched her vehicle after one of her passengers was arrested on an outstanding warrant. Although the search may have been unconstitutional under Arizona v. Gant, 556 U.S. 332 (2009), application of the exclusionary rule would not deter deliberate and culpable police practices and therefore, the search was authorized under New York v. Belton, 453 U.S. 454 (1981), which was binding precedent at the time of the search. The Court next held that the trial court did not abuse its discretion by allowing an officer to testify about the way people sometimes purchase drugs on the street when the testimony was relevant to explain the circumstances that aroused the officer’s suspicion that a drug transaction was taking place. The Court further held that even if the testimony should have been excluded, the error was harmless. The Court next held that there was no palpable error in admitting a detective’s testimony that the counterfeit bills in appellant’s possession could not have been glued together with a glue stick, as alleged by appellant, when the detective was qualified under KRE 702. Any lack of specialized training on the part of the detective concerning the glue went to the weight of his testimony, not his qualification as an expert or the competency of his testimony. The Court next held that the trial court did not err in denying appellant’s motion for a directed verdict on two counts of criminal possession of a forged instrument when the circumstantial evidence was sufficient to support a finding that appellant intended to use the bills to make a drug purchase. The Court finally held that any error
resulting from the trial court’s omission of an intent element from the jury instructions on the charge of possession of drug paraphernalia was harmless when appellant’s defense to the charge was to deny knowledge and ownership of the crack pipe found in her car and when she did not present a defense of lack of intent.


Opinion by Judge Lambert; Senior Judge Shake concurred; Judge Keller concurred in result only. The Court reversed and remanded with directions a judgment of the circuit court entered pursuant to appellant’s guilty plea to incest, reserving the right to appeal the circuit court ruling that KRS 530.020 applied to the step-grandparent/step-grandchild relationship. In a case of first impression, the Court held that the legislature did not intend to extend the reach of the statute to the step-grandparent/step-grandchild relationship and therefore, the circuit court erred in not amending the charge to sodomy in the third degree.


Opinion by Senior Judge Lambert; Chief Judge Taylor and Judge Clayton concurred. The Court vacated and remanded a judgment of the circuit court entered on appellant’s conditional guilty plea, reserving the right to appeal the denial of a motion to suppress evidence seized during a traffic stop. The Court held that because the police officers unreasonably prolonged the duration of the stop of appellant’s vehicle by detaining her beyond the time needed to complete a citation for a traffic violation, the seizure was unconstitutional. The officers lacked reasonable suspicion to prolong the stop for purposes of conducting a drug dog sniff because there was insufficient evidence that appellant was engaged in drug-related activity. There was no evidence of anything suspicious about appellant’s behavior when she was pulled over, no contraband or drug paraphernalia was seen in plain view in the vehicle and the only substantive evidence of criminal activity uncovered prior to the search was the drug paraphernalia found in the car of an individual who told police he was helping appellant move from one hotel to another.


Opinion by Judge Clayton; Judge Nickell and Senior Judge Isaac concurred. The Court affirmed an order of the circuit court revoking appellant’s probation. The Court held that the trial court did not abuse its discretion in revoking appellant’s probation. There was no requirement for the court to advise appellant that he could waive his constitutional rights and appellant’s due process rights were not violated.

Opinion by Judge Clayton; Judges Dixon and Lambert concurred. The Court affirmed in part, reversed in part and remanded a judgment of conviction and sentence entered after a jury found appellant guilty of one count of trafficking in a controlled substance. The Court first held that the trial court did not err by failing to suppress evidence of appellant’s interactions with a police detective. The detective’s testimony was sufficient to show the police had a reasonable and articulable suspicion giving rise to an inquiry of the passengers of the vehicle as to whether they were concealing something illegal. The detective’s testimony that appellant was not free to leave was not dispositive of the issue of whether the questioning constituted a custodial interrogation. There was nothing to indicate to appellant he was being arrested, he was not touched or physically searched by the detective and he was not threatened with arrest. The Court next held that the trial court did not err in failing to grant a mistrial when the detective testified to facts the trial court previously adjudged to be inadmissible as overly prejudicial. The Court held that, given the weight of the evidence against appellant, appellant failed to show that the jury based its decision on something other than the evidence and that the admonition was unsuccessful in removing any prejudice. The Court finally held that the trial court erred in ordering the indigent appellant, who was facing a seven-and-one-half year sentence, to pay court costs and a felony fee upon release from custody when there was not a reasonable basis to believe that appellant would soon be able to pay the costs. In so holding, the Court distinguished the facts from those in **Maynes v. Commonwealth**, 361 S.W.3d 922 (Ky. 2012).


Opinion and order by Judge Nickell; Judges Acree and Moore concurred. The Court dismissed as frivolous appellant’s successive motion for post-conviction relief and directed the circuit court to deny all future requests to proceed in *forma pauperis* appellant might file to pursue subsequent collateral attacks on his conviction. The Court held that while appellant acting *pro se* was not subject to the same standards as litigants represented by counsel, his successive motions for post-conviction relief were prohibited and the Court could bar prospective filings to prevent the deleterious effect of such filings on scarce judicial resources.


Opinion by Judge Keller; Judges Stumbo and VanMeter concurred. The Court affirmed an order of the circuit court denying appellant’s motion for post-conviction relief pursuant to *RCr_11.42*. The Court held that appellant failed to properly preserve the issue of whether the circuit court erred by failing to grant him an evidentiary hearing on the specific
allegation that counsel was ineffective for incorrectly advising him about when he would be eligible for parole. Although the trial court found an evidentiary hearing was unwarranted, it did not specifically adjudicate the claims regarding trial counsel’s alleged misrepresentation of parole eligibility and because appellant failed to file a motion pursuant to CR 52.02 for amended or additional findings of fact, the issue was not properly preserved for appellate review.


Opinion by Judge Stumbo; Judges Keller and VanMeter concurred. The Court reversed and remanded orders of the circuit court dismissing an indictment with prejudice and expunging the assault charge against appellant after the Commonwealth chose not to pursue the case for ten years. The Court first held that it was a violation of the separation of powers for the trial court to dismiss the case with prejudice absent consent by the Commonwealth. Further, the trial court was without jurisdiction to amend the order dismissing without prejudice, which was entered more than ten years earlier. The Court then held that the trial court erred in expunging the charge when there were no factual findings that appellant’s reasons for receiving an expungement outweighed the need of the Commonwealth to retain those records.


Opinion by Judge Lambert; Judges Acree and Combs concurred. On discretionary review, the Court reversed and remanded an opinion and order of the circuit court reversing a district court order denying appellee’s motion to suppress evidence obtained after appellee was stopped by police while driving his motorcycle and arrested for operating a motor vehicle under the influence of alcohol in violation of KRS 189A.010. The court held that the district court properly denied appellee’s motion and the circuit court erred in reversing that ruling. While the matter was initiated by an anonymous tip, which in and of itself would not be reliable or provide any reason for stopping appellee, coupled with the officer’s observation of erratic driving, there was a sufficient reason to initiate a stop.


Opinion by Judge Stumbo; Judge Thompson concurred; Judge Caperton concurred by separate opinion. The Court reversed and remanded an order of the circuit court granting a motion to suppress evidence found in the search of appellant’s vehicle after he was arrested for possession of marijuana. The Court held that the circuit court erred in suppressing the evidence when it relied on Arizona v. Gant, 556 U.S. 332 (2009), without considering the alternate evidentiary basis for the search of the
passenger compartment and trunk of appellant’s car. A police officer observed appellant rolling a marijuana cigarette while sitting in his vehicle, which led to a reasonable belief that evidence of criminal behavior might be found in the passenger compartment. When the search of the passenger compartment yielded both marijuana and cocaine, probable cause existed for the issuance of a search warrant for the vehicle and, therefore, pursuant to U.S. v. Ross, 456 U.S. 798 (1982), a warrantless search of the vehicle’s trunk was constitutional.


Opinion by Judge Moore; Judge Combs and Senior Judge Lambert concurred. In an opinion and order, the Court affirmed an order of the circuit court dismissing the indictment against appellee and denied as moot appellee’s motion to dismiss the appeal as barred by the Double Jeopardy Clause. The Court held that the circuit court had authority to dismiss the indictment after declaring a mistrial. Although the circuit court erred in dismissing the indictment based upon a Brady violation, the court properly dismissed the indictment when the Commonwealth shifted its theories of criminal liability, depriving appellee of a fair opportunity to defend himself. Further, the circuit court did not err in finding that the defect in the indictment prejudiced appellee’s substantial rights. The Court also held that although appellee waited until the jury was sworn to move for a mistrial, the circuit court did not abuse its discretion in dismissing the indictment with prejudice. The decision to move to dismiss was forced upon appellee when the Commonwealth disclosed, after the jury had been sworn and the trial began, that the charges were based upon violations for which appellee was neither charged in the indictment nor informed of through the bill of particulars. Because the jury was impaneled and sworn, the circuit court did not abuse its discretion in dismissing the indictment with prejudice because appellee’s retrial was barred by the Double Jeopardy Clause.


Opinion by Judge VanMeter; Judges Keller and Stumbo concurred. The Court affirmed an order of the circuit court granting appellee’s motion to expunge the record of her voided felony conviction. The Court held that although the circuit court’s decision to expunge the conviction under CR 60.02(f) was incorrect, the effect of the voided conviction amounted to a dismissal of the charges pursuant to KRS 218A.275 and the voided conviction was properly expunged under the provisions of KRS 431.076, permitting expungement of charges dismissed with prejudice.

Opinion by Senior Judge Shake; Judge Lambert concurred; Judge Combs concurred by separate opinion in which Judge Lambert concurred. The Court reversed an order of the circuit court granting appellee’s motion to suppress evidence discovered after he was arrested for driving on a suspended license. The Court first held that the appeal was timely filed. The running of the time for the Commonwealth to take its appeal from the order denying the motion to suppress was tolled by a timely-filed CR 59.05 motion. The Court then held that although the search was unconstitutional under Arizona v. Gant, 556 U.S. 332 (2009), the officer’s good faith reliance on controlling law at the time made the search appropriate as articulated in Davis v. U.S., 131 S.Ct. 2419 (2011).


Opinion by Judge Acree; Judges Moore and Nickell concurred. The Court reversed an order of the circuit court dismissing an indictment with prejudice. The Court held that the circuit court could not convert the dismissal of the criminal indictment without prejudice to a dismissal with prejudice nine years after entry of the original dismissal. The trial court lost jurisdiction over the order ten days after its entry. Appellant was required to either file a timely motion pursuant to CR 59.05 motion to alter, amend or vacate or to pursue an appeal in compliance with CR 73.02(1)(a), neither of which he did.


Opinion by Judge Caperton; Chief Judge Taylor and Judge Acree concurred. The Court reversed and remanded an order of the circuit court dismissing the charge of probation violation against appellee for lack of jurisdiction. The Court held that the trial court erred in finding that it did not have jurisdiction based on KRS 533.020 because the revocation did not occur within the probationary period. The trial court misinterpreted the holding in Conrad v. Evridge, 315 S.W.3d, 313 (Ky. 2010), which left open the possibility that estoppel may foreclose the time limitation imposed by KRS 533.020. Because appellant absconded to intentionally avoid the authority of the Court, the trial court retained jurisdiction.


Opinion by Judge Stumbo; Judge Combs and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court ruling that it lacked jurisdiction to hear the Commonwealth’s motion to revoke appellant’s probation after the five-year statutory period in KRS 533.020(4). The Court held that the circuit court correctly determined that
it lacked jurisdiction, even though appellant had not made restitution. The
Commonwealth was required to seek revocation or amendment of
probation, if at all, at a time after appellee allegedly stopped paying
restitution, but also before the expiration of the five-year term.

2009CA001624

Opinion by Judge Thompson; Chief Judge Taylor and Judge Lambert
concurred. The Court reversed
appellant's conviction for tampering with
physical evidence and for first-degree persistent felony offender. The
case was on remand from the Kentucky Supreme Court for
reconsideration in light of Mullins v. Commonwealth, 350 S.W.3d 434 (Ky.
2011). The Court held that appellant’s placing marijuana in his pocket
was directly incident to the possession of marijuana charge and was not
to prevent the evidence from being used in an official proceeding. “Piling
on” the additional charge of tampering was precisely the situation
forbidden by Mullins. Therefore, the trial court erred when it denied
appellant’s motion for a directed verdict on the tampering with physical
evidence charge.

Y. Cromer v. Commonwealth, 2011 WL 3628870 (Ky. App. August 19,

Opinion by Judge Dixon; Judges Keller and VanMeter concurred. The
Court affirmed orders of the circuit court denying appellant’s motions for a
choice of evils instruction, to suppress evidence found in a warrantless
search of his vehicle and to disqualify the county attorney’s office. The
Court first held that the trial court properly found that the contingencies
articulated in Beasley v. Commonwealth, 618 S.W.2d 179 (Ky. App.
1981), were not met, when it was unreasonable to believe that operating
a motor vehicle under the influence was justified and that there was no
evidence in the record that the risk of injury to other unidentified motorists
was so compelling or imminent as to leave appellant with no alternative to
avoid the injury other than driving under the influence. Therefore, the trial
court correctly concluded that appellant was not entitled to a choice of
evils instruction under KRS 503.030. The Court next held that the search
of appellant’s vehicle, wherein an unlicensed weapon was found, did not
violate Arizona v. Gant, 556 U.S. 332 (2009). Although appellant was not
within reaching distance of the passenger compartment, he was arrested
for DUI, for which evidence might reasonably be found in his vehicle. The
probable cause to search appellant’s vehicle for evidence of DUI did not
end upon the discovery of a ballistics vest, and it was proper for the police
to pick up the vest to see if anything was located beneath it. The Court
finally held that the trial court did not err in refusing to disqualify the
county attorney’s office. Appellant’s reliance on the modified rule allowing
for disqualification without a showing of actual prejudice, articulated in
Whitaker v. Commonwealth, 895 S.W.2d 953 (Ky. 1995), and
Commonwealth v. Maricle, 10 S.W.3d 117 (Ky. 1999), was misplaced.
Appellant could not show that any member of the prosecutorial staff
conducted “substantial and personal preparation” involving an “exchange of confidential information” in connection with the case.


Opinion by Judge Acree; Judges Combs and Keller concurred. The Court affirmed appellant’s conviction for both first-degree robbery under KRS 515.020 and for first-degree unlawful access to a computer under KRS 434.845. The Court held that the conviction did not violate double jeopardy. Under Blockburger v. United States, 284 U.S. 299 (1932), because first-degree unlawful access to a computer is not included within first-degree robbery, or vice versa, the conviction for both offenses did not violate appellant’s constitutional protections against double jeopardy. Further, the legislature did not intend to prohibit convictions for both first-degree robbery and first-degree unlawful access to a computer arising from one underlying transaction or act. Moreover, the convictions did not arise out of one single act as the geographical and temporal separation of the robbery and the use of the victim’s ATM card were two separate and distinct acts.


Opinion by Judge Moore; Judges Stumbo and Wine concurred. The Court reversed and remanded a judgment of the circuit court entered following appellant’s conditional guilty plea to first-degree possession of methamphetamine, first offense; and possession of drug paraphernalia, first offense, wherein she reserved the right to appeal from an order denying a motion to suppress a statement made to the police and evidence found as a result of her statement. The Court held that the trial court erred in failing to suppress the statement, which was the product of a custodial interrogation, and the evidence found as a result of the statement. The Court held that the public safety exception to the Miranda warning requirement did not apply because the interrogation was not made in relation to any quantifiable public safety threat. Appellant was found by police in a bedroom in a private residence, she was immediately handcuffed, she was not read her Miranda rights, and the officer nevertheless asked her questions about the location of drug needles and the type and amount of drugs she had ingested.


Opinion by Judge Caperton; Chief Judge Taylor and Judge Wine concurred. On discretionary review, the Court reversed and remanded an order of the circuit court affirming an order of the district court denying appellant’s motion to suppress the results of a breathalyzer test due to an alleged violation of KRS 189A.105(3). The Court distinguished the holding in Bhattacharya v. Commonwealth, 292 S.W.3d 901 (Ky. App.
2009), and held that appellant’s rights were violated when the police did not allow her to retrieve her attorney’s phone number from her cell phone and did not furnish her with a telephone capable of connecting with the number to be dialed. The Court also held that the district court erred in finding that appellant had the opportunity to use her cell phone while in the police cruiser when she was not informed of her right under KRS 189A.105(3) until after she exited the cruiser, the police took her cell phone and she only had the cell phone outside the period immediately preceding the administration of the test. The Court finally held that because appellant’s right to contact and communicate with her attorney was frustrated by state action, the district court erred in not suppressing the results of all tests conducted pursuant to KRS 189A.


Opinion by Judge Keller; Judge Lambert and Senior Judge Shake concurred. The Court vacated and remanded an order of the circuit court denying appellant’s petition for declaratory judgment wherein he argued he was deprived of due process in a prison disciplinary proceeding. The Court held that the circuit court erred in denying the petition. The proceedings were deficient when the hearing officer did not have or did not review the cafeteria and medical records appellant claimed would establish he was somewhere other than where the assault he was accused of committing took place. Further, the hearing officer was required to state on the record that evidence provided by a confidential informant had been reviewed and had been found to be reliable and to set forth reasoning supporting the finding of reliability.


Opinion by Judge VanMeter; Judges Dixon and Lambert concurred. On discretionary review, the Court affirmed an opinion of the circuit court affirming a district court judgment entered after a jury found appellant guilty of DUI and possession of an open alcohol container in a motor vehicle. The Court held that the testimony of the police officers constituted substantial evidence to support the district court’s conclusion that an officer observed appellant in accordance with KAR 8:030 when the officer remained in the room to observe appellant for twenty-six minutes prior to administering a breath alcohol test. The Court then held that while the circuit court erred in admitting the breathalyzer test results, absent introduction of the maintenance log, testimony that appellant was observed driving erratically, appellant’s failure of the field sobriety tests and a passenger’s remarks to the police that he and appellant had consumed alcohol supported the DUI conviction even without the breath alcohol test results. Therefore, the unpreserved error did not result in manifest injustice.

Opinion by Judge Lambert; Judges Thompson and VanMeter concurred. The Court reversed and remanded an order of the circuit court revoking appellant's pretrial diversion and imposing a sentence of incarceration for the sole reason that he failed to make his child support payments pursuant to the terms of a diversion agreement. The Court held that, pursuant to Commonwealth v. Marshall, 354 S.W.3d 822 (Ky. 2011), the circuit court abused its discretion in revoking the diversion without first addressing the factors in Bearden v. Georgia, 461 U.S. 660 (1983).


Opinion by Judge Caperton; Judges Nickell and Wine concurred. The Court affirmed an order of the circuit court denying appellant's motion for a new trial based upon the failure of the courtroom recording equipment to produce a record of his jury trial. The Court held that appellant could not decline to prepare a narrative statement pursuant to CR 75.13 and subsequently decline to participate in the trial court's preparation of such a statement and then argue on appeal the adequacy of the record. Accordingly, the Court was required to assume the portions which were omitted supported the decision of the trial court.


Opinion by Judge Combs; Judge Lambert and Senior Judge Shake concurred. The Court affirmed an order of the circuit court denying appellant's motion for relief pursuant to CR 60.02 wherein he argued that the amendment of his PFO indictment was a violation of RCr 6.16. The Court held that the circuit court did not err in denying relief and that the unpublished opinion in Miller v. Commonwealth, 2009 WL 160583 (Ky. Jan. 22, 2009), did not affect the Supreme Court's previous decision that the amendment to the indictment was not improper. There was not a facial violation of RCr 6.16 and appellant could not show that he was prejudiced by the amendment. The amendment to appellant's indictment was related to a status offense, it was made after the verdict was returned on the substantive offenses but before the jury returned a verdict on the PFO charge, and the amendment did not change the offense charged in any way.


Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed an order of the circuit court denying appellant's motion to compel the Department of Corrections to recalculate his sentences so that his sentences would run concurrently. The Court
held that there was no authority for the Court of Appeals to convert appellant’s motion to compel into a motion to vacate his sentence or a motion under RCr 11.42 for ineffective assistance of counsel. Appellant could not argue for the first time on appeal that he received ineffective assistance of counsel or that his original request was in fact a motion to vacate judgment. Furthermore, any motion for relief under RCr 11.42 was outside the three-year limitation period and was not verified. Reviewing the motion to compel for error, the Court held that appellant did not follow the procedure required by KRS 454.415 for inmates to raise sentence calculation questions.


Opinion by Judge Lambert; Judges Caperton and Keller concurred. The Court reversed and remanded appellant’s conviction for second-degree burglary. The Court first held that the trial court did not err in denying appellant’s motion for directed verdict as it was not unreasonable for a jury to find appellant guilty given the evidence that a window at the residence was open, jewelry was allegedly out of place, and appellant was observed coming out of the residence. The Court then held that the trial court did abuse its discretion and erred to appellant’s substantial prejudice when it prevented appellant from testifying about a prior instance where he had wandered off to someone else’s house following a seizure. The Commonwealth clearly opened the door when it asked appellant whether he had ever wandered off after a seizure and appellant’s defense was that he suffered a seizure, became confused and wandered into the wrong house. The fact that he had suffered the same side-effect after a seizure on a previous occasion was both relevant and probative.


Opinion by Judge Caperton; Chief Judge Taylor and Judge Clayton concurred. The Court reversed and remanded an order of the circuit court denying appellant’s motion to dismiss the indictments against him, after which he entered a conditional guilty plea to various drug charges. The Court held that the trial court erred in denying the motion after finding that KRS 218A.240(1) provided the Attorney General’s office with the authority to investigate. The Attorney General’s power and authority to investigate and prosecute cases was defined by KRS 15.200. Because no one authorized by statute invited the Attorney General to participate in the investigation, the Attorney General and the UNITE officers were without authority to initiate the investigation, which ultimately led to appellant’s grand jury indictment.

Opinion by Judge Lambert; Judges Clayton and Dixon concurred. The Court affirmed a judgment of the circuit court entered subsequent to a jury verdict finding appellant guilty of second-degree robbery. The Court first held that the trial court did not commit any error in its explanatory comments prior to the start of the trial. Reviewing for palpable error, based on the holding in Travis v. Commonwealth, 327 S.W.3d 456 (Ky. 2010), the Court next held that the jury instructions and the robbery instruction did not prevent the jury from reaching a unanimous verdict. The Court finally held that the trial court did not abuse its discretion in striking a juror for cause and in finding that the juror might lean toward the defense because, as a neighbor of defense counsel, there was a sufficient closeness or proximity between the two.


Opinion by Judge Stumbo; Judges Dixon and Keller concurred. The Court affirmed appellant's conviction entered after appellant entered a conditional guilty plea to the offense of second-degree escape. The Court held that appellant's failure to report for an alternative sentence, to be served on weekends, constituted second-degree escape.


Opinion by Judge Acree; Judge VanMeter concurred; Chief Judge Taylor concurred in result only. The Court reversed and remanded a judgment of the circuit court entered after a jury found appellant guilty of arson, burning personal property to defraud an insurer and committing a fraudulent insurance act over $300. The Court held that the trial court improperly excused, on the basis of KRS 329A.015, appellant's witness presented as an expert on fire scene investigations. The statute did not prohibit a witness not licensed as a private investigator from providing testimony on the cause and/or origin of a fire. The Court further held that the error was not harmless when the result was that appellant's defense then had no expert opinion rebutting the evidence that arson was indeed the cause of the fire. The Court next held that the trial court improperly admitted the opinion testimony of three of the Commonwealth's expert witnesses without conducting a Daubert hearing or reviewing an adequate record to determine whether the expert testimony was reliable. The Court further held that the error was not harmless because without the testimony there was little direct evidence that the fire was the result of arson. The Court next held that admission of financial documents found in the trash outside appellant's business was proper. The fact that the documents were found in a trash can near a public walkway was supported by substantial evidence and the trial court correctly concluded that appellant had no expectation of privacy in the documents. The Court
finally held that the trial court properly excluded a lightning-strike report on the basis that there was no foundation for its admission under the business records exception when there was no certification that the recordings were made by a person. The certification represented that the data was detected and recorded by sensors and therefore, the data was more akin to scientific, technical or specialized information, the admissibility of which was governed by KRE 702.


Opinion by Judge Lambert; Judges Dixon and VanMeter concurred. The Court affirmed a final judgment of the circuit court convicting appellant of first-degree trafficking in a controlled substance (cocaine) and for being a first-degree persistent felony offender. The Court first held that a detective’s discovery of a cell phone number on one of appellant’s cell phones (after he was arrested on an active bench warrant and without a warrant) to check if it matched a number given to a confidential informant during a drug buy did not constitute a search for Fourth Amendment purposes. Therefore, the circuit court did not err in denying the motion to suppress that evidence. The Court next held that the circuit court did not abuse its discretion in denying appellant’s pretrial motion to exclude evidence of other crimes or bad acts pursuant to KRE 404(b) by permitting introduction of a letter appellant passed to another inmate. The letter was properly admitted to show appellant was attempting to intimidate the confidential informant from testifying against him. The Court next held that the Commonwealth’s closing argument did not result in manifest injustice. The Court next held that the Commonwealth did not fail to prove that appellant was eighteen years old when he committed one of the prior felonies upon which the conviction was based, as the jury could reasonably conclude from the evidence that appellant had reached the age of eighteen at the time he committed the prior felonies. The Court next held that there was no basis for the trial judge to recuse because the judge was the Commonwealth Attorney at the time of appellant’s prior conviction. The prior conviction was not the matter in controversy and therefore, the judge’s position at that time was immaterial. The Court finally held that because there was no error in any of the allegations raised in appellant’s brief, there was no cumulative error.


Opinion by Judge Lambert; Judges Dixon and VanMeter concurred. The Court affirmed an order of the circuit court dismissing appellant’s writ of mandamus, claiming that the Department of Corrections erroneously classified appellant as a violent offender, which the circuit court treated as a motion for a declaration of rights. The Court held that appellant was properly classified as a violent offender pursuant to KRS 439.3401 when
he was convicted of manufacturing methamphetamine while in possession of a firearm.


2010CA001822

Opinion by Judge Acree; Judge Wine and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court denying appellant’s motion brought pursuant to CR 60.02 requesting removal from the Sex Offender Registry on the grounds that Kentucky’s Sex Offender Registration Act (SORA) violated his procedural and substantive due process rights. The Court first held that appellant was not deprived of his procedural due process rights when he was not provided an opportunity to dispute his placement on the registry. Appellant received a meaningful opportunity to be heard during his trial and no additional process was due. The Court next held that SORA was not unconstitutionally overinclusive, even though the underlying kidnapping offense was not a sex crime nor did it require or involve a sexual act or component. The protection of children and the public was a legitimate state interest and a registration system for child kidnappers and abductors rationally furthered that interest. The Court finally held that SORA, and specifically KRS 17.510, was not unconstitutionally vague as applied to appellant. Collectively, KRS 17.510(6) and 17.500(3)(a) clearly set forth the precise crimes against minors which would subject an offender to SORA, including the registration requirements.


2010CA000507

Opinion by Judge Acree; Judges Lambert and Thompson concurred. The Court reversed and remanded an order of the circuit court denying a motion to suppress evidence, after which appellant entered a conditional guilty plea to first-degree possession of a controlled substance. The Court first held that although the emergency aid exception to the Fourth Amendment’s warrant requirement applied to automobiles, a warrantless search pursuant to the doctrine could only be upheld if the police entry into the vehicle was based on an objectively reasonable belief, given the information at the time of entry, that a person within the vehicle was in need of immediate aid. A person sleeping in a vehicle on a summer night, headlights off and legally parked did not justify a reasonable belief that appellant was in medical peril necessitating aid. Therefore, the officer’s entry into appellant’s car was not objectively reasonable because the information available to the officer at the time of entry, viewed objectively, did not reasonably indicate that appellant was in immediate need of aid.


2011CA002028. DR Pending.

Opinion by Judge Acree; Judges Moore and VanMeter concurred. The Court dismissed as moot appellant’s appeal, filed pursuant to RCr 4.43,
challenging a circuit court order establishing pretrial bond. The Court held that because appellant was allowed to enter a deferred prosecution program under KRS 218A.1415, the appeal was unquestionably moot. The Court rejected appellant's argument that the issue was capable of repetition, yet evading review. Should the trial court find that appellant violated the conditions of the program, it could continue appellant's participation in the program, change the terms or conditions for participation in the program or order appellant removed from the program and proceed with the ordinary prosecution for the offenses charged in the indictment. That would necessarily include entry of another order determining the conditions of appellant's release, which appellant would be entitled to challenge by means of RCr 4.43.


Opinion by Judge Keller; Judges Stumbo and VanMeter concurred. The Court affirmed an order of the circuit court denying, without a hearing, appellant's combined RCr 11.42 and CR 60.02 motions. The Court held that the trial court did not err in denying the motions without a hearing. In reaching that holding, the Court first held that while there was evidence in the record sufficient to support an extreme emotional disturbance defense, there was no likelihood the defense would have been successful at trial given the overwhelming evidence of appellant's guilt. Further, there was little reason to believe a jury would have sympathized with appellant, given that he shot his wife in his daughter's presence, he calmly reported the crime, he calmly gave his statement to police, and he gave differing versions of events to the police and the expert witnesses. The Court also held that, given the sentences appellant faced, counsel's advice to accept a plea agreement was reasonable.


Opinion by Judge Lambert; Chief Judge Taylor concurred; Judge Thompson dissented. The Court reversed and remanded a judgment of the circuit court convicting appellant of first-degree robbery and second-degree fleeing and evading police and sentencing him to eleven-and-a-half years' imprisonment. The Court first held that appellee was precluded from arguing that appellant lacked standing when it failed to raise the issue before the trial court. The Court then held that because the victim was shown photographs of the suspected assailants and was told she was going to be asked to identify an individual who met the description provided, the trial court correctly found that the pre-identification procedures were unduly suggestive. However, the trial court abused its discretion in denying appellant's motion to suppress the victim's identification of appellant's co-defendant and in finding that the victim's identification was reliable when the Commonwealth failed to offer any testimony or evidence from the victim or anyone else addressing the factors the trial court relied upon in making that finding.

Opinion by Judge Lambert; Chief Judge Taylor and Judge Thompson concurred. The Court affirmed in part and vacated in part an order of the circuit court denying appellant’s motion to dismiss the charges against him for failure to comply with sex offender registration and persistent felony offender in the first degree. The Court first held that appellant had no liberty interest in parole and therefore, he was not deprived of due process of law when his parole recommendation was rescinded prior to his release and he was required to attend a sex offender treatment program. The Court next held that the circuit court did not err in concluding that appellant had not served his time on the sex offenses prior to the 1998 and 2000 amendments to the Sexual Offender Registration Act. Pursuant to KRS 532.12(1)(b), appellant was still serving his sentence for rape and sodomy when the amendments went into effect. Further, since appellant was still incarcerated when the amendments went into effect, a sex offender risk assessment was not mandated and there were no due process or ex post facto violations in the denial of his parole and requirement to register as a sex offender. The Court also held that because appellant was an indigent defendant, the trial court erred in ordering appellant to pay court costs and a fine.


Opinion by Judge Lambert; Judges Combs and Keller concurred. On remand from the Supreme Court of Kentucky pursuant to Hollon v. Commonwealth, 334 S.W.3d 431 (Ky. 2010), the Court vacated appellant’s convictions and remanded the matter to the trial court. The Court first held that appellant did not abandon or waive his ineffective assistance of appellate counsel claim when his brief clearly presented the issue of ex parte contact between the judge and the jury. The Court also held that the trial court erred when it summarily denied appellant relief. Although appellant’s co-defendant’s conviction was reversed on other grounds, this did not render appellant’s arguments moot. The Court then held that appellant received ineffective assistance of appellate counsel when his counsel on direct appeal failed to present to the Kentucky Supreme Court the issue of the ex parte contact. The ex parte contact was reversible error when the judge’s response to a jury question was erroneous and misleading at best and, at the very least, the judge was required to present the jury’s request to counsel in appellant’s presence.


Opinion by Judge Dixon; Judge Caperton and Senior Judge Lambert concurred. The Court affirmed a circuit court order denying appellant’s motion to suppress evidence underlying her conditional plea of guilty to trafficking in marijuana greater than five pounds. The Court first held that
under the totality of the circumstances, given the police officer’s training and experience, the officer had a reasonable and articulable suspicion to detain a package during a scheduled parcel interdiction operation and that the detention to present the package to a drug dog was not unduly lengthy. Because the first package was properly detained and seized, the Court rejected the argument that the second package, which appellant attempted to retrieve, was tainted evidence. The Court then held that the affidavit supporting the warrant to search a package was sufficient to establish probable cause. Even after removing inaccuracies created by the officer’s use of “cut and paste” from the first affidavit to create the affidavit to search the package, the remaining information contained in the affidavit was more than sufficient to establish probable cause justifying the issuance of the warrant.


Opinion by Judge Clayton; Judges Dixon and Lambert concurred. The court affirmed a judgment of the circuit court entered on appellant’s conditional guilty plea to seven counts of incest, wherein he reserved the right to appeal whether the incest statute, as enacted in 2006, was applicable to the sexual contact between appellant and his adult step-daughter. The Court held that since the plain meaning of KRS 530.020, at the time appellant committed the acts for which he was indicted, did not include the victim’s age as an element of the crime of incest, the primary element for incest was the relationship of the parties.


Opinion by Judge Wine; Judge Nickell concurred; Judge Caperton dissented. The Court affirmed in part, reversed in part and remanded orders of the circuit court denying appellant’s motions to set aside his plea, conviction and sentence on charges of wanton abuse or neglect of an adult, wanton exploitation of an adult over $300; theft by unlawful taking over $300; and persistent felony offender, second degree. The Court first held that the guilty plea proceedings fully complied with the requirements of Boykin v. Alabama, 395 U.S. 238 (1969), thus raising a strong presumption that counsel’s assistance was constitutionally sufficient. The Court then held that the circuit court erred in finding that no evidentiary hearing was necessary when appellant pleaded guilty on the advice of counsel without an opportunity to review the evidence against him. Further, given the questionable factual and legal support for the charges, there was a question of the reasonableness of counsel’s advice to plead guilty and a reasonable implication that appellant would not have pleaded guilty but for counsel’s deficient advice. Therefore, appellant was entitled to a hearing on the issues. The Court finally held that appellant’s second motion filed pursuant to RCr 11.42 was barred as successive.

Opinion by Judge Clayton; Judges Keller and Moore concurred. The Court affirmed orders of the circuit court denying appellant’s separate motions for a new trial brought pursuant to RCr 10.02 after a jury convicted him of murder and attempted murder. The Court held that the trial court did not abuse its discretion in denying the motion for a new trial based on newly discovered evidence because appellant did not follow proper procedure when he failed to file affidavits stating the reason an enhanced version of a 911 tape was new evidence that, even with due diligence, could not have been obtained during trial. Notwithstanding the failure, the Court also held that the enhanced version of the 911 tape was not new evidence warranting a new trial since the 911 tape was presented at trial and the enhanced version would not have, with reasonable certainty, changed the result if a new trial were granted. The Court then held that the trial court did not err in denying the second motion for a new trial based on newly discovered evidence because appellant failed to follow procedural prerequisites and made the motion outside the time constraints of RCr 10.06.


Opinion by Judge Wine; Judge Clayton concurred; Judge Combs concurred in part and dissented in part by separate opinion. The Court affirmed a judgment of the circuit court accepting appellant’s Alford plea and denying appellant’s motion to withdraw the guilty plea. The Court held that the trial court did not err in determining that appellant possessed the requisite competence to be prosecuted or to enter a plea. The record indicated that appellant was aware of the nature of the charges against him and that he was capable of providing assistance to counsel. A psychiatrist detailed appellant’s high intelligence scores, appellant submitted his own writings to the court showing a sophistication of legal research and writing, the psychiatric evaluations emphasized that appellant was a malingerer with tendencies to be uncooperative by choice, and the court relied upon the professional evaluations rather than solely upon testimony from appellant or his attorney. The Court then held that the trial court did not err when it denied the motion to withdraw the guilty plea. The totality of the circumstances showed that the court and appellant had interacted over a four-year period, the court was familiar with appellant, the court relied heavily upon the classification of appellant as a malingerer, the court did not believe that appellant really needed the medication he claimed to be essential and the trial judge was in the best position to judge appellant’s credibility.

Opinion by Judge Lambert; Chief Judge Taylor and Judge Thompson concurred. The Court affirmed an order of the circuit court denying appellant's motion filed pursuant to RCr 11.42. The Court first held that the trial court's finding that additional character evidence would not have likely changed the jury's verdict was not clearly erroneous. The Court next held that the trial court properly denied, without an evidentiary hearing, appellant's claim that trial counsel was ineffective for failing to submit an EED defense to the jury. Based on an incomplete record, the Court assumed that the record supported the trial court's conclusion that an EED instruction was submitted. The Court next held that because appellant failed to present proof at the evidentiary hearing to support his claims that trial counsel was ineffective for failing to seek an intoxication instruction and for failing to prepare and present medical and scientific evidence regarding the victim's time of death, appellant waived the arguments on appeal. The Court next held that appellant's argument that he received ineffective assistance of counsel when trial counsel failed to object to the trial court's decision to withhold a ruling on appellant's motion for a directed verdict at trial was meritless. The Court finally held that the trial court did not err in denying appellant's claim of prosecutorial misconduct during jury deliberations without an evidentiary hearing. Absent some corroborating evidence that misconduct occurred, such an allegation could be refuted on the face of the record and did not warrant an evidentiary hearing.


Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed an order of the circuit court denying appellant's motion for RCr 11.42 relief. The Court held that the trial court properly denied relief without an evidentiary hearing and in finding that appellant's claims were refuted by the record. In reaching that conclusion, the Court first held that counsel was not ineffective for failing to seek suppression of a statement appellant made during a custodial interrogation when the record established that appellant waived his right to remain silent. The Court next held that trial counsel was not ineffective for failing to notify appellant of a plea offer from the Commonwealth when the record established that no offer was made by the Commonwealth through the first day of trial and the only evidence offered merely established appellant's offer of a plea that would be acceptable to him, which was rejected by the Commonwealth. The Court next held that trial counsel was not ineffective for failing to object or request corrective action regarding introduction of testimony about a drug purchase and drugs found in appellant's residence when the record showed that appellant continually raised the drug issue on his own. The Court next held that counsel was not ineffective for failing to object to statements made during closing argument when on direct appeal the Supreme Court found no error in the closing argument. The Court finally held that trial counsel was
not ineffective in failing to investigate or subpoena telephone records to
impeach the victim’s testimony when appellant failed to establish that
counsel’s actions were deficient or that he was prejudiced as a result.

BD. **Simms v. Commonwealth**, 354 S.W.3d 141 (Ky. App. September 16,
2011). 2010CA000344

Opinion by Judge Combs; Judges Caperton and Thompson concurred.
The Court affirmed an order of the circuit court denying appellant’s motion
to withdraw his waiver of jury sentencing, which included a waiver of his
right to appeal. The Court held that while the waiver form signed by
appellant could have, and perhaps should have, stated that the right to
appeal was guaranteed by the Kentucky Constitution, and while it would
have been better practice for the trial court to conduct a colloquy in order
to insure the voluntariness of appellant’s plea, appellant was adequately
informed when he agreed to the sentencing plea and therefore, the court
did not err in denying the motion to withdraw the waiver. The Court also
held that any error committed by the trial court in stating that appellant
would not be able to appeal anything at all was harmless as appellant still
possessed the right to appeal the limited issues that could not be waived.

BE. **Smith v. Commonwealth**, 2011 WL 6260371 (Ky. App. December 16,

Opinion by Judge Moore; Judge Wine concurred; Judge Stumbo
dissented. The Court affirmed a circuit court order sentencing appellant
to five years’ imprisonment for possession of drug paraphernalia, second
after appellant failed to successfully complete a pretrial diversion program
as part of a plea agreement with the Commonwealth. The Court held that
appellant was not entitled to be sentenced under the lesser penalties
imposed by KRS 218A.500(5), as amended during appellant’s pretrial
diversion, making the offense a Class A Misdemeanor subject to a term of
imprisonment between ninety days and twelve months. KRS 532.020(2).
Based upon ordinary contract principles, appellant was precluded from
consenting to the imposition of a lesser penalty pursuant to KRS 446.110
after she entered into a valid plea agreement and received the benefit of
her bargain by being afforded the opportunity to avoid the felony charge
in its entirety had she complied with the conditions of her diversion.

BF. **Sprague v. Commonwealth**, 2011 WL 6275988 (Ky. App. December 16,

Opinion by Judge Stumbo; Judges Moore and Wine concurred. The
Court affirmed a judgment of the circuit court entered subsequent to a jury
verdict finding appellant guilty of five counts of first degree sexual abuse.
The Court first held that the phrase “with whom he or she comes into
contact as a result of that position” in KRS 510.110 merely required proof
that appellant came into contact with the victim as a result of his position
of authority, but that the contact could, though did not have to be the
initial contact or the sexual contact. The Court also held that the trial
court did not err in refusing to address the jury’s request for a clarification as to the meaning of this phrase in the statute. The statutory language was not ambiguous and the instructions mirrored the statutory language. The Court next held that the trial court did not erroneously give the jury five sexual abuse instructions, four of which were identical, without proper identifying characteristics. In viewing the record in its totality, the Commonwealth overcame the presumption of prejudice when appellant acknowledged the sexual contact on each of five occasions, it was uncontroverted that he held positions of authority at the victim’s high school, and that he had contact with her at school, at his home and other places, and that the victim was under the age of eighteen when the sexual contact occurred. The Court finally held that the trial court did not err in concluding that lack of consent was not an express element of KRS 51.110. The lack of consent provision of KRS 510.020(1) was subsumed by KRS 510.110 and it was implicit in KRS 510.110 that a minor under the age of eighteen was incapable of consenting to sexual contact with a person in a position of authority, even though that element was not expressly set out in KRS 510.110.


Opinion by Judge Moore; Judge Lambert and Senior Judge Isaac concurred. In an opinion and order the Court dismissed appellant’s appeal from an order finding appellant to be a high-risk sex offender, requiring him to register under the Kentucky Sex Offender Registration Act (SORA), KRS 17.510. The Court held that because the 1998 version of SORA was the version in effect when appellant was released from prison and initially registered, appellant had no judicially recognizable interest in the constitutionality of the 2006 version of the Act and thus, the Court was prohibited from issuing an advisory opinion on the question of whether the statutory scheme was void as violating Section 51 of the Kentucky Constitution.


Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed a judgment sentencing appellant to one year of imprisonment after he entered a conditional guilty plea to two counts of receiving stolen property over $300.00. The Court first held that because the Commonwealth did not file a cross-appeal the issue of whether the trial court erroneously granted an initial motion to suppress evidence found in a warrantless search of appellant’s property was not properly before the Court. The Court then held that the trial court did not err in denying a motion to suppress evidence found in a subsequent search of the property after appellant’s wife gave an oral and written consent to search. The consent to search was voluntary and was obtained after significant time had passed after the illegal search and seizure. Thus, the evidence found was not fruit of the poisonous tree.

Opinion by Judge Stumbo; Judges Caperton and Moore concurred. The Court affirmed an order of the circuit court denying appellant’s petition to declare him a victim of domestic violence under KRS 439.3402 and motion to reopen RCr 11.42 proceedings. The Court held that the circuit court did not err in finding that the KRS 439.3402 motion for relief should have been brought, if at all, either at sentencing, on direct appeal, or by way of appellant’s previous motions for RCr 11.42 and CR 60.02 relief. Further, any argument relating to the application of KRS 439.3402 was moot because appellant had repeatedly violated the terms of his probation, resulting in revocation of his probation.


Opinion by Judge Moore; Judges Caperton and Stumbo concurred. The Court reversed and remanded a circuit court order dismissing appellant’s petition for declaration of rights arising out of a prison disciplinary proceeding. The Court held that the circuit court erred in dismissing the petition because there was no evidence supporting the decision of the disciplinary review board as required by Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445 (1985). No evidentiary basis was provided to the trial court to support the prison officer’s report and the adjustment committee’s determination that a confidential informant was credible and that appellant assaulted another inmate. The information from the confidential informant(s) should have been filed under seal as part of the trial court record in order to provide a meaningful review because without the information, there was no evidence in the record supporting the credibility of the disciplinary charge against appellant. The Court was not permitted to rely on the unsupported conclusions written by the prison officer or the adjustment committee’s review of the confidential informant(s) unknown to the courts.


Opinion by Judge Dixon; Judges Keller and Nickell concurred. The Court reversed and remanded a judgment of the circuit court finding appellant guilty of direct criminal contempt. The Court held that the circuit court erred by failing to hold a sentencing hearing before it rendered the final judgment of contempt after it postponed imposing a sentence for the contempt charges until after appellant’s trial concluded.


Opinion by Judge Wine; Judges Acree and Combs concurred. The Court reversed, and remanded for a new trial, an order of the circuit court
denying appellant's RCr 11.42 motion finding that trial counsel provided effective representation and that appellant entered a knowing, voluntary and intelligent guilty plea. The Court held that appellant was denied counsel at a critical stage of the proceeding when his trial attorneys either refused or failed to make a motion to withdraw his plea after he requested they do so. In light of the importance of counsel's assistance in properly framing the issues and presenting those issues to the court, as well as developing any factual support and being knowledgeable about the requirement of a written motion and the elements considered by a trial court on a motion to withdraw a guilty plea, the Court held that the motion to withdraw appellant's guilty plea was a critical stage of the proceeding.


Opinion by Senior Judge Lambert; Judge Caperton concurred; Judge Dixon dissented. The Court reversed and remanded a judgment of the circuit court entered pursuant to a jury verdict finding appellant guilty of trafficking in methamphetamine and finding that appellant was a persistent felony offender in the first degree. The Court held that the trial court erred in denying appellant's motion to suppress evidence found in his vehicle. The Court held that because appellant was securely in police custody in the back seat of a cruiser with no opportunity to disturb the interior of the truck, pursuant to Arizona v. Gant, 556 U.S. 332 (2009), the warrantless search of his vehicle violated his Fourth Amendment rights.


Opinion by Judge Lambert; Judges Keller and Thompson concurred. On remand from the U.S. Supreme Court, the Court affirmed a judgment and sentence of probation wherein appellant entered a guilty plea, reserving his right to appeal the denial of a motion to suppress contraband discovered in his vehicle after a traffic stop and his arrest for driving on a suspended license. The Court held that in light of Davis v. United States, 131 S.Ct. 2419 (2011), because the officers conducted the search of appellant's vehicle in reasonable reliance on binding appellate precedent, the exclusionary rule did not apply and the evidence obtained in the search should not have been suppressed. Therefore, the trial court did not err as a matter of law in denying the motion to suppress the evidence obtained as a result of the warrantless search of appellant's vehicle.


Opinion by Judge Lambert; Judges Caperton and Keller concurred. On discretionary review, the Court affirmed an order of the circuit court upholding a district court order denying a motion to suppress evidence obtained as a result of appellant's arrest for carrying a concealed deadly weapon. The Court held that the circuit court did not err in upholding the
district court’s denial of the motion to suppress the evidence when the firearm was concealed, appellant’s arrest was proper and the fruits of the search incident to appellant’s arrest were not tainted. A toolbox was sitting on top of the firearm and the only reason the officer observed it was because the toolbox was not balanced and was angled up on one side. Appellant possessed the firearm that would have been visible only from a specific, solitary angle, and even then, only to individuals standing immediately adjacent to the passenger side window and peering carefully into the vehicle to identify the weapon.


Opinion by Judge Lambert; Judges Dixon and VanMeter concurred. The Court affirmed a judgment of conviction and sentence entered subsequent to appellant’s conditional guilty plea, reserving the right to appeal from an order denying a motion to suppress evidence. The Court held that the trial court did not err in denying the motion to suppress the drug evidence found in a warrantless search of appellant’s car after he was stopped for a traffic violation. The thirty-three minutes that elapsed between the stop and arrest, with eight to ten of the minutes elapsing before the dog sniff began and another ten to fifteen elapsing before the dog alerted three times, was not an unreasonable delay and did not warrant suppression of the drugs discovered and seized.


Opinion by Judge Clayton; Judges Stumbo and Thompson concurred. The Court vacated and remanded a judgment entered upon appellant’s conditional guilty plea to one count of first-degree possession of a controlled substance, first offense. The Court held that the trial court erred in denying appellant’s motion to suppress evidence discovered during a routine traffic stop. Appellant’s Fourth Amendment rights were violated when the police officer asked appellant to step from his car after ascertaining that there were no warrants or other problems relating to appellant or his passengers. The subsequent detention based on the officer’s curiosity about a passengers’ unusual attire, the fact that the passenger did most of the talking and lied about where they were coming from, did not give rise to a reasonable and articulable suspicion of criminal activity to justify asking appellant to step out of the vehicle.


Opinion by Judge Wine; Chief Judge Taylor and Judge Caperton concurred. The Court affirmed an order of the circuit court denying appellant’s motion filed pursuant to CR 60.02 to correct his sentence. The Court held that the trial court did not err in finding that appellant committed the offense of third-degree rape while “awaiting trial” on drug
charges, for which he was given five years of diversion under a pretrial agreement, and ordering appellant’s sentences to run concurrently. A subsequent offense committed during a period of pre-trial diversion may be considered committed while “awaiting trial” for the purpose of consecutive sentencing under KRS 532.060(3).


Opinion by Judge Moore; Judges Nickell and Thompson concurred. The Court affirmed a judgment of the circuit court convicting appellant of first degree trafficking in a controlled substance; possession of drug paraphernalia; third degree trafficking in a controlled substance; possession of marijuana; alcohol intoxication in a public place; and of being a second-degree persistent felony offender. The Court first held that the circuit court did not err in denying appellant’s motion for a directed verdict when the evidence was sufficient for a reasonable juror to find beyond a reasonable doubt that appellant was guilty of the two trafficking counts. The Court next held that the circuit court did not abuse its discretion in admitting expert testimony by a police detective about the “Florida Pain Train” whereby a “sponsor” paid Kentuckians to travel to Florida to get prescriptions. The testimony was specialized in character and outside the common knowledge and experience of most jurors. The Court next held that the circuit court did not abuse its discretion in refusing to instruct the jury on the defense of voluntary intoxication given appellant’s actions and the lack of any evidence that he did not know what he was doing at the time of the incident. The Court finally held that the circuit court did not abuse its discretion in refusing to allow the defense to introduce appellant’s records from the detention center regarding information appellant provided about his medical history because the prescription he told the officer at the jail about was not the same as the prescriptions he was accused of trafficking.

IX. EMPLOYMENT


Opinion by Judge Wine; Chief Judge Taylor concurred; Judge Caperton dissented by separate opinion. The Court affirmed an order of the circuit court granting summary judgment against appellant on his claims of wrongful discharge and due process violations following his termination as a police officer. The Court held that because appellant’s termination resulted from an internal police investigation without a citizen complaint, the provisions of KRS 15.520 did not apply.

Opinion by Judge Acree; Judges Caperton and Clayton concurred. The Court affirmed the administrative termination of appellant’s employment after finding that he engaged in sexual contact with two students, constituting conduct unbecoming a teacher. The Court first held that the conclusions of the tribunal were supported by competent substantial evidence, which included the testimony of the two students who alleged appellant had inappropriate contact with them, the testimony of school administrators, and a third student’s testimony supporting the conclusion that one of the other students had not recently fabricated her story. The Court next held that evidence of appellant's criminal acquittal was both irrelevant and potentially confusing to the tribunal and therefore, the hearing officer’s exclusion of the evidence was proper. First, there were different standards of proof at the criminal trial than at the administrative hearing and second, the factual inquiries before the jury in the criminal trial differed from those presented to the tribunal. The Court next held that the hearing officer did not erroneously deny appellant’s motion to enter his personnel file into the record, when the excluded documents were not relevant to the issue of sexual misconduct. The Court next held that the hearing officer did not improperly prevent appellant from asking one of the students whether DNA evidence was found on any of her clothing when it was not likely that the student was qualified to testify about scientific evidence. The Court next held that the hearing officer did not improperly limit the time to present evidence when appellant was permitted to conduct extensive cross-examination of the school board’s witnesses and to call six witnesses of his own, allowing him to present his case and point out the flaws in the board’s evidence. The Court next held that appellant failed to cite any authority in support of his argument that the hearing officer improperly denied his motion for a mistrial and therefore, the argument was waived. Even so, introduction of incompetent evidence did not warrant reversal of factual determinations based on competent substantial evidence. The Court next held that the hearing officer did not err in refusing to permit a witness for appellant to testify by telephone. Appellee did not agree to the telephonic testimony and therefore, allowing it would have violated **KRS 13B.080(7)**. The Court finally held that, while appellant may have preferred to take certain testimony on avowal, the hearing officer did permit appellant to offer proof of the evidence, which was all he was entitled to under **KRE 103(a)(2)**.


Opinion by Judge Acree; Judges Moore and Nickell concurred. The Court affirmed a summary judgment in favor of the appellee employer on the appellant employee’s claims alleging that his termination violated the employer’s substance use/abuse policy and its voluntary assistance program. The Court first held that the circuit court properly concluded that **49 C.F.R. §382.121** did not create a private right of action under either state or federal law and therefore, any claims of wrongful discharge,
breach of contract and promissory estoppel based on the regulation must fail. The Court next held that the circuit court did not err in granting summary judgment on appellant’s claims. Appellant was discharged for failure to comply with the substance use/abuse policy and voluntary assistance program, including the expectations of a treatment facility; the documents appellant claimed constituted an employment contract expressly disclaimed such a relationship and therefore, appellant should have expected that his employment was at-will and terminable at any time for any reason; and appellant did not detrimentally rely on promises from the employer to give rise to a promissory estoppel claim and even if the voluntary assistance program could give rise to such a claim, appellant’s self-reporting was not the cause for his termination but rather, it was a positive drug test after the time he began his participation in the program. Because appellant had no employment security to begin with, his position relative to the employer did not change by his self-reporting his drug use.


Opinion by Judge Wine; Judge VanMeter and Senior Judge Shake concurred. The Court affirmed an opinion and order of the circuit court overruling a decision of the Kentucky Retirement Systems Medical Review Board and directing disability retirement benefits be awarded to appellee. The Court held that the Board misconstrued applicable statutes and erred in its interpretation of the law when it concluded that appellee failed to present objective medical evidence to establish her disability. The opinions and conclusions of the treating physicians must be considered objective medical evidence for purposes of KRS 61.600 and the Board was not free to discount them merely because they were based in part upon the subjective complaints of a patient. Given the overwhelming evidence that appellee was disabled from her previous occupation, which was supported by the unanimous opinions of four treating physicians and one psychologist, the circuit court correctly overruled the decision of the Board.


Opinion by Judge Acree; Judges Dixon and Keller concurred. The Court reversed in part, vacated in part and remanded an order of the circuit court finding that substitute teaching did not qualify as covered employment for purposes of unemployment benefits pursuant to KRS 341.055(4)(e) and KRS 341.050(1)(a). The Court held that the trial court erred in finding that substitute teachers were “noncovered employment” categorically and as a matter of law pursuant to KRS 341.055(4)(e). The Court held that without an evidentiary hearing wherein the parties were permitted to present evidence of the nature of the employment relationship, it was impossible to determine whether the claimant was an
employee as contemplated by KRS 341.050(1)(a) or an independent contractor.

F. Mendez v. University of Kentucky Board of Trustees, 357 S.W.3d 534 (Ky. App. August 12, 2011). 2010CA001244

Opinion by Judge Clayton; Chief Judge Taylor and Judge Caperton concurred. The Court affirmed a judgment of the circuit court entered pursuant to a jury verdict in favor of appellees on appellant's religious discrimination claim and summary judgment entered in favor of appellees on appellant's wrongful discharge claims. The Court first held that the trial court did not err in instructing the jury on the religious discrimination claim. The jury instructions provided sufficient guidance for the jury to decide the threshold issue of whether religious discrimination was involved in the decision to terminate appellant. The Court rejected appellant's reliance on federal cases decided under the Federal Civil Rights Act rather than the Kentucky Civil Rights Act. The Court also held that the trial court did not err when it granted appellees' motion for summary judgment on the wrongful discharge claims. Whether the public policy asserted by appellant met the exceptions to the terminable-at-will doctrine was a question of law for the court, not a question of fact for the jury. Further, appellant failed to provide any support that a conversation he claimed led to his termination was constitutionally protected or that it caused the adverse employment action.


Opinion by Judge Wine; Judges Combs and Stumbo concurred. The Court affirmed in part and reversed in part a summary judgment dismissing appellant's claims against appellees for retaliation and wrongful termination, violation of appellant's First Amendment rights to free speech, breach of contract, promissory estoppel and violation of applicable statutes after the school's foreign language offering was changed from French to Spanish, eliminating appellant's position as the French teacher. The Court first held that while appellant's claim for retaliation could not stand under the public policy exception to the at-will doctrine on state constitutional grounds, it could stand on statutory grounds under KRS 61.102. Because appellant sufficiently demonstrated the first three of the elements to establish a violation of KRS 61.102 (Kentucky's Whistleblower Act) and raised a genuine issue of material fact with respect to the fourth, the board of education was not entitled to judgment as a matter of law with respect to the state law claims for retaliation. However, the individually named board members and the site-based decision-making council (SBDMC) were entitled to summary judgment because KRS 61.101(2) did not impose individual civil liability. The Court next held that it could not reach the merits of appellant's federal claims of retaliation under the First Amendment, based on her speech in response to a letter of reprimand issued by the principal, because she failed to cite to 42 U.S.C. §1983 in any of her pleadings.
The Court next held that appellant failed to raise a genuine issue of material fact sufficient to withstand summary judgment on her claims for breach of contract and promissory estoppel, based on a letter from the superintendent of schools indicating a promise of future employment. The Court next held that the trial court misapplied the law in determining that the SBDMC members and the board members did not owe appellant any duty. While KRS 160.345 gave the SBDMC discretion to establish committees, once it exercised its discretion, it was required to adhere to the procedures and rules it voluntarily established and the rules and procedures for changing the curriculum were binding on the board and the parties dealing with it. The Court then held that the trial court correctly determined that the board of education was entitled to summary judgment on appellant’s claims that KRS 160.345 and KRS 160.290 were violated in making the curriculum change because the board was immune from a suit for money damages. However, the individually named members of the SBDMC, the individual board members, the principal and the superintendent were only entitled to immunity if their actions were discretionary and taken in good faith. Because the enforcement of rules was ministerial, the trial court erred in finding that the individuals were immune from suit. The Court finally held that appellant raised a genuine issue of material fact as to whether KRS 160.345 and KRS 160.290 were violated in making the curriculum change. Therefore, the trial court erred in granting summary judgment to the individuals with respect to the claim of statutory violation.


Opinion by Senior Judge Lambert; Judge Wine concurred; Judge Caperton dissented by separate opinion. The Court affirmed an opinion and order of the circuit court affirming an administrative decision allowing the appellee university to terminate appellant’s employment as a university police officer. The Court first held that the university was not judicially estopped from arguing the inapplicability of KRS 15.520 when it initially conceded the point at a post-termination hearing. The university reversed its course before the administrative proceeding was over and appellant suffered no prejudice in the trial court when he was unrestricted in arguing the applicability of the statute, which was considered de novo without deference to the hearing officer’s determination. The Court then held that KRS 15.520 applied only to disciplinary actions initiated by a citizen’s complaint and not to disciplinary actions initiated by internal departmental concerns. The Court also held that procedural irregularities did not warrant reversal. Appellant could not complain that he was prejudiced by failure to follow KRS 15.520, which was inapplicable; appellant did not suffer any prejudice with respect to an initial “review board,” which simply reviewed the circumstances regarding a fire alarm incident, as an internal investigation into possible discipline was not initiated until after the review board’s findings had been made; and appellant was not deprived of any procedural due process. Appellant’s non-participation in a pre-termination hearing because his counsel was not allowed to attend, resulted in a waiver of any claim of a due process
violation emanating from the proceeding. Further, appellant suffered no prejudice to his right to defend against the charges when a comprehensive de novo post-termination hearing was held at which he was represented by counsel; he was afforded an opportunity to present evidence and witnesses and cross-examine the university witnesses; he was given, before the hearing, copies of all exhibits and names of all persons the university would call as witnesses; and when the hearing officer's decision specifically provided that it was based exclusively upon the evidence admitted at the post-termination hearing. The Court then held that the hearing officer's findings that appellant violated department policy in failing to respond to a report of a fire alarm, in failing to timely prepare an incident report and in pursuing a driver going the wrong way on a one-way street, and finding that appellant was incompetent, were supported by substantial evidence in the record. The Court finally held that the hearing officer's decision to terminate appellant's employment, as opposed to some lesser punishment, was not arbitrary and capricious.


Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed a judgment entered following the return of a jury verdict in favor of the appellee employer on appellant's claims for discrimination and retaliation. The Court first held that, as a matter of law, the circuit court properly granted summary judgment on appellant's disparate treatment claim. A supervisor's use of the words "cultural differences" in a meeting, which was a phrase open to interpretation, could not meet the definition of direct evidence to establish appellant's disparate treatment claim. The Court also held that appellant failed to establish a case of disparate treatment because she failed to prove all four elements set out in Murray v. Eastern Kentucky University, 328 S.W.3d 679 (Ky. App. 2009). The fact that appellant was the only Hispanic manager did not relieve her from establishing that similarly situated non-protected employees were treated more favorably. The Court also held that appellant's failure to offer testimony of another employee until well past the summary judgment stage and failure to seek reconsideration of the order granting summary judgment, precluded her from arguing that the testimony entitled her to prevail on the issue. The Court next held that appellant failed to adequately preserve the issue of whether the circuit court failed to properly instruct the jury on the retaliation claim. Appellant could not advocate a different proposed jury instruction on appeal other than the one she proffered at the trial court level.


Opinion by Judge Thompson; Judge Stumbo and Senior Judge Shake concurred. The Court reversed an opinion and order of the circuit court affirming a decision of the Kentucky Unemployment Insurance
Commission (KUIC) denying appellant's claim for unemployment benefits. The Court held that the circuit court erred in affirming the decision because it was based on an improper application of the law. Appellant's refusal to abruptly relocate her employment for an indeterminate time and with no information regarding compensation for expenses was not a refusal to obey reasonable instructions so that she could be considered as having been discharged for misconduct as set out in KRS Chapter 341. Therefore, appellant was not precluded from receiving unemployment benefits.


Opinion by Judge Acree; Chief Judge Taylor and Judge Combs concurred. The Court reversed in part, vacated and remanded an opinion of the circuit court affirming an order of the Kentucky Unemployment Insurance Commission determining that the eight appellants were successors-in-interest to the tax account and tax rate of the predecessor corporation pursuant to KRS 341.540. The Court held that because the Commission improperly treated all eight LLCs as if they constituted a single business, instead of assessing the relationship between the predecessor corporation and each of the purported successors individually, the findings of the Commission were incomplete. Upon remand, the circuit court was instructed to remand the matter to the Commission for entry of an order consistent with 787 KAR 1:300, Section 2.

X. FAMILY LAW


Opinion by Judge Acree; Judges Caperton and VanMeter concurred. The Court affirmed an order of the family court terminating appellant's parental rights. The Court first held that the briefing procedures of Anders v. California, 386 U.S. 738 (1967), extended to appeals from orders terminating parental rights. KRS 625.080(3) revealed the intent of the legislature to afford indigent parents the benefits of counsel during the entire course of the termination proceedings, including appeal. However, the right to counsel did not include the right to bring a frivolous appeal. Thus, Anders applied to appeals from orders terminating parental rights to which an indigent parent had court-appointed counsel who concluded the appeal lacked any meritorious issues which might support the appeal, and was, therefore, frivolous. The Court included a procedural blueprint to assist the bar in cases in which an Anders brief was warranted. The Court then independently reviewed the record and held that the appeal was, in fact, void of non-frivolous grounds for reversal.

Opinion by Judge Keller; Judges Combs and VanMeter concurred. The Court dismissed the appeal from an order terminating appellant’s parental rights. The Court held that the failure to join a necessary and indispensable party to the appeal, by failing to serve the guardian ad litem for the child with the notice of appeal, required the Court to dismiss the appeal.


Opinion by Judge VanMeter; Judge Dixon concurred; Judge Stumbo dissented by separate opinion. The Court affirmed an order of the circuit court in a dissolution action, which ordered appellant to pay child support, ordered appellee to pay maintenance to appellant and divided marital property. The Court first held that the trial court did not err by exempting appellee’s Kentucky Teacher’s Retirement Account from classification as marital property. Because appellant did not have a retirement account, the divisionary rule under KRS 403.190(4) was not triggered and under KRS 161.700, the retirement account was non-marital property and could not be treated as an economic circumstance for purposes of dividing marital property. The Court next held that the trial court’s award of maintenance was not an abuse of discretion when it considered the factors set forth in KRS 403.200 to determine the amount and duration was sufficient for appellant to obtain a GED and job training. The Court finally held that the trial court did not abuse its discretion in considering the children’s transportation needs in awarding a vehicle to appellee for the children to drive to school.


Opinion by Judge Thompson; Judge Caperton concurred; Judge Combs concurred in result only. The Court affirmed a judgment of the family court, entered in a dissolution of marriage action, dividing the parties’ marital property and debts and awarding maintenance. The Court first held that the family court abused its discretion when it permitted a social worker to testify that she diagnosed the wife with post-traumatic stress disorder (PTSD). Because the social worker lacked training as a psychologist or psychiatrist, her testimony was inadmissible. However, the Court held that the admission of the testimony was harmless, as there was substantial admissible evidence to support the award of maintenance. The Court next held that the family court did not abuse its discretion in setting the amount of maintenance after properly considering the husband’s ability to pay while meeting his own reasonable needs and considering the factors set forth in KRS 403.200. The Court next held that the family court acted within its discretion when it declined to withhold dissolution of the marriage to permit the filing of a joint tax return and to
delay the husband’s obligation to pay the wife much of her share of the marital property until after the marital residence was sold. Further, there was no abuse of discretion in either the division of property or debt. The Court finally held that because the wife was represented by counsel throughout the appeal, the question of whether attorney fees could be advanced for appeal was moot. However, because the issue was capable of repetition, yet evading review, the Court held that attorney fees for an appeal of a judgment in a dissolution of marriage proceeding was a collateral matter over which the family court retained jurisdiction after the filing of the notice of appeal and that the family court had the authority to order fees prospectively pursuant to KRS 403.220.


Opinion by Judge Lambert; Chief Judge Taylor and Judge Thompson concurred. The Court affirmed an order of the circuit court modifying the parties’ parenting time in favor of the appellee father. The Court first held that the trial court correctly treated appellee’s motion for custody as a motion to modify parenting time, as it was originally styled, when appellee did not seek to alter the joint custody arrangement but simply wanted to modify his parenting time. The Court then held that the circuit court’s findings of fact were not clearly erroneous and it did not apply incorrect law in determining the best interests of the children. The determination that it was in the children’s best interests for appellee to be the primary residential parent was supported by extensive findings of fact and the trial court was in the best position to judge the credibility of the evidence.


Opinion by Judge Clayton; Senior Judge Lambert concurred; Chief Judge Taylor dissented by separate opinion. The Court affirmed a domestic violence order entered by the circuit court based on its finding that appellant had perpetrated acts of domestic violence against his mother. The Court held that appellant’s preventing caregivers from attending to his mother, from giving his mother her medications and food and from providing physical support and assistance to her, as well as his removal of night lights and placement of throw rugs in areas where his elderly mother would need to walk in her fragile condition, met the statutory definition of domestic violence in KRS 403.720, because it put appellee’s mother (or, in this case, her guardian) in fear of imminent physical injury and serious physical injury.


Opinion by Judge Acree; Judges Moore and Nickell concurred. The Court affirmed in part, reversed in part and remanded orders of the family court modifying the division of the husband’s military retired pay between
the spouses. The Court first held that the family court did not abuse its discretion in reopening the property order pursuant to CR 60.02(f) to correct the misinterpretation by the Defense Finance and Accounting Service (DFAS) and to meet its specific requirements. The Court next held that the family court did not abuse its discretion in modifying the order to limit the wife’s share to the portion of the military retired pay attributable to the marriage. The Court finally held that the family court erred by adding language requiring the DFAS to take the husband’s disability pay into consideration in dividing the military retired pay.


Opinion by Judge Nickell; Judge Thompson concurred; Senior Judge Shake dissented by separate opinion. The Court reversed and remanded an order of the family court modifying an award of joint custody to grant sole custody to the appellee. The Court held that the family court lacked subject matter jurisdiction to decide the issue of custody modification because appellant’s pro se motion regarding the medical necessity for the child’s tonsillectomy, which the trial court erroneously transformed into a hearing on custody modification, lacked the statutorily required affidavit or verification. Further, appellee’s attempt to cure and join appellant’s motion or consent to it was ineffectual because the motion was statutorily inadequate to raise the issue. Even if appellee’s verified response could be considered a separate motion and statutorily sufficient to convey subject matter jurisdiction, technically there was no notice provided to appellant that the hearing on his motion was a hearing on custody modification.


Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed in part, and reversed in part and remanded, an order of the circuit court confirming a report and supplemental report of a domestic relations commissioner (DRC). The Court first held that the circuit court erred in determining that the real property and a cabinet shop were non-marital assets and in awarding both to appellee as non-marital property when appellee failed to carry his burden to establish by clear and convincing evidence that the funds used were non-marital assets. The Court also held that the circuit court did not abuse its discretion in denying appellant’s request for reimbursement for medical or dental expenses when appellant failed to offer any documentary proof to support her assertion that the bills were for injuries sustained in an altercation with appellee.

Opinion by Judge Thompson; Judge Stumbo and Senior Judge Shake concurred. The Court affirmed an order of the circuit court involuntarily terminating appellant’s parental rights. The Court held that the family court was presented with substantial evidence to support the termination under KRS 625.090. Based on the record, the family court did not abuse its discretion by finding it was in the best interests of the child to terminate his mother’s parental rights. Further, while the mother had not abused drugs for several months prior to the final hearing in the case, the family court was presented with sufficient facts that the mother had not provided for her child and had shown no ability to provide for the child in the near future.


Opinion by Judge VanMeter; Chief Judge Taylor and Judge Acree concurred. The Court dismissed appellant’s appeal from an order of the circuit court, denying her motion to dismiss appellee’s petition for custody of appellant’s biological minor child. The Court held that the appeal was interlocutory. The order did not determine the issue of custody of the minor child and therefore, was not final since it did not adjudicate all the rights of the parties. Although the order granted appellee temporary joint custody and temporary child support, those matters were likewise interlocutory and non-appealable.


Opinion by Judge Lambert; Judges Dixon and VanMeter concurred. The Court affirmed a judgment of the family court valuing appellant’s oral surgery practice and distributing cash to appellee in a dissolution proceeding. The Court first held that the family court did not abuse its discretion by failing to adopt the business valuation performed closest to the date of the decree when the decision to base the valuation on an earlier report was supported by ample evidence. The Court next held that the family court did not err in failing to award appellant post-judgment interest on the money she overpaid appellee in accordance with an original higher valuation of the practice, which was lowered on remand. Appellant’s claim against the overpayment was an unliquidated debt and given the family court’s well-documented reasoning, the family court did not abuse its discretion in denying the request for interest.


Opinion by Judge Acree; Judges Combs and Lambert concurred. The Court vacated an order of the family court naming appellees de facto
custodians of appellant’s minor child and awarding appellees custody. The Court held that the family court lacked subject matter jurisdiction to enter the order. Because a final custody decree awarded custody to appellant, appellees were seeking modification of the final custody decree. Because no affidavits were submitted, as required by KRS 403.270, and the family court order made it clear that the circumstances were identical to those when appellant was originally awarded custody, subject matter jurisdiction did not and could not exist.


Opinion by Judge Acree; Judges Caperton and Clayton concurred. The Court affirmed orders of the circuit court finding that the appellee grandparents were not a child’s de facto custodians and ordering the grandparents to pay a portion of the father’s attorney fees. The Court first held that the circuit court properly found that the grandparents did not satisfy the requirements of KRS 403.270(1) to establish de facto custodian status. The father’s actions in the divorce proceedings were sufficient to suspend the running of time needed to confer appellees standing as de facto custodians. The Court also held that the circuit court did not abuse its discretion in awarding attorney fees to the father. It was not necessary for the court to conclude that the grandparents employed delay tactics but only to consider the financial resources of the parties, even discounting alleged inconsistencies in the invoice for services. The father’s legal bill was well over the amount awarded, and the grandparents were not entitled to cross-examine the attorney regarding the billing statement.


Opinion by Judge Dixon; Judges Clayton and Lambert concurred. The Court affirmed a domestic violence order entered against appellant by the family court pursuant to a petition filed by appellee. The Court first held that the evidence was sufficient for the court to reasonably infer that appellant’s conduct caused appellee to fear imminent physical injury and therefore, the court’s finding of domestic violence was not clearly erroneous. The Court next held that appellant was not denied procedural due process when the family court denied his motion for a continuance until appellee could be deposed. The timely holding of a domestic violence hearing was essential to the purpose of the statutes, the family court conducted the hearing in a full and fair manner, and appellant failed to show how it prejudiced his defense.


Opinion by Judge Combs; Judges Keller and Stumbo concurred. The Court vacated and remanded an order of the circuit court finding that
appellant did not have standing to pursue a paternity action. Applying the
more recent holding in J.A.S. v. Bushelman, 342 S.W.3d 850 (Ky. 2011),
the Court held that appellee’s admissions that she engaged in sexual
intercourse with appellant one or two times per week for a number of
years, including the one year preceding the birth of her child, and that she
did not use birth control during the encounters, were sufficient to provide
a reasonable basis for appellant’s potential paternity, even though the
marital relationship between appellee and her husband had not ceased
during the ten-month period preceding the birth of the child.

December 22, 2012). 2011CA000896

The Court reversed an order of the circuit court finding appellant’s children to be
neglected. The Court held that the trial court’s finding of neglect was
clearly erroneous when there was insufficient evidence to establish that
appellant neglected the children in her refusal to sign an “Aftercare Plan.”
The Cabinet’s substantiation of allegations of sexual abuse by the
children’s father against the children’s cousin was not binding upon the
court and had no preclusive effect in any subsequent proceeding. While
appellant could not be heard to complain that the alleged victim’s
testimony was necessary to establish that the father posed a risk to his
own children, the Cabinet was required to show that the father posed a
risk of harm to his children and that appellant’s failure to agree to the
Aftercare Plan exposed the children to this risk. The Cabinet was further
required to show that the risk of harm was more than a theoretical
possibility but rather, that there was an actual and reasonable potential
for harm before appellant could be subject to a finding of neglect based
only on her refusal to comply with the Cabinet’s recommendations.


The Court affirmed an order of the family court awarding permanent custody of appellant’s son to the child’s paternal
grandparents. The Court first held that that mere compliance with a
permanency plan did not equate to a legal proceeding under KRS
403.270. Further, substantial evidence supported the family court’s
finding that the paternal grandparents, with whom the child had been
placed in dependency, neglect and abuse proceedings, provided a stable
environment for the child. Therefore, they had standing to seek custody
by virtue of KRS 620.027. The Court next held that appellees’ cooperation
with a permanency plan did not result in a waiver of their right to seek
permanent custody of the child. The Court next held that the family court
did not abuse its discretion in awarding permanent custody to appellees
when it thoroughly analyzed all of the factors under both KRS 403.270(2)
and KRS 620.023 in reaching its decision. The Court finally held that the
family court did not err in refusing to permit the child to testify in chambers
when the guardian *ad litem* was not properly served and appellant did not thereafter seek to have the child testify by deposition.


Opinion by Judge Dixon; Judges Keller and VanMeter concurred. The Court affirmed an order of the circuit court finding educational neglect of appellant’s child. The Court held that the circuit court did not abuse its discretion in finding educational neglect as defined in *KRS 600.020(1)*. The facts and evidence permitted an inference that by incurring thirty absences and sixteen tardies, the child was unable to benefit from the instruction, structure and socialization provided in a classroom setting. Providing an adequate education for the child’s well-being necessarily required appellant to ensure the child attended school each day to participate in educational instruction. Her repeated inability to do so presented a threat of harm to the child’s welfare by denying the child the right to educational instruction.


Opinion by Senior Judge Shake; Judges Dixon and Nickell concurred. The Court affirmed an order of the circuit court denying appellant’s petition for primary residential custody of her daughter. The Court held that the trial court did not err in denying the request and disregarding a mediation agreement between the parties purporting to create a presumption that the child’s wishes regarding her residence would constitute her best interests. The court could not abdicate the responsibility imposed by *KRS 403.320(3)* and the record contained ample evidence to support the court’s findings and conclusions that the father was the most appropriate primary residential custodian.


Opinion by Senior Judge Shake; Judges Lambert and Nickell concurred. The Court affirmed a summary judgment in favor of appellees on their suit to enforce a judgment lien against two parcels of property owned by the appellant attorney after a damage judgment for breach of fiduciary duty was entered against the attorney. The Court held that the trial court properly granted summary judgment to appellees. Because the judgment lien was entered prior to the marriage of the attorney and his wife, the wife’s dower interest in the property was subject to the preexisting encumbrance.

Opinion by Judge Acree; Judge Wine concurred; Senior Judge Lambert concurred by separate opinion. The Court affirmed in part and vacated and remanded in part an order of the family court refusing to require the parties’ minor child to undergo additional reconciliation counseling with appellant and permitting appellee to unilaterally decide to relocate the minor child to Texas, contrary to an order of joint custody and without appellant’s agreement. The Court first held that the order from which the appeal was taken was final and appealable because it related specifically to the child’s care and custody. The Court next held that the family court did not abuse its discretion in refusing to require the child to undergo additional counseling because the evidence supported the conclusion that reconciliation counseling would be unsuccessful. The Court then held that that the family court erred in allowing appellee to unilaterally relocate the child to Texas without resolving the issue according to the child’s best interest. The Court finally held that appellee carried the burden of proving that the relocation was in the child’s best interest.


Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. In four consolidated appeals arising from a juvenile action in which the family court found that appellant had neglected her children and subsequently awarded permanent custody to their respective fathers, the Court reversed and remanded. The Court first held that although an order denying a motion to alter, amend or vacate the custody award was inherently interlocutory, because the family court stated its intention to make more detailed findings of fact, the notices of appeal were simply premature and related forward to the entry of the order containing the more detailed findings of fact. The Court next held that appellant failed to properly preserve the issue of whether the family court erred in its rulings entered following a temporary removal and dispositional hearing by failing to set forth specific factual findings relative to the children’s removal and even if the issue had been properly preserved, the family court made adequate findings on the form orders. The Court next held that the family court had authority to hold a permanent custody hearing and an award of custody was not precluded by the structure of KRS Chapter 620, so long as the proper procedures were followed. The Court finally held that the family court erred in granting custody to the fathers. In order to grant permanent custody via a custody decree in a dependency action arising under KRS Chapter 620, the court was required to comply with the standards set out in KRS 403.270(2). Because the family court failed to sufficiently consider and make findings related to the factors set forth in KRS 403.270(2), the case was remanded for further proceedings.
Opinion by Judge Clayton; Judges Stumbo and Thompson concurred.  The Court affirmed a family court order dismissing appellant's motion to modify a child support order originally entered in Florida.  The Court held that the family court correctly found that it did not have subject-matter jurisdiction.  Because appellant, the moving party, resided in Kentucky, she did not meet the requirements of the Uniform Interstate Family Support Act, KRS 407.5611 (UIFSA), and thus, could not move for modification of a foreign order in Kentucky.  Therefore, it was irrelevant whether the trial court had personal jurisdiction over appellee who was personally served in Kentucky.  The Court also held that there was no contradiction between the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. §1738B (FFCCSOA), and the UIFSA and therefore, it was not necessary to determine whether the FFCCSOA preempted the subject-matter jurisdiction requirements of the UIFSA.  The Court finally held that the family court did not abuse its discretion by allowing appellee to file a responsive motion to dismiss when it met the twenty-four-hour deadline of the pertinent local family court rule.

Opinion by Judge VanMeter; Chief Judge Taylor and Judge Acree concurred.  The Court affirmed an order of the circuit court reissuing a domestic violence order against appellant.  The Court held that the trial court did not err in reissuing the order after it found that domestic violence had occurred and may occur in the future and that appellee was in fear of imminent physical harm from appellant, that appellee had a reasonable basis for her fear, that the DVO had been effective in preventing domestic violence, and that a continued need for the DVO existed.

Opinion by Judge Lambert; Judges Clayton and Combs concurred.  The Court reversed and remanded a family court order dismissing appellant's petitions to determine paternity and custody of a child born to appellee while she was married to someone other than appellant.  The Court held that the family court erred in dismissing the petition.  The fact that the husband and wife both judicially admitted that appellant was the child's father and the paternity testing confirmed that relationship, the husband and wife were estopped from arguing that the trial court did not have jurisdiction to establish paternity and custody because appellant did not allege in his initial petition that the husband and wife were separated when the child was conceived.  The presumption of KRS 406.011 was rebutted.  Therefore, the family court had jurisdiction to establish paternity and determine custody.

Opinion by Judge Nickell; Judge Caperton concurred; Judge Combs concurred by separate opinion. The Court reversed and remanded orders of the circuit court partially revoking appellant's conditional discharge. The Court first held that although the circuit court erred in failing to set a purge amount or action upon finding appellant in contempt for failure to pay child support, the issue was not properly preserved and therefore, the Court could provide no relief despite the trial court's clear error. The Court then held that the circuit court erred when the written order revoking appellant's conditional discharge did not contain specific findings and the comments from the bench did not satisfy the specificity requirements of *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011), to find that appellant did not try to remain current in his child support obligation through his own fault, nor that his non-compliance with the court's prior order was willful.


Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court reversed an order of the family court modifying a Qualified Domestic Relations Order (QDRO). The Court held that the family court abused its discretion in modifying the QDRO and reassigning a portion of appellant's non-marital property to appellee. The family court violated KRS 403.190 in reassigning appellant's non-marital property to appellee when the parties entered into a valid separation agreement assigning specific amounts to each party. Furthermore, the family court did not have jurisdiction to modify the QDRO fifteen months after its entry.

XI. GOVERNMENT


Opinion by Judge Clayton; Chief Judge Taylor and Judge Keller concurred. On remand from the Kentucky Supreme Court, the Court reversed and remanded an order of the circuit court dismissing appellant's claim for damages against the appellee county government on sovereign immunity grounds. The Court held that in light of *Madison County Fiscal Court v. Kentucky Labor Cabinet*, 352 S.W.3d 572 (Ky. 2011), the trial court erred in dismissing the claims. Pursuant to KRS Chapter 337, sovereign immunity was waived in the action.


Opinion by Judge Moore; Judge Dixon and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court dismissing appellant’s claim that the appellee city demoted him in retaliation for
making a disclosure protected by KRS 61.102, Kentucky’s whistleblower statute. The Court held that appellant failed to establish a prima facie case for retaliation when the overtime policy he claimed violated KRS 95.495 was already public and publicly known, the public was presumed to know the law, and any alleged illegality with regard to the policy was readily redressable by means of a declaratory action.

XII. INSURANCE


Opinion by Judge Acree; Judges Dixon and Keller concurred. The Court reversed in part, vacated in part and remanded an order of the circuit court granting the appellee coal company’s motion to dismiss the appellant insurer’s declaratory judgment action seeking a declaration that an insurance contract did not provide coverage on a claim that the coal company’s operations had tortiously caused coal dust to enter real property. The Court first held that the circuit court erred in dismissing the action to the extent it rendered the insurer liable for punitive damages when the insurance contract specifically excluded such coverage. The Court then held that the circuit court erred in dismissing the action after concluding that the tort claims should necessarily be covered by the policy. Applying the holding in Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679 (Ky. App. 1996), the Court held that the circuit court properly determined that the “Absolute Pollution” exclusion in the contract was ambiguous. However, the circuit court was not correct in concluding that the tort claims were covered. The Court remanded for additional proceedings to determine whether the alleged injuries suffered by the property owners were a result of pollution caused by the coal company and for which the exclusions would apply, or whether the dust and debris which allegedly entered the property did not constitute pollution as defined in the policy and for which the insurer would be liable.


Opinion by Judge Lambert; Judges Stumbo and Senior Judge Shake concurred. The Court affirmed in part, reversed in part and remanded a multi-million dollar judgment of the circuit court in a third-party insurance bad faith claim brought pursuant to Kentucky’s Unfair Claims Settlement Practices Act (UCSPA). The claim arose from appellant’s handling of appellees’ medical malpractice claim. The Court first held that the jury instructions on punitive damages were proper in that they required the jury to find that there was no reasonable basis for the insurer’s action or inaction or that the insurer acted with reckless disregard for whether there was a basis for delaying payment of the claim. The Court then held that there was sufficient evidence to warrant the award of punitive damages. The twenty-seven-month delay between the injury and the initial settlement offer, where fault was clear, could not be considered mere
delay and the insurer’s focus on the financial appearance of the company established a questionable motive for the method of investigation and timing of the settlement. This was sufficient evidence to submit the issue of bad faith to the jury. The Court next held that appellant’s failure to present the issue of an excessive punitive damage award to the trial court precluded review on appeal. The Court also held that the trial court did not abuse its discretion in permitting witnesses to characterize the settlement offer as low ball; the trial court did not abuse its discretion in excluding the testimony of the insurer’s expert witnesses, none of whom had no claims handling or adjusting experience; the trial court did not abuse its discretion in allowing the introduction of a surveillance tape of the injured appellee in order to question why the insurer failed to review the surveillance after learning it was not helpful to the defense, while at the same time contending that appellee was exaggerating her symptoms. The Court then held that the trial court erred as a matter of law when it determined that appellees were entitled to an award of attorney fees and statutory interest pursuant to KRS 304.12-235. The plain and unambiguous language of the statute limited its application to named insureds and healthcare providers, not third-party claimants. The Court finally held that the trial court did not abuse its discretion in denying the insurer’s motion to lower the interest rate on the post-judgment interest or in ordering the interest to run from the entry an earlier judgment and order when a second order merely reconsidered and corrected the earlier order.


Opinion by Senior Judge Shake; Judge Stumbo concurred; Chief Judge Taylor dissented by separate opinion. The Court reversed and remanded a summary judgment of the circuit court in favor of the appellee insurance company finding that a permissive driver step-down provision was valid and effectively limited appellee’s liability to $25,000 for bodily injuries sustained by appellant. The Court held that the trial court erred in granting summary judgment to appellee. Appellee’s failure to provide adequate notification of its reduction in coverage to appellant promoted a reasonable expectation that appellant’s coverage continued to encompass higher bodily injury liability limits.

XIII. JUVENILES


Opinion by Judge Acree; Judges Moore and VanMeter concurred. The Court affirmed an order of the circuit court denying the Commonwealth’s petition for a writ of prohibition, seeking to prohibit the district court from suppressing a thirteen-year-old juvenile’s confession on the basis that it
was given involuntarily. The Court first held that a writ was proper to challenge the suppression of the statement because the Commonwealth did not have an adequate remedy by appeal and would suffer great and irreparable injury if the district court erred in suppressing the juvenile’s statements. The Court then held that there was no clear error in the district court’s fact-finding. The Court finally held that even though the detectives who questioned the juvenile at school did not deprive him of food or sleep, used calm and conversational tones throughout the interview, read the juvenile his Miranda rights, and told him he was not under arrest, viewing the interrogation through the lens of this thirteen-year-old student, under the circumstances the district court did not err in finding that the juvenile’s statements were not the product of his free choice when given. Therefore, the district court did not act erroneously by granting the motion to suppress the statements.

B.  


Opinion by Judge Combs; Judges Moore and Nickell concurred. The Court vacated and remanded an order of contempt and an order designating appellant to be a status offender. The Court held that the trial court improperly accepted appellant’s admission of guilt without an adequate Boykin colloquy.

XIV. LICENSES

A.  


Opinion by Judge Thompson; Judge Keller and Senior Judge Shake concurred. The Court affirmed opinions and orders of the circuit court addressing a third party’s right to a hearing before and after issuance of a liquor license. The Court first held that the designation of the Department of Alcoholic Beverage Control (ABC) was sufficient to confer subject matter jurisdiction to the circuit court. The statutory scheme conclusively established that the Alcoholic Control Board was not an administrative department separate from ABC and therefore, the failure to name the Board as a party was not fatal. The Court then held that the right to appeal to the ABC from a city administrator’s approval of a liquor license was expressly provided in the statutory language of KRS 241.200. Had the legislature intended to limit an appeal to an applicant or licensee, it could have used limiting language. Further, had the legislature intended to exclude the approval of a liquor license from the term “order” as used in the statute, it could have done so by including language similar to that contained in KRS 243.560. The Court also held that the ABC order dismissing the appeal was a final order because the case was finally disposed of as a matter of law in a formal adjudicatory proceeding; whether the “honest error” rule or equitable estoppel applied and whether the administrator acted in good faith were questions of fact to be decided.
by the ABC Board on remand. *Res judicata* did not preclude the relief sought.


Opinion by Judge Caperton; Judge Wine concurred; Chief Judge Taylor concurred in result only. The Court affirmed in part, reversed in part and remanded an opinion and order of the circuit court finding that KRS 322.180(2) and (12) and KAR 18:142 Sections 2, 3 and 9 were unconstitutionally vague as applied to a licensed land surveyor who testified as an expert witness in a quiet title action and was later disciplined by the Kentucky Board of Licensure for Professional Engineers and Land Surveyors. The Court held that but for 201 KAR 18:142 Section 3, the circuit court correctly found that the provisions were unconstitutionally vague as applied to the testimony. The Court also held that the Board had the authority to institute disciplinary action against the surveyor.


Opinion by Judge VanMeter; Judges Acree and Caperton concurred. The Court affirmed an order of the circuit court denying the appellant crematorium's request for declaratory and injunctive relief wherein it sought to have KRS Chapter 316 declared unconstitutional and to enjoin the Kentucky Board of Embalmers and Funeral Directors from instituting proceedings to enforce the regulations against it for transporting dead human bodies. The Court held that the circuit court did not err by declining to declare KRS Chapter 316 unconstitutional or abuse its discretion by declining to enjoin the Board from regulating appellant's activity under KRS Chapter 316. In reaching that conclusion, the Court first held that the circuit court did not err in determining that the regulations contained in KRS 316.030(1) were rationally related to a legitimate state interest. The distinction between funeral directors and crematory operators reflected the state's legitimate interest in protecting the public health and welfare and there was a rational basis for the licensing requirement. The Court next held that the circuit court did not err in finding that the Board did not exceed the scope of its authority to enforce the provisions of KRS Chapter 316, which expressly required an individual acting for profit to obtain a funeral director's license before transporting a dead human body and the Board properly asserted its authority to enforce the provision upon discovering that appellant had transported a dead human body without first obtaining a license to do so. The Court finally held that the circuit court did not err in finding that an immediate family member could not delegate the personal authority to transport a dead human body to a business subject to the legal regulations governing the transportation of dead human bodies.
XV. MINES AND MINERALS


Opinion by Senior Judge Lambert; Chief Judge Taylor and Judge Clayton concurred. The Court reversed and remanded an order of the circuit court affirming an order of the Secretary of the Commonwealth of Kentucky, Energy and Environment Cabinet, denying a “Lands Unsuitable for Mining” petition but nonetheless imposing numerous restrictive conditions on all future surface coal mining in the petition area. The Court held that 405 KAR 24.030 Section 8(3) was contrary to Kentucky law and more stringent than the Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §1201, et seq. While 30 U.S.C. §1272(b) gave the Secretary the authority to condition mineral leasing or mineral entries in a manner so as to limit surface coal mining operations, it unambiguously restricted the authority to instances in which a designation of unsuitability for all or certain types of surface mining was actually made. Because appellees' unsuitability petition was explicitly denied, 405 KAR 24.030 Section 8(3) ran afoul of the limitation and therefore was null, void and unenforceable.

XVI. OCCUPATIONAL SAFETY


Opinion by Judge Dixon; Judge Caperton and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court affirming an order of the Kentucky Occupational Safety and Health Review Commission affirming a citation to the appellant roofing company for a repeat/serious violation of a fall protection regulation and assessing a penalty. The Court held that the circuit court correctly affirmed the agency decision. The record contained substantial evidence to support the determination that appellant, with reasonable diligence, could have discovered its employees were not complying with the safety regulations.


Opinion by Judge Thompson; Judges Acree and Lambert concurred. The Court reversed an order of the circuit court reversing a decision and order of the Kentucky Occupational Review Commission affirming the issuance of a citation and imposition of penalties under the Kentucky Occupational Safety and Health Act (KOSHAs), KRS 338.011-338.991 to a subcontractor after a worker was injured falling into a hole dug by appellant at a construction site. The Court held that the circuit court erred in reversing the decision. In reaching that conclusion, the Court first held that the citations were not invalid because the appellant was not afforded the opportunity to attend the opening conference or walk around
inspection provided for in KRS 338.111 when appellant had permanently departed the work site when the compliance officer conducted her investigation and the primary contractor who was present and in control of the worksite was afforded the opportunity to attend. The Court next held that the citation was not invalid because the hazard was abated before the citation was issued when the citation acknowledged that the violation had been eliminated and appellant was informed that abatement was not the issue. The Court next held that appellant was responsible for the KOSHA violations under the multi-employer worksite doctrine when there was substantial evidence that it was the creating employer of the hazard. Regardless of the contractual arrangement between appellant and the general contractor, appellant dug the hole at issue and provided a cover in violation of KOSHA standards. The Court finally held that the intentional removal of a plywood cover on the hole by the injured worker did not preclude the citation. Once the unsecured and unmarked plywood was placed as a cover over the hole greater than six feet deep, appellant violated KOSHA.

XVII. OPEN RECORDS


Opinion by Judge Acree; Judge Stumbo and Senior Judge Lambert concurred. The Court affirmed in part, reversed in part, and remanded an order of the circuit court denying appellant’s petition for a declaration that he was entitled to production of records regarding his stay at a detention center and denying appellant’s demand for assessment of a monetary penalty against various detention center officials. The Court first held that while the requested records did not exist, the circuit court erred in determining that appellant was not entitled to any relief under the Open Records Act. The Act required the agency to respond in writing, even when it was unable to supply the records requested. Therefore, appellant was entitled to relief in the form of a written explanation and an order requiring the officials to conduct additional investigation and to provide the circuit court and appellant with a written explanation of their findings. The Court then held that the circuit court did not err in denying appellant’s demand for the assessment of a monetary penalty. While the coercive effect of granting the relief was not a proper consideration under the Open Records Act, appellant waived the issue of whether the officials’ noncompliance with the Act was willful when he failed to present evidence of willfulness and then failed to request that the circuit court enter findings of fact regarding the willfulness of the officials’ behavior.

Opinion by Judge VanMeter; Judge Acree concurred; Judge Caperton concurred in part and dissented in part by separate opinion. The Court affirmed a summary judgment of the circuit court refusing to grant a permanent injunction to preclude the release of appellant’s proffer held by the Office of the Attorney General (OAG) in an investigation of bids for state road contracts. The Court held that the trial court properly held that the proffer was not exempt from disclosure under KRS 61.878(1)(a). Taking into consideration that the proffer did not contain information of a private nature, as well as appellant’s diminished expectation of privacy in the information, the public interest, specifically the methods of procuring state road contracts, required disclosure of the proffer under the Open Records Act. The Court also held that the proffer was not exempt from disclosure under KRS 61.878(1)(h) as that provision was only applicable if the evidence revealed that disclosure would harm the agency. The Court finally held that the trial court did not apply the wrong legal standard when it dissolved a temporary injunction and denied appellant’s motion for a permanent injunction. Since the proffer was not exempt from the Open Records Act, appellant was not entitled to a permanent injunction and the conditions which justified the temporary injunction were no longer present.

XVIII. PREEMPTION


Opinion by Judge Nickell; Judges Moore and Thompson concurred. The Court affirmed an opinion and order of the circuit court granting summary judgment to the appellee bank on its debt collection action and on appellant’s counterclaim for damages. The Court held that the circuit court properly granted summary judgment. In reaching that conclusion, the Court first held that the circuit court correctly determined that the bank was not required to obtain a certificate of authority before filing suit against appellant because the state statutory provision was preempted by the provisions of the National Bank Act, 12 U.S.C. §1 et seq. The Court next held that because appellant produced no affirmative evidence that there was a material issue of fact regarding the bank’s status as a chartered national bank, summary judgment was appropriate. The Court finally held that the circuit court did not err in granting summary judgment on appellant’s counterclaim without adequate discovery. Appellant lacked privity to assert his claims under the Consumer Protection Act because he was not a party to any agreements between merchants and the bank, which he claimed caused his alleged damages. The Court also rejected appellant’s unspecified federal, common law and equitable claims stemming from the allegations regarding the effects of the bank’s agreements with merchants because they were remote and derivative.

Opinion by Judge Acree; Judge Stumbo concurred; Senior Judge Lambert dissented by separate opinion. On discretionary review, the Court reversed an order of the circuit court affirming a judgment of forcible detainer entered by the district court against appellant. The Court held that the Petroleum Marketing Practices Act (PMPA), 15 USC §§2801-2806, preempted state forcible detainer statutes, at least as applied to petroleum franchise agreements and therefore, it was improper for the district court to evict appellant under state law.

XIX. PROPERTY


Opinion by Judge Combs; Judge Nickell and Senior Judge Lambert concurred. The Court affirmed in part, vacated in part and remanded an order of the circuit court dismissing appellant’s counterclaim in a foreclosure action initiated by the appellee bank. The Court held that the circuit court correctly granted summary judgment in favor of the bank on appellant’s counterclaims. Appellant’s claim for money damages, costs and attorney fees was time-barred as it was made outside the one-year limitations period in the Truth in Lending Act, 15 U.S.C. §1640(e). The bank could not be found liable for fraud as there was no indication that it was directly involved with the initial mortgage transaction or that it acquired the note in any manner inconsistent with the exercise of good faith and due diligence. The bank could bear no liability for any alleged discrepancy between what was in the disclosure statement and a good-faith estimate by the subprime mortgage lender, as the bank was not required to undertake an investigation of facts beyond what the law required of assignees. The Court then held that the circuit court erred by refusing to allow sufficient discovery before judgment was entered and by relying solely upon a deficient affidavit offered by the bank with respect to appellant’s breach. While it could be inferred by the affidavit that the affiant had undertaken a review of appellant’s account, copies of the records to which she referred in the affidavit were neither attached nor served with the affidavit as required by CR 56.06. That, coupled with the circuit court’s denial of an opportunity for full and complete discovery, made summary judgment with the respect to the breach prematurely entered.


Opinion by Senior Judge Shake; Judges Dixon and Nickell concurred. The Court affirmed an opinion, judgment and order of the circuit court in a declaration of rights action brought by successors in interest to surface and other mineral rights. The Court held that the trial court correctly found
that the owner of the coal beds had the right to capture coal bed methane (CBM) while it was still located in the coal beds and appellants had the right to capture it once the mining process was complete.


Opinion by Chief Judge Taylor; Judge Stumbo and Senior Judge Lambert concurred. The Court reversed and remanded a judgment of the circuit court adjudicating, under KRS 418.040, a petition for declaration of rights involving real property. The Court held that the trial court erred in determining that the road at issue was a private road for the sole use and benefit of the lot owners in a subdivision and that the road was not a public roadway. The road was dedicated by estoppel to public use through the recording of the subdivision plat and through the selling of lots by reference to the plat. This displayed an objective intent, notwithstanding the subjective intent of the original developers, to dedicate the road to public use and the offer was consummated by the selling of lots in which the deeds referenced the plat. The Court then held that the circuit court erred in finding that a one-foot strip of land was restricted in use and that the appellants could not grant lot owners permission to cross it. There was no written or recorded instrument evidencing a restriction on the use of the one-foot strip of land in the record. The only evidence of the existence or terms of such a restriction was oral testimony which was only enforceable between the original contracting parties. Therefore, any purported restriction was unenforceable against the appellants as no such restriction was recorded in the property’s chain of title.


Opinion by Judge Moore; Judges Dixon and Thompson concurred. The Court affirmed an order of the circuit court denying appellants’ motion for summary judgment and granting summary judgment to appellees, finding that an easement by necessity existed and that appellees had sufficiently proven that the easement was strictly necessary. The Court held that the circuit court did not err in finding an easement by necessity existed. Appellees were not required to prove that they could not obtain access through any other adjoining property. The Court then held that the circuit court did not err in determining that the action was not barred by a statute of limitations and that as long as the necessity existed, an action could be maintained to establish a right of access. The Court also held that the circuit court did not err in finding that appellees’ claim was not barred by a mediation agreement executed a year-and-a-half prior to the filing of the action. Appellants failed to produce any evidence to rebut testimony that the release did not address the easement claim. The Court then held that the circuit court did not err in finding that appellees were not barred from asserting their claim under the doctrine of unclean hands when appellants failed to provide any evidence to support the allegations of fraud, illegality or unconscionable conduct. The Court finally held that the circuit court
did not err in granting an easement appurtenant, rather than an easement in gross. By definition, an easement by necessity must always be appurtenant because there must be both a dominant and servient estate. Further, Kentucky courts disfavor easements in gross and will construe an easement as appurtenant whenever possible.


Opinion by Senior Judge Lambert; Chief Judge Taylor and Judge Stumbo concurred. The Court affirmed a summary judgment in appellee’s favor on appellant’s claim of unjust enrichment brought after appellee purchased property appellant claimed was subject to a *lis pendens* notice. The Court held that the trial court correctly found that the *lis pendens* notice did not cloud any title procured by appellee and that there was no evidence presented that could support appellant’s contention that appellee had been unjustly enriched by his purchase of the property. First, appellant had nothing more than a general creditor’s claim, her claim against appellee did not have a direct attachment to the real property itself, and the recording of the *lis pendens* was ineffective in terms of encumbering a sale of the property to appellee. Further, appellant failed to produce evidence supporting her claim that appellee was unjustly enriched by improvements made to the property or because he may have paid less than fair market value for items left on the property. In all respects, appellee appeared to be a bona fide purchaser for value who took clear title to the property.


Opinion by Judge Acree; Judges Clayton and Wine concurred. The Court affirmed a summary judgment in favor of appellee on appellants’ declaratory judgment action, filed pursuant to KRS 418.040, seeking a declaration that they were the legal owners of a portion of property upon which appellee’s mobile home was located. The Court held that the circuit court did not err in finding that a deed conveying property to appellants was void as champertous under KRS 372.070(1), to the extent of a portion of the property adversely possessed by appellee. In so concluding, the Court held that appellee’s uncontradicted affidavit provided sufficient evidence that her possession of the part of the lot in question was hostile and that she did not have permission to place the mobile home on that portion of the lot and that she did so under a claim of right, believing she owned the property. The Court also held that appellants had an adequate amount of time to produce evidence contradicting or refuting the affidavit. The Court also held that the property owner’s knowledge that a third party was adversely holding possession of property, standing alone, did not negate the “hostile” element. The Court finally held that appellee’s mistaken belief as to the property line did not prevent her claim from being adverse.

Opinion by Judge Moore; Judges Nickell and Thompson concurred. The Court vacated and remanded a judgment of foreclosure in favor of appellee. The Court held that the trial court could not properly enter a default judgment against appellant when appellant filed an answer to the complaint which was not in any way deficient. The Court then held that appellee’s motion for a default judgment could not be converted into a motion for summary judgment and the trial court erred by entering summary judgment *sua sponte* where the legal issues had not been submitted for a determination.


Opinion by Chief Judge Taylor; Judge Nickell concurred; Judge Combs concurred in result only. The Court affirmed in part, reversed in part and remanded an order of the circuit court adjudicating a boundary line dispute and awarding appellee damages representing a one-third interest in a tract of property conveyed by appellants to a third-party. The Court first held that the trial court erred in finding that appellee held a one-third interest in the tract of property conveyed by appellants to the third party. The language of the original devise containing the language “so long as she remains a widow” devised a fee simple subject to executory interest contingent upon divestment in the event the devisee remarried. When she did not remarry, the executory interest terminated upon her death. Thus, appellants’ acquired fee simple absolute title by a deed of conveyance from the devisee. The Court then held that the trial court erred in establishing the location of a missing post used as a corner call in the will subdividing the property between the parties. The location resulted in an absurd boundary line when considered in relation to the other calls in the properties’ descriptions. The Court next held that the trial court erred in concluding that appellants’ possession could not be hostile because it was premised upon the mistaken belief as to the true boundary line between the properties. A landowner’s possession of real property may be deemed hostile when it is subsequently discovered to have been based upon the mistaken belief as to the true boundary line. The Court finally held that the trial court correctly concluded that appellants could not establish the boundary line through the operation of the doctrine of boundary by estoppel because there was insufficient evidence proving their detrimental reliance.


Opinion by Senior Judge Lambert; Judge Thompson concurred; Judge Caperton dissented by separate opinion. The Court reversed and remanded a judgment of the circuit court entered following a bench trial finding in favor of appellees in appellant’s action seeking to void or reform
a deed of conveyance on the grounds that the subject property contained fewer acres than represented in the deed. *Citing Harrison v. Talbot* 32 Ky. (2 Dana) 258 (1834), the Court held that in light of the astounding discrepancy between the acreage set forth in the deed and the actual acreage, the trial court was required to formulate an equitable remedy in the nature of a price reduction or rescission of the subject transaction.


Opinion by Judge VanMeter; Judges Dixon and Stumbo concurred. The Court affirmed a judgment of the circuit court requiring appellees to pay the remaining amount due on a land contract and requiring appellant to execute a deed transferring certain real property to appellees. The Court held that the trial court possessed the equitable power to require appellees to resubmit payment as being owed for checks appellant had held until they were stale and refused by the bank. Once appellees fulfilled the terms of the land contract, appellant was obligated to perform under the land contract and execute the appropriate deed.


Opinion by Judge Caperton; Judges Combs and Thompson concurred. The Court affirmed orders of the circuit court in a title dispute between the appellant estate and the appellee who was convicted on his guilty plea for reckless homicide in the death of the decedent. The Court held that the result reached by the trial court, that appellee was entitled to half of the property and the estate to the other half, was correct. Because appellee and the deceased owned the property in joint tenancy with right of survivorship, the holdings in both *Bates v. Wilson* 232 S.W.2d 837 (1950), and *First Kentucky Trust Co. v. U.S.*, 737 F.2d 557 (6th Cir. 1984), were distinguishable. Because both appellee and the deceased each had their own separate ownership share and could have conveyed their respective interest in the property whenever and to whomever they chose, while appellee forfeited his right of survivorship pursuant to *KRS 381.280*, he was not stripped of the ownership of the property that was already vested in him and the property he would have forfeited passed to the heirs of the deceased.


Opinion by Senior Judge Lambert; Judges Caperton and Combs concurred. The Court reversed and remanded a judgment of the circuit court awarding attorney fees to the appellee landlord. The Court held that while the lease agreement allowed for recovery for past due rent and property damage, the limited statutory exception in *KRS 383.660(3)*, allowing for attorney fees for “willful” noncompliance, as that term is defined in *KRS 383.545(17)*, was not applicable. Moreover, appellee
failed to state any claim for attorney fees in the body of the complaint so as to give appellant notice, as required by CR 8.01, of any acts or omissions alleged against appellant that would authorize application of KRS 383.660(3).


Opinion by Judge Moore; Judges Combs and Nickell concurred. The Court affirmed an order of the circuit court finding that appellee owned two burial sites and a monument located on a family cemetery plot. The Court first held that the circuit court’s finding that the individual who purchased the plots and monument was the owner of the entirety of the interment easement was not clearly erroneous because it was supported by substantial evidence. His name was on the express easement deed issued by the cemetery and his daughter testified that she was present when he purchased the four burial plots. The Court then held that appellants’ claim of adverse possession must fail because individuals buried in two of the plots were buried with the record owner’s knowledge and consent. The Court then held that substantial evidence supported a finding that the particular purpose of the appellant heirs’ easement ceased to exist, had been rendered impossible of accomplishment, and was abandoned after the individuals who were designated to be buried in the plots were disinterred and buried elsewhere. When the owner of the express easement for interment made designations of specific burial plots for the interment of the specific individuals, the individuals received an easement for that particular purpose. Any rights the appellants had were solely derived from the burial of, or the prospect of burying, the specific individuals in the plots and the vacated burial site reverted back to the ownership of the person, or heirs of the person, who originally purchased the easement. The Court next held that the trial court did not err in finding that appellees owned the monument. The monument merely reflected and was part of the then-extinguished burial easements. The Court finally held that appellants were not entitled to their legal costs pursuant to KRS 411.120 because the matter was adjudicated in favor of appellees.


Opinion by Judge Nickell; Judges Caperton and Wine concurred. The Court affirmed a summary judgment in favor of appellee in a mortgage foreclosure action. The Court held that appellee was the real party in interest under CR 17.01 and therefore, had standing to bring the foreclosure action. The assignment of mortgage was not the document which transferred enforcement rights on the note to appellee and the date of its execution was immaterial. When the note was endorsed in blank, it became a bearer instrument and no assignment was necessarily required to transfer the right to collect and enforce the note. Mere possession of the original note was sufficient. Because appellee was lawfully in
possession of the original note, it was entitled to enforce the obligations secured thereby and was the real party in interest in the litigation below.


Opinion by Judge Combs; Judge Lambert and Senior Judge Shake concurred. The Court vacated and remanded an order of the circuit court finding that appellants violated provisions of a condominium association's bylaws when they leased their condominium to a tenant. In a case of first impression, the Court held that because the amendment to the bylaws restricting leasing of condominiums was made without the proper percentage of owner approval, the association failed to state a cause of action against appellants. Therefore, the trial court's finding was clear error.


Opinion by Judge Caperton; Judges Combs and Lambert concurred. The Court reversed and remanded an order of the circuit court granting appellee's CR 60.02 motion and finding that the appellant homeowner's association had waived its ability to enforce subdivision restrictions. The Court held that the circuit court abused its discretion in amending a permanent injunction under CR 60.02 based on actions taken by the homeowner's association after the injunction was entered. The Court further held that the actions taken by the homeowner's association after entry of the injunction was not “extraordinary” in nature, which was required to otherwise obtain relief under CR 60.02(f).

XX. PUBLIC HEALTH


Opinion by Senior Judge Shake; Judges VanMeter and Wine concurred. The Court affirmed an order of the circuit court declaring that physician-owned ambulatory surgery centers (ASCs) were exempt from the certificate of need requirements of KRS 216B. The Court also reversed and remanded an order of the circuit court finding that an ASC was not exempt from KRS 216B regulation. The Court held that the ASCs at issue were distinguishable from the facilities in Gilbert v. Commonwealth, Cabinet for Health and Family Services, 291 S.W.3d 712 (Ky. App. 2008). The physician shareholders of both ASCs performed surgery on their own patients, the nature of the activity conducted included a more intimate doctor/patient relationship than that of a diagnostic testing facility or ASC owned by a third party and the doctor/patient relationship uniquely connected the ASCs to the medical offices. Because the ASCs were extensions of the physicians' office practices and their equipment did not
exceed the maximum allowable, they were entitled to exemption from regulation.


Opinion by Judge Keller; Judges Caperton and Lambert concurred. The Court affirmed an order of the circuit court finding that the appellee medical MRI entity was exempt from the certificate of need requirements in **KRS 216B**. The Court first held that the circuit court correctly found that the appellant hospital and association bore the burden of proof. Once a requester received a favorable advisory opinion from the Cabinet for Health and Family Services, the affected party seeking to challenge the opinion bore the burden of proof. The Court then held that the MRI entity met the private physician office exemption under **Gilbert v. Commonwealth**, 291 S.W.3d 712 (Ky. App. 2008). Although there was discussion of expanding the ownership, no such expansion had taken place.


Opinion by Judge VanMeter; Judge Dixon concurred; Judge Keller concurred in result only. The Court affirmed an opinion and order of the circuit court affirming an order of the Cabinet for Health and Family Services, which held the actions of a nursing home discharging appellant from its long-term care facility to be in compliance with federal and state law. The Court first held that **900 KAR 2:050 §2**, which deals with transfer and discharge rights from long-term care facilities, defined by **KRS 216.510(1)**, and the applicable portion of the Centers for Medicare and Medicaid Services State Operations Manual revealed no requirement that an appeal be heard regarding a denial of Medicaid benefits prior to the discharge of a patient for nonpayment. Appellant filed two applications for Medicaid benefits, both which were denied, and subsequently did not pay for her care. Therefore, the ALJ did not err by finding the nursing home could discharge her for nonpayment. The Court next held that the ALJ did not err by finding that the nursing home notified appellant of her discharge and transfer from the facility by sending notice to her daughter. Based on the plain language of the financial agreement, the daughter was listed as the person to whom all correspondence and billing statements should be mailed. The Court finally held the nursing home did not fail to comply with **900 KAR 2:050 §2** by failing to provide sufficient preparation and orientation on discharge from the facility.

Opinion by Judge Wine; Judge VanMeter and Senior Judge Shake concurred. The Court vacated and remanded an opinion and order of the circuit court remanding a Certificate of Need (CON) application for an additional hearing. The Court held that the circuit court erred in limiting the scope of remand to the need numbers in existence at the time of the hearing approving the application for a CON. The Court held that to restrict the numbers on remand to the incorrect numbers utilized at the hearing would not effectuate justice. In addition, the language of the applicable regulations required the use of the latest numbers available at the time of a decision. Moreover, the State Health Plan required the use of the latest numbers available at the time of a decision.

XXI. TAXATION


Opinion by Senior Judge Lambert; Judges Acree and Wine concurred. The Court reversed an opinion order of the circuit court finding that the provider of natural gas to a hospital was not liable for the utility tax authorized by KRS 160.593 and KRS 160.613 and that the hospital was required to reimburse the provider because the hospital was not exempt from what it found was an excise tax. In a case of first impression, the Court held that, consistent with KRS 160.613(4) and (5), which focused on the act of furnishing utility services rather than whether the provider was a regulated utility, because the provider furnished natural gas to the hospital, the provider was subject to imposition of the utility tax and the trial court erred in finding otherwise.


Opinion by Judge Stumbo; Judges Moore and Wine concurred. The Court reversed and remanded an order of the circuit court approving a master commissioner’s recommended dispersal of funds from the sale of a parcel of real property, giving priority to liens held by a city and county. The Court held that, pursuant to KRS Chapter 134, the liens resulting from the non-payment of ad valorem taxes were not rendered inferior by the sale of certificates of delinquency from municipalities to third-party purchasers and therefore, the circuit court erred in approving the dispersal of funds. The Court remanded for entry of a pro rata distribution of the proceeds.
XXII. TORTS


Opinion by Judge Lambert; Judges Clayton and Dixon concurred. On direct appeal, the Court reversed and remanded a summary judgment in the appellee paratransit bus service’s favor on appellant’s claims for gross negligence brought after appellant was injured when she was dropped from her wheelchair while exiting a paratransit bus. On cross-appeal, the Court affirmed a judgment entered pursuant to a jury verdict in favor of appellant on her claims for negligent hiring, retention, training and supervision of a bus driver and for vicarious liability against the bus service. In the direct appeal, the Court held that trial court improperly granted summary judgment on the gross negligence claim. Appellant presented clear and convincing evidence that the bus service ratified, authorized or anticipated the conduct of the bus driver. Therefore, a trial for punitive damages was warranted. On the bus service’s cross-appeal, the Court first held that the bus service properly preserved the issue of whether appellant’s negligent hiring claims were improperly submitted to the jury. Because its motion for summary judgment was based on a legal issue and there were not any contested issues of material fact, the motion was sufficient for review. Further, the bus service also preserved the argument by moving for a directed verdict at the close of its evidence. However, the Court rejected the bus service’s argument that because it admitted respondeat superior liability, it was entitled to summary judgment on the claims. The Court held that there was a distinction between the vicarious liability of the employer and the actual liability of the employer and therefore, the admission to vicarious liability did not preclude appellant pursuing her claims for negligent hiring, retention, supervision or training. The Court next held that the trial court did not err by admitting evidence of the bus driver’s prior history of alcoholism. While somewhat prejudicial, the evidence was relevant to appellant’s negligent hiring claims. The Court next held that the trial court did not err by admitting evidence of a subsequent accident on another paratransit bus. The evidence was relevant to support appellant’s claims of negligent training and supervision. The Court next held that the trial court did not err in admitting evidence of the bus service’s contract to provide services. While the issue was preserved for review, the brief mention of the contract was at most, harmless error. Further, it showed that the bus service had an incentive not to conduct thorough investigations and to not report safety violations and thus, was directly related to its credibility regarding whether it conducted a thorough investigation of the accident. The Court next held that the jury instructions were not improper with respect to the duty of care and the scope of the bus service’s liability for negligent hiring. The instructions were in accord with Kentucky’s bare-bones approach and did not misstate the law.
2010CA000828

Opinion by Judge Lambert; Judge Keller and Senior Judge Shake concurred. The Court affirmed a judgment dismissing appellant’s claim against appellee after a jury found that appellant had not met the $1,000 statutory medical expense threshold required by KRS 304.39-060(2) on his claim for injuries he sustained in a motor vehicle accident. The Court first held that the trial court did not commit error in including in the jury instructions the threshold question of whether appellant’s medical expenses were reasonably needed as a result of the motor vehicle accident. The Court also held that the instructions provided by the trial court were in line with binding precedent as set forth in Bolin v. Grider, 580 S.W.2d 490 (Ky. 1979). The Court next held that the trial court did not err by attempting to educate the jury as to what it should do in relation to completing the instructions and verdict forms depending on what findings it made. The Court next held that the trial court correctly determined that appellee’s objections to a doctor’s deposition testimony were timely filed by operation of CR 6.01. The Court then held that trial court did not abuse its discretion in striking portions of the doctor’s testimony, after which the court excluded appellant’s claim for future medical expenses from the trial. The doctor qualified his opinion on the permanency of appellant’s claimed injuries to the performance of a current physical examination, which never occurred, even after the trial court permitted appellant to take additional testimony from the doctor regarding permanency.

2010CA001087

Opinion by Senior Judge Shake; Judges Keller and Lambert concurred. The Court affirmed a summary judgment in favor of appellee on his claim for damages for injuries he sustained during an altercation with appellant. The Court first held that the trial court did not err by finding an absence of a genuine factual dispute as to liability based on the uncontroverted evidence that appellant caused serious physical injury to appellee and in light of appellant’s statements on the record taking responsibility for severe injuries inflicted on appellee. The Court next held that the trial court did not err in awarding compensation to appellee for his lost income and lost profits even though he received his base salary during the time he was unable to work. The salary received was a fraction of what his income would have been to his for-profit corporation and concomitantly to him, when his labor was the sole source of income for his business. Further, appellee’s testimony was substantial evidence to prove lost profits and appellee’s claim advised appellant that he intended to seek damages in the amount of $95,000 in lost profits to his business. The Court then held that the record contained significant evidence indicating that appellant viciously attacked appellee and severely beat him with an object. This conduct constituted an egregious display of total disregard for the safety of others to support the trial court’s award of punitive damages. The Court finally held that the trial court did not err in awarding
appellee the full amount of medical bills even though his healthcare providers accepted less payment than the full amount billed.


Opinion by Judge Dixon; Judges Acree and Keller concurred. The Court reversed and remanded an order dismissing appellant’s claims for defamation, libel and tortious interference with business relations. The Court held that the trial court erred in dismissing the action after finding that appellee was entitled to absolute immunity for statements it made in a letter to a city mayor related to appellant’s qualifications and references as low bidder on a city project. The Court held that the legislative immunity afforded by case law and statute was not only limited to actual members of a legislative body but also only to statements made while acting within the scope of the duties imposed upon them by statute. Appellee was not a member of the city council and had no duties imposed upon it by statute; therefore it was not entitled to legislative immunity. The Court also rejected appellee’s argument that the statements were comparable to statements made by witnesses in judicial proceedings entitling it to judicial immunity.


Opinion by Judge Wine; Judge VanMeter concurred; Judge Thompson concurred in part and dissented in part. On direct appeal, the Court affirmed an order of the circuit court denying appellant’s motion for a new trial in his medical negligence case and on cross-appeal, reversed and remanded the circuit court’s denial of the cross-appellant’s CR 59.05 motion to alter, amend or vacate the judgment. The Court first held that the jury award, which awarded past medical expenses but nothing for pain and suffering and lost wages after an emergency room doctor misdiagnosed appellant’s appendicitis, was adequate. While the jury could have reached a different conclusion, its conclusion with respect to pain and suffering and lost wages was nonetheless supported by evidence that appellant’s appendix may have perforated twelve to twenty-four hours before he ever presented to the emergency room and that even if he had not been misdiagnosed, the more invasive surgery may have been necessary. Further, the jury was free to return a $0 award for lost wages when appellant was unemployed at the time of the medical negligence. On the doctor’s cross-appeal, the Court held that the trial court erred when it failed to reduce the amount of judgment to the extent that the bill was written off by the hospital.


Opinion by Judge Keller; Judges Combs and Stumbo concurred. The Court reversed and remanded a circuit court opinion and judgment
remanding to the Board of Claims appellees’ petition for review before the Board seeking compensation from the Division of Forestry for property lost after the Division set “line fires” to create a buffer to control a fire. The Court held that, while the Division had the ministerial duty to fight the fire, the methods used to fight that fire, including the determination that the fire had been contained and that it was appropriate to leave the area, were discretionary. Therefore, the circuit court’s finding that the Division may be subject to liability for negligence was in error.

G.  
2008CA001506

Opinion by Judge Nickell; Chief Judge Taylor and Judge Combs concurred. On remand from the Kentucky Supreme Court to consider the matter under **Kentucky River Medical Center v. McIntosh**, 319 S.W.3d 385 (Ky. 2010), the Court again affirmed a summary judgment in favor of appellees on appellant’s claims related to injuries she sustained when she fell while leaving a restaurant. The Court distinguished the facts in McIntosh and held that appellant was not foreseeably distracted nor did a third party push her into danger. Therefore, the trial court’s award of summary judgment was proper. Unlike McIntosh, appellant tripped over the threshold marked with yellow- and black-striped caution tape while leaving a restaurant following a leisurely holiday meal. She admitted being familiar with the threshold, having traversed it on prior occasions, and admitted she would not have fallen had she been looking in the direction she was walking.

H.  
2010CA000537. DR Pending.

Opinion by Judge Nickell; Judge Combs and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court dismissing appellants’ action for damages and loss of consortium in a personal injury case stemming from an automobile accident. The Court held that the “discovery rule” did not toll the limitations period for bringing a tort action under Kentucky’s Motor Vehicle Reparations Act (MVRA), **KRS 304.39-230**.

I.  
2011CA000332. DR Pending.

Opinion by Judge Moore; Judges Acree and VanMeter concurred. The Court affirmed in part, reversed in part and remanded a summary judgment in favor of the appellee physician on appellant’s claim that the physician negligently failed to detect a mass in appellant’s breast for a period of approximately eighteen months. The Court first held that the trial court erred in granting summary judgment on appellant’s claim for mental anguish, emotional distress, and a loss of ability to enjoy life due to an increased fear of cancer recurrence or death. While it might be difficult for appellant to attribute any specific part of her existing mental
anguish that was specifically related to her five to twenty-five percent increased likelihood of having cancer again, as opposed to what her mental anguish would have been if she had been timely diagnosed, this difficulty did not preclude her from presenting her case to the finder of fact. The Court next held that the trial court erred in granting summary judgment on appellant’s claim for compensatory damages arising as a result of chemotherapy treatment and the surgical removal of her ovaries. Testimony was capable of supporting a finding that it was more probable than not that a mammogram would have detected appellant’s tumor a year and a half prior to her actual diagnosis, that appellant would have received less treatment and chemotherapy would have been unnecessary if the tumor had been discovered earlier. The Court then held that the trial court did not err in determining that any future medical treatment related to a potential recurrence of cancer was non-compensable when appellant was cancer-free and it was at least seventy percent likely that she would suffer no recurrence and therefore, would not require future medical treatment. The Court finally held that the trial court did not err in finding that appellant’s five to twenty-five percent decreased chance of remaining cancer free was non-compensable. Kentucky was among the minority of jurisdictions that did not consider a decreased chance for long-term survival or lost chance for recovery or a better medical result as a compensable injury.


Opinion by Judge Lambert; Judges Thompson and VanMeter concurred. The Court affirmed a summary judgment in favor of appellee on appellant’s claim for injuries he received after his vehicle was struck by a vehicle owned by appellee. The Court held that the circuit court did not err in granting summary judgment when the record clearly established that appellee’s employee did not breach his duty to exercise ordinary care under the circumstances. The employee was operating the vehicle within his lane of travel and was otherwise proceeding with all due care until the time another vehicle suddenly turned from its lane into the employee’s lane and directly into his path and that the force of the impact on the employee’s vehicle was what caused the subsequent collision with appellant’s vehicle.


Opinion by Judge Combs; Chief Judge Taylor concurred; Judge Nickell dissented by separate opinion. The Court affirmed an order of the circuit court denying appellants’ motion for a new trial. The Court held that the improper statement by appellee’s counsel in closing argument regarding the prospect of financial ruin for appellee was cured by the strong admonition to each jury member that consideration of either party’s financial condition was not permitted. The Court further held that the trial court did not err in refusing to allow the jury to be informed of appellee’s
insurance policy when appellants could not show that any prejudice resulted from the decision.


Opinion by Judge Dixon; Judges Keller and Nickell concurred. The Court affirmed an opinion and order of the circuit court granting summary judgment to appellees and concluding that appellant’s action for damages incurred in a motor vehicle accident was time barred. The Court first held that the trial court correctly concluded that the action was governed by the two-year statute of limitations in KRS 413.125 and not the five-year statute of limitations in KRS 413.120(4) for a trespass against chattel. The record was devoid of any proof that the collision was intentional, which was required for an action for trespass against chattel. The Court then held that the trial court properly dismissed the action as filed outside the prescribed time limitation. The police report filed in the record was properly considered by the circuit court, the allegations in the petition were insufficient to avoid summary judgment, appellant did not plead facts necessary to establish a trespass to chattel, and the cause of action was nothing more than a property damage claim arising from an automobile accident.


Opinion by Judge Clayton; Chief Judge Taylor and Judge Caperton concurred. The Court affirmed a summary judgment in favor of the appellees on a guardian’s claims of negligence and intentional infliction of emotional distress after an inmate at the county detention center attempted to commit suicide, resulting in permanent brain injury. The Court first held that the trial court properly granted summary judgment to the appellees. The acts taken by the appellees as employees of the detention center were discretionary and therefore, entitled to qualified official immunity. The Court also held that the appellee psychologist was entitled to qualified official immunity and that official immunity related to the functions performed rather than the title or credentials of the one performing the functions.


Opinion by Judge Moore; Judges Acree and Nickell concurred. The Court affirmed a jury verdict in favor of a physician in appellants’ medical negligence action. The Court held that the trial court did not abuse its discretion in admitting into evidence a wire used in an esophageal dilation procedure on the basis that the wire qualified as a true replica of the instrument that allegedly caused the injuries at issue. The wire was properly identified and authenticated as evidence of the wire it represented and the wire used was relevant. The differences between
the condition of the sample guide wire and what the appellants speculated was the condition of the actual guide wire were a matter of weight, not admissibility, and appellants could not demonstrate that the sample wire posed a substantial danger of misleading the jury. Appellants’ argument that the trial court failed to admonish the jury per the requirements of KRE 105(a) was meritless. Finally, admitting the sample wire into evidence posed little danger of prejudicing appellants’ case and even if it was needlessly cumulative, any error that resulted from admitting it was harmless.


Opinion by Judge Lambert; Judges Nickell and Wine concurred. The Court affirmed a summary judgment entered in favor of appellees on appellant’s claim for damages for negligent maintenance and construction of a parking lot and failure to maintain premises in a safe and hazard-free condition after she was injured in a fall. The Court held that, based on appellant’s own testimony, summary judgment was proper and the circuit court properly found that there were no disputed issues of material fact concerning the open and obvious condition of the parking lot. The Court then held that Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010), did not apply to alter the result because appellant’s own testimony showed that she was not distracted so as to make her injury foreseeable.


Opinion by Judge Caperton; Judge Wine concurred; Chief Judge Taylor dissented by separate opinion. The Court reversed and remanded a summary judgment of the circuit court dismissing appellants’ complaint, brought after their son sustained fatal injuries when his mother backed over him in the driveway, alleging that their automobile was defective and negligently designed because it was not equipped with a rearview camera or back-up sensors. The Court held that the trial court erred by granting summary judgment because the question of the risk of a backover injury in the automobile was a question for the jury.


Opinion by Judge VanMeter; Judges Keller and Stumbo concurred. The Court affirmed a judgment entered after a jury rendered a verdict in favor of appellees, finding that appellant was the initial aggressor in an altercation on a golf course. The Court first held that the trial court did not err by denying appellant’s motion for a directed verdict on appellee’s counterclaim for assault. Physical contact was not required to recover for fright or other mental suffering caused by an assault and if the jury believed the evidence warranted it, damages based on appellee’s mental
suffering were appropriate under the circumstances. The Court next held that trial court did not err by denying appellant’s motion for a directed verdict and submitting appellee’s assault claim to the jury. While there was conflicting evidence, evidence was presented to support a finding that appellant was the initial aggressor. The Court next held that the trial court did not err by denying appellant’s motion for JNOV or for a new trial wherein he argued that the jury’s award was excessive. Based on the evidence, the trial court correctly found that the award was not influenced by passion or prejudice. The Court next held that the trial court did not err in denying appellant’s motion for a new trial based on the questioning of a defense witness about appellant’s insurance coverage and questioning appellant regarding prior psychiatric care, when appellant failed to address how either question resulted in prejudice so as to affect his substantial rights. The Court next held that the trial court did not abuse its discretion in granting both appellees four peremptory strikes under CR 47.03. The trial court properly considered the relevant factors in determining that appellees maintained antagonistic interests. The Court finally held that the trial court did not err in granting appellees’ motion to exclude damages related to appellant’s shoulder injury. Based on the evidence before it, the jury unanimously found appellant to be the aggressor and therefore, not entitled to any recovery. Thus, there was no likelihood that the jury would have awarded appellant damages and any error in this regard was harmless.

2011CA000779

Opinion by Judge Keller; Judges Combs and Stumbo concurred. The Court affirmed a jury verdict and judgment in favor of appellee on his medical malpractice suit against the appellant doctor wherein appellee claimed the doctor did not adequately inform appellee of alternative treatment modalities for a kidney stone and that the doctor should have removed the kidney stone using a less invasive and less risky procedure. The Court first held that the trial court did not err in issuing a separate jury instruction regarding the doctor’s duty to inform appellee of the risks of the procedure performed. Because the evidence indicated that the doctor had two duties of care – to treat appellee with the care and skill of a reasonably competent surgeon and to disclose to appellee the risks associated with surgery as a reasonably competent surgeon would - the evidence supported the issuance of two separate duty-of-care instructions. The separate jury instructions did not result in inconsistent verdicts. The Court next held that the trial court did not err in failing to issue a comparative negligence instruction. While a comparative negligence instruction may be appropriate in a medical malpractice case based on lack of informed consent, the case must be extraordinary, which this case was not. The Court next held that because appellant did not offer any narrative statement regarding appellant’s claim that the trial judge’s conduct during the first day of trial resulted in undue prejudice to him, the Court presumed the record supported the judge’s actions. The Court finally held that the trial court did not abuse its discretion in failing to declare a mistrial when counsel for appellee quoted a passage from a
treatise during closing arguments, nor did the trial court err by not reprimanding counsel and admonishing the jury. The statements by counsel did not rise to the level of egregiousness in Risen v. Pierce, 807 S.W.2d 945 (Ky. 1991). Further, a number of passages from the treatise had been read or cited to the jury, the concepts put forth in the disputed passage had been discussed by witnesses and appellant did not ask the court to reprimand opposing counsel or to admonish the jury.


Opinion by Judge Moore; Judge Nickell concurred; Judge Combs concurred in result only. The Court affirmed in part, reversed in part and remanded a summary judgment in favor of appellee on appellant’s claims for fraudulent and negligent misrepresentation based upon an alleged promise by appellee to personally guarantee payment to appellant on a contract appellant entered into with a company partly owned and co-managed by appellee. The Court first held that the trial court erred in concluding that there was no evidence to defeat summary judgment on the fraudulent misrepresentation claim. It was for the trier of fact to resolve whether the evidence supporting that appellee actually made the promise was more convincing than the evidence to the contrary and whether appellant’s reliance upon it was reasonable and justified. The Court also held that appellant’s pleadings, taken together with the sum of the evidence, adequately stated a prima facie claim of fraudulent misrepresentation. The Court then held that the trial court did not err in dismissing the negligent misrepresentation claim. Assuming appellant proved that appellee made a promise he never intended to carry out, he did not make the promise carelessly but rather, made it knowing it was false. In addition, consistent with Restatement (Second) of Torts §552 and Kentucky law, appellee’s intent to perform a promise or agreement could not form the basis of a negligent misrepresentation claim.


Opinion by Judge Acree; Judges Combs and Keller concurred. The Court affirmed a judgment of the circuit court awarding $6 million in punitive damages to appellee on a claim for compensatory and punitive damages for physical and emotional injuries she sustained as a result of appellant’s sexual abuse of her multiple times per week for a substantial span of time when she was eleven years old. The Court held that the punitive damage award was not constitutionally excessive. The degree of reprehensibility of appellant’s actions was significant; the award bore a reasonable relationship to the compensatory damages of over $2 million; and given the severe penalty the circuit court could have imposed on both the original charges of first-degree sodomy and the amended charges of four counts of sexual misconduct, there was no reason to modify the punitive damages award.

Opinion by Judge Combs; Judge Thompson concurred by separate opinion; Judge Caperton concurred in part and dissented in part by separate opinion. On appeal and cross-appeal, the Court affirmed a judgment of the circuit court following a jury verdict in favor of Ford Motor Company on appellants’ premises liability claims brought after an elevator mechanic was diagnosed with malignant mesothelioma. The Court first held that based on the lengthy passage of time, involving some thirty years, the trial court did not abuse its discretion in admitting newspaper articles under the ancient-documents exception to the hearsay rule. The Court next held that the trial court did not err in admitting the testimony of an occupational epidemiologist who offered a theory that the worker had developed mesothelioma as a result of household exposure to his own father’s work clothes. The witness was qualified as an expert in asbestos-related diseases and was sufficiently qualified to review the literature pertaining to high risk for asbestos-related disease in elevator mechanics. While the evidence for the home-exposure theory was weak, it was the sole province of the jury to evaluate the conflict clearly demonstrated and highlighted by the effective cross-examination. The Court also held that appellants were not prejudiced by a fleeting reference by the expert witness to the worker’s exposure from other locations, as the jury had been made aware of the other locations from other testimony presented in appellants’ case-in-chief. The Court next held that the trial court improperly dismissed the loss of consortium claims by the workers’ wife and children because the injury occurred when the mesothelioma became manifest, not upon mere exposure, which was after the marriage and the children were born. However, the error was moot because it was derivative upon a finding of damages rejected by the jury. On the cross-appeal, the Court held that the trial court did not err in denying a motion for summary judgment based on the issue of up-the-ladder immunity as the issue had already been determined by the Supreme Court and thus, was the binding law of the case. The Court also held that the trial court did not err in admitting internal memoranda listing other employees who had died as a result of mesothelioma. The documents were relevant to prove that Ford had notice of the risks of working with asbestos, not as proof that the worker’s mesothelioma was caused by asbestos at the location where he worked. Further, Ford did not offer proof that the evidence was unduly prejudicial.


Opinion by Judge Lambert; Judges Caperton and Keller concurred. The Court affirmed a summary judgment in favor of appellee on appellant’s medical malpractice claims. The Court held that the circuit court did not err in granting appellee’s motion for summary judgment or in denying appellant’s motion to set it aside. The Court first held that appellant waived the issue of whether the circuit court correctly relied upon prior case law in concluding that affidavits, which contradicted appellant’s
answers to interrogatories, could not be submitted for the purpose of attempting to create a genuine issue of material fact, when appellant failed to raise the argument before the trial court. The Court next held that appellant also waived any argument that his interrogatory answers were not entirely inconsistent with the subject affidavit. Moreover, the argument lacked merit. The Court next held that that appellant had ample time to produce expert witnesses to support his cause of action and to sustain his burden of proof. Because he failed to do so, appellee was entitled to summary judgment as a matter of law. The Court finally held that the circuit court did not abuse its discretion in denying the motion to set aside the summary judgment when the motion did nothing more than reassert the same arguments made in challenging the motion for summary judgment. Although the circuit court cited to CR 60.02, rather than to CR 59.05, its decision was otherwise sound.


Opinion by Judge Keller; Judges Combs and Stumbo concurred. The Court affirmed a summary judgment in favor of appellee on appellant's claim that she was injured while pumping gas at appellee's establishment and that her injury was due to a latent defect in the gasoline pump. The Court held that the trial court did not err in granting summary judgment and that it correctly determined that \textit{res ipsa loquitur} did not apply. Appellant was operating the pump at the time of the injury and therefore, it was not under the exclusive control of appellee. Further, there was no evidence that appellee was negligent, as appellant submitted no evidence that the pump was defective. Appellant's conclusory allegations and subjective beliefs that the accident would not have happened but for appellee's negligence were not enough to survive summary judgment.


Opinion by Judge Lambert; Judges Caperton and Keller concurred. In an appeal and cross-appeal, the Court affirmed several orders of the circuit court in a personal injury suit wherein appellant sought damages for injuries she sustained in a motor vehicle accident. The Court first held that the trial court properly denied appellant's motion for a new trial. In so concluding, the Court first held that the jury's decision not to award damages for pain and suffering was supported by the record. The jury had a sufficient basis upon which to find that appellant's complaints were not causally related to the accident but were related to a pre-existing back problem. The Court next held that while appellant's six-minute delay in objecting to a comment made in closing argument did not make the objection untimely or the issue unpreserved, the admonition given by the trial court and requested by appellant cured any alleged error. On the cross-appeal, the Court first held that when the trial court entered conflicting orders awarding costs, the more specific order awarding costs to appellant was the one that should be followed. The Court then held
that while appellant did not receive the amount of damages she requested, she was nonetheless awarded a portion of what she claimed and therefore, she was properly considered the “prevailing party” for purposes of awarding costs. Therefore, the trial court did not commit any error or abuse its discretion in awarding the costs she requested.


Opinion by Senior Judge Lambert; Judges Caperton and Thompson concurred. The Court reversed and remanded a judgment entered upon a jury verdict assigning to appellant a portion of the liability arising from a motor vehicle accident after the trial court granted appellant a directed verdict. The Court held that the trial court erred in presenting the question of appellant’s liability to the jury after it granted appellant’s unopposed motion for a directed verdict as it pertained to the claims against him. While it was appropriate for the jury to determine appellant’s portion of fault incident to its determination of the comparative fault of the other parties, it was error for the trial court to adjudge liability for that fault after appellant had already been dismissed from the case.


Opinion by Judge Acree; Chief Judge Taylor concurred; Judge Combs dissented by separate opinion. The Court reversed an order of the circuit court denying appellant’s motion to dismiss appellee’s claim that the appellant water district failed to terminate water service to his property upon his request, resulting in damage to his property. The Court first held that it had jurisdiction to review the interlocutory order under the collateral order doctrine. The Court next held that it did not have jurisdiction under the collateral order doctrine or any other jurisprudence to review appellant’s defense under the Claims against Local Governments Act, KRS 65.200-65.2006. As a statutory defense to liability only, as with any other liability defense, the denial could be vindicated following a final judgment. The Court then held that the water district was entitled to governmental immunity and therefore, instructed the circuit court to dismiss the claim. Because appellant did not name as a defendant any government official, the discretionary/ministerial function analysis was irrelevant and the circuit court erred in considering whether the alleged conduct constituted a ministerial or a discretionary act. Appellant was a state agency engaged in the governmental function of providing water and therefore, was entitled to governmental immunity from a claim of damages resulting from an employee’s failure to terminate water service.
Opinion by Judge Caperton; Judge Clayton concurred; Judge Acree concurred by separate opinion. The Court affirmed in part and reversed and remanded in part a judgment entered pursuant to a jury verdict finding in favor of a medical clinic and doctor on the appellant estate’s claims that the doctor misread CT scans and as a result the deceased’s lung cancer went undiagnosed. The Court first recognized the tort of negligent credentialing and set out the elements of the tort. On the direct appeal, the Court then held that, pursuant to CR 42.02, the trial court did not abuse its discretion in bifurcating the proceedings for medical negligence from those for negligent credentialing. The procedure did not violate KRS 411.186. The estate was free to pursue punitive damages and introduce evidence to support said damages in the first and second phase of the trial. Further, while the estate should have been permitted to conduct a full and complete voir dire concerning both phases of the trial, any error was harmless because the jury did not find appellees to be negligent during the first phase of the trial and the second phase had not yet been conducted. The Court next held that the trial court did not abuse its discretion in excluding peer review reports and minutes seeking to establish the doctor’s habit of reading radiological films at a dangerously fast pace when the reports and minutes were not verbatim, the meetings were not recorded and the statements contained in the minutes could not be attributed to any particular person. The Court next held that the trial court did not abuse its discretion in determining that members of the peer review committee were not qualified to express expert opinions because their opinions would be based on radiological practices and standards, the very expertise of which they had no independent knowledge. The Court next held that because the estate failed to revive a fraud claim against the doctor, the argument presented related to the fraud claim was not preserved for the Court’s review. The Court next held that the trial court committed prejudicial error by depriving the estate of the right to cross-examine the doctor regarding the suspension of his medical license. Although post-treatment of the deceased, the suspension was not a collateral matter when it was close in time to the deceased’s misread CT scans and relevant to the doctor’s qualifications as an expert witness. The Court finally held that the trial court did not improperly prohibit the estate from cross-examining a witness who made a statement to the peer review committee when a hearing revealed that the peer review secretary could not attribute the statement directly to the witness. On the cross-appeal the Court first held that the trial court did not err in admitting habit evidence in the form of testimony regarding the doctor’s workload and speed of film interpretation. The testimony of two physicians and four employees, along with the doctor’s own testimony, was sufficient to establish a habit of the doctor and any question as to the timeliness of the evidence bore on the weight, not to its admissibility. Further, the witnesses had sufficient personal knowledge. The Court then held that the trial court did not abuse its discretion in denying a motion for a change of venue, given the information presented to the trial court concerning pretrial publicity.

Opinion by Judge Thompson; Judges Clayton and Stumbo concurred. The Court affirmed a summary judgment dismissing appellant’s claims against his landlord for injuries he sustained when he fell from his apartment balcony. The Court held that the circuit court properly granted summary judgment because the landlord could not be held liable for appellant’s injuries caused by an open and obvious hazard that appellant was aware of prior to his fall. Recovery for appellant’s claim for negligent repair could only be permitted if a repair resulted in an increased danger that was unknown to the tenant or if the repair gave the deceptive appearance of safety. However, the undisputed facts were to the contrary. The Court also held that the exceptional circumstances described in Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385 (Ky. 2010), did not apply. Further, because the common law precluded recovery, the disputed facts were immaterial and therefore, did not preclude summary judgment.


Opinion by Senior Judge Lambert; Judges Caperton and Thompson concurred. The Court affirmed in part, reversed in part and remanded an order of the circuit court dismissing appellant’s claims against a police detective and a county attorney for malicious prosecution, abuse of process and negligence. Appellant claimed that appellees coerced her into signing a stipulation of probable cause to get her case dismissed without prejudice and then later used that stipulation to avoid liability. The Court first held that the trial court did not err in dismissing the claim for abuse of process. While there was a genuine issue of material fact as to whether the county attorney requested a probable cause stipulation for improper reasons, because the county attorney had already commenced prosecution at the time he requested the stipulation, he was not acting outside of his authority as a prosecutor and therefore, he was immune from suit on the claim. The Court next held that because the dismissal required a stipulation of probable cause, the trial court erred when it failed to make specific findings of fact that the agreement was voluntary, that there was no evidence of prosecutorial misconduct and that public policy interests would not be affected before allowing the agreement to preclude suit for malicious prosecution. While appellees’ actions taken subsequent to formal prosecution were cloaked with absolute immunity, their actions while investigating only entitled them to qualified immunity. The Court finally held that the trial court erred in granting summary judgment on appellant’s negligence claim when there was a genuine issue of material fact as to whether appellees acted in good faith in misidentifying appellant as the offender during the investigation and prior to prosecution but nevertheless initiated the prosecution.
XXIII. UCC


Opinion by Judge Acree; Chief Judge Taylor and Judge VanMeter concurred. The Court affirmed a summary judgment in favor of the appellee bank on appellant’s claims alleging violation of the Uniform Commercial Code, specifically KRS 355.4-405 and 355.4-406; aiding and abetting fraud and illegal activity and breach of ordinary care; common law negligence; and breach of contract and breach of duty of good faith and fair dealing. The Court held that KRS 355.4-406, and not a statute of limitations, prohibited pursuit of the claims. In light of the uncontroverted facts and the legislative intent, appellant should have reasonably discovered unauthorized transactions on its account and its failure to timely examine its bank statements, combined with the failure to timely notify the bank, resulted in an absolute prohibition to the claims which were more than a year old.

XXIV. UTILITIES


Opinion by Chief Judge Taylor; Judges Caperton and Clayton concurred. The Court affirmed an opinion and order of the circuit court affirming a final order of the Kentucky Public Service Commission (PSC) granting a Certificate of Public Convenience and Necessity to Kentucky American Water Company for construction of a water treatment facility. The Court adopted the opinion of the circuit court and held that the PSC’s granting of the certificate was neither unreasonable as to the evidence nor unlawful as violating any statute or constitutional provision. Rather, there was more than ample evidence supporting the decision and the PSC committed no error of law in granting the certificate.


Opinion by Judge Wine; Judges Moore and Stumbo concurred. The Court affirmed a summary judgment of the circuit court resolving a utility service dispute in favor of the appellee city. The Court held that the circuit court correctly found that the county fiscal court was the consumer, both before annexation and after annexation of the property where a new courthouse was constructed, and the municipal electric utility had the dominant right to furnish electricity to the new courthouse. The determination of whether a particular entity or individual was a “consumer” under KRS 96.538 was a question best left to the trial court, as the finder of fact, on a case-by-case basis. The Court then held that because the county both paid for the services and used the services, the
park at issue was an extension of the county itself, the new courthouse built on the annexed property was both owned and operated by the county, and the electrical services provided to it were paid by the county, both were arms of the county. Because the rural electric cooperative had no consumers in the area prior to annexation, and because the county fiscal court could not be considered a new consumer, the rural cooperative had no superior right to provide electricity to the new courthouse. The Court then held that the trial court did not err by viewing three tracts as one annexed property.

XXV. WILLS AND ESTATES


Opinion by Judge Thompson; Judges Moore and Nickell concurred. The Court affirmed an order of the circuit court declaring that the appellee trust beneficiaries did not violate a no-contest clause of a trust document executed by their mother. The Court first held that the trial court did not abuse its discretion when it certified the order as final and appealable. The no-contest clause was significant to the other pending claims because if the children forfeited their interest in the trust, they would have no standing to allege that the trusts’ assets were improperly distributed. Further, because the question of forfeiture under the no-contest clause was distinctly different from the remaining claims of breach of fiduciary duty, mismanagement of the trusts and distributions contrary to the trust, the trial court did not abuse its discretion in certifying the order as final and appealable. The Court then held that the trial court correctly found that the children did not forfeit their interest in their mother’s trusts by asserting their claims. While the trust document contained an enforceable no-contest clause, the children’s complaint sought a construction of the trust document, not an invalidation of any of its terms.


Opinion by Judge VanMeter; Judges Dixon and Stumbo concurred. The Court affirmed in part and reversed and remanded in part a judgment of the circuit court finding that the appellee estate and heirs could recover certain property, as well as accrued interest and earnings from the property, they claimed passed to them upon the life tenant’s death. The Court first held that the trial court correctly concluded that the heirs were entitled to the property and while the life tenant had the unlimited power to use and consume the estate property during her lifetime, she could not make a testamentary disposition of the remaining property to appellant. The Court then held that the trial court erred in concluding that the heirs were entitled to the cash dividends and interest earned during the time of the life estate. Absent a limitation imposed by the grantor, the life tenant was entitled to the income or benefits accrued during the life estate. The Court remanded to the circuit court to make further factual findings to
determine the amount of property or principal remaining in the estate at the time of the life tenant’s death.


Opinion by Judge VanMeter; Judges Dixon and Stumbo concurred. The Court reversed an order of the circuit court finding that the execution of a purported will substantially complied with KRS 394.040. The Court held that the document, which was not wholly in the handwriting of the testator, could not be admitted to probate when two persons actually observed the testator subscribing the document but only one subscribed her name to the document as a witness.

**XXVI. WORKERS’ COMPENSATION**


Opinion by Judge VanMeter; Judges Lambert and Thompson concurred. The Court affirmed an opinion and order of the Workers’ Compensation Board dismissing appellant's appeal from an order granting a worker’s motion to reopen her workers’ compensation claim. The Court held that the Board correctly determined that the order was interlocutory and therefore, properly dismissed the appeal. The order only determined that the worker established a *prima facie* showing to warrant a reopening of the claim but did not adjudicate the claim that the worker's condition had worsened or the claim that the worker was entitled to an increase in benefits.


Opinion by Judge Thompson; Judge Caperton and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court requiring appellant to transfer workers’ compensation benefits payable to a worker to appellee under a structured settlement agreement. The Court first held that the circuit court had subject matter jurisdiction to approve the petition for approval of transfer of the structured settlement rights. The petition was unrelated to the worker’s compensation and the Structured Settlement Act established jurisdiction in the circuit court. The Court then held that the transfer of the structured settlement payment did not violate the anti-assignment provision of KRS 342.180. The agreement was not an assignment of a claim but was a transfer of the compensation received under the compensation agreement. Further, pursuant to the terms of the Act, the transfer of the structured settlement agreement was subject to judicial approval and a finding that it was in the worker’s best interest to satisfy his delinquent housing and automobile debts.
XXVII. ZONING


Opinion by Judge Acree; Judge Nickell and Senior Judge Shake concurred. The Court affirmed an order of the circuit court reversing a board of zoning and adjustment decision to grant a conditional use permit. In the direct appeal, the Court held that based upon the correct application of the zoning ordinances to the uncontested facts, the circuit court correctly determined that the proposed use of an outbuilding as a machine and welding shop did not constitute an agricultural home occupation. In the cross-appeal, the Court held that the circuit court properly rejected the contention that the property constituted two separate tracts when the deed evinced the parties’ intent to consolidate two tracts to create a single plot of land.
I. SIXTH CIRCUIT COURT OF APPEALS

A. Administrative Law


Petitioner appealed a Benefits Review Board order affirming the ALJ’s decision denying his claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, et seq. Petitioner filed his claim in February 2007. The ALJ found none of the x-ray interpretations were positive for pneumoconiosis under 20 CFR §718.202(a)(1). He also weighed the medical opinion evidence under 20 CFR §718.202(a)(4) and found two doctors did not make a diagnosis of clinical or legal pneumoconiosis. A third doctor’s sleep study produced no objective medical evidence to support a COPD or pneumoconiosis diagnosis. The ALJ found Petitioner established a totally disabling respiratory impairment based on the results of a 2007 pulmonary function study, but because he did not establish he had pneumoconiosis, he could not show the disabling condition was the result of pneumoconiosis. As such, Petitioner failed to meet his burden to show he was entitled to benefits. After the ALJ and Board’s decisions, Congress amended the Black Lung Benefits Act with the Patient Protection and Affordable Care Act (PPACA), 124 Stat. 119 (2010). The amendment revived a rebuttable statutory presumption that miners who worked underground for at least fifteen years and can demonstrate they suffer from a total respiratory disability are presumed to be totally disabled due to pneumoconiosis. See 30 U.S.C. §921(c)(4). The presumption was made retroactive to claims filed after January 1, 2005, that were pending on or after March 23, 2010. The Sixth Circuit vacated the Board’s decision and remanded the case to the ALJ for application of the presumption in consideration of the evidence. The negative x-ray evidence in this case alone does not rebut the §921(c)(4) presumption. In addition, because the record did not contain an affirmative showing Petitioner does not suffer from pneumoconiosis or that his respiratory impairment was not related to coal mine work, the medical opinion evidence was also insufficient to rebut the presumption. The Sixth Circuit directed the ALJ to permit the parties to submit additional evidence on remand.

B. Americans with Disabilities Act

Stansberry v. Air Wisconsin Airlines Corp., 651 F.3d 482 (6th Cir. 2011).

Plaintiff sued his former employer, Air Wisconsin Airlines, after being fired, alleging “association discrimination” under the Americans with Disabilities Act. He argued the airline terminated him because of fears he would be distracted at work on account of his wife’s disability due to a
rare autoimmune disorder. The airline argued it terminated Plaintiff due to his poor performance based on his failure to stay within budget, failure to report safety violations and improper supervision of employees. The district court granted summary judgment to the airline, holding Plaintiff did not establish a *prima facie* case of discrimination. It also held his poor performance was a legitimate reason for his termination and he failed to show it was pretextual. The Sixth Circuit affirmed. It adopted the formulation of the McDonnell Douglas framework the Tenth Circuit used in *Den Hartog v. Wasatch Academy*, 129 F.3d 1076 (10th Cir. 1997). In order to establish a *prima facie* case of associational discrimination, plaintiffs must establish "(1) the employee was qualified for the position; (2) the employee was subject to an adverse employment action; (3) the employee was known to be associated with a disabled individual; and (4) the adverse employment action occurred under circumstances that raise a reasonable inference that the disability of the relative was a determining factor in the decision." The Sixth Circuit held Plaintiff failed to satisfy the fourth prong in light of evidence in the record regarding his poor job performance and lack of any evidence he was terminated due to fears he would be distracted due to his wife's condition.

*Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012).

Plaintiff filed suit in 2007 under Title I of the ADA, which prohibited discrimination "because of" an employee's disability. *42 USC §12112(a)* (1990). Defendant requested the court to instruct the jury that Plaintiff could only prevail if its decision to fire her was "solely" due to her disability, a term that appears in the Rehabilitation Act, but not in the ADA. *29 USC §794(a)*. Plaintiff asked the court to instruct the jury that she could prevail if her disability was a "motivating factor" in the company's decision, a phrase that appears in *Title VII* but not in the ADA. The district court used the Defendant's proposed instruction, and the jury ruled for the Defendant. The Sixth Circuit reversed and remanded for a new trial, holding the "sole-cause standard" does not apply to claims under the ADA. It held the ADA bars discrimination "because of" an employee's disability, meaning it prohibits "discrimination that is a 'but-for' cause of the employer's adverse decision."

**C. Bankruptcy**

*In re Barbee*, 461 B.R. 711 (6th Cir. 2011).

The Chapter 13 Debtor instituted an adversary proceeding against U.S. Bank Association as trustee for a trust, by and through its mortgage servicing agent BAC Home Loan Servicing (Bank) seeking to avoid the Bank's interest in his manufactured home pursuant to *11 USC §544*. Debtor asserted as a hypothetical lien holder he had superior title to the manufactured home, and that any interest the Bank had in the home was avoidable under the statute because the Bank failed to perfect its lien on the home under Kentucky law. The Bank argued Debtor did not have standing to bring the avoidance action, and that he did not acquire title to the home under *KRS 186A.215*. It also argued the home does not
constitute an asset of the estate because Debtor acquired no interest in the home apart from its status as an improvement to real property or as a fixture. Finally, it argued Debtor's claims were barred by 11 USC §1322(b)(2) and §1325(a)(5) in that Debtor may not modify the Bank's rights as the holder of a mortgage secured solely by his residence. The bankruptcy court granted summary judgment to Debtor and the Sixth Circuit affirmed. The Court followed the reasoning of the Bankruptcy Appellate Panel in In re Dickson, 427 B.R. 399 (6th Cir. B.A.P. 2010), and affirmed the bankruptcy court's determination that Debtor had derivative standing to avoid the Bank's lien pursuant to §544. The manufactured home is property of the Debtor's estate under 11 USC §541(a)(1) because he had, at minimum, an equitable interest in the home. The Bank's argument that the home is subject to its mortgage lien as an improvement to real property was erroneous. Under Kentucky law, a manufactured home is personal property for which a certificate of title is required. It may be converted to an improvement to real estate by filing an affidavit of conversion to real estate and surrendering the Kentucky certificate of title. KRS 186A.297. It was undisputed that Debtor did not comply with KRS 186A.297 by filing an affidavit of conversion and surrendering the certificate of title or by seeking a court order converting the property. The manufactured home remained personal property, and the Bank's lien on it was not perfected because it was not noted on the certificate of title. As such, the lien was avoidable under §544.

In re Ingram, 460 B.R. 904 (6th Cir. 2011).

Debtor appealed an order of the bankruptcy court dismissing his Chapter 13 case pursuant to 11 USC §1307 for failure to complete mandatory prepetition credit counseling prior to filing his petition as required by 11 USC §109(h)(1), and the denial of his motion seeking reconsideration of the order. The Sixth Circuit affirmed. On November 17, Debtor filed his Chapter 13 petition. The next day he filed a Certificate of Credit Counseling indicating the counseling session was completed on November 18. At a hearing on a creditor's motion for relief from stay held on December 16, the Debtor told the bankruptcy court the certificate was incorrect and he completed the counseling before he filed his petition on November 17. The bankruptcy court issued an order for Debtor to show cause why his petition should not be dismissed and an order inviting the trustee to ascertain the actual status of Debtor's counseling progress as of the petition's filing date. The trustee thereafter filed a motion to dismiss. It stated that Debtor completed the online portion of his counseling on November 17, but did not complete the telephone component until November 18. The court granted the trustee's motion, finding that Debtor's counseling session required completion of both the online and telephone portions and he failed to complete both prepetition. It informed Debtor that if the counseling agency misled him into believing he had completed the course on time, it may be required to reimburse his costs, but he would still remain ineligible to file under 11 USC §109(h). The Sixth Circuit held the bankruptcy court did not abuse its discretion in dismissing Debtor's petition. Section 109(h) is unambiguous, and because Debtor failed to comply with its requirements or qualify for
deferral of the credit counseling requirement, he was not eligible to be a debtor.

In re Bailey, 664 S.W.3d 1026 (6th Cir. 2011).

In 2001, Debtors borrowed $157,291 from Salyersville National Bank, pledging their home and real property as security. In 2004, the Debtors borrowed $15,870 pledging their 1998 truck as security. In 2005, they filed for Chapter 7 bankruptcy protection. Debtors and the bank thereafter signed a reaffirmation agreement committing Debtors to pay the two debts, which were otherwise dischargeable in bankruptcy. Not long after, they stopped making payments on the loans, and the bank attempted to repossess the truck. When it found out the truck was in disrepair and had been stolen, it abandoned its attempts at repossession. It filed a wholly unsecured claim against the bankruptcy estate because its collateral was not available to be repossessed. The bankruptcy trustee sued the bank, seeking a declaration that the lien on the property should be avoided because the bank had not properly perfected the mortgage. This suit was settled by agreed judgment, which provided the real property would be sold by the trustee at auction with the proceeds going to the estate, and in the event the bank bought the property, the trustee’s complaint would be considered dismissed with prejudice, with the mortgage to remain in effect. The bank bought the property, resold it at a profit, and filed an unsecured claim with the bankruptcy estate for the full balance Debtors owed on the mortgage. The bankruptcy court allowed the claim and determined the bank was an unsecured creditor. It received $37,000 in payments from the bankruptcy estate on the two loans. The bank then sued Debtors in Kentucky state court seeking $100,500 on the two loans. Debtors moved the bankruptcy court to reopen their case under Fed.R.Civ.P. 60 and declare the reaffirmation agreement void. The bankruptcy court voided the agreement on the ground of mutual mistake because the parties signed it based on the false assumption the bank held secured interests in the real property and truck. The district court and Sixth Circuit affirmed. Under Kentucky law, if a mutual mistake between contracting parties regarding whether a debt is secured or unsecured has a material effect on the agreed exchange, the adversely affected party is entitled to relief. Overstreet v. Barr, 72 S.W.2d 1014, 1015-16 (Ky. 1934). "'[P]articipation by a secured creditor in distributions from the general assets [of the bankruptcy estate] on the basis of his full claim [generally] indicates a waiver of the security and an election to be treated as an unsecured creditor.'" U.S. Nat'l. Bank in Johnson City v. Chase Nat'l. Bank of N.Y.C., 331 U.S. 28, 35 (1947). Rather than file a claim as a secured creditor or attempt to recover insurance proceeds for the stolen truck, the bank opted to file its claim as a wholly unsecured claim. It could not later claim it should be treated as a secured creditor. As for the real property, the bank relinquished its collateral in the agreed judgment and became an unsecured creditor.
A Chapter 13 plan may only be confirmed if the debtor contributes "all projected disposable income" to the plan. 11 USC §1325(b)(1)(B). The Court held that post-petition income that becomes available to debtors after their 401(k) loans are fully repaid, which is allowed under 11 USC §1322(f), is "projected disposable income" that must be turned over to the trustee for distribution to unsecured creditors pursuant to §1325(b)(1)(B) and may not be used to fund voluntary 401(k) plans. Section 541(b)(7) only excludes contributions being made before the petition date from the property of the estate.}


The Chapter 7 debtor instituted an adversary proceeding against Sallie Mae, Inc. pursuant to 11 USC §523(a) seeking to determine the dischargeability of her student loans. On May 23, 2011, the bankruptcy court issued a summons, which debtor's counsel mailed to Sallie Mae by certified mail on June 6. On June 8, an employee for Sallie Mae signed the certified mail receipt for the summons and complaint. On June 28, debtor filed an affidavit of service attesting the summons, complaint and order for trial were sent by certified mail to Sallie Mae's chief operating officer. Under Federal Rule of Bankruptcy Procedure 7012, Sallie Mae's answer to the complaint was due by June 22, 2011. On June 30, debtor filed a motion for default judgment requesting her student loan be discharged. The bankruptcy court rejected the original motion for improper service, and debtor refiled the motion with proper service on July 6. The bankruptcy court entered a default judgment against Sallie Mae on July 8. Sallie Mae filed a motion to set aside default judgment on July 26, and Debtor objected. The bankruptcy court denied the motion, and Sallie Mae appealed. The Sixth Circuit affirmed. Sallie Mae argued its failure to answer the complaint did not entitle debtor to a default judgment because the complaint "contained only a conclusory allegation of nondischargeability under §523(a)(8)." Reconsideration of a point of law under Rule 60(b)(1) is allowed only when relief from judgment is sought within the normal time for taking an appeal. Federal Rule of Bankruptcy Procedure 8002(a) requires notices of appeal to be filed with the clerk within fourteen days of the date of entry of judgment. Sallie Mae was four days past the deadline to appeal when it filed its motion to set aside judgment, and was not entitled to have the purported legal error reconsidered under Rule 60(b)(1). In addition, the bankruptcy court did not abuse its discretion in rejecting Sallie Mae's argument that its failure to timely answer debtor's complaint was due to excusable neglect. The Court also held debtor properly served the summons and complaint.

In re Pierce, 471 B.R. 876 (6th Cir. 2012).

Vanderbilt Mortgage and Finance, Inc. appealed the bankruptcy court's grant of summary judgment to the Chapter 7 trustee which avoided its lien on the debtor's manufactured home under 11 USC §544. The sole means in Kentucky for perfecting a security interest in property requiring a
certificate of title is by notation of the lien on the certificate of title. Johnson v. Branch Banking and Trust Co., 313 S.W.3d 557, 560 (Ky. 2010). The bankruptcy court held the security interest was unperfected at the time of the debtor's petition despite notation of the lien on the certificate of title because the proper procedure was not followed in obtaining the notation. It was not “in accordance with” KRS Chapter 186A because the notation had been made following submission of a title lien statement to the Whitley County Clerk rather than the Clerk in Laurel County, the location of the debtor's residence. The Sixth Circuit affirmed.

D. Civil Procedure


MERS, Inc. sought permission from the Sixth Circuit, pursuant to 28 USC §1453(c), to appeal a district court order remanding the underlying action to the Kentucky state court from which it was removed. A district court's order remanding a case to state court for lack of subject-matter jurisdiction or defects in removal procedure is generally not appealable. 28 USC §1447(d); Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 229-30 (2007). The Class Action Fairness Act of 2005, 28 USC §1332(d), contains an exception which allows the circuit courts to accept an appeal of an order granting or denying a motion to remand a class action to the state court from which it was removed if the application for leave to appeal is filed not more than ten days after entry of the order. §1453(c)(1). The circuit court's decision must be rendered not more than sixty days after the date on which the appeal was filed, or within any extension agreed to by the parties or ordered by the court. §1453(c)(2), (c)(3). At issue in the instant case was whether MERS, as a third-party defendant, may remove the underlying state court action to federal court under §1453(c)(1). The Sixth Circuit held the sixty-day time period in §1453(c)(2) begins to run when the court of appeals decides to grant the petition for permission to appeal. It granted MERS' petition and held third-party defendants do not have statutory authority under the Act to remove a state court action to a federal district court.

E. Civil Rights

Barker v. Goodrich, 649 F.3d 428 (6th Cir. 2011).

Plaintiff, who was incarcerated in the London Correctional Institute, failed to stand during the 4:00 p.m. count. He was removed from his cell, handcuffed with his hands behind his back, and left in an observation cell for over twelve hours. During that time, he was forced to maintain an awkward and uncomfortable position, could not raise his hands to press a button for water or to remove his pants to use the toilet, and his request for mental health services were ignored. He filed a 42 U.S.C. §1983 claim against the Institute and eleven of its employees for violation of his Eighth Amendment rights. The magistrate judge granted Defendants' motion for summary judgment on the basis of qualified immunity, holding
the evidence established a constitutional violation, but the right at issue
was not clearly established. To succeed on his §1983 claim, Plaintiff must
demonstrate a person acting with the color of state law deprived him of a
right, privilege or immunity secured by the Constitution or federal statute.
*Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005). The Sixth
Circuit held the district court erred in granting the Institute qualified
could have asserted sovereign immunity under the *Eleventh Amendment*,
but the burden of establishing such immunity lies with the state, and the
defense is waived if not raised. *See Gragg v. Ky. Cabinet for Workforce
Dev.*, 289 F.3d 958, 963 (6th Cir. 2002); *Nair v. Oakland Cnty. Cnty.
Mental Health Auth.*, 443 F.3d 469, 476 (6th Cir. 2006). The Sixth Circuit
reversed the district court’s grant of summary judgment to the Institute,
holding it is entitled to neither qualified nor sovereign immunity. It affirmed
the district court’s grant of summary judgment to Defendants on the
§1983 claims for monetary damages against them in their official
capacities. *Thiokol Corp. v. Dept’ of Treasury*, 987 F.2d 376, 381 (6th Cir.
1993). Plaintiff’s suit may proceed to the extent it seeks declaratory and
injunctive relief against Defendants in their official capacities. The Sixth
Circuit also reversed the district court’s grant of qualified immunity to all
Defendants and remanded the case for further proceedings. The
evidence viewed in the light most favorable to Plaintiff was sufficient to
find “the force was applied maliciously and sadistically to cause harm,”
and Defendants disregarded a substantial risk of serious harm to Plaintiff.
Defendants’ conduct violated Plaintiff’s *Eighth Amendment* rights, which
were clearly established at the time of the violation.

*Cochran v. Gilliam*, 656 F.3d 300 (6th Cir. 2011).

Defendants appealed the district court’s denial of their motion for
summary judgment on the basis of qualified immunity. Plaintiff alleged
Defendants, who are deputy sheriffs, violated his constitutional rights by
assisting his landlords in wrongfully seizing his personal property without
due process during the execution of an eviction order. An official may be
held personally liable for civil damages for unlawful official action if that
action was not objectively reasonable in light of the legal rules that were
clearly established at the time the action was taken. *Anderson v.
Creighton*, 483 U.S. 635, 639 (1987). Courts must examine whether the
facts, viewed in a light most favorable to the plaintiff, show a constitutional
right was violated and whether the right at issue was clearly established
at the time of the defendant’s alleged action. *Saucier v. Katz*, 533 U.S.
194, 201 (2001), *overruled on other grounds by Pearson v. Callahan*, 555
U.S. 223 (2009). The Sixth Circuit agreed with the district court’s finding
that participation of deputy sheriffs in an improper seizure of personal
property for sale constitutes a seizure in violation of the *Fourth
Amendment*. Defendants helped Plaintiff’s landlords carry his
possessions out of the home, and threatened to arrest Plaintiff if he
interfered with the landlords’ actions. The Sixth Circuit rejected
Defendants’ argument that their actions were reasonable because they
received advice from the local county attorney. It held the *Fourth
Amendment violation was clearly established, and affirmed the district court's denial of Defendants' motion for summary judgment.

O'Neill v. Louisville/Jefferson County Metro Government, 662 F.3d 723 (6th Cir. 2011).

Uniformed Louisville Metro Animal Services (LMAS) officers entered Plaintiffs' home without consent or a warrant and confiscated their two adult dogs and a litter of seven puppies, altered the adult dogs, implanted microchips in all nine animals, and required Plaintiffs to pay over $1,000 to retrieve the animals without any formal charges ever being lodged against Plaintiffs. The district court dismissed Plaintiffs' constitutional and state-law claims, holding they were operating an unlicensed Class A kennel in violation of Louisville's animal-control ordinance. A Class A kennel is defined as "'[a]ny establishment where dogs and/or puppies...are kept for the primary purpose of breeding, buying, or selling such animals and which establishment is so constructed that the dogs [and/or] puppies...cannot stray therefrom.'" Louisville/Jefferson Cnty. Metro Gov't., Ky., Code of Ordinances (LMCO) §91.001. No Kentucky court had previously interpreted the term "Class A kennel" as defined in the ordinance. Plaintiffs kept the two adult dogs as family pets that they bred on a one-time basis. The Sixth Circuit held no one could reasonably argue on the facts as alleged that Plaintiffs' primary purpose for keeping the adult dogs was to breed them, and they were not for sale. While the litter of pups was for sale, the Court noted "the 'are kept' language in the ordinance implies a long-term operation applicable to a commercial kennel, not to a private residence where a single litter of puppies are put up for sale over a period of a few weeks or less." It held Plaintiffs were not operating a Class A kennel and were under no obligation to obtain a breeder's license in order to sell the single litter of pups. Initial entry of undercover LMAS officers into Plaintiffs' home was constitutional because Plaintiffs opened a portion of their home to the public when they invited those responding to their newspaper ad to come look at the puppies there. They assumed the risk that some of those who visited their home might not have a genuine interest in purchasing the puppies. See Katz v. U.S., 389 U.S. 347, 351 (1967). The Court declined to extend the consent-once-removed doctrine to cover reentry after an undercover agent or informant has left the premises or where there is no intent to effectuate an arrest. "Applying the consent-once-removed doctrine to LMAS' officers' second entry, where no arrest was intended, would go well beyond the confines of this limited doctrine, which has yet to be adopted by the Supreme Court." See Pearson v. Callahan, 555 U.S. 223, 243-44 (2009). Plaintiffs sufficiently pleaded a Fourth Amendment violation based on the officers' second warrantless entry. They also properly alleged a violation of their right to procedural due process. The only notice they were given regarding the charges or evidence against them was during a conversation they had with the LMAS director, who informed Plaintiffs they had the choice of being fined up to $3,000 and/or arrested or they could pay $1,020 on the spot and retrieve their animals. "Because of the confluence of the questionable circumstances under which this 'deal' allegedly occurred, we conclude that the lack of notice
was unconstitutional." The Sixth Circuit reinstated Plaintiffs' claims and remanded the case for further proceedings consistent with its opinion.


Eastern Michigan University (EMU) prohibits students in its graduate-level counseling degree program from discriminating against others based on sexual orientation and teaches students to affirm a client's values during counseling sessions. Plaintiff, who was participating in a student practicum while enrolled in the counseling program, requested that her faculty supervisor refer a gay client to another student because her faith prevented her from affirming the client's same-sex relationship. The faculty member referred the client, and EMU began a disciplinary hearing into Plaintiff's referral request, eventually expelling her from the program. Plaintiff then filed suit against EMU under the First and Fourteenth Amendments. The Sixth Circuit reversed the district court's grant of summary judgment to EMU, holding when the facts are construed in Plaintiff's favor, a reasonable jury could find her professors expelled her from the counseling program because of hostility toward her speech and faith, not due to a policy against referrals. Faculty members told Plaintiff that she violated two provisions of the American Counseling Association's code of ethics, which is incorporated into the student handbook. The code of ethics, however, does not prohibit values-based referrals like the one Plaintiff requested. In addition, a jury could find that EMU's blanket rule barring practicum students from referring clients was "an after-the-fact invention." At no point did faculty inform Plaintiff of the policy, and it was not articulated in the school's course materials or the student handbook. "A reasonable jury could find that the university dismissed [Plaintiff] from its counseling program because of her faith-based speech, not because of any legitimate pedagogical objective. A university cannot compel a student to alter or violate her belief systems based on a phantom policy as the price for obtaining a degree." However, in light of the school's claim that a no-referral policy existed, which was supported by the testimony of professors and school administrators, the district court properly rejected Plaintiff's cross-motion for summary judgment. The Sixth Circuit remanded to the district court for further proceedings.

Howell v. Sanders, 668 F.3d 344 (6th Cir. 2012).

Plaintiff appealed the district court's grant of summary judgment to Defendant on the basis of absolute and qualified prosecutorial immunity. Defendant is the Commonwealth's Attorney for the sixteenth judicial district in Kentucky. Plaintiff, who was a teacher, sued him after she was acquitted of criminal charges relating to the alleged sexual abuse of a minor student. The district court held Defendant's actions were taken in the course of his prosecutorial duties, entitling him to absolute immunity, and in any event, his actions were not in violation of clear constitutional rights, entitling him to qualified immunity. The Sixth Circuit affirmed. The "dividing line" in determining whether absolute immunity applies "is the point at which the prosecutor performs functions that are intimately associated with the judicial phase of the criminal process."
Hicks, 198 F.3d 607, 614 (6th Cir. 1999). At issue in this case were Defendant's decision to order the police to execute the arrest warrant and his decision to cancel a polygraph exam. A prosecutor's decision to initiate a prosecution, including the decision to file a criminal complaint or execute an arrest warrant is protected by absolute immunity. Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); Ireland v. Tunis, 113 F.3d 1435, 1446 (6th Cir.), cert. denied, 522 U.S. 996 (1997). "We see no reason to hold as a blanket rule that commanding the arrest of a suspect is per se outside the scope of a prosecutor's role as an advocate, particularly when, as here, the instruction follows the issuance of a valid arrest warrant by a neutral judge and is supported by probable cause." In addition, the Court held the facts suggested Defendant stopped Plaintiff's polygraph exam in order to initiate her prosecution, "which was well within his role as an advocate for the state of Kentucky." It affirmed the district court's conclusion that, because Defendant did not violate Plaintiff's asserted constitutional rights, he was also entitled to qualified immunity. It also affirmed the district court's dismissal of Plaintiff's state-law tort claims, but solely on the basis of absolute and qualified immunity under Kentucky law.

Davis v. Prison Health Services, 679 F.3d 433 (6th Cir. 2012).

Plaintiff brought a pro se action against Defendants alleging he was improperly removed from his employment in a prison public-works program due to his sexual orientation. The district court dismissed the complaint for failure to state a claim under 28 USC §1915(e)(2), §1915A and 42 USC §1997e(c) because Plaintiff failed to allege he was treated differently from other similarly-situated prisoners and because his claim was barred by Engquist v. Oregon Department of Agriculture, 553 U.S. 591 (2008). Plaintiff is an insulin-dependent diabetic who was screened and cleared for the public-works assignment by prison health officials. There were other insulin-dependent diabetics in the work program, but Plaintiff claimed he was the only homosexual. He also claimed he was treated differently than the other inmates by the supervising work crew. After Plaintiff complained of low blood sugar while on a public-works assignment, the prison health unit manager ordered him removed from the program. Prison officials alleged Plaintiff's blood sugar episode required the work team to return to the prison early, while Plaintiff claimed he returned to work and finished his shift. The district court dismissed the complaint, stating Plaintiff failed to identify any other diabetic prisoner who caused a work incident requiring the crew to return to the facility prematurely so that he could receive medical treatment. It also interpreted Engquist to bar all claims involving the application of rational basis scrutiny to employment decisions and other discretionary decision-making. The Sixth Circuit reversed. The district court erred when it relied on a description contained in Defendants' response to Plaintiff's initial grievance that stated his diabetic episode prompted the work crew to return to the prison prematurely. Plaintiff disputed this version of events, and the district court was required, at this stage of the proceedings, to treat his allegations as true. Because he alleged the diabetic episode did not prompt an early return to the prison, Plaintiff is similarly situated to the
heterosexual diabetic prisoners who were allowed to continue working in the public-works program. In addition, by dismissing Plaintiff's claim because he failed to identify any similarly situated prisoners, the district court required him "to plead more facts than he may ultimately need to prove to success on the merits if direct evidence of discrimination is discovered." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002). The Court also held the district court improperly grouped "class-of-one" claims with other types of claims subject to rational basis scrutiny. Plaintiff did not allege a "class-of-one" claim, and the fact his claim must be evaluated under the rational basis standard does not automatically mean he has asserted a "class-of-one" claim. Engquist prohibits only "class-of-one" claims in the public employment context. 553 U.S. at 607.


Plaintiff filed suit against his former employer alleging discrimination and retaliation under federal and state law. The district court dismissed his claims on the ground he had previously filed an administrative complaint alleging discrimination with the Lexington-Fayette Urban County Human Rights Commission (HRC), which found no probable cause to believe a violation of state anti-discrimination laws had occurred. The district court held KRS 344.270 bars individuals from bringing a civil-rights lawsuit after unsuccessfully seeking relief on the same claims from an administrative civil-rights commission in Kentucky, which barred Plaintiff from bringing his claim under the Kentucky Civil Rights Act (KCRA) in federal court. It also held the doctrine of administrative preclusion barred his federal §1981 discrimination and retaliation claims because the HRC had already considered and rejected Plaintiff's administrative complaint, which was based on essentially the same claims. The Sixth Circuit affirmed the district court's dismissal of Plaintiff's KCRA and §1981 discrimination claims, but reversed its dismissal of his federal retaliation claim because the county HRC did not adjudicate that claim. "We believe that the Supreme Court of Kentucky would hold that, where an individual receives an Order of Dismissal from a civil rights commission – whether state or local – and the individual does not seek further relief in the manner prescribed by the commission, but rather files a KCRA lawsuit in court based on the same claim, the election-of-remedies doctrine bars the subsequent lawsuit."

F. Constitutional Law

Discount Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509 (6th Cir. 2012).

Plaintiffs, who are manufacturers and sellers of tobacco products, appealed the district court's decision granting partial summary judgment to Defendants and partial summary judgment to Plaintiffs on their claim that provisions of the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009), violate their rights to free speech under the First Amendment. The Sixth Circuit upheld the Act's restrictions on the marketing of modified-risk tobacco products, its bans
on event sponsorship, branding of non-tobacco merchandise, and free sampling, and the requirement that tobacco manufacturers reserve significant packaging space for textual health warnings. It also affirmed the district court's grant of summary judgment to Plaintiffs on the Act's restriction of tobacco advertising to black and white text. It affirmed the district court's decision upholding the constitutionality of the Act's color graphic and non-graphic warning label requirement. The Court reversed the district court's holding that the Act's restriction on statements regarding the relative safety of tobacco products based on FDA regulation is unconstitutional. It also reversed its holding that the ban on tobacco continuity programs is permissible under the First Amendment.

G. Criminal Law

**Evans v. Zych, 644 F.3d 447 (6th Cir. 2011).**

Petitioner challenged the classification of his convictions under 26 USC §5861(d) and 26 USC §5861(e) as "crimes of violence" under 18 USC §924(c)(3), for purposes of 18 USC §4042(b), which requires the Bureau of Prisons to notify state, tribal and local law enforcement officials before the release of a prisoner convicted of a crime of violence. The Sixth Circuit held the crimes of possession and transfer of a firearm under §5861 are not crimes of violence within the meaning of §924(c)(3)(b). This was an issue of first impression in the Sixth Circuit.

**U.S. v. Johnson, 656 F.3d 375 (6th Cir. 2011).**

Defendant was charged with possession of counterfeit securities and fraudulent identification documents. The district court denied his motion to suppress evidence obtained during a search of his home. Police went there to investigate an anonymous tip indicating residents at the address possessed marijuana and a firearm. Defendant's mother-in-law owned the home, and stayed there with her mother and Defendant's wife. Defendant claimed at the time of the search, he told police he lived at the home and expressly objected to the search. Police officers testified Defendant said he did not live there and only visited to see his children, and that he did not object to the search. The officers obtained formal consent forms from Defendant's wife and her grandmother authorizing the search. In Defendant's bedroom, police found a gun, counterfeit money, and marijuana all belonging to Defendant. The district court determined Defendant objected to the search, but held the objection was invalid because he was not a full-time resident of the home and his possessory interest was inferior to that of his wife and her grandmother, who lived there full-time. The Sixth Circuit held the district court misconstrued **U.S. v. Ayoub, 498 F.3d 532, 537 (6th Cir. 2007)**, when it interpreted the decision to draw a distinction between superior and lesser possessory and privacy interests. **Georgia v. Randolph, 547 U.S. 103, 109 (2006)**, states that in situations where one co-tenant consents to a search, but another physically present co-tenant expressly refuses consent, a warrantless search is not reasonable as to the objecting co-tenant. id. at 120. **Ayoub** did not address whether consent to search from someone
with a superior possessory interest invalidates an objection to a search from someone present with a lesser possessory interest, rendering the search reasonable as to the objector. It simply stated someone with a lessor possessory interest can consent to a search when a person with a greater possessory interest is not present to refuse consent. *Id.* at 540-41. There is no precedent addressing the question of whether the decision in *Randolph* requires residential co-tenants to have equal possessory interests. Defendant in the instant case had a reasonable expectation of privacy in the bedroom he shared with his wife, and he expressly objected to the search. This made the search unreasonable as to Defendant. See *Randolph*, 547 U.S. at 120.


Appellant was convicted and sentenced to life in prison for participating in a sexual assault and multiple murders while stationed in Iraq while a member of the U.S. Army. Appellant’s co-conspirators were still on active duty and subject to the Uniform Code of Military Justice (UCMJ)\(^1\) when the crimes were discovered, but the military had no authority to court-martial Appellant because he had already been discharged. Civilian prosecutors charged Appellant under the Military Extraterritorial Jurisdiction Act (MEJA),\(^2\) which extends federal criminal jurisdiction to persons who commit crimes while a member of the Armed Forces but later cease to be subject to military jurisdiction. Appellant claimed the district court lacked jurisdiction to try him because he was never validly discharged and never ceased to be subject to military law as required by MEJA. He also argued MEJA is unconstitutional because it violates the separation-of-powers doctrine, equal protection and due process. The Sixth Circuit affirmed Appellant's convictions. Under **U.S. v. Harmon**, 63 M.J. 98 (C.A.A.F. 2006), three elements must be satisfied to accomplish an early discharge: 1) delivery of a valid discharge certificate; 2) a final accounting of pay; and 3) undergoing of a clearing process under appropriate service regulations to separate the member from military service. *Id.* at 101 (*citing U.S. v. King*, 27 M.J. 327, 329 (C.M.A. 1989)).

Appellant argued the clearing process in his case failed to comply with Army Regulations 635-10, 635-19 and 635-200 and rendered his discharge invalid. The Sixth Circuit held the district court erred in suggesting the clearing process was not necessary to effect a valid discharge, but it correctly concluded the Army complied with the requirements of out-processing Appellant as referenced in King. There is no authority stating that strict compliance with the Regulations cited by Appellant is required to effectuate a valid discharge. The Sixth Circuit also held MEJA is constitutional. It does not violate the separation of powers doctrine because it does not present "the encroachment or aggrandizement of one branch at the expense of another." **Buckley v. Valeo**, 424 U.S. 1, 122 (1976). Appellant's equal protection claims failed because he was not similarly situated to his coconspirators at the time of

---


the charging decision. See Braun v. Ann Arbor Charter Tp., 519 F.3d 564, 575 (6th Cir. 2008). He also failed to prove the second element of a class-in-one claim that there was no rational basis for the difference in treatment.

U.S. v. Trent, 654 F.3d 574 (6th Cir. 2011).

In 2007, Defendant entered a conditional guilty plea to the offense of failing to register under the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §16901, et seq., reserving his right to appeal the district court's denial of his motion to dismiss the indictment. This case presented an issue of first impression in the Sixth Circuit: is a sex offender, who was convicted of a sexual offense after SORNA was enacted on July 27, 2006 but before SORNA was implemented in a particular jurisdiction (Ohio in this case), required to register under the Act at any time before the Attorney General promulgated valid rules specifying SORNA's application to such pre-implementation convictions? Based on the holdings in U.S. v. Cain, 583 F.3d 408 (6th Cir. 2009), and U.S. v. Utesch, 596 F.3d 302 (6th Cir. 2010), the Court held sex offenders who were convicted before a particular jurisdiction had implemented SORNA are not required to register under the Act until the Attorney General promulgated valid rules specifying when or whether the Act would apply to them. Under 42 U.S.C. §16913(d), the Attorney General has authority to specify the applicability of the Act to sex offenders convicted before the Act's July 27, 2006, enactment or before its implementation in a particular jurisdiction. The Attorney General did not issue final guidelines in compliance with the APA rule making procedures until August 1, 2008. While Appellant's failure to register was a violation of both Indiana and Ohio state law, it was not a separate and independent violation of SORNA because it occurred before the Attorney General validly specified SORNA applied retroactively to pre-implementation sex offenders. The Court noted that had Appellant been indicted in a jurisdiction that adopted February 28, 2007, as the effective date of the Attorney General's regulations specifying retroactive application of SORNA to all sex offenders, or in a jurisdiction that held SORNA was self-effectuating against all sex offenders on the date of its enactment, his failure to register in November 2007 would have been indictable under the Act.

U.S. v. Richards, 659 F.3d 527 (6th Cir. 2011).

Defendant appealed his convictions on eleven child pornography related offenses, arguing the district court erred in denying his motion to suppress evidence obtained from a computer server because the search warrant was overbroad and the search exceeded the scope of probable cause set forth in the warrant. The government's expert testified at the suppression hearing that the server in question was a commercial web server, and that he would not restrict his search for child pornography offenses to the folders associated with Defendant's websites because, in his experience, individuals intentionally mislabel directory structures to hide evidence of child pornography. In addition, most servers have
unallocated space which might contain deleted files, log records, emails and without looking at individual server files, he would not know whether any of the websites were related. The district court found there was probable cause to search the entire server because "(1) the agents did not know how many websites were on the server before seizing it; and (2) the server administrator had access to all of the sites, and, therefore, 'could have secreted in any other websites [or in the unallocated space] information relevant to the investigation'" concerning the child pornography contained on Defendant's websites. It held the search warrant was not impermissibly overbroad. The Sixth Circuit affirmed, holding in light of the information known at the time the search warrant was issued, it was not unconstitutionally overbroad. The warrant's scope was limited to a search for evidence of child pornography crimes and did not permit a "free-ranging search." The Court also rejected Defendant's argument that the government's initial refusal to identify the images embraced by the charges and its subsequent identification of over 2,000 images constituted a violation of Federal Rule of Criminal Procedure 16(a)(1)(E). The district court did not abuse its discretion in denying Defendant's motion to compel identification of evidence under Rule 16. He conceded in his pretrial motion for identification of images that the Rule does not require separate identification of the government's case-in-chief evidence. In addition, there was no evidence the government acted in bad faith or attempted to "obfuscate the relevant documents by burying them without direction under an avalanche of irrelevant materials." U.S. v. Perraud, 2010 WL 228013 at *11 (S.D. Fla. Jan. 14, 2010).

U.S. v. Ferreira, 665 F.3d 701 (6th Cir. 2011).

Defendant was charged with conspiracy to distribute 500 grams or more of methamphetamine in violation of 21 USC §846 and §841(b)(1)(A). At the time of his indictment, he was in state custody in Georgia on unrelated charges. In October 2005, the federal government filed a petition for writ of habeas corpus ad prosequendum directing Georgia officials to bring Defendant to federal court in Tennessee for an initial appearance. A second superceding indictment was filed against Defendant, and the government filed a second petition for a writ of habeas corpus ad prosequendum, which the district court granted. Before the government petitioned for the second writ, Defendant was transferred to a jail in a different county in Georgia. The U.S. Marshals Service notified the federal government of the transfer, but it misplaced the notice and directed the second writ petition to state officials in the first county. The U.S. Marshals lodged federal detainers with Georgia authorities in December 2006 and February 2007. In September 2007, Defendant filed a pro se motion requesting appointment of counsel and included a copy of his executed detainer and request for a speedy trial. In July 2008, he filed a pro se motion to dismiss the indictment for speedy trial violations. Defendant was later appointed counsel, who filed a motion to dismiss with prejudice, alleging violations of Defendant's Sixth Amendment rights, the Speedy Trial Act, the Interstate Agreement on Detainers Act (IADA) and Rule 48(b) of the Federal Rules of Criminal Procedure. The government conceded it violated the IADA, and the
The district court granted Defendant's motion to dismiss the case on the basis of the IADA violation. It did not dismiss the case without prejudice because Defendant failed to show how the delay had actually harmed him. In February 2009, the government filed a new indictment on the charge, and Defendant entered a conditional guilty plea, reserving the right to appeal. The Sixth Circuit held the four factors listed in Barker v. Wingo, 407 U.S. 514, 530 (1972), weighed in favor of finding the government violated Defendant's Sixth Amendment right to a speedy trial. The three-year delay was sufficient to cross Barker's threshold requirement and trigger analysis of the remaining three factors. The delay was caused by the government's negligence, and Defendant clearly asserted his right to a speedy trial on numerous occasions. The Court noted it had not previously ruled in a published decision on whether a three-year delay due to the government's negligence generates a presumption of prejudice under the fourth Barker prong. It held both the government's negligence and the significant length of delay warranted dismissal of the indictment with prejudice. It noted it was not imposing a bright-line rule that every three-year delay will constitute a violation of a defendant's right to a speedy trial or that it will generate a presumption of prejudice.

U.S. v. Fofana, 666 F.3d 985 (6th Cir. 2012).

In November 2007, someone opened two U.S. Bank checking accounts in the name of Ousmane Diallo. In February 2008, the IRS deposited $3,787 into one of the accounts, and Diallo withdrew $2,500 from the account before the bank discovered the money was a tax return belonging to someone named Allison Miller. In December 2008, the IRS made two more direct deposits into the account which were tax returns belonging to Christopher Marks. Diallo attempted to make a cash withdrawal from the account in January 2009, but U.S. Bank had already blocked the account and contacted police and the IRS. Later the same day, Defendant arrived at the Port Columbus International Airport. After presenting a valid state driver's license bearing the name "Fode Fofana" at the security checkpoint, Defendant was subjected to extra screening. During the search, TSA agents found two unsealed envelopes containing a large amount of cash and three passports bearing Defendant's picture but different names, one of which was "Ousmane Diallo." Defendant was indicted on three counts of possession of a false passport in violation of 18 USC §1546(a) and two counts of bank fraud in violation of 18 USC §1344 and 1028A(a)(1). The district court granted his motion to suppress all evidence obtained as a result of the search in the airport. It held the extent of the search went beyond the permissible purpose of finding weapons and explosives and was "motivated by a desire to uncover contraband evidencing ordinary criminal wrongdoing." Prosecutors then moved to voluntarily dismiss the three counts of possession of a false passport. The district court also granted Defendant's motion in limine to bar introduction of the U.S. bank account records in the name of Ousmane Diallo. It held the government failed to allege sufficient facts to meet its burden of proof to show the connection of Defendant to his alias would have been made through an independent source or through
inevitable discovery. The government appealed the grant of the motion in limine, and the Sixth Circuit reversed. "[B]ank records and other evidence that the Government obtained independently of the airport search do not have to be suppressed on account of the unconstitutionality of that search, merely because the relevance or usefulness of that evidence became apparent because of the search." The actual documents were in the government's possession free of illegal means, and the illegal search was not directed to the crime for which the discovered information turned out to be useful, eliminating the deterrent effect of the suppression in this case. "It is only incidental that an illegal search speeded the recognition of the usefulness of the available evidence, or in other words narrowed the investigation."

U.S. v. Myers, 666 F.3d 402 (6th Cir. 2012).

Original charges against Defendant for his involvement in a heroin-distribution ring were dismissed without prejudice due to the government's violations of the Speedy Trial Act. A federal grand jury later returned a new indictment against him charging him with the same crimes. The district court granted his motion to dismiss, holding that because the charges in the new indictment were based on the same conduct as the charges in the original indictment, the same speedy-trial deadlines applied. The Sixth Circuit reversed the district court's judgment and remanded for further proceedings. "When the court dismisses a charge and the government subsequently brings a new charge based on the same conduct, the thirty-day speedy-indictment clock and the seventy-day speedy-trial clock...apply to the new charge." See 18 USC §3161(d)(1).

U.S. v. Toth, 668 F.3d 374 (6th Cir. 2012).

Defendant was charged with conspiring to steal government property as part of a scheme to defraud the Veterans Administration. On the third day of trial, he pleaded guilty and entered into a written plea agreement that included an appellate waiver provision. Eighty days later and prior to sentencing, Defendant sent a letter to the court complaining he had been coerced into pleading guilty by counsel. The district court treated the letter as a pro se motion to withdraw the guilty plea, appointed new counsel, held an evidentiary hearing, and denied the motion. The Sixth Circuit dismissed Defendant's appeal, holding "an appeal of the denial of a motion to withdraw a guilty plea is an attack on the conviction subject to an appeal waiver provision," noting the rule is "subject to the proviso...that the waiver be knowing and voluntary." Defendant attested in writing that he understood and voluntarily agreed to the plea agreement, and told the court under oath that he understood the waiver and was giving up his rights voluntarily.

U.S. v. Felts, 674 F.3d 599 (6th Cir. 2012).

Defendant was convicted for failing to register as a sex offender under SORNA in Tennessee, and the Sixth Circuit affirmed. This case
presented an issue of first impression in the Sixth Circuit – can an offender be convicted for failure to register under SORNA if his home state, Tennessee, has not yet completely implemented the act? The Sixth Circuit joined six other circuits in holding that SORNA is effective in a state even prior to its complete implementation. The duty to register in a state registry is independent of a state's degree of implementation of SORNA. In the instant case, there was no question Defendant failed to update his address when he moved with a minor to Florida and Puerto Rico, and he cited no specific inconsistencies between Tennessee law and SORNA that would have rendered it impossible for him to comply with SORNA in Tennessee. The Court held Defendant had standing to challenge the Act for being enforced in violation of the Tenth Amendment. However, his constitutional claim failed because Congress, through SORNA, neither commandeered Tennessee nor compelled it to comply with its requirements. Instead, it simply placed conditions on the receipt of federal funds. States are free to keep their existing sex offender registry systems and risk losing federal funding or adhere to SORNA's requirements and maintain that funding.

Green v. Throckmorton, 681 F.3d 853 (6th Cir. 2012).

Plaintiff was arrested for DUI after failing to dim her high beams in the face of oncoming traffic. The arrest was based on her responses to field sobriety tests, but when her urine sample came back clean, all charges against her were dropped. She brought suit under 42 USC §1983 against the arresting officer alleging he had violated her Fourth Amendment rights by conducting field sobriety tests without having a reasonable suspicion that she was impaired and by arresting her without probable cause. The district court granted summary judgment to Defendant and dismissed the case. The Sixth Circuit reversed and remanded for further proceedings. The Court held that after viewing the facts in the light depicted by the videotape of the stop, it could not say as a matter of law that the officer had a reasonable suspicion, prior to administering the field sobriety tests, to believe Plaintiff was under the influence of drugs or alcohol. He testified that her pupils were constricted, which suggested possible impairment, but the video provided no evidence to support his claim. In addition, the subsequent test for drugs and alcohol that later showed Plaintiff was sober was "alone sufficient to cast doubt on the truthfulness of [the officer]'s testimony regarding [Plaintiff]'s pupils." The rationale in Miller v. Sanilac County, 606 F.3d 240 (6th Cir. 2010), "that an officer's unsupported and contested observations regarding a driver's signs of impairment are called into question when a subsequent blood or urine test shows that the driver was not actually impaired," "applies with as much force to a detention governed by the reasonable-suspicion standard as one governed by the probable-cause standard." Under the circumstances of this case, a reasonable jury could find that Plaintiff's conduct did not create a reasonable suspicion that she was driving under the influence. The district court erred in concluding as a matter of law that Defendant's detention of Plaintiff for field sobriety tests did not violate her Fourth Amendment rights. The district court's grant of summary judgment must also be reversed because the question of whether
Defendant was entitled to qualified immunity turns upon which version of the facts is accepted in the case. The district court also erred in deciding as a matter of law that Defendant had probable cause to arrest Plaintiff.


Defendants were two of three attorneys who represented hundreds of Kentucky clients against the manufacturers of Fen-Phen. The case settled for $200 million, entitling Defendants to $22 million in attorney fees. However, Defendants "concocted a fraudulent scheme to take from their clients almost twice that amount." They were permanently disbarred from the practice of law in Kentucky, and were each indicted on one count of conspiracy to commit wire fraud in violation of 18 USC §§1343 and 1349. After a mistrial, a superseding indictment was issued again charging them with one count of conspiracy to commit wire fraud and adding eight counts of wire fraud that specifically detailed the wire communications that were part of the scheme. Defendants were convicted on all counts at a second trial. Cunningham was sentenced to 240 months in prison and Gallion was sentenced to 300 months in prison, and the court ordered them to pay over $127 million in restitution to their clients. The Sixth Circuit consolidated their appeals and affirmed.


Defendant appealed his convictions on two counts of making false oral and written statements to a federal probation officer in violation of 18 USC §1001(a)(2) and (a)(3) and the revocation of his supervised release. At issue was whether a defendant's false statements to a probation officer during the course of a monthly supervisory meeting are protected by the Fifth Amendment privilege against self-incrimination, and whether those statements fall within the "judicial function exception" to prosecution set forth in 18 USC §1001(b). The Sixth Circuit answered both questions in the negative and affirmed Defendant's convictions.

H. Employment & Labor Law

Bryson v. Middlefield Volunteer Fire Department, Inc., 656 F.3d 348 (6th Cir. 2011).

Plaintiff, a female volunteer firefighter, appealed the district court's grant of summary judgment to Defendants on her claims of sexual harassment under Title VII of the Civil Rights Act of 1964. The district court held the Department's volunteer firefighters were not employees during the relevant time period and could not be counted toward Title VII's requirement that an employer have fifteen employees in order to be subject to the Act. Courts must interpret the term "employee" by incorporating the common law of agency. Ware v. U.S., 67 F.3d 574, 576 (6th Cir. 1995) (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-24 (1992); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). The Sixth Circuit held the district court erred in adding a significant remuneration requirement as an independent antecedent to
the common law agency test. "Although remuneration is a factor to be
considered, it must be weighed with all other incidents of the relationship."
It reversed the district court's grant of summary judgment on Plaintiff's
Title VII claims and remanded for further proceedings. It also reversed
the district court's order dismissing Plaintiff's state law claims so that it
may again decide whether to exercise supplemental jurisdiction over
those claims. The Sixth Circuit had not yet considered the issue of
employment relationships in the context of a volunteer prior to this case.


Plaintiff, who is African-American, appealed the district court's grant of
summary judgment to UPS on his discrimination and retaliation claims
brought under the Uniformed Services Employment and Reemployment
Rights Act (USERRA) and his race discrimination and retaliation claims
under 42 USC §1981, Title VII and the Tennessee Human Rights Act
(THRA). The Sixth Circuit affirmed the grant of summary judgment on the
retaliation claims brought under §1981, Title VII and THRA but reversed
and remanded for trial on the remaining claims. Plaintiff, who was a
member of the Army Reserve and a combat veteran, returned to his
employment as a supervisor at UPS following rehabilitation for an injury
sustained in Iraq. When he presented a copy of his military orders for
annual training, his supervisor stated he needed to choose between the
Army and UPS. Plaintiff was discharged for violation of the company
integrity policy after he admitted to falsifying other drivers' safety ride
forms and instructing those drivers to sign incomplete forms. He claimed
UPS management knew there was a company custom of conducting
shortened safety rides, and that every supervisor had falsified a safety
ride form at some point. He claimed he was discharged due to his
commitment to military service which required him to be absent from
work, his race and his opposition to unlawful discrimination. The Sixth
Circuit held the district court improperly restricted the scope of discovery
when it allowed UPS to determine unilaterally that there was only one
Caucasian, non-military supervisor who was similarly situated to Plaintiff.
"[T]he discovery order effectively blocked Bobo from obtaining relevant
and potentially admissible evidence on a critical element of his case –
evidence necessary to convince a jury that there were supervisors other
than Wallace who were similarly situated to Bobo in all relevant aspects
and yet received better treatment than Bobo because they did not take
time off for military service or were of a different race." The discovery
order was contrary to law and should have been set aside by the district
court. Fed.R.Civ.P. 72(a). The district court also unduly delayed its ruling
on Plaintiff's discovery motions until after it had already granted summary
judgment to UPS. The Sixth Circuit reversed the discovery order and the
district court's post-judgment order affirming it and denying Plaintiff's Rule
56(f) motion. It remanded the case to the district court to re-evaluate
Plaintiff's discovery requests. The Court also held Plaintiff presented
sufficient facts to warrant a jury trial on his USERRA claim. There were
genuine issues of material fact concerning whether his military service
was a motivating factor in his discharge and whether UPS would have
taken the same employment action in the absence of his protected status.
He also demonstrated sufficient temporal proximity to establish a *prima facie* case of retaliation under [USERRA](https://www.cla.org/). In addition, a reasonable jury could logically infer Plaintiff's race was a motivating factor in his termination. None of the Caucasian employees who were accused of violating the integrity policy were terminated, and whether those employees were similarly situated to Plaintiff is a jury question.

**Thom v. American Standard, Inc., 666 F.3d 968 (6th Cir. 2012).**

Defendant appealed from the district court's grant of partial summary judgment to Plaintiff on his claim it interfered with his rights under the [FMLA](https://www.dol.gov), 29 USC §2612(a)(1)(D). Plaintiff requested FMLA leave from April 27-June 27, 2005, for a non-work related surgery. Defendant granted his request in writing. Following the procedure, Plaintiff's doctor cleared him for light duty work beginning May 31 and set June 13 as the probable date on which he could return to unrestricted work. When Plaintiff tried to resume light duty work on May 31, Defendant's human resources representative sent him home, stating the company did not allow employees with non-work-related injuries to perform light duty work temporarily after FMLA leave. On June 14, Defendant contacted Plaintiff to see why he had failed to come to work on June 13. He responded he was experiencing pain and would return on June 27, the end of his approved leave. Following a doctor's appointment on June 17, he went to work with a note requesting an extension of leave until July 18. Defendant terminated Plaintiff, counting every day from June 13-17 as an unexcused absence. Plaintiff argued Defendant failed to adequately notify him of its method for calculating FMLA leave because it did not inform him in writing or otherwise that company policy was to use a "rolling" method of leave calculation. The Sixth Circuit affirmed the district court's grant of partial summary judgment to Plaintiff on his interference claim, including damages, under 29 USC §2612. It noted that at no point through the FMLA process did Defendant tell Plaintiff that his leave time would be governed by a "rolling" twelve-month period. The only document he received stated his leave would expire on June 27. Plaintiff only found out Defendant had accelerated his return-to-work date to June 14 after it had already elapsed the day before, and the first time he received notice that Defendant was using a "rolling" method to determine his return-to-work date was after he filed suit. It reversed the district court's judgment on Plaintiff's liquidated damages claim under 29 USC §2617(a) and remanded for the doubling of damages. The district court found Defendant acted unreasonably but met the test of good faith. "To avoid paying liquidated damages under 29 USC §2617(a)(1)(A)(iii), the burden was on American Standard to prove both parts of the statutory exception." *See Arban v. West Pub. Co.*, 345 F.3d 390, 408 (6th Cir. 2003). The Sixth Circuit held Defendant could not prove good faith by pointing to its reliance on a policy that Plaintiff did not know about that was not used in his case.
Chapman v. United Auto Workers Local 1005, 670 F.3d 677 (6th Cir. 2012).

Chapman brought suit against his employer, GM, alleging breach of the collective bargaining agreement and against his union, alleging breach of the duty of fair representation, which constituted a hybrid §301/fair representation case. The district court held he was barred from suit because he failed to exhaust internal union remedies and granted summary judgment to GM and the union. Chapman appealed, arguing Williams v. Molpus, 171 F.3d 360, 369 (6th Cir. 1999), required that his case be remanded for trial on his fair representation claims to determine whether the exhaustion bar to suit was excused. The Sixth Circuit accepted en banc review to determine whether it erred in Molpus by holding the general requirement that a plaintiff must exhaust internal union remedies or be barred from suit is excused if the union breaches its duty of fair representation. The Court overruled the portions of Molpus and Burkholder v. Int'l. Union, 299 Fed.App'x. 531 (6th Cir. 2008), analyzing exhaustion of internal union remedies and aligned its precedent with the analysis set forth in Clayton v. Int'l. Union, 451 U.S. 679 (1981). In Clayton, the Supreme Court stated "[w]here internal union appeals procedures can result in either complete relief to an aggrieved employee or reactivation of his grievance, exhaustion [of internal union remedies] would advance the national labor policy of encouraging private resolution of contractual labor disputes." ld. at 692. Courts have discretion to decide whether to require exhaustion of internal union procedures, but the Supreme Court provided three factors relevant to that exercise of discretion: "(1) 'whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim'; (2) 'whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks'; and (3) 'whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim.'" ld. at 689. If any of these factors exist, the court may excuse the employee's failure to exhaust. Chapman provided no evidence union officials were hostile or that the internal union procedures would unreasonably delay a judicial hearing on his claim. In addition, the internal union appeals procedures were adequate in this case. The Sixth Circuit affirmed the district court's grant of summary judgment and dismissal of Chapman's suit.

I. Environmental

Sierra Club v. Korleski, 681 F.3d 342 (6th Cir. 2012).

The State of Ohio, pursuant to legislation passed by its General Assembly and signed by its governor, chose to no longer administer a federal regulation promulgated under the Clean Air Act prohibiting new source air polluters from installing or modifying an emissions source without first obtaining a permit from the Director of the Ohio EPA. Before the Director may issue a permit, he/she must determine that the new or modified source will employ the best available technology (BAT). Plaintiffs filed a
citizen suit against the Director of Ohio’s EPA. They alleged his refusal to make a BAT determination before issuing permits to small emitters constituted a violation of an emission standard or limitation within the meaning of the Clean Air Act’s citizen suit provision. The district court denied Plaintiffs’ motion for summary judgment, holding §7604(a)(1) of the Act authorizes citizen suits against a state only to the extent the state itself emits pollutants in violation of an emissions standard, rather than against the state in its regulatory capacity. Plaintiffs moved for reconsideration in light of the decision in U.S. v. Ohio Dept. of Highway Safety, 635 F.2d 1195, 1204 (6th Cir. 1980), which involved a different but related provision of the Clean Air Act. The district court restated its view that the statute does not authorize Plaintiffs’ suit, but held the reasoning in Highway Safety compelled the opposite conclusion. It granted Plaintiffs’ motion for summary judgment and ordered Ohio’s EPA to implement and enforce the BAT requirement against all emitters. The Sixth Circuit reversed. "The text and structure of the CAA make plain that §7604(a)(1) does not permit citizen suits against state regulators qua regulators." The Court declined to extend the holding in Highway Safety to §7604(a)(1). It noted that §7509(a) provides that if the federal EPA finds that a state has failed to implement a requirement in its state implementation plan, the EPA Administrator "shall," following the eighteen-month cure period, impose one of the sanctions set forth in §7509(b). Plaintiffs are not without a remedy in this case because §7604(a)(2) authorizes citizen suits against the Administrator when there is an alleged failure by the Administrator to perform "any act or duty under this chapter which is not discretionary." (emphasis in original)

J. ERISA


Plaintiffs brought suit under ERISA for the improper denial of pension benefits under Defendant's Account Executive Nonqualified Defined Benefit Fund (Plan). After exhausting their claim before the Plan's Administrative Committee, both parties briefed an appeal from the Committee's denial of benefits. The district court granted summary judgment to Plaintiffs on their claim the Plan violated ERISA's vesting requirements. Defendants appealed, claiming for the first time that the district court lacked subject matter jurisdiction because the Plan does not meet ERISA's definition of an "employee pension benefits plan." The Sixth Circuit held in light of the Supreme Court's decision in Arbaugh v. Y & H Corp., 546 U.S. 500 (2006), the existence of an ERISA plan is not a jurisdictional issue, but instead goes to whether Plaintiffs can state a claim upon which relief may be granted. "[T]he existence of an ERISA plan must be considered an element of a plaintiff's claim under Section 502(a)(1)(B), not a prerequisite for federal jurisdiction." "[F]ederal jurisdiction exists over Plaintiffs' ERISA claim unless 'the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or ...is wholly insubstantial and frivolous.'" Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 (1998) (quoting Bell v. Hood, 327 U.S. 678, 682-83 (1946)). Plaintiffs met this burden as
evidenced by the district court's determination that the AE Plan qualified as an ERISA plan after considering the question on the merits. The Sixth Circuit held Defendants waived any objection to this element of Plaintiffs' claim by failing to raise the issue before the district court granted summary judgment to Plaintiffs. The AE Plan Committee held the AE Plan was a top-hat, deferred compensation plan under ERISA §201(2). The district court reversed, and the Sixth Circuit affirmed, holding the Committee erred in only considering the fourth factor outlined in Bakri v. Venture Mfg. Co., 473 F.3d 677 (6th Cir. 2007), in deciding whether the Plan qualified as a top-hat plan. However, the Sixth Circuit held the district court erred in considering the top-hat issue itself without first remanding Plaintiffs' claims to the Committee. It remanded the case to the district court with instructions to remands Plaintiffs' claims of ERISA violations to the Committee.


State Street Bank was the fiduciary for the two primary retirement plans offered by General Motors (GM), and Plaintiffs were plan participants. They alleged State Street breached its fiduciary duty by continuing to allow plan participants to invest in GM common stock after reliable public information showed GM was headed for bankruptcy. Plaintiffs filed a class action suit alleging State Street's breach of fiduciary duty in violation of ERISA §409(a), 29 USC §1109(a), specifically alleging it had failed to prudently manage the plan's assets thereby breaching its fiduciary duty under §404. The district court held Plaintiffs sufficiently pleaded a breach of State Street's fiduciary duty, but they had not plausibly alleged the breach proximately caused losses to the plans. It noted plan participants had a wide variety of investment options from which to choose, and they maintained control over the allocation of assets in their accounts at all times. The district court granted State Street's motion to dismiss, and Plaintiffs appealed. An Employee Stock Ownership Plan (ESOP) fiduciary's decision to remain invested in employer securities is presumed to be reasonable under the Kuper/Moench presumption. A plaintiff may rebut the presumption "by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision." Kuper, 66 F.3d at 1459; accord Quan v. Computer Sciences Corp., 623 F.3d 870, 881-82 (9th Cir. 2010); Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 254-56 (5th Cir. 2008). The district court assumed the presumption would apply at the pleadings stage and held Plaintiffs pleaded sufficient facts to rebut the presumption. The Sixth Circuit clarified that the presumption of reasonableness adopted in Kuper is not an additional pleading requirement, and does not apply at the motion to dismiss stage of proceedings. It also noted that the rebuttal standard adopted in the Sixth Circuit "requires a plaintiff to prove that 'a prudent fiduciary acting under similar circumstances would have made a different investment decision.'" Kuper, 66 F.3d at 1459. The Court held Plaintiffs

---

3 Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995).

4 Moench v. Robertson, 62 F.3d 553, 569 (3d Cir. 1995).
plausibly pleaded causation to survive State Street's motion to dismiss. The district court erred in relying on the fact Plaintiffs could divest their 401(k) accounts of the GM stock to hold that State Street's alleged breach did not cause losses to the plan. As a fiduciary, State Street "was obligated to exercise prudence when designating and monitoring the menu of different investment options that would be offered to plan participants." The Court held the safe harbor provision in §404(c) is not applicable at this stage of the case. It is an affirmative defense that is not appropriate for consideration on a motion to dismiss when Plaintiffs did not raise it in the complaint. It reversed the district court's judgment and remanded the case for further proceedings.

**Shelter Distribution, Inc. v. General Drivers, Warehousemen & Helpers Local Union No. 89, 674 F.3d 608 (6th Cir. 2012).**

Shelter Distribution, Inc. (Shelter) filed an action with the district court seeking to enforce a provision of its collective bargaining agreement with the Union which obligated the Union to indemnify Shelter for any contingent liability incurred by Shelter as a result of its participation in a pension plan. After the collective bargaining process broke down between Shelter and the Union, Shelter withdrew from the multiemployer pension fund plan. The pension fund imposed withdrawal liability against Shelter in the amount of $57,291.50. Shelter argued the Union was obligated to indemnify it for "withdrawal liability" imposed on it pursuant to 29 USC §1399(b) under Section 8(m) of the collective bargaining agreement. The Union argued it is a violation of public policy for a union to indemnify an employer for any contingent liability to a pension plan established under ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 USC §1381-1461. This was an issue of first impression. The district court enforced the provision, holding it did not violate public policy. The Sixth Circuit affirmed, holding a third party may contractually agree to be held liable for an employer's monetary responsibilities under the Multiemployer Pension Plan Amendments Act. ERISA §401(a), 29 USC §110(a), states "'an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.'" The agreement in this case did not violate §110(a) because there was no shifting of the financial liability. Shelter was still financially liable to the fund and the company satisfied its financial obligation. The indemnification provision in the collective bargaining agreement merely provided the Union would reimburse Shelter for any financial liability it would incur should any contingent liability be imposed by the pension plan.

**Bidwell v. University Medical Center, Inc., 2012 WL 2477588 (6th Cir. Jun. 29, 2012).**

Plaintiffs were employees at UMC and participated in its retirement contribution plans. Each elected to place 100 percent of their investments in the Lincoln Stable Value Fund. This fund was also used by UMC as the default investment vehicle for all §403(b) plan participants who failed
to elect a preferred investment vehicle after enrollment. In 2007, the Department of Labor (DOL) promulgated new regulations that insulated employers from liability for default investments made on behalf of retirement-plan participants who failed to elect their preferred investment vehicle. It created a safe harbor for plan administrators that directed automatic enrollment investments into qualified default investment alternatives (QDIAs). 29 CFR §2550.404c-5(b)(1). In 2008, UMC changed its default-investment vehicle from the Lincoln Stable Value Fund to the Lincoln LifeSpan Fund, and sent notice of the change to all participants with 100 percent of their investments in the Stable Value Fund. Plaintiffs alleged they did not receive a copy of the notice, and did not respond by the deadline contained in the letter. Their investments were transferred to the Lincoln LifeSpan Fund, and each Plaintiff suffered significant financial losses prior to the return of their funds to the Lincoln Stable Value Plan. After exhausting administrative procedures, they filed suit in district court against UMC and Lincoln for breach of fiduciary duty under ERISA. The district court granted Lincoln and UMC's motions for judgment as a matter of law. It held Lincoln could not be held liable because it was not a fiduciary and UMC was not liable because it was entitled to the safe harbor protections in the DOL regulation. Plaintiffs' argument on appeal focused solely on whether the court erred in concluding UMC was shielded from liability. They argued the safe harbor provision only applies to employer-selected investments made on behalf of participants who fail to elect an investment vehicle, and they do not qualify as such participants because they each specifically selected the Lincoln Stable Value Fund. In enacting the safe harbor provision, the DOL stated that plan fiduciaries may avail themselves of its relief whenever plan participants have the opportunity to direct the investment of assets in their accounts, but do not direct the investment of those assets. The DOL noted that this includes the scenario where a plan administrator requests participants who had previously elected a particular investment vehicle to confirm whether they wished for their funds to remain in that investment vehicle. 72 Fed. Reg. 60452-01, 60453 (Oct. 24, 2007). The Sixth Circuit deferred to the DOL's interpretation of the regulation and affirmed the district court.

K. Evidence


Defendant was charged with carjacking in violation of 18 USC §2119 and brandishing a firearm during a crime of violence in violation of 18 USC §924(c)(1)(A)(ii). At trial, he sought to exclude evidence of an assault he committed in 2006. The district court admitted the assault victim's testimony under Rule 404(b) to show Defendant's specific intent, but prevented the government from informing the jury he had been convicted of assaulting the victim. The court also provided a limiting instruction before her testimony. Defendant also sought to exclude any evidence relating to the theft of a handgun that was taken in the same robbery as the items found in the car Defendant was alleged to have taken during the carjacking. The court admitted evidence of the uncharged theft under the
**res gestae** doctrine and Rule 404(b) and issued a limiting instruction prior to the evidence's introduction. Defendant was convicted on both counts and appealed to the Sixth Circuit, which reversed and remanded for a new trial. 18 USC §2119 requires the government to prove a defendant had the specific intent to cause serious bodily harm or death when he/she took the victim's car. U.S. v. Fekete, 535 F.3d 471, 476 (6th Cir. 2008). The Court had not previously considered whether prior bad acts are admissible to show specific intent to cause bodily harm or death in a carjacking case, but noted that other circuits have found such evidence admissible in narrow circumstances such as when the acts occur nearly simultaneously with the charged offense or when they involve the same victim. It held the district court erred in admitting the evidence in this case because the two offenses were unrelated and too far apart in time to be probative of whether Defendant had the specific intent to harm the carjacking victim. It also erred in admitting evidence of the uncharged handgun theft under the **res gestae** exception to Rule 404(b). There was no evidence firmly establishing a relationship between the carjacking and the theft, and no confirmation that the gun that was stolen was the same gun Defendant used during the carjacking. It was not properly admitted to show evidence of preparation or identity for the same reasons. The district court did not err in denying Defendant's Rule 29 motion for acquittal based on insufficient evidence.

L. Fair Debt Collection Practices Act


Washington Mutual foreclosed on a property before receiving an assignment and transfer of the promissory note and the delinquent home mortgage and before recording it in the Warren County, Ohio, recorder's office. Because Washington Mutual did not own the mortgage, Plaintiff filed suit for an allegedly false claim of ownership under the Fair Debt Collection Practices Act, 15 USC §1692, et seq., against the law firm acting for Washington Mutual in the foreclosure action. The district court dismissed the action under Fed.R.Civ.P. 12(b)(6) for failure to state a claim under the Act. It held the failure to record an assignment of mortgage before filing a foreclosure action is not a deceptive practice under the Act. It declined to exercise supplemental jurisdiction over Plaintiff's state law claims. The only issue on appeal was the district court's dismissal of Plaintiff's claim that the law firm used "false, deceptive or misleading representations" in connection with the collection of any debt in violation of 15 USC §1692e. The Sixth Circuit reversed and remanded for further proceedings, holding Plaintiff's complaint stated a valid claim. She alleged that identifying Washington Mutual as the holder of the note caused her confusion and delay in attempting to contact the proper party concerning payment on the loan. "Given these allegations, plaintiff has sufficiently alleged a material misrepresentation that would confuse or mislead an unsophisticated consumer." The Court noted that it was making no conclusions regarding the merits of Plaintiff's claim, only that she had alleged sufficient facts to survive a motion to dismiss on the pleadings.
After Plaintiff fired a construction crew member, the Laborers' International Union of North America (LIUNA) filed an unfair labor practice charge with the NLRB, claiming Plaintiff fired the worker for wearing a LIUNA shirt to work. It also began bombarding Plaintiff's corporate offices and executives with thousands of phone calls and emails. These actions clogged Plaintiff's voicemail system and prevented customers from reaching its sales offices and representatives. Plaintiff filed suit in federal court alleging state law torts and violations of the Federal Computer Fraud and Abuse Act (CFAA), 18 USC §1030, which criminalizes certain computer fraud crimes and creates a civil cause of action. LIUNA moved to dismiss the federal complaint for failure to state a claim and labor preemption under San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959), and Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976). Rather than address preemption, the district court held Plaintiff failed to state a claim under the CFAA, withheld leave to amend, declined to exercise supplemental jurisdiction over Plaintiff's state law claims and dismissed the entire case with prejudice. On appeal, the Sixth Circuit held Garmon preemption does not bar Plaintiff's CFAA claims. The independent-federal-remedy exception to Garmon preemption allows federal courts to decide labor law questions that are collateral issues in suits brought under independent federal remedies. See Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 609 (6th Cir. 2004). The CFAA provisions implicated in Plaintiff's suit prohibit knowingly transmitting information that damages a computer, 18 USC §1030(a)(5)(A), and intentionally accessing a computer without authorization, §1030(a)(5)(B), (C), conduct "wholly unrelated to the labor laws." The Machinists preemption doctrine has only been applied to bar state rather than federal claims. The Court reinstated Plaintiff's CFAA transmission claim, and reversed the dismissal of its state law claims. It remanded to the district court to determine whether it may exercise jurisdiction over those claims. To state a transmission claim, a plaintiff must allege the defendant "knowingly cause[d] the transmission of a program, information, code, or command, and as a result of such conduct, intentionally cause[d] damage without authorization, to a protected computer." 18 USC §1030(a)(5)(A). Whether LIUNA's communications constituted transmissions and whether Plaintiff's phone and email systems qualify as "protected computers" was not in dispute. The Court held Plaintiff properly alleged both damages and intent, holding "a transmission that weakens a sound computer system – or, similarly, one that diminishes a plaintiff's ability to use data or a system – causes damage." LIUNA's conduct was also intentional, as it instructed its members to send thousands of emails and used an auto-dialing service to generate a high volume of calls. The district court properly dismissed Plaintiff's CFAA access claim under 18 USC §1030(a)(5)(B), (C). LIUNA used unprotected public communications systems, which "defeats
[Plaintiff]'s allegation that LIUNA accessed its computers 'without authorization.'" The Court noted Plaintiff may not amend its access claim on remand. Finally, it held the district court lacked jurisdiction to issue an injunction to block LIUNA's activities because Plaintiff failed to comply with §8 of the Norris-LaGuardia Act (NLGA).

N. Federal Tort Claims Act


Plaintiff filed a FTCA suit against the U.S. in district court after he was injured while mowing grass at an Army base in Kentucky. Plaintiff was an employee of a fencing and excavating company hired to provide grounds maintenance at the base. The fencing company was covered by workers' compensation insurance as required by Kentucky law. The district court granted summary judgment to the U.S. on the grounds that under KRS 342.690, the U.S. was an "up the ladder" statutory employer and Plaintiffs' only remedy was the worker's compensation benefits he received from his direct employer. It held that Plaintiff's work in providing grounds maintenance was a regular and recurrent part of the Army base's business. On appeal, the Sixth Circuit rejected Plaintiff's argument that governmental entities are not "persons" under the Kentucky Workers' Compensation Act and are not entitled to an up-the-ladder defense pursuant to Davis Hensley, 256 S.W.3d 16, 18 (Ky. 2008). It noted Davis used the phrase "governmental entities" in the context of addressing a state entity rather than the federal government. Because the FCTA explicitly waives federal governmental immunity and allows torts claims against the U.S., the federal government should be considered a "person" entitled to the "up-the-ladder" defense under the Kentucky Workers' Compensation Act. It affirmed the district court's holding that the U.S. is entitled to immunity as a "contractor" under KRS 342.690(1).

O. Habeas Corpus

Muniz v. Smith, 647 F.3d 619 (6th Cir. 2011).

Petitioner filed a petition for a writ of habeas corpus challenging his state convictions for assault with intent to commit murder and felon in possession of a firearm on the ground he was denied his Sixth Amendment right to counsel when his attorney fell asleep while Petitioner was being cross-examined. His convictions were upheld at the state level, and the federal district court denied habeas relief but granted a certificate of appealability on the issue of whether he was denied effective assistance of counsel. The Sixth Circuit held the state court properly applied the ineffective assistance standard in Strickland v. Washington, 466 U.S. 668 (1984) rather than the standard in U.S. v. Cronic, 466 U.S. 648 (1984). The Ninth, Fifth and Second Circuits have held denial of counsel with presumed prejudice under Cronic only occurs once counsel sleeps through a "'substantial portion of [defendant's] trial.'" Javor v. U.S., 724 F.2d 831, 834 (9th Cir. 1984); Burdine v. Johnson, 262 F.3d 336, 340-41 (5th Cir. 2001) (en banc); Tippins v. Walker, 77 F.3d 682, 685 (2d Cir.
1996). The Sixth Circuit held Petitioner could only show his attorney was asleep for an undetermined portion of a single cross-examination. It reasoned because the total cross-examination was brief, spanning only twenty-six pages of trial transcript, the attorney must have only been asleep for a short period of time. It also held Petitioner's claim did not satisfy the Strickland standard because Petitioner could not show prejudice from his attorney's deficient performance.

**D'Ambrosio v. Bagley, 656 F.3d 379 (6th Cir. 2011).**

At issue was whether a federal court has jurisdiction to bar the re-prosecution of a criminal defendant when it determines the state failed to comply with an earlier order issuing a conditional writ of habeas corpus. The warden for the state of Ohio appealed the district court's decision to vacate a prior order and issue an unconditional writ that barred the re-prosecution of an Ohio death row inmate. In 2001, the district court concluded the prosecution failed to disclose exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), and granted the prisoner a conditional writ requiring the state to either set aside his conviction and sentence or conduct a new trial within 180 days. D'Ambrosio v. Bagley, 2006 WL 1169926 at *56 (N.D. Ohio Mar. 24, 2006). The Sixth Circuit affirmed the decision, D'Ambrosio v. Bagley, 527 F.3d 489, 499-500 (6th Cir. 2008), and the district court issued the conditional writ in September 2008. The state court scheduled the retrial for March 2009, but one week before trial, the prosecutor notified defense counsel that additional evidence existed. Defense counsel requested additional time to examine the evidence, which prompted the trial court to reschedule the trial date to May 4, 2009, which was outside the 180 day time limit. The state moved the federal court for an enlargement of time in which to conduct the retrial. The district court granted an enlargement of time solely for the purpose of having the parties submit briefs on the motion. In his response, Petitioner asked the district court to grant an unconditional writ and bar his retrial because of the state's failure to comply with the conditional writ. In April 2009, the district court denied the state's motion and issued an unconditional writ but declined to bar his re-prosecution. D'Ambrosio v. Bagley, 619 F.Supp.2d 428, 460 (N.D. Ohio 2009). He appealed the district court's decision with respect to his re-prosecution. In April 2009, the prosecution's key witness died. It did not inform the state trial court of this until August, the date on which the prisoner moved the court, pursuant to Rule 60(b)(2), (5) and (6) to vacate its April 27 order and bar his re-prosecution in light of the witness' death. The Sixth Circuit remanded his appeal, and the district court granted his Rule 60(b) motion, vacating a portion of its original judgment and barring the prisoner's re-prosecution. D'Ambrosio v. Bagley, 688 F.Supp.2d 709, 735 (N.D. Ohio 2010). The Sixth Circuit affirmed, holding the district court had subject-matter jurisdiction to vacate part of its original judgment, grant the unconditional writ, and bar Petitioner's re-prosecution. Because the state never complied with the conditional writ, the district court's jurisdiction remained intact pursuant to Gentry v. Deuth, 456 F.3d 687, 692 (6th Cir. 2006).
Ata v. Scutt, 662 F.3d 736 (6th Cir. 2011).

Petitioner appealed the district court’s dismissal of his petition for a writ of habeas corpus, arguing the court improperly granted the state of Michigan’s motion for summary judgment on statute of limitations grounds because his motion for equitable tolling required an evidentiary hearing. He argued that his serious and prolonged mental illness prevented him from filing his petition on time. The state argued that because Petitioner failed to show that he was incompetent during the five year period before the statute of limitations expired and because he provided only “unsupported and conclusory claims,” he was not entitled to equitable tolling. The Sixth Circuit held, in light of the detailed factual allegations in this case, the district court should have granted Petitioner an evidentiary hearing to determine whether the allegations were true, and if so, whether he was entitled to equitable tolling. See Schriro v. Landrigan, 550 U.S. 465, 474-75 (2007). A prisoner’s mental incompetence, which prevents the timely filing of a habeas petition, is an extraordinary circumstance that may equitably toll AEDPA’s one-year statute of limitations. To obtain equitable tolling in such a case, the petitioner “must demonstrate that (1) he is mentally incompetent and (2) his mental incompetence caused his failure to comply with AEDPA’s statute of limitations.” “[A] blanket assertion of mental incompetence is insufficient to toll the statute of limitations…a causal link between the mental condition and untimely filing is required.” See McSwain v. Davis, 287 Fed.App’x. 450, 456 (6th Cir. 2008). “Although an evidentiary hearing need not be provided as a matter of right, an evidentiary hearing is required when sufficiently specific allegations would entitle the petitioner to equitable tolling on the basis of mental incompetence which caused the failure to timely file.” See McSwain at 457-58. The Court held Petitioner in the instant case established sufficient facts and the causal connection in his petition so as to entitle him to an evidentiary hearing. It vacated the district court’s dismissal of his petition and remanded for an evidentiary hearing on his motion for equitable tolling.

Hall v. Warden, Lebanon Correctional Inst., 662 F.3d 745 (6th Cir. 2011).

Petitioner submitted his petition for a writ of habeas corpus five days after the one-year statute of limitations had run. The district court dismissed his petition as time-barred, and denied his request for a certificate of appealability. The Sixth Circuit granted Petitioner a COA on his claim that lack of access to the trial transcript justified equitably tolling the limitation period. Defense counsel withdrew shortly after Petitioner was sentenced on August 15, 2005, and the trial court appointed a second attorney to represent Petitioner on direct appeal. Petitioner alleged that from January to July 2006, his new attorney ignored his attempts to obtain a copy of the trial transcript. The Ohio Court of Appeals denied Petitioner’s appeal on August 15, 2006, and Petitioner’s attorney withdrew as counsel. He failed to turn over any of the documents in the case, including the trial transcript. Petitioner proceeded pro se and missed the September 29, 2006, deadline to timely appeal his convictions to the Ohio Supreme Court. The statute of limitations for filing his habeas petition began to run
on September 30, 2006. It was tolled for several months while Petitioner submitted various motions to the Ohio Supreme Court, and began to run again on March 14, 2007. It expired on January 16, 2008. He delivered his petition to the prison mailroom on January 21, 2008, and it was filed in the district court on February 1. Petitioner had still not received a copy of his trial transcript at that time. A habeas petitioner is entitled to equitable tolling if he can establish he has been pursuing his rights diligently and that "some extraordinary circumstance stood in his way and prevented timely filing." Holland v. Florida, 130 S.Ct. 2549, 2562 (2010). The Court held the Holland two-part test has replaced the five-factor test in Dunlap v. U.S., 250 F.3d 1001, 1008 (6th Cir. 2001) as the means in the Sixth Circuit for determining whether a habeas petitioner is entitled to equitable tolling. Unavailability or delay in receiving transcripts, standing alone, is not enough to entitle a habeas petitioner to equitable tolling. Inglesias v. Davis, 2009 WL 87574 at *2 (6th Cir. Jan. 12, 2009). The Court held there was no reason why Petitioner could not have submitted on January 16, 2008, the same petition he submitted on January 21, 2008. In addition, Petitioner was on notice that the Ohio Supreme Court has not adopted the prison-mailbox rule, and he had an obligation to monitor the status of his motion for delayed appeal to ensure it was timely filed.

Lowe v. Swanson, 663 F.3d 258 (6th Cir. 2011).

Petitioner appealed the district court's denial of his petition for a writ of habeas corpus, arguing the Ohio Supreme Court unreasonably applied federal law as clearly established by the U.S. Supreme Court in Lawrence v. Texas, 539 U.S. 558 (2003), when it upheld his incest conviction for engaging in sexual conduct with his twenty-two year old stepdaughter in violation of Ohio Rev. Code §2907.03(A)(5). The Ohio Court of Appeals upheld the conviction, holding the statute prohibits sexual conduct between a stepparent and stepchild regardless of the stepchild's age. The Ohio Supreme Court affirmed, holding Lawrence did not establish a "fundamental" right to all consensual adult sexual activity or consensual sex with one's adult children or stepchildren, noting the Texas statute at issue in that case was subjected to a rational-basis test rather than strict scrutiny. It held Petitioner's conviction was constitutional because the Ohio statute bears a rational relationship to the state's legitimate interest in protecting families from the destructive influence of incestuous relationships. The magistrate judge issued a report and recommendation to deny Petitioner's petition, holding the Ohio Supreme Court's decision was not unreasonable because Lawrence "was not clear as to the nature of the right it considered or the standard of review it applied to the Texas statute," as evidenced by a split among federal circuits. See Lowe v. Swanson, 639 F.Supp.2d 857, 859 (N.D. Ohio 2009). The district court adopted the magistrate judge's report and recommendation and denied the petition. Id. at 860. The Sixth Circuit affirmed, holding in light of the split among the circuits and the "well-reasoned authority in favor of respondent," the Ohio Supreme Court did not unreasonably apply clearly established federal law in reviewing Ohio Rev. Code §2907.03(A)(5) for a rational basis. See Wright v. Van Patten, 552 U.S. 120, 126 (2008). In addition, it held, assuming Lawrence in fact clearly established a
fundamental right and/or higher standard of review, neither the right nor standard was implicated in the present case given Lawrence's specific focus on homosexual sodomy. Lawrence did not address or clearly establish federal law regarding state incest statutes.


Petitioner and two other people were charged with murdering, robbing and conspiring to murder an unidentified person. The investigation began when one of the defendants told a man to whom she'd sold cocaine that she had been involved in a murder. He thereafter told the story to police in exchange for immunity from prosecution. No physical evidence was ever found, and the only witnesses were the three co-conspirators. The only direct evidence establishing Petitioner as the shooter came from the third defendant's unsworn taped confession, which was made to police while the defendant was in custody following his arrest. At trial, the defendant asserted his Fifth Amendment right not to incriminate himself, and the prosecution made a redacted version of the tape to play at trial. The defendant waived his Fifth Amendment rights because he thought the redacted version made him appear to be the shooter, and the unredacted tape was played at trial. The defendant was available to testify at trial, and Petitioner had not had any prior opportunity to cross-examine him. The district court overruled Petitioner's objection on Confrontation Clause grounds. He was convicted of intentional murder, first-degree robbery, conspiracy to commit murder and tampering with physical evidence. A majority of the Kentucky Supreme Court affirmed the convictions, but only a three-justice plurality joined the opinion. It held the Confrontation Clause does not bar a statement as long as "the declarant is present at trial to defend or explain it." Peak v. Kentucky, 197 S.W.3d 536, 544 (Ky. 2006) (quoting Crawford v. Washington, 541 U.S. 36, n. 9 (2004)). Because Petitioner had the opportunity to call the other defendant as a witness and chose not to, he waived his right to confrontation. The U.S. Supreme Court denied certiorari, and Petitioner petitioned for a writ of habeas corpus. The district court denied the petition but issued a certificate of appealability. It noted the Kentucky Supreme Court's decision was not contrary to Crawford because "the Constitution does not actually require the prosecution to call a witness to the stand in its case-in-chief to satisfy the Confrontation Clause. Rather, the Constitution simply requires that the witness must be made available for cross-examination." The Sixth Circuit affirmed. "As long as 'faiminded jurists could disagree on the correctness of the state court's decision,' then relief is precluded under AEDPA." Harrington v. Richter, 131 S.Ct. 770, 786 (2011). "The Supreme Court simply had not, at the time [Petitioner]'s conviction became final, clearly held that the ability to cross-examine immediately is required by the Confrontation Clause." It was not unreasonable to believe that confrontation only requires that a declarant be made available in the courtroom for a criminal defendant to call during his/her own case.
Perkins v. McQuiggin, 670 F.3d 665 (6th Cir. 2012).

Petitioner was convicted of murder, and the conviction became final on May 5, 1997. Under AEDPA, he needed to file his petition for a writ of habeas corpus by May 5, 1998. 28 USC §2244(d)(1)(A). Petitioner filed his petition on June 13, 2008, and the magistrate judge recommended it be denied as untimely. Petitioner objected, arguing the petition should be governed by AEDPA's "new evidence" statute of limitations, which extends the statute of limitations to one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 USC §2244(d)(1)(D). He introduced three affidavits, the last of which was signed on July 16, 2002. The "new evidence" statute of limitations expired on July 16, 2003. Petitioner filed the instant petition in 2008, requesting that AEDPA's statute of limitations be equitably tolled because he is actually innocent of the murder. The district court denied the request because the evidence offered was substantially available to Petitioner at trial and it pointed to the same theory that Petitioner had already unsuccessfully argued at trial – that he was being framed by the prosecution's lead witness. It also found that even if Petitioner had presented evidence to satisfy the actual innocence standard, he had failed to pursue his claim with reasonable diligence. The court denied the petition for relief. The Sixth Circuit granted a certificate of appealability. The only issue on appeal was whether the district court erred in finding reasonable diligence is a precondition to relying on actual innocence for purposes of equitable tolling. The Court rejected the warden's argument that actual innocence is not a valid basis for equitable tolling in light of the Supreme Court's decision in Holland v. Florida, 130 S.Ct. 2549 (2010). It noted that while a number of decisions, including Supreme Court decisions, have held equitable tolling requires a petitioner to be reasonably diligent in pursuing his/her rights, "none of those decisions analyze whether equitable tolling based on claims of actual innocence must be pursued in the same way." It held "petitioners who seek equitable tolling based on actual innocence should not be treated in the same way as those seeking equitable tolling because of ineffective assistance of counsel, confusion of filing requirements, or other important, but less compelling reasons." It reversed the district court's judgment and remanded for the court to fully consider whether Petitioner had asserted a credible claim of actual innocence.

P. Immigration

Giraldo v. Holder, 654 F.3d 609 (6th Cir. 2011).

Petitioner and her minor daughter sought review of the Board of Immigration Appeals' (BIA) order vacating the immigration judge's (IJ) order granting Petitioners withholding of removal. Petitioners were charged with being removable as aliens illegally present in the U.S. without inspection, admission or parole under the INA, 8 U.S.C. §1182(a)(6)(A)(i). The IJ denied Petitioners' application for asylum as untimely and found both removable, but granted Petitioners withholding or
removal as to Colombia under 8 U.S.C. §1231(b)(3). The IJ ordered Petitioners removed to any country other than Colombia. The Department of Homeland Security appealed, and the BIA held Petitioners failed to establish a clear probability of future persecution in Colombia on account of political opinion. It sustained the appeal, reversed the IJ's grant of withholding of removal, and remanded the record to the IJ for the purpose of allowing Petitioners to apply for voluntary departure. Petitioners petitioned the Sixth Circuit seeking a stay of removal and an order staying the BIA's remand to the IJ. The Attorney General moved to dismiss the petition for lack of jurisdiction, arguing the Sixth Circuit does not have jurisdiction to consider the petition for review because there was no final order of removal. The AG claimed the order was not final because the BIA remanded the proceedings to the IJ for consideration of voluntary departure relief. The Sixth Circuit joined the Second, Fourth, Eleventh and Ninth Circuits in holding a BIA order denying relief from removal and remanding for the exclusive purpose of considering a request for voluntary departure is a final order of removal subject to federal appellate court jurisdiction. The BIA's order in the instant case reversing the IJ's grant of withholding of removal to Colombia amounted to a final order because it left in place the IJ's order that Petitioners were removable and that they be removed in accordance with §241(b). In addition, the BIA's order was in effect a final order because the IJ's decision regarding voluntary departure was not subject to judicial review. The Sixth Circuit declined to exercise its jurisdiction in this case for prudential reasons in light of the amendment to the voluntary departure regulation that took effect in January 2009. See 8 CFR §1240.26(i), (f). Under the amended regulation, a grant of voluntary departure on or after January 20, 2009, automatically terminates with the filing of a petition for review. Petitioners must now elect either voluntary departure or judicial review of their petition. Hakim v. Holder, 611 F.3d 73, 79 (1st Cir. 2010). If Petitioners in the instant case are granted voluntary departure, they may decide whether they want to comply with the departure provisions or file a petition for judicial review of their application for withholding of removal.

Shewchun v. Holder, 658 F.3d 557 (6th Cir. 2011).

Petitioner is a Canadian citizen who was admitted to the U.S. in 1963 as a lawful permanent resident. In 1983, he was convicted in Rhode Island of larceny and taking money under false pretenses. In 1984, he was convicted in Florida on federal mail and wire fraud charges. In 1990, the former INS issued an order to show cause, charging Petitioner with deportability under former §241(a)(4) of the Immigration and Nationality Act (currently 8 USC §1227(a)(2)(A)(ii)). The IJ found Petitioner deportable because he had been convicted of two crimes involving moral turpitude and because his theft conviction constituted an aggravated felony. The BIA affirmed the IJ's determination, but remanded for a determination of whether Petitioner was eligible for a waiver from deportation under former §212(c) or any other applicable relief. DHS thereafter added another ground of removability against him, charging that Petitioner's 1984 conviction qualified as an aggravated felony under the INA because it constituted an attempt or conspiracy to commit fraud.
or deceit involving over $10,000 in losses. The IJ held he was statutorily ineligible for a waiver of removability under either INA §212(c) or (h) because of his prior aggravated felony convictions. The BIA affirmed. Petitioner thereafter sought to terminate removal proceedings pursuant to 8 CFR §1239.2(f) based on his pending application for naturalization. The regulation allows an IJ to terminate removal proceedings, allowing an alien to obtain a final hearing on a pending application for naturalization, if the alien has established prima facie eligibility for naturalization and the matter involves "exceptionally appealing or humanitarian factors." The BIA rejected Petitioner's motion to terminate because it ruled in In re Acosta Hidalgo, 24 I. & N. Dec. 103 (BIA 2007) that IJs do not have authority to make determinations concerning an alien’s eligibility for naturalization. It held Petitioner was required to establish his prima facie eligibility through an affirmative communication from the DHS. It upheld the IJ's denial of his motion because he failed to provide the necessary proof. The Sixth Circuit denied Petitioner's petition for review, upholding Acosta Hidalgo's interpretation of §1239.2(f). It held "the interplay between 8 USC §1429 and 8 CFR §1239.2(f) does not detract from the deference that we owe the BIA's interpretation of Acosta Hidalgo." Congress prioritized removal proceedings over naturalization proceedings, and "DHS's ability to prevent an alien from halting ongoing removal proceedings in order to adjudicate a pending application for naturalization is therefore consistent with Congress's statutory scheme." See Zayed v. U.S., 368 F.3d 902, 905 (6th Cir. 2004); see also Hernandez de Anderson v. Gonzales, 497 F.3d 927, 933 (9th Cir. 2007).


The Court held it does not have jurisdiction to review the Secretary of Homeland Security's decision to revoke a visa petition made pursuant to 8 USC §1155. The Secretary's decision to revoke a visa petition under the statute is discretionary, and the Court lacks jurisdiction to review it pursuant to 8 USC §1252(a)(2)(B)(ii). This was an issue of first impression in the Sixth Circuit.

Q. Insurance

Continental Casualty Co. v. Law Offices of Melbourne Mills, Jr., PLLC, 676 F.3d 534 (6th Cir. 2012).

After Attorney was successfully sued for millions of dollars in a legal malpractice action, Continental, his malpractice insurance carrier, sought a judicial declaration that it was entitled to rescind his insurance policy for the time period covered by the class action. The district court granted Continental summary judgment, holding that Attorney's failure to disclose an ongoing state bar association inquiry constituted a material misrepresentation when the policy renewal application specifically asked if any attorney was subject to any disciplinary inquiry during the expiring policy period. The Sixth Circuit affirmed. It held Attorney’s answer to a different question on the 2003 application represented a material
misrepresentation, and the policy was properly voided under Kentucky law. The question asked "Are there any claims, or acts or omissions that may reasonably be expected to be a claim against the firm, that have not been reported to the Company, or that were reported during the expiring policy period?" Attorney answered "no." However, at the time, he was aware of both the Kentucky Bar Association's investigation, initiated in February 2002, and all of the acts surrounding the class action settlement negotiations which reasonably could have and ultimately did lead to a malpractice claim. In addition, the policy's dishonesty exclusion clause barred coverage of any claim arising out of a "dishonest, fraudulent, or …malicious act or omission." In 2010, the Kentucky Supreme Court issued an order permanently disbarring Attorney from the practice of law. The Sixth Circuit held this order constituted "a sufficient 'regulatory ruling' under the dishonesty clause to bar coverage."

Pedicini v. Life Ins. Co. of Alabama, 682 F.3d 522 (6th Cir. 2012).

Plaintiff purchased a supplemental cancer-insurance policy from Defendant which, at the time of purchase, provided for unlimited cash benefits equal to the "usual and customary charge made for" radiation or chemotherapy received as treatment. Following a significant increase in premiums over time, Plaintiff requested that the policy be amended. The new policy tied radiation and chemotherapy benefits to "actual charges" for those treatments and defined "actual charges" as those "made by a person or entity furnishing the services treatment or material." Plaintiff did not know, however, that eight months earlier, Defendant had changed its benefit payment practices. Prior to February 2001, it paid benefits tied to "actual charges" based on the amount billed by medical providers regardless of the amount those providers accepted as full payment. In February 2001, it began paying benefits equal to the amount accepted as full payment by medical providers. In February 2007, Plaintiff was diagnosed with cancer. He thereafter realized Defendant was not paying him benefits equal to the amount billed by his medical provider, but only equal to the discounted amount accepted by his medical provider in light of his status as a Medicare recipient. Plaintiff filed suit in state court claiming breach of contract, breach of good faith and fair dealing, bad faith, violations of the Kentucky Unfair Claims Settlement Practices Act, and punitive damages. Defendant removed the action to federal court, which bifurcated the breach of contract claims from the bad faith claims. The district court granted summary judgment to Plaintiff on the breach of contract claims, holding the term "actual charges" was ambiguous and must be construed in Plaintiff's favor under Kentucky law. See Bituminous Cas. Corp. v. Kenway Contracting Inc., 240 S.W.3d 633, 638 (Ky. 2008). The Sixth Circuit affirmed, holding the term "actual damages" is ambiguous. It reversed the district court's grant of summary judgment to Defendant on Plaintiff's bad faith claims. Defendant lacked a reasonable basis in law for disputing Plaintiff's claim to benefits according to his interpretation of "actual charges." It should have been aware that its actions in unilaterally altering its definition of "actual charges" would likely result in legal claims against it by policyholders, and that, under Kentucky law, it would lack a reasonable basis for denying those policyholders
relief. A reasonable jury could also conclude that Defendant acted knowingly or in reckless disregard of the lack of legal basis for its interpretation. Plaintiff also argued the district court abused its discretion in refusing leave to amend the complaint in light of Defendant's failure to disclose that the Kentucky Department of Insurance found its change in the interpretation of "actual charges" discriminated against policyholders and violated KRS 304.12-080. The Court remanded to the district court to determine whether leave to amend Plaintiff's claim in support of the bad faith claims is proper.

R. Land Use

Northridge Church v. Charter Tp. of Plymouth, 647 F.3d 606 (6th Cir. 2011).

Appellant is an ecclesiastical corporation in Plymouth, Michigan, that sought special land-use exemptions to use a piece of property it purchased for a church and related recreational uses. At the time, the property was surrounded by a multiple-family residential development, two single-family residential areas and an expressway. The town denied Appellant's application. Following an action in state court, the parties agreed to a consent judgment in 1995 that permitted Appellant to build a church and related structures on its property with restrictions that included limits on auditorium seating, total number of parking spaces, and the number of events and activities that could take place on the property. At the time of the instant action, the church's weekly attendance had grown from 1,100 to over 14,000. Appellant moved to reopen the case and modify or set aside the consent judgment under Rule 60(b) in 2008. The district court denied the motion and Appellant's motion for reconsideration. The Sixth Circuit rejected the city's argument it did not have jurisdiction to adjudicate Appellant's consent judgment challenge because the judgment did not affect rights protected by the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc, et seq. The district court had jurisdiction over the litigation under 28 U.S.C. §1331 and section 4.7 of the consent judgment itself. The Sixth Circuit held, in light of the recent decision in United Student Aid Funds, Inc. v. Espinosa, 130 S.Ct. 1367 (2010), the fact that the consent judgment may violate RLUIPA did not render the judgment void under Rule 60(b)(4). Rule 60(b)(4) applies only when a judgment is premised on jurisdictional error or a violation of due process that deprives a party of notice or the opportunity to be heard. Id. at 1377. Appellant also argued RLUIPA's enactment five years after entry of the consent judgment challenge because the judgment did not affect rights protected by the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc, et seq. The district court had jurisdiction over the litigation under 28 U.S.C. §1331 and section 4.7 of the consent judgment itself. The Sixth Circuit held, in light of the recent decision in United Student Aid Funds, Inc. v. Espinosa, 130 S.Ct. 1367 (2010), the fact that the consent judgment may violate RLUIPA did not render the judgment void under Rule 60(b)(4). Rule 60(b)(4) applies only when a judgment is premised on jurisdictional error or a violation of due process that deprives a party of notice or the opportunity to be heard. Id. at 1377. Appellant also argued RLUIPA's enactment five years after entry of the consent judgment constituted a change in legal circumstance allowing for modification of the consent judgment under Rule 60(b)(5). The district court did not abuse its discretion in finding no significant change in the law occurred during the time span in question. RLUIPA was intended to replace the Religious Freedom Restoration Act, which was in effect in 1995 when the parties agreed to the consent judgment, and provides in all relevant respects the same test for First Amendment zoning challenges that existed in 1995. The Sixth Circuit also rejected Appellant's argument that changed factual circumstances supported modifying the consent judgment, noting most of
the changes stemmed from the church's growth, which was under its control. "To allow a party to escape a consent judgment based on its own voluntary actions strikes us as unjustified."

S. Medicare

Henry Ford Health System v. Department of Health and Human Services, 654 F.3d 660 (6th Cir. 2011).

Under Medicare, teaching hospitals receive additional payments above and beyond the reimbursement rate for treating Medicare patients to cover "direct" and "indirect costs of medical education." 42 USC §1395ww(d)(5)(B), (h). Direct costs include residents' salaries, and indirect costs include those incurred by teaching hospitals due to the inefficiencies and demands placed on staff from educating residents. In the Patient Protection and Affordable Healthcare Act of 2010, Congress required the Secretary of Health and Human Services to reimburse teaching hospitals for the time spent by interns and residents in non-patient care activities as that time and those activities are defined by the Secretary. The Secretary promulgated a regulation excluding the time residents spent conducting pure research from hospitals' Medicare reimbursement. The Sixth Circuit upheld the regulation under Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984), holding the Secretary reasonably exercised the authority delegated to her under the Act. The statute does not directly answer whether pure research amounts to an eligible non-patient care activity that must be counted toward a hospital's reimbursement calculation. The key words in the statute are not-self defining, and the statute expressly delegated authority to the Secretary to define eligible non-patient care activities. PPACA §5505(b). In addition, the Secretary's exclusion of pure research was not arbitrary, capricious or manifestly contrary to the statute. See Chevron, 467 U.S. at 843-44. The Sixth Circuit held the regulation applies retroactively to the fiscal years at issue in the instant case because Congress gave express authorization in the statute for the agency to regulate retroactively. See PPACA §5505(b).

Bio-Medical Applications of Tennessee, Inc. v. Central States Southeast and Southwest Areas Health and Welfare Fund, 656 F.3d 277 (6th Cir. 2011).

The case involved the proper construction of the Medicare Secondary Payer Act, which makes private insurers covering the same treatment as Medicare "primary" payers and Medicare the "secondary" payer. At issue was who should bear the cost of kidney dialysis treatment – private insurers, healthcare providers, or Medicare – and the proportionate responsibilities of each. The Sixth Circuit held a group health plan cannot immediately deny coverage to an insured simply because that person became eligible for Medicare after being diagnosed with end-stage renal disease. See 42 U.S.C. §1395y(b)(1)(C). If a group health plan fails to pay a provider promptly, Medicare may step in and make a temporary payment on behalf of the delinquent private insurer. The Act also contains
a private cause of action allowing the healthcare provider to sue the private insurer. 42 U.S.C. §1395y(b)(3)(A). The Court held a healthcare provider does not need to demonstrate a private insurer's responsibility to pay before bringing a lawsuit under the Act's private cause of action. The "demonstrated responsibility" provision in 42 U.S.C. §1395y(b)(2)(B)(ii) only limits lawsuits against tortfeasors, not lawsuits against private insurers. See 42 C.F.R. §411.22(b)(3). It also only applies to lawsuits brought by Medicare, not those brought by private insurers under the Act's private cause of action. See 42 U.S.C. §1395y(b)(2)(B)(ii). 42 U.S.C. §1395y(b)(3)(A) establishes that damages under the private cause of action shall be "in an amount double the amount otherwise provided," but the Act fails to provide a reference point for the doubling. The Sixth Circuit remanded the case to the district court for a determination on this issue.

T. Products Liability

Smith v. Wyeth, Inc., 657 F.3d 420 (6th Cir. 2011).

Plaintiffs developed tardive dyskinesia after taking generic metoclopramide. They filed individual actions against the manufacturers of the generic drug seeking damages under Kentucky state law for failure to warn. They alleged the defendants failed to include adequate information on product labels concerning the risks associated with long term use of the drug. They also named Wyeth, Inc. and Schwarz Pharma, Inc., the manufacturers of the name brand form of metoclopramide known as Reglan, alleging fraud and tortious misrepresentation. The district court dismissed plaintiffs' claims against the generic defendants on federal preemption grounds. The Supreme Court held in Pliva, Inc. v. Mensing, 131 S.Ct. 2567 (2011), that federal law preempts state laws that attempt to impose the duty to change a drug's label on generic drug manufacturers. It also dismissed plaintiff's claims against the name brand defendants because they did not allege that they had ingested Reglan, which is a threshold requirement for a products-liability action under Kentucky law. See Holbrook v. Rose, 458 S.W.2d 155, 157 (Ky. 1970). The Sixth Circuit affirmed, rejecting plaintiffs' claim that a name brand drug manufacturer owes a duty of care to individuals who have never taken the drug actually manufactured by that company. It rejected Plaintiffs' argument that the Kentucky state courts would adopt this theory of vicarious-liability under the Kentucky Products Liability Act.

U. Securities

Bennett v. Durham, 683 F.3d 734 (6th Cir. 2012).

"The Kentucky Securities Act imposes liability on (1) anyone who 'offers or sells a security' in violation of its terms and (2) any 'agent' of the seller who 'materially aids' the sale of securities, defined as someone who 'effect[s] or attempt[s] to effect' the sale." KRS 292.480(1); KRS 292.310(1). The Sixth Circuit held the Act does not impose liability on an
attorney who performs traditional legal services for a company offering its securities for sale to the public.

V. Sentencing


The Sixth Circuit held the district court impermissibly lengthened a federal prisoner's sentence for escape from supervised release to promote his rehabilitation. The prisoner was sentenced in 2005 to thirty-six months for two counts of credit card fraud. In 2009, he was assigned to a halfway house in Tennessee, where he signed himself out and knowingly and willfully failed to return by 5:00 p.m. The presentence investigative report started with a base offense level of thirteen, but applied a four level reduction for escape from non-secure custody and a two level reduction for acceptance of responsibility to arrive at a total offense level of seven. The prisoner's twenty-three criminal history points yielded a criminal history score of VI, which yielded an advisory guidelines range of fifteen to twenty-one months' imprisonment. The district court noted it was considering an above-guidelines sentence in light of the prisoner's record, the nature of the offense, and his need for drug treatment spanning longer than the guidelines' recommended sentence. It sentenced him to thirty-six months' imprisonment. In Tapia v. U.S., 2011 WL 2369395 at *9 (June 16, 2011), the Supreme Court held courts may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise promote rehabilitation. Because the district court based its sentence on impermissible factors, its sentencing decision was substantively unreasonable. The Sixth Circuit vacated the sentence and remanded for resentencing consistent with its opinion.

U.S. v. Hall, 661 F.3d 320 (6th Cir. 2011).

Defendant pleaded guilty to possession with intent to distribute more than fifty grams of cocaine base in violation of 21 USC §841(a)(1), (b)(1)(A) and possession of a firearm in furtherance of a drug trafficking offense in violation of 18 USC §924(c)(1). The Guidelines recommended a sentence of 262 to 327 months imprisonment on the first count and a sixty-month mandatory-minimum sentence on the second count, with sentences to run consecutively. Defense counsel sought a below-Guidelines sentence of 117 to 131 months imprisonment on the first count. The prosecution told defense counsel it had no problem with a total sentence of fifteen years, which equaled the mandatory minimums on both counts. The prosecution informed the district court this conversation occurred before the Guidelines calculations, and that it thereafter recommended a sentence towards the top end of a range of 130 to 162 months. The district court orally sentenced Defendant on February 5 to 156 months of imprisonment on the first count and sixty months on the second count, to run consecutively for a total of 216 months. It did not enter judgment at that time. Four days later, the district court noticed a hearing to resentence Defendant, referencing the conversation at the last sentencing hearing. It changed the sentence on the first count to 120
months, the mandatory minimum sentence for that count, and announced the sixty-month sentence on the second count would remain the same. The district court entered judgment on March 1, and the prosecution appealed, challenging the district court's authority to resentence Defendant under Fed.R.Crim.P. 35. Rule 35 allows a court to correct a sentence that resulted from "arithmetical, technical, or other clear error" within fourteen days after sentencing. The prosecution argued the district court's resentencing did not comply with Rule 35 because it was entered more than fourteen days after announcement of the original sentence and because the original sentence did not result from arithmetical or technical error. The Sixth Circuit vacated the district court's judgment entered March 1 and remanded with instructions to enter judgment on the sentence imposed on February 5. The district court entered the original sentence on February 5, and did not resentence Defendant until February 23, eighteen days after announcing the original sentence. This was four days late for the purposes of Rule 35(a), and the Court held it did not matter that the district court issued its notice of resentencing within the fourteen-day period.


Defendant challenged his 108-month sentence for being a felon in possession of a firearm in violation of 18 USC §922(g). His presentence investigation report assigned Defendant a total offense level of twenty-five and a criminal history category of VI, and recommended a sentence of 110 to 120 months' imprisonment. Defendant filed an objection to the PSR's use of a four-level enhancement to his base offense level for possession of a firearm in connection with another felony pursuant to Guidelines §2K2.1(b)(6). He argued he did not possess any drugs when he was arrested for being a felon in possession of a firearm. The probation officer who prepared the report rejected this argument, explaining the enhancement was warranted because officers found marijuana and cocaine near where Defendant was sitting when he was arrested. The district court accepted the PSR's guidelines calculations, then analyzed the factors in 18 USC §3553(a). It sentenced Defendant to 108 months' imprisonment with three years of supervised release. The Sixth Circuit held the court's application of the four-level enhancement to Defendant's base offense level was unwarranted, and his sentence was procedurally unreasonable. It held there was an insufficient nexus between the firearm and the drugs recovered during Defendant's arrest. There was no evidence Defendant was involved in drug trafficking, and he possessed only a small amount of marijuana and a baggy containing cocaine residue. Close proximity between a firearm and drugs suffice to justify the enhancement when a defendant is engaged in drug trafficking, but in other cases, the enhancement only applies if the government establishes that the firearm actually or potentially facilitated the offense. U.S. v. McKenzie, 410 Fed.App'x. 943, 945 (6th Cir. 2011). Proximity that is merely coincidental is not enough for application of §2K2.1(b)(6) when a defendant merely possesses drugs. See also U.S. v. Angel, 576 F.3d 318, 321 (6th Cir. 2009). *Because the street value of the drugs [Defendant] possessed was negligible, application of the sentencing
enhancement was not appropriate in this case." The Court declined to set a bright line rule for the amount of controlled substances that would permit application of the enhancement with a drug possession offense. It vacated Defendant's sentence and remanded for resentencing consistent with its opinion.

**U.S. v. Coleman, 664 F.3d 1047 (6th Cir. 2012).**

Defendant pleaded guilty to one count of bank robbery in violation of 18 USC §2113(a). Defendant objected to a two-point enhancement under §2B3.1(b)(4)(B), which applies when a "person was physically restrained to facilitate commission of the offense," and a six-point enhancement under §3A1.2(c)(1) because the offense involved an "official victim." The district court overruled the objections and assessed a total offense level of thirty-three with a criminal history category of V, resulting in a Guidelines range of 210 to 240 months. After considering the §3553(a) factors, it sentenced him to 168 months' imprisonment. The district court applied the §2B3.1(b)(4)(B) enhancement because Defendant forced a bank employee from his office into the lobby at gunpoint. The Sixth Circuit affirmed, holding this type of restraint is sufficient for application of the sentencing enhancement. Defendant also argued the "official victim" enhancement did not apply because he acted recklessly due to fear rather than with intent to cause bodily harm when he rammed a police cruiser with the getaway car. The Sixth Circuit noted neither the text nor commentary to §3A1.2(c)(1) suggest an intent requirement, and affirmed the district court's conclusion that Defendant's conduct constituted an assault on a law enforcement officer.

**U.S. v. Bistline, 665 F.3d 758 (6th Cir. 2012).**

Defendant pleaded guilty to possessing 305 images and fifty-six videos of child pornography on his computer. A majority of the images depicted eight- to ten-year old girls being raped by adult men. Under the Guidelines, his recommended sentence was sixty-three to seventy-eight months' imprisonment. The district court rejected the recommendation and sentenced Defendant to a single night's confinement in the courthouse lockup and ten years' supervised release. The Sixth Circuit vacated Defendant's sentence, holding it was substantively unreasonable. "'[A] sentence may be substantively unreasonable when the district court selects the sentence arbitrarily, bases the sentence on impermissible factors, fails to consider pertinent §18 USC §3553(a) factors or gives an unreasonable amount of weight to any pertinent factor.'" U.S. v. Borho, 485 F.3d 904, 908 (6th Cir. 2007). If a district court decides to impose a sentence outside the Guidelines range, it "must 'ensure that the justification is sufficiently compelling to support the degree of the variance.'" Gall v. U.S., 552 U.S. 38, 50 (2007). Defendant's sentence did not reflect the seriousness of his offense and did not "afford adequate deterrence to criminal conduct." In addition, the district court focused on Defendant's age, physical condition and family responsibilities, which are

---

"discouraged factors under the guidelines." See U.S. v. Christman, 607 F.3d 1110, 1119 (6th Cir. 2010).


Defendant pleaded guilty to one count of possession with intent to distribute crack cocaine in violation of 21 USC §841(a)(1) and one count of being a felon in possession of a firearm in violation of 18 USC §922(g)(1). He appealed the district court's decision to enhance his sentence under the Armed Career Criminal Act (ACCA), 18 USC §924(e). He argued his two prior state convictions for domestic violence did not qualify as "violent felonies" under the ACCA because both were misdemeanors under Michigan law, each carrying a possible maximum sentence of ninety-three days imprisonment. However, both convictions had been enhanced pursuant to a state recidivism provision, and Defendant faced a two year maximum on each charge. Whether a prior state conviction can qualify as a predicate "violent felony" under ACCA if the offense was enhanced pursuant to a state recidivism statute was an issue of first impression in the Sixth Circuit. The Court held a sentencing court should reference underlying enhancements when evaluating whether a predicate offense meets ACCA's definition of "violent felony." The district court did not err in counting Defendant's domestic violence convictions as predicate violent felonies under the ACCA, and the Sixth Circuit affirmed his sentence.

W. Trademarks


The Court affirmed the district court's holding that Maker's Mark's registered trademark in its signature trade dress element – a red dripping wax seal – was due protection in the form of an injunction from a similar trade dress element used on Defendant's tequila bottles. Defendant argued on appeal that the red wax seal is aesthetically functional, and the mark was therefore unenforceable. The Sixth Circuit uses two tests to determine whether a trademark is functional and not enforceable. Under the comparable alternatives test, it "asks whether trade-dress protection of certain features would nevertheless leave a variety of comparable alternative features that competitors may use to compete in the market. If such alternatives do not exist, the feature is functional..." The effective competition test asks "whether trade dress protection for a product's feature would hinder the ability of another manufacturer to compete effectively in the market for the product. If such hindrance is probable, then the feature is functional and unsuitable for protection." Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc., 280 F.3d 619, 641 n. 16 and 642 (6th Cir. 2002). The Court held Defendant's claim failed under both tests. There is more than one way to seal a bottle with wax to make it look appealing. In addition, red wax is not the only pleasing color of wax, and competitors are not put at a significant non-reputation related disadvantage when they are prevented from using it. In addition, the
district court did not err in its evaluation of the strength of the red dripping wax mark or the degree of similarity between the two marks. The balancing of all the factors under Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642, 648 (6th Cir. 1982), compelled a finding of infringement. In addition, the district court did not abuse its discretion in awarding costs to Maker's Mark.

II. U.S. SUPREME COURT

A. Bankruptcy


Petitioners filed Chapter 12 bankruptcy. They proposed a plan whereby they would pay off outstanding debts with proceeds from the sale of their farm. The IRS objected, asserting a tax on the capital gains from the sale. Petitioners then suggested treating the tax as an unsecured claim to be paid to the extent funds were available, with the unpaid balance being discharged. Under §1222(a)(2)(A), certain governmental claims arising from the disposition of farm assets are stripped of priority status and downgraded to general, unsecured claims that may be discharged after less than full payment. The exception applies only to claims entitled to priority under 11 USC §507. Section 507(a)(2) covers administrative expenses allowed under §503(b), including any tax incurred by the estate. §503(b)(B)(i). The bankruptcy court sustained the IRS’ objection, the District Court reversed, and the Ninth Circuit reversed the District Court. It held that because a Chapter 12 estate is not a separate taxable entity under 26 USC §§1398, 1399, it does not “incur” post-petition federal income taxes. Because the tax was not incurred by the estate under §503(b), it was not a priority claim eligible for the §1222(a)(2)(A) exception. The Supreme Court affirmed, holding federal income tax liability resulting from a petitioner’s post-petition farm sale is not “incurred by the estate” under §503(b) and is neither collectible nor dischargeable in the Chapter 12 plan. A Chapter 12 estate is not a separate taxable entity because the debtor, not the trustee, is generally liable for taxes and files the only tax return. As such, the post-petition income taxes are not “incurred by the estate.”


Debtors obtained a secured loan from an investment fund for which Bank serves as trustee to finance the purchase of commercial property. Debtors became insolvent and filed for Chapter 11 bankruptcy. Pursuant to 11 USC §1129, Debtors sought to confirm a “cramdown” bankruptcy plan over the Bank’s objection. The plan proposed selling Debtors’ property at auction and using the proceeds to repay the Bank. However, the Bank would not be allowed to bid for the property using the debt it was owed to offset the purchase price. The bankruptcy court denied Debtors’ request, holding the auction procedures did not comply with §1129(b)(2)(A)’s requirements for cramdown plans. The Seventh Circuit
affirmed, holding §1129(b)(2)(A) does not allow debtors to sell encumbered assets free and clear of a lien without permitting the lienholder to credit-bid. The Supreme Court affirmed, holding debtors may not obtain confirmation of a Chapter 11 cramdown plan that allows for the sale of collateral free and clear of a bank’s lien, but does not allow the bank to credit-bid at the sale.

B. Civil Rights


Petitioner was arrested during a traffic stop by a state trooper who checked the statewide database and discovered a bench warrant had been issued for Petitioner's arrest after he failed to appear at a hearing to enforce a fine. Petitioner was taken to jail, where he was required to shower and submit to a strip search like all incoming detainees. He was released once it was determined that the fine had been paid. He filed a 42 USC §1983 action alleging Fourth and Fourteenth Amendment violations. He argued that persons arrested for minor offenses cannot be subjected to invasive searches unless prison officials have reason to suspect concealment of weapons or other contraband. The District Court granted him summary judgment, ruling that strip searching non-indictable offenders without reasonable suspicion violates the Fourth Amendment. The Third Circuit reversed, and the Supreme Court affirmed its decision. It held the search procedures at the county jails in question struck a reasonable balance between inmate privacy and the needs of the institutions in detecting and deterring possession of contraband.


Respondent, the chief investigator for the district attorney’s office, testified at a grand jury proceeding that resulted in Petitioner’s indictment. After the indictments were dismissed, Petitioner filed suit under 42 USC §1983 alleging Respondent had conspired to present and did present false testimony to the grand jury. The District Court denied Respondent’s motion to dismiss on the basis of absolute immunity. The Eleventh Circuit reversed, holding Respondent had absolute immunity from suit under §1983 based on his grand jury testimony. The Supreme Court affirmed, holding a witness in a grand jury proceeding is entitled to the same absolute immunity from suit under §1983 as a witness who testifies at trial.


Respondent, a city firefighter, missed work after becoming ill on the job. His employer was suspicious of his extended absence and hired an investigator to conduct surveillance. When Respondent was seen buying home building supplies, the City began an internal affairs investigation. It hired Petitioner, a private attorney, to interview Respondent. Respondent acknowledged buying the supplies, but denied working on his home. He
also refused to let Petitioner and fire department officials enter his home to view the unused materials. Petitioner thereafter ordered Respondent to bring the materials outside of home for officials to see. After the interview concluded, officials followed Respondent to his home, where he produced the materials. He thereafter filed suit under 42 USC §1983 against the City, the fire department, Petitioner, and others alleging the order to produce the building materials violated his Fourth and Fourteenth Amendment rights. The District Court granted summary judgment to the individual defendants on the basis of qualified immunity. The Ninth Circuit affirmed as to all individual defendants except Petitioner, holding he was not entitled to seek qualified immunity because he was a private attorney, not a city employee. The Supreme Court granted certiorari and reversed. It held a private individual who is temporarily retained by the government to carry out its work is entitled to seek qualified immunity from suit under §1983.

C. Constitutional Law


18 USC §1464 bans the broadcast of obscene, indecent or profane language. FOX aired two isolated utterances of obscene words during two live broadcasts, and ABC showed a woman partially nude for approximately seven seconds during a television show broadcast. After these incidents but before the FCC issued Notices of Apparently Liability to the stations, it issued its Golden Globes Order, declaring that fleeting expletives could be actionable. It then held the stations violated this new standard but declined to propose forfeitures. The Second Circuit reversed, holding the FCC’s decision to modify its indecency enforcement regime to regulate fleeting expletives was arbitrary and capricious. The Supreme Court reversed and remanded for the Second Circuit to address the stations’ First Amendment challenges. F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502 (2009). On remand, the Second Circuit found the policy unconstitutionally vague and invalidated it in its entirety. The Supreme Court affirmed the Second Circuit’s judgment in favor of the stations. Because the FCC failed to give FOX or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent, its standards as applied to those broadcasts were vague. It noted that because it was deciding this case on fair notice grounds under the Due Process Clause, it did not need to address the First Amendment implications of the FCC’s indecency policy or the constitutionality of the current Golden Globes Order and subsequent adjudications. The FCC is free to modify its current policy in light of its determination of the public interest and applicable legal requirements, and courts are free to review the current or any modified policy in light of its content and application.
At issue in this case were the individual mandate and Medicaid expansion provisions of the Patient Protection and Affordable Care Act. The individual mandate requires most Americans to maintain minimum essential health insurance coverage. 26 U.S.C. §5000A. Beginning in 2014, those who do not comply with the mandate must make a "shared responsibility payment" to the federal government. §5000A(b)(1). The Act states this "penalty" will be paid to the IRS with an individual’s taxes, and "shall be assessed and collected in the same manner" as tax penalties. §§5000A(c), (g)(1). The Medicaid expansion provision expands the scope of the Medicaid program and increases the number of individuals the states must cover. The Act increases federal funding to cover states' costs in implementing the expansion, but if a state does not comply with the Act, it may lose all of its federal Medicaid funds. §1396c. Twenty-six states, several individuals, and the National Federation of Independent Business filed suit in federal District Court challenging the constitutionality of these provisions. The Eleventh Circuit upheld the Medicaid expansion as a valid exercise of Congress' spending power, but held Congress lacked the authority to enact the individual mandate. Finding the mandate severable from the Act's other provisions, it left the rest of the Act intact. The Supreme Court granted certiorari, affirmed in part and reversed in part. The Chief Justice announced the judgment of the Court and delivered its opinion with respect to Parts I, II and III-C, which Justices Ginsburg, Breyer, Sotomayor and Kagan joined; an opinion with respect to Part IV in which Justices Breyer and Kagan joined; and an opinion with respect to Parts III-A, III-B and III-D. The Court first held in Part II that the Anti-Injunction Act does not bar this suit because Congress did not intend for the payment under the individual mandate to be treated as a "tax" for purposes of the Act. The Chief Justice then concluded in Part III-A that the individual mandate is not a valid exercise of Congress' power under the Commerce and Necessary and Proper Clauses. In Part III-B, the Chief Justice held the individual mandate must be construed as imposing a tax on those who do not have health insurance. In Part III-C, the Court upheld the individual mandate as within Congress' power under the Taxing Clause. Chief Justice Roberts, joined by Justices Breyer and Kagan, concluded in Part IV that the Medicaid expansion violates the Constitution by threatening states with the loss of their existing Medicaid funding if they decline to comply with the expansion. This violation may be remedied by precluding the government from applying §1396c to withdraw existing Medicaid funds for failure to comply. Justice Ginsburg, joined by Justice Sotomayor, believed that the Spending Clause does not preclude the government from withholding Medicaid funds based on a state’s refusal to comply with the expansion. However, given the majority view, she agreed with the Chief Justice's conclusion in Part IV that the Medicaid Act's severability clause, 42 U.S.C. §1303, determines the appropriate remedy.

---


The Stolen Valor Act makes it a crime to falsely claim receipt of military decorations or medals and provides for an enhanced penalty if the Congressional Medal of Honor is involved. 18 USC §704(b). Respondent pleaded guilty to falsely claiming to have received the Medal of Honor, but reserved his right to appeal his claim that the Act is unconstitutional. The Ninth Circuit reversed, holding the Act violates the First Amendment. The Supreme Court affirmed. Justice Kennedy, joined by the Chief Justice, and Justices Ginsburg and Sotomayor, held the Act infringes on speech protected by the First Amendment. It noted the Act seeks to control all false statements on this subject in almost limitless times and settings, and that permitting the government to decree this speech to be a crime would endorse government authority to compile a list of subjects about which false statements are punishable. There is no direct causal link between the restriction imposed and the injury to be prevented. The government failed to show that the public’s general perception of military awards is diluted by false claims such as those made by Respondent or that counter speech, such as that in the media, would not suffice to achieve its interest. It is also possible for the government to protect its interest in a less restrictive way. Justice Breyer, joined by Justice Kagan, held that because the Act, as presently written, works “disproportionate constitutional harm,” it fails intermediate scrutiny and violates the First Amendment.

D. Criminal Law


At issue in this case was whether attachment of a GPS tracking device to an individual's vehicle and use of that device to monitor the vehicle's movements on public streets constituted a search or seizure under the Fourth Amendment. The government obtained a warrant allowing it to place a GPS tracking device on a car registered to Respondent’s wife. It authorized government officials to install the device within ten days in Washington, D.C. Agents installed the device on the eleventh day in Maryland. The government subsequently indicted Respondent on drug trafficking conspiracy charges. The District Court suppressed the data obtained while the car was parked at Respondent's residence, but held the remaining data was admissible because he had no reasonable expectation of privacy when the car was on public streets. Respondent was convicted. The D.C. Circuit reversed, holding the admission of evidence obtained by warrantless use of the GPS device violated the Fourth Amendment. The Supreme Court affirmed. It held the government’s attachment of the GPS device to the car and its use of that device to track Respondent’s movements constituted a search under the Fourth Amendment. It specifically noted the government physically occupied private property for the purpose of obtaining information. The government argued in the alternative that even if the attachment and use of the device was a search, it was reasonable and lawful under the Fourth Amendment because officers had reasonable suspicion and probable
cause to believe Respondent was leading a cocaine distribution conspiracy. The Supreme Court considered this argument forfeited, noting the government did not raise it in previous proceedings and it was therefore not considered by the D.C. Circuit.


Petitioner was convicted by a jury in federal court on one count of violating the Resource Conservation and Recovery Act (RCRA) for knowingly storing liquid mercury without a permit at a subsidiary's facility from September 2002 until October 2004. RCRA violations are punishable by a fine of not more than $50,000 for each day of the violation. 42 USC §6928(d). At sentencing, the probation office calculated a maximum fine of $38.1 million, on the basis Petitioner violated RCRA on each of the 762 days from September 2002-October 2004. Petitioner argued that imposing any fine greater than the one-day penalty of $50,000 would be unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* held that the Sixth Amendment's jury trial guarantee requires that any fact other than the fact of a prior conviction that increases the maximum punishment authorized for a particular crime must be proved to a jury beyond a reasonable doubt. Petitioner argued that based on the District Court's instructions and the jury verdict, the only violation the jury necessarily found was for one day. The District Court held *Apprendi* applies to criminal fines, but found from the "context and content of the verdict all together" that the jury found a 762-day violation. The First Circuit disagreed that the jury necessarily found a 762 day violation, but affirmed the sentence because it found *Apprendi* does not apply to criminal fines. The Supreme Court held *Apprendi* applies to the imposition of criminal fines and remanded the case for further proceedings consistent with its opinion.


The Court held that the federal *Sex Offender Registration and Notification Act (SORNA)* does not require pre-Act offenders to register before the Attorney General validly specifies that the Act's registration procedures apply to them. The Act became law in July 2006, and the Attorney General promulgated an Interim Rule specifying that the Act applies to all pre-Act offenders in February 2007. The instant case concerned applicability of the Act to pre-Act offenders during the period between July 1, 2006, and the time when the Attorney General promulgated the Interim Rule on February 28, 2007, (or a later date if the February 28 specification was invalid). Petitioner was convicted in 2001 and released from prison in 2005. In September 2007, he moved to Pennsylvania without updating his Missouri registration information. He claimed the Interim Rule was invalid because it violated the Constitution's non-delegation doctrine and the APA's requirement for good cause to promulgate a rule with notice and comment. The District Court rejected his arguments on the merits, but the Third Circuit rejected his claim without reaching the merits. It held the Act's registration requirements applied to pre-Act offenders even in the absence of a rule by the Attorney
General. As such, the validity of the Interim Rule made no legal difference in the outcome. The Court reversed the Third Circuit's judgment, holding the Act's registration requirements do not apply to pre-Act offenders until the Attorney General so specifies. Whether the Attorney General's Interim Rule sets forth a valid specification therefore matters in the instant case. It remanded to the Third Circuit for further proceedings consistent with its opinion.


After officers responded to a call that a man was trying to break into cars in a neighborhood, an eyewitness pointed to her kitchen window and told an officer that Petitioner, who was standing in the parking lot talking to police, was the man she saw committing the crimes. Petitioner moved to suppress the identification on the ground that admitting it at trial would violate due process. The state court denied the motion, holding the identification did not result from an unnecessarily suggestive police procedure. Petitioner was convicted of theft by unauthorized taking. On appeal, he argued the trial court erred in requiring an initial showing that police arranged a suggestive identification procedure. He argued suggestive circumstances alone are sufficient to require the court to evaluate the eyewitness identification's reliability before allowing it to be presented to the jury. The New Hampshire Supreme Court affirmed his conviction. The U.S. Supreme Court granted *certiorari* and affirmed. It held the Due Process Clause does not require a preliminary judicial inquiry into the reliability of eyewitness identifications when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.


Respondent was charged with driving with a revoked license. He had been convicted of the same offense three times before, and was charged with a felony carrying a maximum four-year prison term under Missouri law. The prosecution sent defense counsel a letter offering two possible plea bargains, including an offer to reduce the charge to a misdemeanor and to recommend a ninety-day sentence with a guilty plea. Defense counsel did not inform Respondent of the offers and they expired. Less than a week before his preliminary hearing, Respondent was arrested again on the same charge. He pleaded guilty with no underlying plea agreement and was sentenced to three years in prison. He sought post-conviction relief in state court, alleging his attorney's failure to inform him of the plea offers denied him the effective assistance of counsel. He testified he would have pleaded guilty to the misdemeanor if he had known about the offer. The state court denied his motion, but the state appellate court reversed, holding Respondent met the requirements for showing a Sixth Amendment violation under *Strickland v. Washington*, 466 U.S. 668 (1984). The Supreme Court granted *certiorari*, vacated and remanded. The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. The Missouri court correctly held counsel's failure to inform Respondent of the
written plea offer before it expired fell below an objective reasonableness standard. However, it failed to require Respondent to show that the plea offer would have been adhered to by the prosecution and accepted by the trial court. Those issues must be addressed by the Missouri appellate court in the first instance on remand.


Respondent, a Michigan state prisoner, was escorted from his cell by a corrections officer to a conference room where he was questioned by two sheriff’s deputies regarding criminal activity he was allegedly involved in before his incarceration. He was given no Miranda warnings and was not advised he did not have to speak with the officers. He was questioned five to seven hours, but was informed more than once he was free to leave. Respondent stated he no longer wanted to talk several times, but did not request to go back to his cell. Respondent eventually confessed. The trial court denied his motion to suppress, and he was convicted. The Michigan Court of Appeals affirmed, rejecting his argument that the statements should have been suppressed because he was subjected to custodial interrogation without a Miranda warning. The federal District Court granted Respondent habeas relief under 28 USC §2254(d)(1), and the Sixth Circuit affirmed. It held the interview was a custodial interrogation, holding that Mathis v. U.S., 391 U.S. 1 (1968), “clearly established” that isolation from the general prison population combined with questioning about conduct that occurred outside the prison makes any interrogation custodial. The Supreme Court granted certiorari and reversed. It held precedent does not establish the categorical rule relied upon by the Sixth Circuit. Rather, the Court has repeatedly declined to adopt any such rule. When a prisoner is questioned, the determination of custody should focus on all features of the interrogation. It held Respondent in this case was not taken into custody for Miranda purposes. He was told he was free to leave, was not physical restrained or threatened, was offered food and water, and was interviewed in a well-lit, average sized conference room. Those facts are consistent with an environment in which a reasonable person would have felt free to terminate the interview and leave.


Defendant was charged in Arkansas with capital murder. The charge included the lesser offenses of first-degree murder, manslaughter and negligent homicide. The trial court gave the jury a set of verdict forms which allowed it to either convict him of one of the charged offenses or to acquit him of all of them. Acquitting on some but not others was not an option. The jury reported it could not reach a verdict, and the foreperson disclosed that while the jury was unanimous against guilt on the charges of capital murder and first-degree murder, it was deadlocked on manslaughter, and had not voted on negligent homicide. The trial court eventually declared a mistrial. When the state sought to retry Defendant, he moved to dismiss the capital and first-degree murder charges on the grounds of double jeopardy. The trial court denied the motion, and the
Supreme Court of Arkansas affirmed on interlocutory appeal. The U.S. Supreme Court also affirmed, holding the Double Jeopardy Clause does not bar retrying Defendant on the capital murder and first-degree murder charges because the jury did not acquit him of those charges. The trial court’s declaration of a mistrial was not improper. As permitted under Arkansas law, the jury’s options were limited to either convicting on one of the charges or acquitting on all. The trial court did not abuse its discretion by refusing to add a third option allowing the jury to acquit on some offenses but not others.

E. Employment Law


Respondent was a called teacher at a Lutheran church and school. She taught a religion class, led her students in daily devotional exercises and prayer, and took them to school-wide chapel services. Respondent led the service herself about twice a year. After developing narcolepsy, she began the 2004-2005 school year on disability leave. In January 2005, she informed the principal she would be able to return to work the following month. The principal informed her that the school had contracted with a lay teacher to fill her position for the remainder of the school year. The school offered to pay a portion of Respondent’s health insurance premiums if she would resign. Respondent refused, and was ultimately terminated. Respondent filed a charge with the EEOC claiming she was terminated in violation of the ADA. The EEOC filed suit against the school alleging Respondent had been fired in retaliation for threatening to file an ADA lawsuit. At this point, Respondent intervened in the suit. Invoking the “ministerial exception,” the school argued the suit was barred by the First Amendment because the claims concerned the employment relationship between a religious institution and one of its ministers. The District Court granted summary judgment in the school’s favor. The Sixth Circuit vacated and remanded, holding Respondent did not qualify as a “minister” under the exception. The Supreme Court granted certiorari and reversed. Because Respondent was a minister within the meaning of the ministerial exception, the First Amendment required dismissal of the employment discrimination suit against the religious employer. An order reinstating Respondent as a called teacher would have plainly violated the church’s freedom under the Religion Clauses to select its own ministers.


The Fair Labor Standards Act requires employers to pay employees overtime wages, but the requirement does not apply to workers employed as “outside salesmen.” 29 USC §§207(a), 213(a)(1). Petitioners were employed by Respondent as pharmaceutical sales representatives. They spent approximately forty hours in the field calling on physicians during business hours and an additional ten to twenty hours attending events and performing other tasks. They were not paid time-and-a-half wages
when they worked more than forty hours per week. Petitioners filed suit, arguing Respondent violated the FLSA by failing to compensate them for overtime. The District Court granted summary judgment to Respondent, holding Petitioners were employed as outside salesmen and exempt from the overtime requirement. The Ninth Circuit and Supreme Court affirmed. The Court rejected the Department of Labor’s interpretation that “sale” requires a consummated transaction directly involving the employee for whom the exemption is sought.


The Family and Medical Leave Act of 1993 (FMLA) entitles an employee to take twelve weeks of unpaid leave per year for (A) the care of a newborn son/daughter; (B) the adoption or foster-care placement of a child; (C) the care of a spouse, son, daughter, or parent with a serious medical condition, and (D) the employee’s own serious health condition when the condition interferes with the employee's ability to perform work. 29 USC §2612(a)(1). The FMLA creates a private cause of action for equitable relief and damages against any employer, including public agencies, in any federal or state court. §2617(a)(2). In Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003), the Court held Congress could subject states to suit for violations of subparagraph (C) based on evidence of family-leave policies that discriminated on the basis of sex. Petitioner filed suit, alleging his employer, the Maryland Court of Appeals, violated the FMLA by denying him self-care leave. The District Court dismissed the suit on grounds of sovereign immunity. The Fourth Circuit affirmed, holding that unlike the family-care provision in Hibbs, the self-care provision was not directed at an identified pattern of gender-based discrimination and was not "congruent and proportional" to any pattern of sex-based discrimination on the part of the states. Justice Kennedy, joined by the Chief Justice and Justices Thomas and Alito, held that suits against the states under the self-care provision are barred by sovereign immunity. The sex-based discrimination that supported allowing subparagraph (C) suits against the states is absent with respect to the self-care provision. Justice Scalia, concurring in the judgment, adhered to his view that the Court should abandon the "congruence and proportionality" approach in favor of one tied to the text of §5 of the Fourteenth Amendment. Outside the context of racial discrimination, Congress’ §5 power should be limited to the regulation of conduct that itself violates the Fourteenth Amendment, and would not reach a state’s failure to grant self-care leave to its employees.

F. Environmental Law


The Clean Water Act prohibits the discharge of any pollutant by any person into navigable waters without a permit. 33 USC §§1311, 1344. Upon determining a violation has occurred, the EPA may either issue a compliance order or initiate a civil enforcement action. Petitioners received a compliance order stating their residential lot contained
navigable waters and their construction project violated the Act. They sought declarative and injunctive relief in federal District Court, arguing the compliance order was arbitrary and capricious under the Administrative Procedures Act (APA), and that it deprived them of due process in violation of the Fifth Amendment. The District Court dismissed the claims, holding it lacked subject matter jurisdiction. The Ninth Circuit affirmed, holding the Clean Water Act precludes pre-enforcement judicial review of compliance orders, and that such preclusion did not violate due process. The Supreme Court reversed and remanded, holding Petitioners may bring a civil action under the APA to challenge the issuance of the EPA’s order. The APA provides for judicial review of final agency action for which there is no other adequate remedy in court. The compliance order at issue was final, and legal consequences flowed from it that exposed Petitioners to double penalties in future enforcement proceedings. The order severely limited their ability to obtain a permit from the Army Corp of Engineers, and Petitioners had no other adequate remedy in court. A civil action brought by the EPA under provides judicial review, but Petitioners cannot initiate that process. Every day they wait, they incur additional penalties. The Clean Water Act is not a statute that precludes judicial review under the APA.

G. Evidence


At Petitioner’s bench trial, a forensic specialist from the state police lab testified that she matched a DNA profile produced by an outside laboratory, Cellmark, to a profile the state lab produced using a sample of Petitioner’s blood. She testified that Cellmark was an accredited lab, and that vaginal swabs taken from the victim were sent there and returned. She offered no testimony for the purpose of identifying the sample used for Cellmark’s profile or to establish how Cellmark handled or tested the sample. Defense counsel moved to exclude the evidence on Confrontation Clause grounds. The prosecution argued that Illinois Rule of Evidence 703 permitted an expert to disclose facts on which the expert’s opinion is based even if the expert is not competent to testify to those underlying facts, and that any deficiency went to the weight of the evidence, not its admissibility. The trial court admitted the evidence and found Petitioner guilty. The Illinois Court of Appeals and Supreme Court affirmed, holding the expert’s testimony did not violate Petitioner’s confrontation rights because Cellmark’s report was not offered into evidence to prove the truth of the matter asserted. The U.S. Supreme Court granted certiorari and affirmed. Justice Alito, joined by the Chief Justice, and Justices Kennedy and Breyer, held that the form of expert testimony given in this case did not violate the Confrontation Clause because the Clause does not apply to out-of-court statements that are not offered to prove the truth of the matter asserted. "When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for explaining the assumptions on which that opinion rests are not offered
for their truth and thus fall outside the scope of the Confrontation Clause." Justice Thomas, who concurred in the judgment, concluded the disclosure of Cellmark's out-of-court statements through the expert's testimony did not violate the Confrontation Clause solely because the statements lacked the requisite "formality and solemnity" to be considered "testimonial."

H. Federal Preemption


The District Court issued a preliminary injunction preventing four provisions of Arizona's Senate Bill 1070 from taking effect. Section 3 made failure to comply with federal alien-registration requirements a state misdemeanor. Section 5(c) made it a misdemeanor for an unauthorized alien to seek or engage in work in Arizona. Section 6 authorized state and local law enforcement to arrest without a warrant anyone the officers had probable cause to believe had committed any public offense that made the person removable from the U.S. Section 2(b) required officers conducting a stop, detention or arrest to make efforts, in some circumstances, to verify the person's immigration status with the federal government. The Ninth Circuit affirmed, agreeing that the U.S. had established a likelihood of success on its federal preemption claims. The Supreme Court granted certiorari and affirmed, holding §§3, 5(c) and 6 of SB 1070 are preempted by federal law. It held it was improper to enjoin §2(b) before the state courts had an opportunity to construe it and without a showing that its enforcement in fact conflicted with federal immigration law and its objectives. It was not clear at this stage of the proceedings and on the record whether §2(b) in practice will require state officers to delay the release of detainees for no reason other than to verify their immigration status. If the law only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision would likely survive preemption, absent a showing it has other consequences adverse to federal law and its objectives. The Court noted its opinion does not foreclose preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.

I. Habeas Corpus


Petitioner was convicted of murder and sentenced to life in prison in 1987. He filed a federal habeas petition in 2008. The U.S. District Court asked the state if it planned to argue that the petition was untimely. The state twice informed the court that it would not challenge but was not conceding the timeliness of the petition. The District Court rejected Petitioner's claims on the merits. The Tenth Circuit held the petition was time barred, holding it had authority to raise the issue of timeliness on its own motion, and that the state had not taken the issue off the table by declining to raise a statute of limitations defense in District Court. The
Supreme Court granted certiorari, reversed and remanded. It held that circuit courts have the authority, though not an obligation, to raise a forfeited timeliness defense on their own initiative in exceptional cases. However, a federal court does not have complete freedom to depart from the principle of party presentation. It would be an abuse of discretion for a court to override a state’s deliberate waiver of a limitations defense. The Tenth Circuit abused its discretion when it dismissed Petitioner’s petition as untimely. The state twice informed the District Court it would not challenge the timeliness of the petition, deliberately waiving the statute of limitations defense. The Tenth Circuit should have followed the District Court’s lead and decided the merits of the petition.


Arizona prisoners may raise claims of ineffective assistance of counsel in state collateral proceedings, but not on direct review. In Petitioner’s first state collateral proceeding, his counsel did not raise such a claim. On federal habeas review, with new counsel, he argued he received ineffective assistance of counsel both at trial and during the first collateral proceeding. He also claimed he had a constitutional right to an effective attorney in the collateral proceeding because it was his first opportunity to raise his claim of ineffective assistance at trial. The District Court denied the petition, finding Arizona’s preclusion rule was an adequate and independent state-law ground barring federal review. It also held that under Coleman v. Thompson, 501 U.S. 722 (1991), the attorney’s errors during the post-conviction proceeding did not qualify as cause to excuse the procedural default. The Ninth Circuit affirmed. The Supreme Court granted certiorari, reversed and remanded. It held that when, under state law, ineffective assistance of counsel claims must be raised in an initial review collateral proceeding, a procedural default will not bar a federal habeas court from hearing those claims if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective. It noted that this is a limited exception, and Coleman remains good law except with respect to initial review collateral proceedings for claims of ineffective assistance at trial. Whether Petitioner’s attorney in the first collateral proceeding was ineffective and whether Petitioner’s ineffective assistance at trial claim is substantial are issues that must be resolved on remand.


Respondent was charged with capital murder in 1984 and commenced habeas proceedings in 1994 by filing a request for appointment of counsel, which the District Court granted under 18 USC §3599. The statute contemplates that appointed counsel may be replaced upon the defendant's motion, but does not specify a standard for district courts to use in evaluating those motions. Respondent's counsel filed his habeas petition in 1994, and the Office of the Federal Public Defender (FPD) was

§3599(e).
substituted as counsel of record in the late 1990s. The District Court held an evidentiary hearing on the petition in August 2004, and the parties submitted post-hearing briefs by February 2005. The court thereafter told the parties it did not wish to receive further material regarding the petition. In March 2005, Respondent moved to substitute counsel. His attorneys thereafter told the court they had met with Respondent and would continue to represent him. Six weeks later, Respondent filed another substitution motion. The court denied both the renewed motion and the habeas petition. Respondent appealed the denial of his substitution motion pro se, and the FPD appealed the habeas ruling. When the FPD informed the Ninth Circuit that the attorney-client relationship had broken down, it provided Respondent with a new attorney. He then asked the District Court to vacate the denial of his habeas petition under Fed.R.Civ.P. 60(b), arguing he should be allowed to investigate the significance of new physical evidence in the case. The District Court denied the motion. On appeal, the Ninth Circuit vacated the District Court's denial of the substitution request and the habeas petition. It held "the interests of justice" standard used in non-capital cases should govern substitution motions. See 18 USC §3006A. The District Court abused its discretion by failing to inquire into the complaints made by Respondent. The Supreme Court reversed and remanded. It agreed that district courts should use the same "interests of justice" standard that applies in non-capital cases under §3006A when evaluating motions to substitute counsel in capital cases under 18 USC §3599. However, the District Court in the instant case did not abuse its discretion in denying Respondent's second request for substitution of counsel. It received the motion on the eve of deciding his ten-year-old habeas petition, and the Court concluded the motion's timing precluded a holding that the District Court abused its discretion.


Respondent was charged under Michigan law with assault with intent to murder and three other offenses. The prosecution offered to dismiss two of the charges and to recommend a shortened sentence on the remaining charge in exchange for a guilty plea. Respondent rejected the offer, alleging his attorney convinced him the prosecution would be unable to establish intent to murder because the victim had been shot below the waist. Respondent was convicted on all counts, and the trial court rejected his claim that his attorney's advice to reject the plea constituted ineffective assistance. The Michigan Court of Appeals affirmed. The federal District Court granted his habeas petition, finding the state appellate court unreasonably applied the ineffective assistance standards outlined in Strickland v. Washington, 466 U.S. 668 (1984), and Hill v. Lockhart, 474 U.S. 52 (1985). It granted a conditional writ and ordered specific performance of the original plea offer. The Sixth Circuit affirmed. The Supreme Court granted certiorari, vacated and remanded. When counsel's ineffective assistance leads to a plea offer's rejection, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the offer would have been presented to the court, the court would
have accepted it, and that the conviction or sentence would have been less severe under the offer's terms than under the actual judgment or sentence imposed. Where a defendant shows ineffective assistance caused the rejection of a plea leading to a more severe sentence at trial, the remedy must "neutralize the taint" of a constitutional violation, but must not grant the defendant a windfall or needlessly squander the state's resources invested in the prosecution. See U.S. v. Morrison, 449 U.S. 361 (1981), U.S. v. Mechanik, 475 U.S. 66 (1986). The Court held Respondent satisfied Strickland's two-part test, and the parties conceded the fact of deficient performance. Respondent also showed that but for that performance, there was a reasonable probability he and the trial court would have accepted the plea. The District Court erred in ordering specific performance of the plea agreement. The correct remedy is to order the state to reoffer the plea. If Respondent accepts the offer, the state trial court can exercise its discretion in determining whether to vacate his convictions and resentence pursuant to the agreement, to vacate only some of the convictions and resentence accordingly, or leave the original conviction and sentence in place.


During Petitioner's trial for murder, robbery and conspiracy, the prosecution introduced the redacted confessions of two of his co-defendants. The Pennsylvania Superior Court upheld his convictions, holding the rule announced in Bruton v. U.S., 391 U.S. 123 (1968), did not apply because the confessions were redacted to remove any specific reference to Petitioner. While his petition to the Pennsylvania Supreme Court was pending, the U.S. Supreme Court held in Gray v. Maryland, 523 U.S. 185 (1998), that Bruton does apply to some redacted confessions. The Pennsylvania Supreme Court declined Petitioner's appeal, and he sought federal habeas relief. The District Court held that because Gray had not been decided when the Pennsylvania Superior Court issued its opinion, the condition for granting habeas relief under 28 USC §2254(d)(1) had not been met. The Third Circuit and U.S. Supreme Court affirmed. Under §2254(d)(1), "clearly established Federal law, as determined by the Supreme Court of the United States" includes only the Court's decisions as of the time of the relevant state-court adjudication on the merits. See Cullen v. Pinholster, 131 S.Ct. 2951 (2011).


After the intermediate state appellate court affirmed his convictions, Petitioner let the time for seeking discretionary review with the state's highest court expire. When he thereafter sought habeas review, the District Court dismissed his petition as time-barred by AEDPA's one-year statute of limitations. 28 USC §2244(d)(1)(A). It held Petitioner's judgment became final when his time for seeking discretionary review in the state's highest court expired, and his petition was untimely if the statute of limitations was run from that date. Petitioners must obtain a certificate of appealability (COA) to appeal a district court's final order in a habeas proceeding. 28 USC §2253(c)(1). The COA may only issue if the
petitioner has made a "substantial showing of the denial of a constitutional right," and "shall indicate which specific issue" satisfies that showing.\footnote{\(\textit{§2253(c)(2)}\).} A Fifth Circuit judge granted Petitioner a COA on the issue of whether his petition was untimely, but failed to indicate a constitutional issue. The Fifth Circuit affirmed, but it did not mention, and the state did not raise, the \(\textit{§2253(c)(3)}\) defect. When Petitioner petitioned the U.S. Supreme Court for review, the state argued for the first time that the Fifth Circuit lacked jurisdiction to adjudicate his appeal based on the \(\textit{§2253(c)(3)}\) defect. The Court held \(\textit{§2253(c)(3)}\) is a mandatory but non-jurisdictional rule. A COA's failure to indicate a constitutional issue does not deprive a circuit court of jurisdiction to adjudicate the appeal. For state prisoners who do not seek review in a state's highest court, the judgment becomes final for purposes of \(\textit{§2244(d)(1)(A)}\) on the date that the time for seeking such review expires. Because Petitioner did not appeal to the state's highest court, his judgment became final when his time for seeking review in that court expired.


Petitioner was indicted for two murders and burglary in Kentucky state court. At trial, he sought to show he acted under "extreme emotional disturbance," which reduces a homicide that would otherwise be murder to first-degree manslaughter. \(\textit{KRS §§507.020(1)(a), 507.030(1)(b)}\). The jury convicted him on all charges, and the Kentucky Supreme Court affirmed. \textit{Matthews v. Commonwealth}, 709 S.W.2d 414, 417 (Ky. 1985). It held the evidence regarding Petitioner's conduct before, during and after the crimes was more than sufficient to support the jury's findings of capital murder. \textit{Id.} at 421. Petitioner then filed a habeas petition in federal District Court, arguing the Kentucky Supreme Court contravened clearly established federal law in rejecting his claim that the evidence was insufficient to prove he had not acted under the influence of extreme emotional disturbance. The District Court dismissed the petition, but a divided panel of the Sixth Circuit reversed with instructions to grant relief. It held the evidence regarding Petitioner's conduct before, during and after the crimes was more than sufficient to support the jury's findings of capital murder. \textit{Id.} at 421. Petitioner then filed a habeas petition in federal District Court, arguing the Kentucky Supreme Court contravened clearly established federal law in rejecting his claim that the evidence was insufficient to prove he had not acted under the influence of extreme emotional disturbance. The District Court dismissed the petition, but a divided panel of the Sixth Circuit reversed with instructions to grant relief. It held that the evidence supported a finding of no extreme emotional disturbance. The U.S. Supreme Court granted \textit{certiorari} and reversed. Under AEDPA, the Sixth Circuit was without authority to issue a writ of habeas corpus unless the Kentucky Supreme Court's decision was contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented at the state trial court proceedings. The Kentucky Supreme Court's rejection of Petitioner's sufficiency of the evidence claim is controlling in the habeas proceeding. It made no objectively unreasonable error in holding that the question of extreme emotional disturbance was not supported by the evidence presented at trial.
emotional disturbance was properly committed to the jury for resolution. The Sixth Circuit also held remarks made by the prosecutor during closing argument constituted a denial of due process. The Kentucky Supreme Court rejected this claim on the merits. The Sixth Circuit held the prosecutor violated Darden v. Wainwright, 477 U.S. 168 (1986), by suggesting Petitioner colluded with his attorney and expert witness to manufacture an extreme emotional disturbance defense. The U.S. Supreme Court held that in light of the prosecutor’s immediate clarification that he was not alleging collusion, the Sixth Circuit’s holding that this portion of the closing argument clearly violated due process is unsupportable. It also erred in consulting Sixth Circuit precedent rather than Supreme Court precedent in assessing the reasonableness of the Kentucky Supreme Court’s decision.

J. Immigration


8 USC §1229b(a) authorizes the Attorney General to cancel the removal of an alien from the U.S. who, among other things, has held the status of a lawful permanent resident (LPR) for at least five years,\footnote{10} and has lived in the U.S. for at least seven continuous years after a lawful admission.\footnote{11} At issue in this case was whether the Board of Immigration Appeals should impute a parent’s years of continuous residence or LPR status to his or her child. The issue arises because a child may enter the U.S. lawfully or gain LPR status after his/her parent, meaning the parent may satisfy §§1229b(a)(1) or (2) while the child, considered independently, does not. The BIA held an alien must satisfy the statute’s requirements on his/her own, but the Ninth Circuit reversed, holding the statute requires imputation. See Mercado-Zazueta v. Holder, 580 F.3d 1102 (9th Cir. 2009); Cuevas-Gaspar v. Gonzalez, 430 F.3d 1013 (9th Cir. 2005). In the instant case, the immigration judge concluded Respondent qualified for relief because of his father’s immigration history even though he could not satisfy §1229b(a)(1) or (2) on his own. The BIA reversed, and the Ninth Circuit granted Respondent’s petition for review and remanded the case to the BIA for reconsideration in light of its contrary decision. The Supreme Court granted \textit{certiorari}, reversed and remanded. It held the BIA’s rejection of imputation is based on a permissible construction of §1229b(a) and is entitled to \textit{Chevron} deference.


Until repealed in 1996, §212(c) of the Immigration and Nationality Act (INA) permitted the Attorney General to grant discretionary relief to an excludable alien, if the alien had lawfully resided in the U.S. at least seven years before temporarily leaving the country and if the alien was

\footnote{10} §1229b(a)(1).

\footnote{11} §1229b(a)(2).
not excludable on one of two specified grounds. Section 212(c) only applied in exclusion proceedings, but the Board of Immigration Appeals (BIA) extended it to deportation proceedings as well. Although Congress substituted a narrower discretionary remedy for §212(c) in 1996,12 §212(c)'s relief remains available to aliens whose removal is based on a guilty plea entered before it was repealed. See INS v. St. Cyr, 533 U.S. 289 (2001). In deciding whether to exclude an alien, the BIA checks the statutory ground identified by the Department of Homeland Security as the basis for exclusion. Unless that ground is one of the two falling outside §212(c)'s scope, the alien is eligible for discretionary relief. The BIA then determines whether to grant relief based on factors such as the seriousness of the offense. The instant case concerned the BIA's method for applying §212(c) in the deportation context. It used a "comparable-grounds rule" whereby it evaluated whether the charged deportation ground has a close analogue in the statute's list of exclusion grounds. If it does, the alien may seek §212(c) relief. If the deportation ground covers different or more or fewer offenses than any exclusion ground, the alien is ineligible for relief, even if the alien's particular offense falls within an exclusion ground. The Supreme Court held the BIA's policy for applying §212(c) in deportation cases is arbitrary and capricious under the Administrative Procedures Act. In basing a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories, which is irrelevant to the alien's fitness to reside in the U.S., the BIA failed to exercise its discretion in a reasoned manner. The BIA must use a system that is tied to the purposes of the immigration laws or the appropriate operation of the immigration system. The comparable-grounds approach has no connection to either of these factors and makes §212(c) eligibility turn on an irrelevant comparison between statutory provisions.


Rosenberg v. Fleuti, 374 U.S. 449 (1963), held that lawful permanent residents were not regarded as making an "entry" upon their return from casual, innocent, brief excursions outside U.S. borders. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress abolished the distinction between exclusion and deportation procedures and created a uniform removal proceeding. 8 USC §1229b. The BIA held this alteration superseded Fleuti, and lawful permanent residents returning from a trip abroad are now regarded as seeking admission if they have committed an offense identified in §1182(a)(2),13 including crimes involving moral turpitude or conspiracy to commit such a crime. Petitioner, a permanent lawful resident since 1989, pleaded guilty to conspiracy to make a counterfeit security in 1994 and served a four-month prison sentence. After his conviction and the passage of IIRIRA, he regularly traveled to Greece to visit family. In 2003, after returning from a week-long trip, immigration officers classified

12 8 USC §1229b.

13 See §1101(a)(13)(C)(v).
him as an alien seeking “admission” based on his 1994 conviction. At his removal proceeding, his attorneys conceded removability and requested discretionary relief under former §212(c) of the INA. The immigration judge denied the request and ordered Petitioner removed to Greece. The BIA affirmed. In 2008, Petitioner filed a timely motion to reopen the removal proceedings, alleging his previous attorneys were ineffective for conceding removeability. He sought to withdraw this concession on the ground that IIRIRA’s admission provision did not reach back to deprive him of lawful resident status based on his pre-IIRIRA conviction. The BIA denied the motion, and the Second Circuit affirmed. The Supreme Court granted certiorari and reversed, holding the impact of Petitioner’s travel is not determined by IIRIRA, but by the laws in effect at the time of his conviction.

K. Privacy Act of 1974


Respondent failed to disclose his HIV-positive status to the FAA at a time when the agency did not issue medical certificates, which are required to operate an aircraft, to persons with HIV. He subsequently applied to the Social Security Administration (SSA) and received long-term care disability benefits based on his HIV status. Respondent also renewed his certificate with the FAA on several occasions, intentionally withholding information regarding his condition. The Department of Transportation (DOT) began a joint criminal investigation with the SSA to identify medically unfit people who had obtained FAA certifications. It provided the SSA with the names of licensed pilots, and the SSA provided the DOT with a spreadsheet containing information on those pilots who had also received disability benefits. When Respondent’s HIV status was discovered, his pilot’s license was revoked and he was indicted for making false statements to a government agency. He pleaded guilty and was fined and sentenced to probation. He then filed suit alleging the FAA, SSA and DOT violated the Privacy Act of 1974. The Act allows an aggrieved individual to sue for actual damages if the government intentionally or willfully violates the Act’s requirements in a way that adversely affects the individual. 5 USC §552a(g)(4)(A). Respondent claimed the unlawful disclosure to the DOT of his confidential medical information caused him mental and emotional distress. The District Court held the government violated the Act, but finding the term “actual damages” to be ambiguous, held the Act does not authorize the recovery of non-pecuniary damages. The Ninth Circuit reversed, holding the term “actual damages” is not ambiguous and includes damages for mental and emotional distress. The Supreme Court granted certiorari and reversed and remanded. It held the Privacy Act does not unequivocally authorize damages for mental or emotional distress, and therefore does not waive the government’s sovereign immunity from liability for those harms.
L. Securities


Respondent filed numerous §16(b) actions claiming that in underwriting various initial public offerings in the late 1990s and 2000, Petitioners and others inflated the stocks’ aftermarket prices, allowing them to profit from the aftermarket sales. She also claimed Petitioners failed to comply with §16(a)’s requirement that insiders disclose any changes to their ownership interests, and that failure tolled the two year statute of limitations in _15 USC §78p(b)_. The District Court dismissed the complaints as untimely, and the Ninth Circuit reversed. It held the limitations period is tolled until an insider files the §16(a) disclosure statement regardless of whether the plaintiff knew or should have known of the conduct at issue. _See Whittaker v. Whittaker Corp., 639 F.2d 516 (9th Cir. 1981)_. The Supreme Court vacated the decision and remanded. It held that even if the two-year time period can be extended (an issue on which the Court evenly divided), the Ninth Circuit erred in holding it is tolled until a §16(a) statement is filed. The text of §16(b) starts the clock from “the date at which such profit was realized.”

M. Sentencing


Under the _Anti-Drug Abuse Act (1986 Drug Act)_ , the five- and ten-year mandatory minimum prison terms for federal drug crimes reflected a 100-to-one disparity between the amounts of crack cocaine and powder cocaine needed to trigger the minimums. The _Fair Sentencing Act_ , which took effect on August 3, 2010, reduced the disparity to eighteen-to-one, lowering the mandatory minimums applicable to many crack offenders by increasing the amount of crack needed to trigger the five-year minimum from five to twenty-eight grams and the amount for the ten-year minimum from fifty to 280 grams. It also directed the Sentencing Commission to make conforming amendments to the Guidelines as soon as practicable but not later than ninety days after the Act’s effective date. The amendments became effective on November 1, 2010. Petitioner sold fifty-three grams of crack in 2007, but was not sentenced until December 2010. The District Judge sentenced him according to the ten-year minimum mandated by the _1986 Drug Act_ , holding the _Fair Sentencing Act_ ’s five-year minimum for selling that amount of crack did not apply to offenses that were committed before the Act’s effective date. The Seventh Circuit affirmed. The Supreme Court granted _certiorari_ , vacated and remanded, holding the _Fair Sentencing Act_ ’s new lower mandatory minimums apply to post-Act sentencing of pre-Act offenders. The new Act’s lower minimums also apply to those who committed an offense prior to August 3 and were sentenced between that date and November 1, 2010, the effective date of the new Guidelines.

The Court held the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders.

N. Social Security


Eighteen months after her husband died, Respondent gave birth to twins conceived through in vitro fertilization using her husband’s sperm. She applied for Social Security survivors benefits for the twins. The Social Security Administration denied her application, and the District Court affirmed. It held that, in accordance with the Administration’s construction of the Social Security Act, the twins would qualify for benefits only if, as 42 USC §416(h)(2)(A) specifies, they could inherit from the deceased wage earner under state intestacy laws. It then found Respondent's husband was domiciled in Florida at his death, and that under Florida law, posthumously conceived children do not qualify for inheritance through intestate succession. The Third Circuit reversed. It held that under §416(e), the undisputed biological child of an insured and his widow qualify for survivors benefits without regard to state intestacy laws. The Supreme Court granted certiorari, reversed and remanded. It held the Administration’s reading of the statute is better attuned to its text and design to benefit primarily those supported by the deceased wage earner in his or her lifetime. It also noted that even if the Administration’s interpretation is not the only reasonable one, it is a permissible construction of the statute that is entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
I. INTRODUCTION

A. How We Got Here
   1. Subprime mortgage lending.
   2. Opposing counsel.

   In re Taylor, 407 B.R. 618 (Bankr. E.D. Pa. 2009): gives excellent background as to how opposing counsel “interact” with their client through computer program; the role of Lender Processing Systems (sanctions reversed by 2010 WL 624909 (E.D.Pa. Feb 18, 2010), and aff’d in part, reversed in part by 655 F.3d 274 (3rd Cir. 2011)).

B. The Stakes

C. What Every Lawyer (and Homeowner) Needs to Know about Foreclosure
   1. Long process.
   2. Many can afford and should hire an attorney.
   3. Communicating with bank.

D. Empowering Homeowners: The Psychology and Rhetoric of Foreclosure

II. PART ONE: DEFENDING CLIENTS FROM FORECLOSURE IN COURT

A. UCC Standing
   1. Real party in interest with standing to enforce the note.
      a. As a practical matter, the foreclosing plaintiff must be the real party in interest and have standing to pursue foreclosure. Technically, these are separate inquiries, though they often get blended in court opinions and in the heat of argument in our cases. I use the phrase “real party in interest with standing to enforce the note” as an all-encompassing statement of what interests the Plaintiff must prove it possesses in the case. I like to focus on the requirements of standing for two reasons: 1) the standard for showing standing is higher, and 2) it can be raised at any time. Technically, a claim that a Plaintiff is not the real party in interest should be brought in a motion to dismiss prior to (or contemporaneously with) filing an answer.
Defendants can assert the Plaintiff lacks standing at any time – after discovery is over, for example. Which route you go is a matter of personal preference and the client’s situation.

b. Real Party in Interest (CR 17.01): “Every action shall be prosecuted in the name of the real party in interest.”

   i. Taylor v. Hurst, 216 S.W. 95 (Ky. 1919) (citation omitted). “The real party in interest, within the meaning of the Code provision, is the party who will be entitled to the benefits of the action upon a successful termination thereof; one who is actually and substantively interested in the subject-matter. ... Does he satisfy the call for the person who has the right to control and receive the fruits of the litigation?” In foreclosures, this is the party entitled to be paid from the foreclosure sale.

   ii. In Kentucky, at minimum, real party in interest must have a significant interest, Kentucky Center for the Arts v. Whittenberg Engineering & Construction Company, 746 S.W.2d 71, 73 (Ky. App. 1987).

      a) Question is whether KCA is RPI.

      b) Suing for breach of construction contract of KCA in downtown Louisville.

      c) Charged with supervising construction and had statutory power to take, acquire and hold property.

      d) KCA held no legal or equitable title to property, however, and had no contract with Whittenberg.


   iv. However, the D must be prejudiced by a mid-suit showing of RPI for SJ to be inappropriate. Stuart.

   v. RPI claim must be “by demurrer” (motion to dismiss). Thompson-Starret Co. v. Mason’s Adm’rs, 201 S.W.2d 876 (Ky. 1947). If not, such claims are waived. Johnson v. Ruby Lumber Co., 278 S.W.2d 71 (Ky. 1955) (note: standing can never be waived).
c. See generally, Chris Markus, et. al., "From Main Street to Wall Street: Mortgage Loan Securitization and New Challenges Facing Foreclosure Plaintiffs in Kentucky," 36 N. Ky. L. Rev. 395. This article can be relied upon for an analysis of the real party in interest problem for servicers, banks, and trustees of securitized trusts. It CANNOT be relied on for the ways in which foreclosing Plaintiffs may prove their status as real party in interest with standing to foreclose.

2. Standing requirements.

a. Standing requires a “judicially recognizable interest in subject matter. The interest may not be 'remote and speculative,' but must be a present and substantial interest in the subject matter.” City of Louisville v. Stockyards Bank & Trust Co., 843 S.W.2d 327, 328-329 (Ky. 1992)


c. Court can inquire sua sponte into parties’ standing (as it impacts subject matter jurisdiction) at any time. Kentucky Employers Mut. Ins. v. Coleman, 236 S.W.3d 9, 15 (Ky. 2007).

d. Plaintiff must have standing at the time the suit is filed.


ii. Bank of Commerce of Louisville v. Abell, 184 S.W.2d 86, 89 (Ky. 1944). “In order to determine the time when a transferee becomes a holder in due course, it is necessary to look at the date when the endorsement is actually made as that is the time negotiation takes effect for that purpose.”


v. *Citibank v. Carroll*, 220 P.3d 1073, 1078 (Idaho 2009). “Because [Plaintiff] was the sole owner of Carroll’s account at the time it brought suit, it is entitled to recovery on the funds on that account, and therefore, has standing to sue. Questions of standing must be decided by this Court before reaching the merits of the case.”

e. Judgments entered without Plaintiff having standing are void and subject to collateral attack.

f. Ripeness: “Section 112(5) of the Kentucky Constitution states in relevant part that ‘[t]he Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court.’ Questions that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy. Because an unripe claim is not justiciable, the circuit court has not subject matter jurisdiction over it. It is well-established that the issue of subject matter jurisdiction can be raised at any time, even *sua sponte*, as it cannot be acquired by waiver, consent, or estoppel.” *Buckley v. Kroger Co.*, 2007 WL 4210675 at *3 (Ky. App. Nov. 30, 2007).

g. Servicer’s standing to sue.


ii. *CWC Capital Asset Management, LLC v. Chicago Properties, LLC*, 610 F.3d 497 (7th Cir. 2010). Provides support to Green Tree’s position that servicer has standing to foreclose (but only after inquiring into the PSA terms). Judge Posner gives a good background of the legal ramifications of the servicer/trustee relationship.

h. Trustee’s standing to sue.

Trustee’s standing depends on whether trustee “possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others.” *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 464 (1980).
3. Plaintiff’s *prima facie* case.

   a. Plaintiff’s burden.

       Here is the whole point of requiring the Plaintiff to prove its case: “it becomes essential to establish that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of title.” *HSBC v. Thompson*, 2010 WL 3451130 at *11 (Ohio App. Sep. 3, 2010).

   b. According to 6 Hawkland’s Uniform Commercial Code Series §308:3 (Rev. 2009). (Also, there’s the test in *Geiselman v. Cramer Financial Group, Inc.*, 965 S.W.2d 532 (Tex. App. 1997)).

       i. Establish the effectiveness of the obligor’s signature.

       ii. Produce the instrument.

           *KRS 355.3-308(2)* states, “If the validity of signatures is admitted or proved and there is compliance with subsection (1) of this section, a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under *KRS 355.3-301*, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.”

       iii. Prove that he is a person entitled to enforce the instrument.

           Three ways to be PETE under *KRS 355.3-301*: “Person entitled to enforce” an instrument means: (1) The holder of the instrument; (2) A nonholder in possession of the instrument who has the rights of a holder; or (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to *KRS 355.3-309* or *KRS 355.3-418(4)*. A person may be a person entitled to enforce the instrument even though the person is not the owner.
of the instrument or is in wrongful possession of the instrument.

a) (1) Negotiation §3-201: “(1) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder. (2) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

i) "The instrument sued on is payable to order and can be negotiated only by the endorsement of the Bank of Commerce and completed by delivery." Bank of Commerce of Louisville v. Abell, 184 S.W.2d 86, 89 (Ky. 1944).

ii) Harponola Co. v. Conklin, 266 S.W. 626 (Ky. 1924). This case from the old Court of Appeals stands for a few important propositions. First, it is the Plaintiff's burden to prove the elements of negotiation. Second, mere possession of a note payable to the order of another is subject to a motion to dismiss.

iii) Transfer of possession.

a. The transfer of possession requires the physical delivery of the note “for the purpose of giving the person receiving delivery the right to enforce the instrument.” In re Wells, 407 B.R. 873 (Bkrtcy. N.D. Ohio 2009).

b. Bank’s physical possession of note (and date of indorsement) is a genuine issue of material fact that precludes summary judgment. In re Koontz, 2010 WL 5625883
iv) Indorsement by the holder.

a. Blank indorsements.

b. **KRS 355.3-109:** (1) A promise or order is payable to bearer if it: (a) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment; (b) Does not state a payee; or (c) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

b) (2) **Transfer KRS 355.3-203:** “(1) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument. (2) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument. (3) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made. (4) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this article and has only the rights of a partial assignee.”
i) Comment 1 to 3-203: right to enforce depends on obtaining possession of the instrument.

ii) Transferring the Mortgage without the Note is a nullity.


c) (3) Lost Note (3-309).

   i) (1) A person not in possession of an instrument is entitled to enforce the instrument if: (a) The person seeking to enforce the instrument: 1. Was entitled to enforce the instrument when loss of possession occurred; or 2. Has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred; (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
(2) A person seeking enforcement of an instrument under subsection (1) of this section must prove the terms of the instrument and the person’s right to enforce the instrument. If that proof is made, KRS 355.3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

ii) Kentucky has made it easier to enforce lost notes with recent changes to UCC.

iii) Attorneys should not sign lost note affidavits. See In re Cook, 457 F.3d 561 (6th Cir. 2006).

c. Proving holder status in practice.

i. Production of the original.

KRE 1003: A photocopy is admissible to the same extent as the original unless: 1) A genuine question is raised as to the authenticity of the original; or 2) In the circumstances it would be unfair to admit the duplicate in lieu of the original.

ii. Allonges.

a) Traders Deposit Bank v. Chiles, Thompson & Co., 14 Ky. L. Rptr. 617 at *2 (Ky. Sup. Ct. 1893): “As a general rule the legal title to a negotiable paper, payable to order, passes, according to the law merchant, only by the payee’s indorsement on the security itself. The established exception to this rule is, when the indorsement is made on a piece of paper so attached to the original instrument as in effect to become part thereof or be incorporated with it. This
addition is called, in the adjudged cases and elementary treatises, an allonge. The device had its origin in cases where the back of the instrument had been covered with indorsements or writing, leaving no room for further indorsements thereon. But neither the general doctrines of commercial law nor any established exception thereto make words of mere assignment and transfer of such paper, contained in a separate instrument executed for a wholly different and distinct purpose, equivalent to an indorsement within the rule which admits the payor to urge, as against the holder of an unindorsed negotiable security, payable to order, any valid defense which he had against the original payee."

b) McRae stands for the common sense proposition that when indorsements and allonges start showing up in the middle of litigation, they were created for litigation (and are not therefore business records).

c) In re Weisband, 427 B.R. 13 (Bankr. D. Ariz. 2010): a piece of paper not attached to the note at the time the note was produced was not an effective indorsement sufficient to negotiate the note to make the party a holder with standing to enforce the note. Further, the fact that the piece of paper called an allonge was not included with the copy of the note provided at an earlier date was a “further indication that the allonge containing the Endorsement was not affixed to the note.” See also Adams v. Madison Realty & Dev., Inc., 853 F.2d 163, 167 (3d Cir. 1988): The Code’s requirement that an indorsement be “firmly affixed” to its instrument is a settled feature of commercial law, adopted verbatim by every American state, the District of Columbia, and the Virgin Islands. With a unanimity unusual in decisional law, the directive has been faithfully observed.” The court continues to note that this requirement serves to prevent fraud and preserves a traceable chain of title. See also HSBC v. Thompson, 2010 WL 3451130 (Ohio App. Sep. 3, 2010) holding that dismissal is appropriate when Plaintiff
fails to prove that allonge is actually affixed to the Note.

iii. Business records exception.

a) This arises with letters sent to the homeowner, payment histories, etc.

b) For a business record to be admissible as an exception to the hearsay rule, it must meet three requirements: 1) the maker of the record as well as the person providing the information for the record must have been acting under a “business duty” to report the information; 2) the record must have been made in the regular practice of that business activity; and 3) the record must be made at or near the time of the activity by someone with knowledge. 9 Ky. Prac. Crim. Prac. & Proc. §27:239 (2011-2012).

c) Commercial paper, though, is self-authenticating. (Note: whether something is authentic and therefore admissible under BRE has no bearing on whether admission of a copy would be unfair on KRE 1003.)

d) The burden is on the party wishing to use the exception to establish that foundation.

iv. Attacking affidavits.

The problems with supporting affidavits:

a) They don’t exist.

Servicer forecloses and produces original note and mortgage endorsed in blank, but no supporting affidavits or deposition testimony that establish valid transfer to servicer. Riggs v. Aurora Loan Services, LLC, 2010 WL 1561873 (Fl. App. Apr. 21, 2010).¹

¹ This opinion was withdrawn and superseded on rehearing by Riggs v. Aurora Loan Services, LLC, 36 So.3d 932 (Fla. App. 2010). “The circuit court granted summary judgment in favor of Aurora over Riggs's objections that Aurora's status as lawful 'owner and holder' of the note was not conclusively established by the record evidence. We agree with the circuit court that Aurora sufficiently established that it was the holder of the note.” Id. at 933
b) They are based on computer evidence.


c) The affiants have no idea what they are saying.

i) Affidavit traditionally used by foreclosure mills “is self-serving, lacks credibility, and is entirely unpersuasive on the question of whether the Note and Deed of Trust were properly assigned to BAC.” The statement, claiming to be the “holder” is a “legal conclusion, not a fact, and inappropriate for such an affidavit. In re Box, 2010 WL 2228289 (Bankr. W.D. Mo. June 3, 2010) quoting Bellistri v. Ocwen Loan Servicing.


d) They are also communications for purposes of FDCPA (cannot be false or misleading) Gionis v. Javitch, Block, Rathbone, LLP, 238 F.Appx 24, 27-30 (6th Cir. 2007).

v. Additional requirements of assignee.

• Attacking sufficiency of pleadings

vi. Proving lost note cases.

4. Additional problems of securitization.

a. Locating and reading securitization documents.

• EDGAR

b. Who has standing to sue under the PSA?

This question can only be answered by looking at the language of the Pooling and Servicing Agreement. See Green Tree Servicing, LLC v. Sanders for Kentucky
analysis. Both Green Tree and CWCapital Asset Management both find that the servicer has standing to sue on behalf of the trust, but only AFTER looking at the language in the PSA. Do not let servicers foreclose without producing the Pooling and Servicing Agreement.

c. Attacking securitization processes.

Servicer or other foreclosing Plaintiff must “connect the dots” in order to have standing to foreclose. In re Weisband.

d. How securitization works.

Governed by New York law:

i. McKinney’s EPTL §7-2.4 “Act of Trustee in Contravention of the Trust.”

ii. “If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void.”

5. Additional problems of MERS.

a. Understanding MERS.

b. Attacking MERS arguments.

i. MERS is not a real party in interest.

MERS has no financial interest in the notes, therefore assignees of MERS have no standing, either. In re Weisband.

ii. Assignment of mortgage is totally irrelevant to question of entitlement to enforce.

a) Note follows mortgage, not the other way around. Securities Inv. Co. of St. Louis v. Harrod Bros., 7 S.W.2d 492, 493 (Ky. 1928).

b) Negotiation of note creates equitable assignment: “Though the mortgage was not assigned of record, it was in effect a mortgage to Mrs. Drinkard, and the transfer of the notes operated as an equitable
assignment of the mortgage.” Drinkard v. George, 36 S.W.2d 56 (Ky.1930).


e) Ohio Bankruptcy: Assignment of mortgage “did not transfer the right to enforce the note to [Plaintiff]; it only gave that entity a claim to ownership of the Note.” Plaintiff would not become PETE until compliance with the UCC for negotiation or transfer. In re Wells, 407 B.R. 873 (Bankr.N.D. Ohio 2009). See U.C.C. §3-23 cmt. 1 (2002).

f) Assignment of mortgage after suit is filed is especially damning.


ii) Wells Fargo Bank, N.A. v. Byrd, 897 N.E.2d 722 (Ohio App. 2008); Plaintiff bank cannot get standing halfway through the case through assignment of mortgage, but dismissal with prejudice was a little much; just dismiss without prejudice.

iii) U.S. Bank Nat. Ass’n v. Ibanez, 2009 WL 3297551 at *3 (Mass. Land Ct. Oct. 14, 2009) (citation omitted): “While ‘mortgagee’ has been defined to include assignees of a mortgage,
in other words the current mortgagor, there is nothing to suggest that one who expects to receive the mortgage by assignment may undertake any foreclosure activity.”


v) There are some cases against us.

Deutsche Bank Nat. Trust Co. v. Pagani, 2009 WL 3440028 (Ohio App. Oct. 23, 2009): assignment of mortgage after start of suit is allowable so long as there is evidence plaintiff is the current holder and owner of the note.

B. Equitable Standing

1. See Equity Memo for full treatment.

2. See also Pearman v. West Point Nat. Bank, 887 S.W.2d 366 (Ky. App. 1994).


C. HAMP Enforcement

1. General program guidelines.
   a. Standard waterfall within NPV test.
   b. Communication requirements.

2. Common problems.
   a. Failure to review.
   b. Failure to provide reason why homeowner is not eligible.
   c. Failure to calculate income correctly.
   d. Failure to request additional documentation.
   e. Failure to timely review for permanent modification.
D. Affirmative Defenses

1. Waiver.

2. Equitable estoppel.
   - See Jury Instructions document for elements

E. Torts

1. Fraudulent misrepresentation.
   - See Jury Instructions document for elements

2. Negligent misrepresentation.
   - See Jury Instructions document for elements

F. Breach of Contract

1. Breach of duty of good faith and fair dealing.
   a. All contracts under the UCC are governed by a duty of good faith and fair dealing: KRS 355.1-304.
   b. Kentucky law recognizes that every mortgage contract has an implied covenant of good faith and fair dealing. Pearman.
      i. In Pearman: A bank cannot sell real property subject to a foreclosure proceeding to a third party during the proceeding. To do so violates the implied covenant of good faith and fair dealing. Before the foreclosure proceedings were complete, the West Point Bank sold the house to a third party for a profit. The court held that the bank had a duty to act in a bona fide manner and this sale ran contrary to that duty.
      ii. Harvest Homebuilders LLC v. Commonwealth Bank & Trust Co., 310 S.W.3d 218 (Ky. App. 2010). The duty of good faith and fair dealing does not extend to an obligation to accept a third party offer to purchase a property subject to foreclosure.

2. Mortgage servicing.
   In re Stewart, 391 B.R. 327 (Bankr. E.D. La. 2008). Exhaustive, damning, inside-look at the mortgage servicing industry; bogus fees not allowed, servicer’s multiple late fees not allowed, legal fees partly not allowed.
G. Statutory Violations

1. **TILA**.

2. **RESPA**.

3. **HOEPA**.


4. **Kentucky Consumer Protection Act**.

   a. **UDAP**: KRS 367.110-367-300.

      i. People protected: people who purchased goods or services primarily for personal, family, or household purposes.


      iii. Credit as “service” under KCPA.

         A federal court has interpreted case law and the KCPA to determine that the sale of credit, so long as it was purchased for personal use, is covered by KCPA. Stafford v. Cross Country Bank, 262 F. Supp.2d 776, 792-793 (W.D. Ky. 2003).

   iv. Mortgages and real estate.

      a) KCPA does not apply to real estate transactions such as a contract with a builder to build a home. Craig v. Keene, 32 S.W.3d 90 (Ky. App. 2000).

      b) KCPA does not apply to purchase money mortgage transactions. Todd v. Ky. Heart-

v. Jury instructions.

- See Jury Instructions Document for elements

vi. Critical questions.

a) Is servicing a good or service that can be purchased?

b) Can violations of **HAMP** be an unfair or deceptive act or practice?

c) Can statements made to homeowners during the loan modification process be **KCPA** violations?

b. Home solicitation.

5. **FDCPA**.

Law firms as debt collectors: *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000). **FDCPA** applies to lawyers. **FDCPA** prohibits law firm’s statement of debt that only includes principle balance but does not include the interest, late charges, and other charges.

6. **FCRA**.

Credit card case: whether credit card company’s inquiry into a consumer’s dispute satisfies the requirements of the **FCRA** is a question for the jury: *Johnson v. MBNA America Bank, NA*, 357 F. 3d 426 (4th Cir. 2004).

7. Proving joint venture.

Proving joint venture between loan brokers, title companies, realtors, and/or loan originators.

H. Punitive Damages

1. Available in fraudulent misrepresentation, **Kentucky Consumer Protection Act**.


I. Discovery Requests

J. Defeating Summary Judgment Motions

1. Homeowner must have opportunity to complete discovery.

   Suter v. Mazyck, 226 S.W.3d 837, 841 (Ky. App. 2007): Entry of judgment “is proper only after the party opposing summary judgment has been given ample opportunity to complete discovery and then fails to offer controverting evidence.”

2. Fleet Real Estate Funding Corp v. Smith. Mortgagee’s failure to comply with loss mitigation procedures (FHA in this case) created a genuine issue of material fact that precluded foreclosure (and impacted the foreclosing Plaintiff’s equitable standing).

K. Protecting Your Client Following Foreclosure

   • Securing a release of the lien: KRS 382.365. (Kate’s bonanza claims)

III. PART TWO: HELPING CLIENTS PURSUE ALTERNATIVES TO FORECLOSURE

A. Preparing the Client to Consider Options

B. Leaving the House

   1. Avoiding foreclosure.

      a. Sale.

      b. Deed-in-lieu.

      c. Short sale.

   2. Mitigating the impact of foreclosure.

      a. Chapter 7 bankruptcy.

      b. Cash-for-keys.
C. Saving the House

1. Loan modification.
   a. General considerations.
   b. **HAMP**.
   c. In-house products.
   d. Forbearance agreements.

2. Chapter 13 bankruptcy.

3. The res.
   a. Repayment.
   b. Reinstatement.
   c. Refinance.

4. Reverse mortgage.
Notice of Default
Default occurs as soon as you miss a payment. After default, your bank sends you a notice of default, usually waiting until a payment is at least 30 days late. Afterward, your bank sends notice that it is accelerating the debt, which means that the entire sum that you owe is now due.

Pre-Foreclosure Phase
Lenders refer loans to their foreclosure attorneys at 60-90 days past due.

Complaint Is Filed
Your bank files a complaint in Circuit Court. The case is assigned to one of 13 divisions. You are served by the Sheriff or certified mail and have 20 days to respond to the Complaint. If you cannot be served personally, a Warning Order Attorney is appointed. A hearing may be held if you file an Answer or respond to a motion for summary judgment.

Judgment & Order of Sale
If you do not respond to the complaint, your bank will seek a default judgment. If you do respond, you and/or your bank may ask the judge for summary judgment. The judge makes a final ruling, often based on the recommendation of the Master Commissioner.

Case Sent to Commissioner’s Office
This office conducts an appraisal, sets a sale date, and gives notice of the sale.

Foreclosure Auction
A public auction (you can attend) is held at 514 W. Liberty Street. The highest bidder wins and receives the deed to the property upon payment.

This Is When Legal Aid Society Can Take Cases
Legal Aid Society may not take a foreclosure case before the complaint is filed or after the time to file an Answer has passed.

Eviction & Cash for Keys
The new owner of the property asks the court for a writ of possession. Deputy sheriffs supervise the setting-out of your things. In order to avoid this hassle and expense, the new owner may pay you $500-$1,000 to move out voluntarily and leave the house in good condition.

Redemption Period
If your home sells for less than 2/3 of its appraised value, you have one year to buy it back for the price paid at auction plus interest at 10%. 

2-21
# Alternatives to Foreclosure

## Borrower’s Copy

## Leave the Home

<table>
<thead>
<tr>
<th>Option</th>
<th>What Happens</th>
<th>When it works best</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sale</strong></td>
<td>Sell your home and use the proceeds to pay off the loan.</td>
<td>You owe less than the sale price of the home.</td>
</tr>
<tr>
<td><strong>Deed in Lieu</strong></td>
<td>Give your bank the deed to the home.</td>
<td>You owe less than the fair market value of the home and there are no junior liens on the home. You lose your equity in the home but avoid the expenses of foreclosure.</td>
</tr>
<tr>
<td><strong>Short Sale</strong></td>
<td>Sell your home for less than you owe.</td>
<td>You are “under water,” and you have your bank’s permission to do this.</td>
</tr>
</tbody>
</table>

## Keep the Home

<table>
<thead>
<tr>
<th>Option</th>
<th>What Happens</th>
<th>When it works best</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Forbearance Agreement</strong></td>
<td>Your bank allows you to suspend payments temporarily.</td>
<td>You cannot currently afford your monthly payments, but expect to be able to afford them in the future.</td>
</tr>
<tr>
<td><strong>Loan Modification</strong></td>
<td>You and your bank renegotiate the terms of the loan, including principal, interest rate and duration.</td>
<td>You can no longer afford your monthly payments because of, for example, increased interest rates or reduced income.</td>
</tr>
<tr>
<td><strong>Reverse Mortgage</strong></td>
<td>You get a new mortgage, with no monthly payment or with a monthly payment to you, which is paid off when you sell the home or pass away.</td>
<td>You are sixty-two (62) or older and have some equity in your home.</td>
</tr>
<tr>
<td><strong>Chapter 13 Bankruptcy</strong></td>
<td>You file for bankruptcy protection.</td>
<td>You have regular income and can afford monthly payments outside bankruptcy and payments within bankruptcy.</td>
</tr>
<tr>
<td><strong>Chapter 7 Bankruptcy</strong></td>
<td>You file for bankruptcy protection.</td>
<td>Your bank agrees to reaffirm the debt outside of bankruptcy.</td>
</tr>
<tr>
<td><strong>Reinstatement</strong></td>
<td>You pay missed payments plus any applicable late fees, legal fees and foreclosure fees.</td>
<td>You can afford it. This is often a very expensive option.</td>
</tr>
<tr>
<td><strong>Refinance</strong></td>
<td>You find another bank to borrow money to pay back original bank.</td>
<td>You owe less than the house is worth, and have regular income and a good credit score.</td>
</tr>
</tbody>
</table>

## Worst-Case Scenario: Cash for Keys

If your home is sold in a foreclosure auction and the buyer wants to avoid the expenses of eviction by the Sheriff, the buyer may pay you to move out and leave the home in good condition.
WHAT IS HAMP?

HAMP is a voluntary, incentive-based plan that requires servicers to review their portfolio of loans for modification under a specific regime of changes to a loan’s interest-rate, amortization period, and principle balance.


The HAMP Three-Step

I. IS SERVICER PARTICIPATING?
A. Eighty-five Percent of All Loans Are Being Serviced by Participating Servicers
B. Full List of Participating Servicers at www.makinghomeaffordable.gov
C. Mandatory for All Fannie Mae and Freddie Mac Insured Loans, Even If Servicer Not Participating
D. For Non-GSE Loans, Servicers Choose Whether to Participate or Not
E. Similar HAMP Programs for VA and FHA Loans
F. Servicer Incentives
   1. $1,000 for each completed modification.
   2. $1,000/year for three years for sustained loan modification.

II. IS HOMEOWNER ELIGIBLE?
A. Has to Be a Homeowner (No Investment Property, No Rental Property)
B. One to Four Units
C. $729,450 Loan Cap (for One-Unit Homes)
D. Not Previously Modified under HAMP
E. Default or Imminent Risk of Default
   1. Default caused by hardship.
   2. Default is imminent due to hardship: loss of income, resetting rate, divorce, death, low cash reserves.
F. Current Payment of 31 Percent or More (PITIA)
III. DOES THE HOMEOWNER QUALIFY?

A. HAMP Application

1. Hardship affidavit.
2. Verified income.
3. 4506-T: Request for Transcript of Tax Return.

B. Net Present Value (NPV) Test: Is Our Investor Going to Lose More Money Foreclosing or Modifying This Loan under HAMP?

1. How much money they’re going to lose in foreclosure.
   - Value of existing loan x probability of default
2. How much money they’re going to lose modifying the loan.
   - Value of modified loan (less revenue stream) x probability of re-default
3. Default model.
   - FICO score, MTM Loan-to-Value, Current delinquency, DTI

IV. HOW TO ADVISE AND REPRESENT HOMEOWNERS

A. What Homeowners Can Expect

1. Degradation.
2. Waterfall.

B. Things That Can and Probably Will Go Wrong

1. Servicers encourage current homeowners to miss payment in order to qualify.
   a. Equity, negligent/fraudulent misrepresentation, breach of duty of good faith and fair dealing.
   b. Default model based on current delinquency and FICO score (both impacted by servicer’s actions).
2. Servicers don’t modify an eligible and qualifying homeowner (they do the NPV math wrong).
   a. NPV test is not public.
      i. Demand in discovery.
ii. FDIC Mod in a Box.

ii. Dodd-Frank requires disclosure of certain inputs.

b. Servicers who sign contracts must modify eligible and qualifying homeowners (and comply with existing laws, p. 12).


d. Equity prohibits a servicer from enjoying the extreme remedy of foreclosure while it is not complying with a federal program designed to preserve home ownership.

3. “Investor isn’t participating.”

a. HAMP doesn’t override PSA, but HAMP is the “usual and customary industry standards.”

b. If investor forbids modification, servicer must request waiver.

c. MHA Handbook, p. 11: servicers are required to use “reasonable efforts” to get approval and provide a list of non-participating investors and to contact each in writing at least once to encourage participation.

V. SERVICER DOES WHAT IT’S SUPPOSED TO DO
### HARDSHIP AFFIDAVIT

I (We) am/are requesting review under the Making Home Affordable program. I am having difficulty making my monthly payment because of financial difficulties created by (check all that apply):

- [ ] My household income has been reduced. For example: unemployment, underemployment, reduced pay or hours, decline in business earnings, death, disability or divorce of a borrower or co-borrower.
- [ ] My monthly debt payments are excessive and I am overextended with my creditors. Debt includes credit cards, home equity or other debt.
- [ ] My expenses have increased. For example: monthly mortgage payment reset, high medical or health care costs, uninsured losses, increased utilities or property taxes.
- [ ] My cash reserves, including all liquid assets, are insufficient to maintain my current mortgage payment and cover basic living expenses at the same time.
- [ ] Other:

Explanation (continue on back of page 3 if necessary): ____________________________________________

---

**Additional Liens/Mortgages or Judgments on this property:**

<table>
<thead>
<tr>
<th>Lien Holder's Name/Servicer</th>
<th>Balance</th>
<th>Contact Number</th>
<th>Loan Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

**REQUEST FOR MODIFICATION AND AFFIDAVIT (RMA)**

**BORROWER**

- Borrower's name
- Social Security number Date of birth
- Home phone number with area code
- Cell or work number with area code

**CO-BORROWER**

- Co-borrower's name
- Social Security number Date of birth
- Home phone number with area code
- Cell or work number with area code

**Mailing address**

- Property address (if same as mailing address, just write same)
- E-mail address

**Is the property listed for sale?**

- [ ] Yes
- [ ] No

**Have you received an offer on the property?**

- [ ] Yes
- [ ] No

**Date of offer**

**Amount of offer** $___________

**Agent's Name:**

**Agent's Phone Number:**

**For Sale by Owner?**

- [ ] Yes
- [ ] No

**Who pays the real estate tax bill on your property?**

- [ ] I do
- [ ] Lender does
- [ ] Paid by condo or HOA

**Are the taxes current?**

- [ ] Yes
- [ ] No

**Condominium or HOA Fees**

- [ ] Yes
- [ ] No

**Paid to:**

- [ ] $___________

**Have you filed for bankruptcy?**

- [ ] Yes
- [ ] No

**Has your bankruptcy been discharged?**

- [ ] Yes
- [ ] No

**Filing Date:**

**Bankruptcy case number**

---

**Have you received a credit-counseling agency for help?**

- [ ] Yes
- [ ] No

If yes, please complete the following:

- **Counselor's Name:**
- **Agency Name:**
- **Counselor's Phone Number:**
- **Counselor's E-mail:**

---

**Who pays the hazard insurance premium for your property?**

- [ ] I do
- [ ] Lender does
- [ ] Paid by Condo or HOA

**Is the policy current?**

- [ ] Yes
- [ ] No

**Name of Insurance Co.:**

**Insurance Co. Tel #:**

---

**Loan I.D. Number**

**Servicer**
### INCOME/EXPENSES FOR HOUSEHOLD

<table>
<thead>
<tr>
<th>Monthly Household Income</th>
<th>Monthly Household Expenses/Debt</th>
<th>Household Assets</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monthly Gross Wages</td>
<td>First Mortgage Payment</td>
<td>Checking Account(s)</td>
</tr>
<tr>
<td></td>
<td>Second Mortgage Payment</td>
<td>Checking Account(s)</td>
</tr>
<tr>
<td></td>
<td>Insurance</td>
<td>Savings/ Money Market</td>
</tr>
<tr>
<td></td>
<td>Property Taxes</td>
<td>CDs</td>
</tr>
<tr>
<td></td>
<td>Credit Cards / Installment Loan(s) (total minimum payment per month)</td>
<td>Stocks / Bonds</td>
</tr>
<tr>
<td></td>
<td>Alimony, child support payments</td>
<td>Other Cash on Hand</td>
</tr>
<tr>
<td></td>
<td>Net Rental Expenses</td>
<td>Other Real Estate (estimated value)</td>
</tr>
<tr>
<td></td>
<td>HOA/Condo Fees/Property Maintenance</td>
<td>Other _____________</td>
</tr>
<tr>
<td></td>
<td>Car Payments</td>
<td>Other _____________</td>
</tr>
<tr>
<td></td>
<td>Other (investment income, royalties, interest, dividends etc.)</td>
<td>Other _____________</td>
</tr>
<tr>
<td>Total (Gross Income)</td>
<td>Total Debt/Expenses</td>
<td>Total Assets</td>
</tr>
</tbody>
</table>

### INFORMATION MUST BE DOCUMENTED

1. Include combined income and expenses from the borrower and co-borrower (if any). If you include income and expenses from a household member who is not a borrower, please specify using the back of this form if necessary.

2. You are not required to disclose Child Support, Alimony or Separation Maintenance income, unless you choose to have it considered by your servicer.

### INFORMATION FOR GOVERNMENT MONITORING PURPOSES

The following information is requested by the federal government in order to monitor compliance with federal statutes that prohibit discrimination in housing. You are not required to furnish this information, but are encouraged to do so. The law provides that a lender or servicer may not discriminate either on the basis of this information, or on whether you choose to furnish it. If you furnish the information, please provide both ethnicity and race. For race, you may check more than one designation. If you do not furnish ethnicity, race, or sex, the lender or servicer is required to note the information on the basis of visual observation or surname if you have made this request for a loan modification in person. If you do not wish to furnish the information, please check the box below.

#### BORROWER
- I do not wish to furnish this information
- Hispanic or Latino
- Not Hispanic or Latino
- American Indian or Alaska Native
- Asian
- Black or African American
- Native Hawaiian or Other Pacific Islander
- White
- Female
- Male

#### CO-BORROWER
- I do not wish to furnish this information
- Hispanic or Latino
- Not Hispanic or Latino
- American Indian or Alaska Native
- Asian
- Black or African American
- Native Hawaiian or Other Pacific Islander
- White
- Female
- Male

### To be completed by interviewer
- This request was taken by:
  - Face-to-face interview
  - Mail
  - Telephone
  - Internet
- Name/Address of Interviewer’s Employer
- Interviewer’s Name (print or type) & ID Number
- Interviewer’s Signature
- Date
- Interviewer’s Phone Number (include area code)
ACKNOWLEDGEMENT AND AGREEMENT

In making this request for consideration under the Making Home Affordable Program, I certify under penalty of perjury:

1. That all of the information in this document is truthful and the event(s) identified on page 1 is/are the reason that I need to request a modification of the terms of my mortgage loan, short sale or deed-in-lieu of foreclosure.

2. I understand that the Servicer, the U.S. Department of the Treasury, or their agents may investigate the accuracy of my statements and may require me to provide supporting documentation. I also understand that knowingly submitting false information may violate Federal law.

3. I understand the Servicer will pull a current credit report on all borrowers obligated on the Note.

4. I understand that if I have intentionally defaulted on my existing mortgage, engaged in fraud or misrepresented any fact(s) in connection with this document, the Servicer may cancel any Agreement under Making Home Affordable and may pursue foreclosure on my home.

5. That: my property is owner-occupied; I intend to reside in this property for the next twelve months; I have not received a condemnation notice; and there has been no change in the ownership of the Property since I signed the documents for the mortgage that I want to modify.

6. I am willing to provide all requested documents and to respond to all Servicer questions in a timely manner.

7. I understand that the Servicer will use the information in this document to evaluate my eligibility for a loan modification or short sale or deed-in-lieu of foreclosure, but the Servicer is not obligated to offer me assistance based solely on the statements in this document.

8. I am willing to commit to credit counseling if it is determined that my financial hardship is related to excessive debt.

9. I understand that the Servicer will collect and record personal information, including, but not limited to, my name, address, telephone number, social security number, credit score, income, payment history, government monitoring information, and information about account balances and activity. I understand and consent to the disclosure of my personal information and the terms of any Making Home Affordable Agreement by Servicer to (a) the U.S. Department of the Treasury, (b) Fannie Mae and Freddie Mac in connection with their responsibilities under the Homeowner Affordability and Stability Plan; (c) any investor, insurer, guarantor or servicer that owns, insures, guarantees or services my first lien or subordinate lien (if applicable) mortgage loan(s); (d) companies that perform support services in conjunction with Making Home Affordable; and (e) any HUD-certified housing counselor.

__________________________  __________________________
Borrower Signature                       Date

__________________________  __________________________
Co-Borrower Signature                       Date

HOMEOWNER’S HOTLINE

If you have questions about this document or the modification process, please call your servicer. If you have questions about the program that your servicer cannot answer or need further counseling, you can call the Homeowner’s HOPE™ Hotline at 1-888-995-HOPE (4673). The Hotline can help with questions about the program and offers free HUD-certified counseling services in English and Spanish.

888-995-HOPE™
Homeowner’s HOPE™ Hotline

NOTICE TO BORROWERS

Be advised that by signing this document you understand that any documents and information you submit to your servicer in connection with the Making Home Affordable Program are under penalty of perjury. Any misstatement of material fact made in the completion of these documents including but not limited to misstatement regarding your occupancy in your home, hardship circumstances, and/or income, expenses, or assets will subject you to potential criminal investigation and prosecution for the following crimes: perjury, false statements, mail fraud, and wire fraud. The information contained in these documents is subject to examination and verification. Any potential misrepresentation will be referred to the appropriate law enforcement authority for investigation and prosecution. By signing this document you certify, represent and agree that:

“Under penalty of perjury, all documents and information I have provided to Lender in connection with the Making Home Affordable Program, including the documents and information regarding my eligibility for the program, are true and correct.”

If you are aware of fraud, waste, abuse, mismanagement or misrepresentations affiliated with the Troubled Asset Relief Program, please contact the SIGTARP Hotline by calling 1-877-SIG-2009 (toll-free), 202-622-4559 (fax), or www.sigtarp.gov. Mail can be sent to Hotline Office of the Special Inspector General for Troubled Asset Relief Program, 1801 L St. NW, Washington, DC 20220.
# Foreclosure Clinic Data Sheet

## Contact Information

<table>
<thead>
<tr>
<th>Name</th>
<th>Case Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address</td>
<td>KHC Case Number</td>
</tr>
<tr>
<td>Phone</td>
<td>Servicer</td>
</tr>
<tr>
<td>Email</td>
<td>Opposing Counsel</td>
</tr>
</tbody>
</table>

## Selling the Home

<table>
<thead>
<tr>
<th>FMV of Home</th>
<th>Current Payment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unpaid Balance</td>
<td>Amount Behind</td>
</tr>
</tbody>
</table>

## Loan Mod/Forbearance

| Current Payment | Monthly Income |
| Taxes & Insurance | Other Income |
| Interest Rate | Escrow: Income x .31 |
| ARM | Fixed |
| Working with | HPI | UL | N/A |
| Counselor | |

## Bankruptcy

| Other Debts | Date Filed |
| Filed: Ch. 7 | Ch 13 | N/A |
| Date Discharged |

## Other

| Date of Loan | Place Closed |
| Loan Purpose | |
Potential Defenses

<table>
<thead>
<tr>
<th>Note Unavailable</th>
<th>Lack of Endorsement</th>
<th>Servicing Abuses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blank Endorsement</td>
<td>Rescission Possibility</td>
<td>Origination Abuses</td>
</tr>
</tbody>
</table>

Case Acceptance

<table>
<thead>
<tr>
<th>_____ LAS Eligible</th>
<th>_____ Needs KHC entry</th>
</tr>
</thead>
<tbody>
<tr>
<td>_____ Not LAS eligible because:</td>
<td></td>
</tr>
<tr>
<td>Not in foreclosure</td>
<td>Does not want to remain in home</td>
</tr>
<tr>
<td>Received complaint long ago</td>
<td>Defenses outside LAS priorities</td>
</tr>
</tbody>
</table>

Next Steps

<table>
<thead>
<tr>
<th>_____ Work with HPI/UL</th>
<th>_____ Hire an attorney</th>
</tr>
</thead>
<tbody>
<tr>
<td>_____ Go to a conciliation conference</td>
<td>_____ File a pro se answer</td>
</tr>
<tr>
<td>_____ Sell the home</td>
<td>_____ Get a reverse mortgage</td>
</tr>
<tr>
<td>_____ Explore bankruptcy</td>
<td>_____ Other:</td>
</tr>
</tbody>
</table>

Notes:

LAS Representative: __________________________________________

Homeowner: __________________________________________
RULE 18: FORECLOSURE MEDIATION PROGRAM

18.01 Definitions. As used in this Rule 18:

(a) “Program” means the Franklin County Foreclosure Diversion Program.

(b) “Mediator” means the person appointed as the Foreclosure Mediator for the Program.

(c) “Qualifying Foreclosure” means an action seeking as a remedy foreclosure on owner-occupied residential property, or upon property that was owner-occupied following its purchase or construction by a Defendant.

(d) “Court” means the Franklin Circuit Court.

18.02 Appointment of Mediator. A regularly-practicing member of The Bar of the Court shall be appointed by the Court Judges as the Mediator for the Program.

18.03 General Duties of Mediator. The Mediator shall conduct the Program and assist Plaintiffs and Defendants participating in the program. The Mediator shall conduct meetings between the parties, including mediation, and issue reports and recommendations to the Court.

18.04 Automatic Stay. All proceedings in a Qualifying Foreclosure action shall be stayed upon commencement of the action. No answer or motion shall be required of any defendant subject to the automatic stay until the stay is dissolved as to that defendant or the Court otherwise orders.

(a) As to each Defendant the automatic stay shall terminate without further order of the Court upon the earlier of:

(1) That Defendant’s failure to contact the Mediator within 20 days of service of process upon that defendant and that Defendant’s failure to elect to participate in the Program;

(2) The filing and service by the Mediator of notice that after electing to participate in the Program that Defendant has not participated in the Program;

(3) The filing and service by the Mediator of notice that mediation of the claims against that Defendant has concluded.

(b) The automatic stay may be terminated as to any Defendant by order of the Court upon motion by Plaintiff’s counsel to lift the stay.
(c) Upon termination of the automatic stay as to any Defendant, that Defendant shall have 20 days to answer, move or take any other action required or permitted under the Rules of Civil Procedure.

(d) Notwithstanding the termination of the automatic stay under this Rule 18, any Judge of the Court may order any foreclosure case to mediation.

18.05 Plaintiff’s Duties Upon Filing Of The Complaint. Upon commencement of a Qualifying Foreclosure Action the Plaintiff:

(a) Shall file with the Clerk of the Court and cause to be served with each Qualifying Foreclosure Complaint a Notice conspicuously printed on colored paper containing the following:

(1) The Mediator’s contact information. The contact information may be obtained by the Plaintiff from the Clerk of the Court.

(2) A statement that within 20 days of service of process each Defendant may contact the Mediator by telephone, e-mail or in-person to request a mandatory Status Conference.

(3) A statement that a Defendant’s failure to contact the Mediator within 20 days of service of process will result in dissolution of the automatic stay as to that Defendant without further order of the Court.

(b) Shall provide to the clerk and cause to be served with each Qualifying Foreclosure Complaint the following forms:

(1) A Request for Modification Affidavit (RMA) in the form illustrated at Appendix FM-1 to these rules;

(2) Dodd-Frank Certificate; and

(3) 4506T-EZ.

(c) Shall serve the Mediator with a copy of the Qualifying Foreclosure Complaint.

18.06 Information To Be Provided To Defendants. Upon contact by a Defendant the Mediator shall provide the Defendant with information regarding the Program, including fees, and determine whether the Defendant elects to participate in the Program.

18.07 Notice of Election. If a Defendant elects to participate in the Program the Mediator shall file a Notice of Election with the Court identifying the electing Defendant and provide copies of the Notice to the Plaintiff and all Defendants named in the Qualifying Foreclosure Complaint. Upon filing of a Notice of Election in a Qualifying Foreclosure Proceeding, all papers required to be served shall also be served on the Mediator until further Order of the Court.
18.08 **Status Conference.** The Mediator shall schedule a Status Conference once the Defendants alleged in the Complaint to be liable to the Plaintiff on the debt giving rise to the foreclosure have contacted the Mediator, or the Mediator otherwise determines it is appropriate to proceed.

(a) The Plaintiff and all Defendants electing to participate in the Program shall be required to appear at the Status Conference to explore alternatives to foreclosure.

(b) The Status Conference shall be conducted by the Mediator no later than 70 days after the earlier of the date service of process on all Defendants is complete, or the date the Mediator determines it is otherwise appropriate to proceed. The Status Conference shall not be scheduled earlier than 10 days after the earlier of the date service of process on all Defendants is complete, or the date the Mediator otherwise determines it is appropriate to proceed.

(c) At the Status Conference, the parties shall report to the Mediator the progress made in resolving Plaintiff's claims without foreclosure.

(d) The attorney for any party represented by counsel must appear in person at any Status Conference. The plaintiff or its attorney shall have immediate access (either in-person or telephonically) to the Plaintiff or its agent with full authority to approve or deny an alternative to foreclosure, including a loan modification, deed-in-lieu of foreclosure, short sale, or a forbearance agreement.

(e) At any Status Conference the Mediator may determine whether to order additional conferences or order other action by the parties.

(f) At the conclusion of any status conference, the Mediator shall recommend whether to lift the existing stay of the foreclosure proceedings based on parties' good faith in attempting to settle the case without a foreclosure sale.

18.09 **Hardship Packet.** The Mediator may direct any Defendant allegedly indebted to the Plaintiff to submit a hardship packet to the Plaintiff for Plaintiff’s review and action.

a) The Hardship Packet must be delivered to the Plaintiff, or Plaintiff’s counsel if represented, by a Defendant 30 days after the Mediator directs that Defendant to submit a Hardship Packet.

b) The Hardship Packet shall include the following:

   (1) A Request for Modification Affidavit (RMA) in the form shown at Appendix FM-1 to these rules and documents supporting the Defendant or Defendants' reported income;

   (2) A 4506T-EZ form;

   (3) A Dodd-Frank Certificate.
18.10 **Plaintiff’s Obligations Upon Receipt of Hardship Packet.** No later than 14 days after delivery by a Defendant of a Hardship Packet the Plaintiff shall acknowledge receipt of the Hardship Packet and serve on the submitting Defendant one of the following:

(a) A loan modification or trial payment plan offer; or

(b) A written notice describing the additional documents required by the Plaintiff to review of the loan for modification or other alternative to foreclosure; or

(c) A written statement denying a loan modification and a detailed explanation of the reasons Defendant does not qualify for a loan modification.

18.11 **Loan Modification Application.** Within thirty (30) days after service by a Defendant of a completed loan modification application, the Plaintiff must serve one of the following on the submitting Defendant:

(a) A written offer of trial or permanent loan modification; or

(b) A written denial of the application that articulates the reasons for Plaintiff’s refusal to modify the loan. The written denial must also explain why other alternatives to foreclosure, including a deed-in-lieu of foreclosure, a short sale, a repayment plan, or a forbearance agreement, are not appropriate.

18.12 **Failure to Perform Mediation Agreement.** A Plaintiff may request that the Mediator recommend to the Court that a stay be terminated as to any Defendant who fails to perform under any agreement reached through mediation. Upon such request, the Mediator may file a report with the Court recommending that the stay be lifted. The Plaintiff may move the Court to terminate a stay without regard to the Mediator’s recommendation, or the necessity of seeking such a recommendation.

18.13 **Mediator’s Fee.** The Mediator’s fee of $300.00 is payable at or before the Mandatory Status Conference.

(a) One-half of the fee ($150.00) shall be paid by the Plaintiff(s).

(b) One half of the fee ($150.00) shall be paid by those defendants who are alleged in the Complaint to be liable for the debt giving rise to the foreclosure proceeding.

(c) No additional Mediator fees will be assessed absent good cause (e.g. failure of a party to appear at a status conference or to have the required authority.)

(d) Plaintiff may not charge the Defendants or the Defendants’ account the $150.00 fee payable by the Plaintiff.
(e) For good cause, the Court may adjust or reallocate the Mediator’s $300.00 fee based on the time and expense incurred in the mediation, the failure a party to participate in good faith, a Defendant’s inability to pay the fee, or other equitable cause.

18.14 Modification or Waiver of Local Rule 18. This local rule governing the Program may be waived or modified in a pending action only by Order of the Court entered following hearing on a motion with notice to all parties and the Mediator. The Mediator may move to waive or modify the local rule governing the Program. Any party to the action or the Mediator may make a motion to modify or waive this local rule in that action.

18.15 Order of Sale. A motion for an Order of Sale must be accompanied by the moving party’s certification that:

(a) The moving party complied with the requirements of Local Rule 18; and

(b) The Defendant(s) alleged in the Complaint to be liable for the debt giving rise to the foreclosure proceeding elected not to participate in the Program or the mediation was unsuccessful.
Leading a client through a discussion about whether bankruptcy is right for him or her is never easy. There are many pros and cons to consider, and clients have plenty of questions about not only the immediate process but what bankruptcy will mean for them a year, two years or ten years later. This program is designed to provide information to attorneys assisting clients in making this decision. We will address pre-filing considerations regarding the impact of a bankruptcy filing, determining whether bankruptcy is right for a client, and if so, what kind of case to file, and finally how to prepare clients to make the most of their fresh start and repair their credit.

I. PRE-FILING CONSIDERATIONS

A. Impact on Debtor’s Business Interests

There are several considerations an individual must think about when making the decision to file bankruptcy when that individual has an ownership interest in other businesses. For example:

1. Filing bankruptcy by an individual requires that person to disassociate from and cease to be a member of any limited liability company in which he is a member. KRS 275.280(1)(d). This disassociation may be waived by the operating agreement or by written consent of a majority of the members.

2. Filing bankruptcy by an individual causes dissolution of a partnership. KRS 362.300(5).

3. Filing bankruptcy by an individual who is a limited partner in a limited partnership entitles the other partners to expel that person from the limited partnership. KRS 362.2-601(2)(d).

4. Filing bankruptcy by an individual who is a general partner in a limited partnership entitles the other partners to expel that person from the limited partnership. KRS 362.2-603(4).

B. Delinquent Taxes

Delinquent taxes are not normally dischargeable. 11 U.S.C. §523(a)(2). If the debtor’s primary debts are tax-related, bankruptcy may not be the answer. If the tax obligation is too high to make a bankruptcy payment plan feasible, then the debtor should probably seek an offer in compromise with the IRS or other taxing entity. Unless the taxing authority agrees to a compromise (which it won’t) a debtor must pay all priority claims in a Chapter 13 plan. Further, for business owners who have let employee withholding taxes slide, principals should be made aware that personal liability accrues to them and can never be discharged.
C. Domestic Support Obligations

Domestic support obligations are defined in 11 U.S.C. §101(14)(A) and are not dischargeable. Changes in the Bankruptcy Court have all but eliminated the distinction between a settlement and alimony/maintenance and all debt to a spouse, former spouse, or child that “accrues before, on or after” the petition date gets payment priority and is not dischargeable.

Divorcing couples often reach a settlement relating to joint debt in which one spouse assumes certain marital debts in exchange for making future maintenance payments. Many courts interpret that debt assumption as a non-dischargeable “domestic support obligation” to preclude one spouse from defaulting on joint and several debts and forcing the other to face collection of that debt despite settlement to the contrary. Couples who are planning to divorce may want to consider filing joint bankruptcy in conjunction with the divorce in order to resolve joint marital debts and thus better resolve distribution of assets.

Finally, if a domestic support obligation is owed by the debtor, the debtor should be aware that special notices are given to a debtor’s ex-spouse with instructions on how to file a claim.

D. Fraudulent Conveyance, Preferences

When a bankruptcy case is filed, a trustee has the opportunity to “look back” at the debtor’s transactions up to five years prior to the filing to determine if the debtor made an effort to treat some creditors more favorably than others, or to move or sell assets so that they would be out of the reach of the bankruptcy court. Trustees may institute lawsuits, commonly called Chapter 5 actions, against the recipients of these payments or other transfers, forcing defendants to prove that the transaction was ordinary, or not an attempt by the debtor to defraud the Bankruptcy Court.

Chapter 5 actions can create difficulties for debtors. Often, without intent to violate the Bankruptcy Code, or to defraud anyone, potential debtors have made payments to one creditor over another, or sold assets to family members for less than the true value due to a desperate need for cash prior to finally filing bankruptcy. These debtors need to be aware that the creditors they tried to help or the family members who might have been doing them a favor could be subject to suit after they file. This potential obstacle is not insurmountable, but should be discussed prior to reaching a filing decision.

E. Confidentiality

Bankruptcy filings are public record and are not confidential. Anyone with a Public Access to Court Electronic Records ("PACER") account can learn of a debtor’s bankruptcy, and view schedules of their assets and debts. Many newspapers publish bankruptcies when they are filed. (Not to mention the possibility of an awkward run in with someone in court.)
F. Discharge Action

Filing bankruptcy is a fine solution for most debtors who have no way of paying their debts. However, debtors should be made aware that some debts are not dischargeable under the Bankruptcy Code under any circumstances, such as taxes, domestic support obligations, student loans, and criminal fines. Some types of debts that are normally dischargeable may not be discharged due to the prior actions of the debtor, or how the debts were incurred, such as civil penalties for malicious injury, DUI or judgments against the debtor involving fraud. A debtor’s discharged debt may be objected to by creditors or trustees.

G. Effect on Credit History

A personal (consumer) bankruptcy under Chapter 7 or 11, or a non-discharged or dismissed personal Chapter 13 reorganization remain on a debtor’s credit history for ten years from the date the case filed. A Chapter 13 plan that is completed with a discharge granted, is normally expunged seven years after filing due to the fact that in a successful Chapter 13, the debtor has essentially made monthly payments on his debts for the duration of the Chapter 13 plan, which helps rebuild his credit history. Although filing for bankruptcy is a big negative on a debtor’s credit history, bankruptcy is better for his or her credit history than a multitude of collections and judgments. New loans to debtors are possible with a history of bankruptcy, although good loans with more competitive interest rates are unlikely for three or four years and then only with a clean record since bankruptcy.

II. FILING DECISIONS

There are two types of consumer bankruptcy cases, Chapter 7 and Chapter 13. Chapter 11 is available for individuals, usually those whose assets and debts exceed the limits of a Chapter 13 case (generally with unsecured debt of less than a million dollars).

A Chapter 7 bankruptcy is referred to as a liquidation case. In a Chapter 7 case, a trustee is appointed to administer the assets of the debtor’s estate. The Chapter 7 trustee reviews the debtor’s assets, and determines whether there are assets sufficient to liquidate for the benefit of creditors, notwithstanding exemptions the debtor may claim. Assets include equity in a home as well as Chapter 5 actions discussed above. If assets are available, the trustee will sell them, and make distributions to creditors. If no assets are available for sale, the trustee will declare the case a no asset case, and recommend a discharge for the debtor.

A Chapter 13 is a personal reorganization case. In a Chapter 13, the debtor reports to the Court his assets and debts, as well as submits a budget to the Court of his or her household living expenses. Comparing his or her expenses and income against state averages, a debtor then calculates what amount of his or her monthly income could be used for the payment of his or her creditors, in lieu of a liquidation of his or her assets. A Chapter 13 repayment plan cannot
extend beyond five years by statute, so the debtor makes a maximum of sixty monthly payments to pay down his or her debts. At the completion of the plan, the debtor will receive a discharge of any remaining debt that did not get paid through the plan.

A. Chapter 7 vs. Chapter 13 – How to Decide?

1. Reasons for choosing Chapter 7: Debtor’s income is below the state median (Kentucky = $62,588 for a family of four); debts are too large to have any reasonable prospect of rehabilitation; individual is disabled or elderly, or not likely to see an increase in income.

2. Reasons for choosing Chapter 13: Income is above the state median ($62,588 for a family of four); debtor seeks to preserve equity in a home or has a mortgage that is in default and can be cured in a plan; debtor has a repossessed vehicle that needs to be returned; debtor has a high interest secured debt that can be put in a plan at a much lower interest rate; debtor needs to bifurcate a secured loan and render it mostly unsecured under Section 506 (subject to the “hanging paragraph” at the end of Section 1325(a)). Chapter 13 is a good vehicle for paying delinquent taxes, provided they can be paid in five years. Delinquent child support obligations can be put in a Chapter 13 plan and paid as a priority claim.

B. Cash Management

Does the Debtor owe money to the bank that has his or her deposit account? If so, the bank may freeze the checking, savings, CDs and exercise right of setoff upon filing the petition. Debtor should manage cash accordingly, as in a Chapter 7 or personal Chapter 11, cash becomes property of the estate and permission may be required from the Court in order to spend it.

C. Credit Cards

Advise clients that running up large debts on credit cards in the months/weeks prior to filing for bankruptcy protection is a red flag to investigating trustees. Not only is there the danger of a dischargeability action by the credit card company or trustee, there will likely be intense scrutiny on debtor’s personal property to locate and liquidate recent “big ticket” purchases.

III. DOS AND DON’TS OF CONSUMER FILING

If after discussing these factors, your client wants to move forward with filing a bankruptcy case, below is a checklist of Dos and Don’ts when preparing to file.
A. Do:

1. Go over each schedule with your client carefully, explaining legal terms and insisting that you get all information.

2. Proofread the petition and schedules before filing; make sure all schedules are included.

3. Check the Bankruptcy Code to make sure that all available exemptions have been used.

4. Make sure that the client has completed credit counseling prior to filing and have the certificate dated the day before filing.

5. Make sure the client is qualified to file based on residency requirements.

6. Do an independent verification of information where possible:
   a. Run title on debtor's real property for mortgage, liens etc.
   b. Verify debt balances with most recent billing statements and credit reports (Every person is entitled to a free credit report once a year from each of the three credit reporting agencies. See www.annualcreditreport.com).
   c. Verify debtor's bank account balance on day of filing.
   d. Check PVA office for valuation of home.
   e. Consult NADA for value of automobiles.
   f. Verify gross income.
   g. Verify utility bills.
   h. Check Secretary of State for UCC financing statements http://www.sos.ky.gov.
   i. Check national PACER for any prior bankruptcy cases.

7. Gather documents required by trustee (tax returns, bank statements, titles, etc.) prior to filing.

8. Gather six month payment advices for each debt for trustee and U.S. Trustee.

9. Retain an original signed copy of the petition for the trustee to review at the §341 hearing.
10. Do have the client make a detailed listing of household goods (ex: a family of four should have more than one bed listed).

11. Review child support/spousal maintenance orders or domestic settlement agreement for accuracy and keep on file for the trustee.

12. List domestic support obligation (if current, list on Schedule E as $0.00).

13. List employer 401(k) or other pension plan contributions on Schedule I (income must be gross).

14. List all suits and proceedings – remind clients that this includes claims not yet subject to court action and claims pending but not resolved.

15. List any gifts made to a family member that total $200 over the previous year.

16. List all losses: insurance, fire, autos, gambling, etc.

17. Attach a detailed statement listing business expenses.

18. Check tax returns to make sure charitable giving matches with that claimed on schedules.

B. Don't:

1. Attach client's Social Security Number to the petition and schedules.

2. List debtor's children's names or ages in the petition ("minor child" is sufficient).

3. Underestimate the value of household goods.

4. List a secured debt in its original amount instead of the deficiency.

5. "Double dip" on debts (ex: Lowe's $6,000 and collection agency (pursuing Lowe's account $6,000)).

6. Rely on tax returns for gross income (income calculated to preclude pre-tax deductions).

7. Make promises to your client regarding trustee's actions!
I. ARE TAXES CONSTITUTIONAL?

Yes, federal income taxes are constitutional. The Sixteenth Amendment gave Congress the power to tax income that is earned by United States citizens. Tax protestors often allege that federal income taxes are unconstitutional. Tax protestors always lose these arguments.

II. WHO CONTROLS THE INTERNAL REVENUE SERVICE?

The three branches of government control the IRS. First, the legislative branch (Congress) makes the law that is codified in the Internal Revenue Code. Second, the executive branch (President), including the Internal Revenue Service and the Department of Justice, enforces the tax laws. Third, the judicial branch of government (the Courts) interprets the laws. There are basically three courts (excluding bankruptcy court) where judges and juries interpret the tax laws. There is the United States Tax Court, the United States Federal District Court, and the United States Court of Claims.

III. WHO REPRESENTS THE IRS?

If you are under an IRS audit, you will be dealing with IRS revenue agents. If you owe the IRS money, you will be dealing with revenue officers. If the IRS believes that you have committed federal tax crimes, you will be dealing with IRS special agents. Each of these agents has different training and different skill sets that assist them in their job. If you are litigating in the courts against the IRS, you will either deal with IRS lawyers or lawyers from the Department of Justice Civil Tax Division out of Washington, D.C. Both the IRS lawyers and the Department of Justice civil tax lawyers are very well educated, knowledgeable and skillful in performing their job.

IV. HOW IS THE IRS ORGANIZED?

The IRS is technically broken down into four operating divisions. However, I like to think of the IRS as four different divisions. First, there is the audit division that actually audits federal income tax returns. Second, there is the IRS Appeals Division that hears appeals from an IRS audit and attempts to settle tax disputes before they go to court. Third is the Collection Division that actually collects the taxes that are due and owing. Fourth, there is the Criminal Division that investigates and assists in prosecuting criminal tax evasion.

V. WHAT RULES MUST THE IRS FOLLOW?

The IRS generally attempts to follow the Internal Revenue Manual. The Internal Revenue Manual provides good instruction on how Internal Revenue Service employees should handle specific situations. Second, the IRS must follow the Internal Revenue Code (the law) and the IRS Treasury Regulations that interpret
and explain the Internal Revenue Code. Third, the IRS must follow revenue rulings and revenue procedures that outline the manner in which the IRS will treat specific issues. Finally, the IRS will generally follow case law.

VI. HOW DOES THE IRS SELECT TAX RETURNS FOR AUDIT?

The IRS has a secret formula called the discriminate information function ("DIF") that is a multi-factor scoring process for federal income tax returns. The DIF score is like golf: the higher your score, the worse off you are, and the more likely you are to be audited. In other words, if you make $50,000 a year and you have charitable deductions of $40,000, this will result in a high DIF score and your return will likely be selected for audit. Additionally, if you file a refund claim attempting to recover money that you have paid to the IRS you may be audited.

VII. WHAT TRIGGERS AN IRS AUDIT?

Generally, an IRS audit is triggered when there are disproportionate ratios on the federal income tax return. Additionally, the IRS often audits home-based businesses, excessive travel and entertainment expenses, excessive charitable contributions and home offices.

VIII. CAN YOU LOWER YOUR AUDIT RISK?

Some commentators believe that if you file an extension that you may lower your audit risks. In my experience, the best way to lower your audit risk is to hire a competent certified public accountant to accurately prepare your federal income tax return.

IX. IF I AM AUDITED, HOW DO I PREPARE AND HANDLE THE IRS AUDIT?

The first general rule is to be nice and polite to the revenue agent. Additionally, you should promptly gather and organize all documents that are requested by the Internal Revenue Service in advance of the first meeting with the auditor. Generally, we will pre-audit the federal income tax return before our first meeting with the IRS. This will help identify any potential issues that may come up during the IRS audit.

X. CAN THE IRS REQUEST MY TAX DOCUMENTS AND RECEIPTS?

The IRS has broad summons authority that permits it to obtain any documents that are relevant to a civil tax audit. As long as the summons is issued in good faith and it is reasonable in scope, the IRS is entitled to your documents.

XI. CAN YOU OBTAIN RECORDS FROM THE INTERNAL REVENUE SERVICE THAT RELATE TO YOU AND YOUR TAX CASE?

You have a right under the Freedom of Information Act to request many of the internal IRS documents that relate to you and your tax case. Obtaining records that the IRS has gathered concerning you and your tax case can assist you tremendously when attempting to deal with an IRS problem.
XII. HOW IS AN IRS AUDIT CONCLUDED?

Generally, there will be a closing conference in which you will meet with the IRS revenue agent. The IRS revenue agent will then either prepare a no-change letter indicating that no additional tax is due, or the IRS agent will ask you to sign a form agreeing to an additional tax that is due and owing. If you disagree with the revenue agent’s conclusions, you will generally receive a “thirty day letter.” The thirty day letter gives you thirty days in which to file a written protest contesting the revenue agent’s conclusions. If you do not file a written protest, you will likely receive a “ninety day letter” explaining that you have ninety days to file a petition in the United States Tax Court or you will forever lose your rights to contest the tax liability in the United States Tax Court. In other words: the ninety day letter is your ticket to the United States Tax Court.

XIII. WHAT IS THE IRS APPEALS OFFICE?

The IRS Appeals Office and the appeals officers who work there are very experienced tax professionals that have worked for the IRS for many years. The IRS Appeals Office will conduct an independent review of your case and determine if a settlement can be reached. Many contested audits are settled in the IRS Appeals Office. The reason for this is that the IRS Appeals Office can settle cases based on the “hazards of litigation.” In other words, if the IRS Appeals Office believes that there is a fifty percent chance of losing the case if it goes to court, it can settle the case for 50 cents on the dollar.

XIV. WHEN DO I SEEK APPEALS OFFICE REVIEW?

Generally, in a regular IRS audit, you will file a protest in response to a thirty day letter. The thirty day letter will generally propose an additional amount of taxes that the IRS believes you owe. There are other circumstances related to collection actions and if your tax refunds are denied in which you can obtain Appeals Office review.

XV. HOW DO I SEEK APPEALS OFFICE REVIEW?

If the amount in dispute is greater than $25,000, you must write a formal written protest to the IRS outlining your position on why you do not owe the additional tax that is being proposed against you.

XVI. HOW DO I PREPARE FOR AN IRS APPEALS CONFERENCE?

First, you may want to file a Freedom of Information Act request gathering all of the documents that the IRS has relating to you and your tax liability. Second, you should research IRS positions on the issues that you are going to contest before the appeals officer. Finally, if there are contested facts that are important to the outcome of the issue, you should consider obtaining affidavits from independent third parties that support and explain the true facts that occurred in your case.
XVII. IS IT TRUE THAT I CAN SETTLE MY TAX LIABILITY FOR PENNIES ON THE DOLLAR?

There are procedures within the Internal Revenue Service, like the “Offer in Compromise” program, that allow taxpayers to settle their case for less than the full amount that is due and owing. However, there are very strict rules that taxpayers must follow before they qualify for these settlement options.

XVIII. HOW DO I FIGHT THE IRS IN COURT?

Excluding bankruptcy court, there are three primary courts in which you can litigate a tax dispute. These are the United States Tax Court, the United States Federal District Court, and the United States Court of Federal Claims. The U.S. Tax Court is the only court in which you can litigate your tax case before you have to pay the tax bill that is due and owing. In the U.S. Tax Court, a tax judge will make a decision regarding whether you win or lose. You do not have a jury of your peers. However, the tax court is an excellent forum in which to litigate certain tax disputes. The U.S. Federal District Court will decide your case using the United States jury system. In other words, a federal judge will oversee the court proceedings but a jury will decide your case. The biggest drawback to litigating your case in U.S. Federal District Court is that you generally must pay the full amount of the tax liability that is being proposed against you before you can litigate in the U.S. District Court.

XIX. WHAT MAKES A CIVIL TAX CASE A CRIMINAL TAX CASE?

Generally, a case that involves a substantial amount of money that is owed to the United States government is the largest determining factor in whether or not the IRS will criminally prosecute a tax case. Additionally, the IRS will look for “badges of fraud” indicating that the taxpayer intended to cheat the government out of taxes that are due and owing. For example, if the taxpayer maintains a double set of books or has created false documents, these are the types of activities that can result in the IRS criminally prosecuting you.

XX. WHAT TYPES OF CRIMES CAN TAXPAYERS COMMIT AGAINST THE GOVERNMENT?

There are many criminal tax statutes that can result in you going to federal prison if you violate them. For example, if you lie to an IRS agent or provide false documents to an IRS agent you are probably committing a federal criminal tax offense that could result in you going to federal prison. Additionally, if you are taking steps to intentionally impede the IRS’s ability to audit your tax returns or to collect a tax that is due and owing you may be committing a federal criminal tax offense. It is important to keep in mind that when you are dealing with the Internal Revenue Service you must make sure that your statements and representations are completely accurate and truthful.

XXI. WHAT IS THE IRS CRIMINAL INVESTIGATION DIVISION?

The Criminal Investigation Division is a highly specialized unit within the IRS whose job it is to criminally investigate and prosecute individuals who have
committed federal tax crimes. There are approximately 3,000 IRS “special agents” who spend all of their time investigating and criminally prosecuting individuals for criminal tax offenses. These special agents are highly trained and are the best financial investigators in the entire United States government. If an IRS special agent wants to talk to you, it is because he believes that you or someone you know is being investigated for a criminal tax offense.
IRS AUDIT PROCESS

Tax Return is filed

IRS sends letter saying return is being examined and requests documents

TP does not respond at all or not fully

TP sends information to IRS

IRS concludes insufficient documentation to support claimed items

IRS issues 30-day letter

TP does not respond to 30-day letter

TP requests an appeals conference

Notice of Deficiency (90 day letter) issued

Appeals finds against TP

Appeals finds in favor of the TP

Tax Court Petition not filed – Deficiency assessed

Tax Court Petition filed – Litigation started
I. MARKETING

Technology has changed the way we, as a society, communicate from letters to phones to online. In turn, businesses have changed the way they market their products or services. Law firms are not immune to this change. However, as technologies continue to evolve, creating an online presence to market your law firm can be an intimidating endeavor.

Most often discussed in this area are social media (Facebook, LinkedIn, Google+, etc.) and “blogging” (writing a blog on legal topics). There are plenty of resources available for firms wishing to engage in social media or start a blog. Instead of focusing on well-trodden ground, I have attempted to provide you with three less-discussed and often overlooked tools that may provide your firm with new ways to increase public awareness.

As with any form of advertising, Kentucky Supreme Court Rules 3.130-7.01-7.60 govern these activities. While the three items listed below might appear to meet an exception to the advertisement rules, how you use the services will ultimately control whether an exception applies. Consult the rules and commentary to ensure compliance. When in doubt, submit the item for review to the KBA Attorneys’ Advertising Commission and seek an advisory opinion.

With the obligatory ethics caveat out of the way, below are the three overlooked cost-effective ways to market your practice.

A. Google Places

Google is the world’s most used search engine and many law firms spend a great deal of time and money to increase the number of hits their website receives from Google and other search engines (known as search engine optimization or “SEO”). While SEO is a worthy endeavor, there is a quick and easy way to help move your firm up to the front page of relevant Google searches. Simply claim or create your firm’s Google Places listing.

Google Places is Google’s version of the Yellow Pages. It is a listing of the business’s address, phone number, and other publicly available information. Google Places is also connected to Google’s social network (Google +), which allows its users to rate your firm and write reviews. But the beauty of Google Places is that Google devotes a large portion of the page-one search results to local Google Places listings. As one commentator has stated,

This new, combined approach means that for some local searches, 80 percent of the page-one listings now belong to local businesses. As a result, law firms without a Google
Places account face the real possibility that they may fall from the number-one position to the bottom of the first page in a search result – or even off the page entirely.¹

For this reason, every firm should ensure that they have a Google Places listing and that the information is accurate.

Google created the existing listings using available public data. Therefore, it is very likely that your practice already has a listing. But this listing may contain incomplete, inaccurate and even misleading information. If Google generated a listing for your firm, usually searching for your firm by name and address will reveal the listing. Google Places marks its listings with the familiar red marker map icon. The listing could contain your address, phone number, website, photos, reviews, or any other publically available information.

To edit this information you will need to claim the listing. If you were unable to find your firm, you will have to create a listing. The processes for claiming and creating a listing are similar. Head over to google.com/places and click the link titled “Get started now.”

To create or claim a listing, you will need a Google account (if you do not already have one, you should start one; it’s free). After signing into your Google account, you will be allowed to claim the listing. Google will need to verify that you are who you say you are. This is done either by postcard (to the listed address) or over the phone (Google will make an automated call to the listed phone number).

Once verified, you can start optimizing the listing. You can do this a number of ways. The first is making sure the contact information is correct. Second, add photos and any videos your firm may have produced. Lastly, under your Google Places settings assign your listing to relevant categories. These categories will help Google find you when particular searches are made, so choose them wisely.

Other search engines like Bing and Yahoo have similar offerings. After you claim your Google Places listing, you may want to do the same with Bing and Yahoo to spread your reach and make sure the information on other search engines is consistent.

B. Foursquare

Foursquare is a location-based social networking service. Foursquare members use their smart phones to “check-in” at venues they visit. Each check-in awards the user points, and occasionally badges. Badges are rewards placed on the user’s profile, which indicate various

accomplishments within Foursquare. Beyond its award system, Foursquare has some practical uses for its members, providing them with information about the venues around their current location, including reviews and other helpful tips. Foursquare started in 2009 and has since grown to over 20 million users.

Similar to Google Places, Foursquare is free and it uses publicly available information to create its venues. Chances are your firm’s address is already a location on Foursquare. All you need to do is go over to foursquare.com/business and click the link “claiming your venue.” Claiming your venue will allow you to ensure the information listed is accurate and to track any traffic generated from check-ins to your firm.

Many business use Foursquare to offer their customers special discounts for checking in. This may be a great tool for the local ice cream shop, but I am not convinced of its effectiveness in the legal market. Where I think Foursquare can be a cost effective way to advertise your practice is through the actual member functions.

As a Foursquare member, you can connect with other users, colleagues and potential clients in a way that other social sites do not provide. Foursquare allows its members to leave tips about places they have visited. The History Channel excels at using this member function to increase brand awareness. The History Channel leaves historical facts as tips to thousands of places across the country. An attorney with a particular expertise could use the tips feature in a similar fashion. This of course should be used tactfully. For example, I would not recommend that a personal injury lawyer check-in at a local hospital and provide information about medical malpractice claims.

Another member function that attorneys could use as a marketing tool is the “Mayorship” award. Foursquare crowns a user as the “Mayor” of a venue, if that user has checked-in to a venue on more days than anyone else in the last sixty days. Being the Foursquare mayor of a venue highlights your profile on that location. Claiming the mayorship for your local circuit or district court could serve to highlight your profile and your practice.

As a social media service, Foursquare has just reached its adolescence but it already offers a range of marketing possibilities. As Foursquare continues to grow and develop, its overall usefulness for your practice could grow as well.

C. **Avvo**

Avvo is a legal directory on steroids, offering not only a directory of attorneys, but a unique rating service, peer and client reviews, and an expert-only question and answer forum that drives a great deal of the website’s traffic. Avvo gets its name from the Italian word for lawyer, “avvocato.” Mark Britton, a former legal counsel for Expedia.com, started Avvo in 2007. Britton’s approach to the legal directory was to create a
place that would attract potential clients and provide a medium for attorneys to communicate with those potential clients.

So why should you get involved in another lawyer directory? For starters, Avvo has grown to over two million unique visitors per month, which is more than findlaw.com and just behind Martindale-Hubbell. And like the other two items, your listing on Avvo already exists. You just need to claim your profile and maximize its potential. Lastly, Avvo is very good at SEO, meaning your Avvo profile often shows up on the front page of related Google searches.

Avvo offers a rating system that is easy for users to understand. Avvo rates lawyers using a proprietary algorithm that produces a score on a scale of 1-10. This rating system, however, is somewhat controversial. Only nine days after its launch, Seattle attorneys sued Avvo claiming that the rating system was deceptive. The heart of the suit, and what remains a turn-off for many practitioners, is that Avvo maintains more control over your profile than other sites. As it related to the merit of the suit, the court found that the rating system was only opinion and therefore protected by the First Amendment.

Since its initial hiccup, Avvo has skyrocketed. Its approach to the legal directory has turned a simple directory into a social medium for lawyers to interact with current and potential clients. Ignoring your Avvo listing entirely would be folly.

II. TIME KEEPING AND BILLING

There are several free billing and accounting options available, and several free options to track time entries. There are a few that do both. However, in my experience the programs offering to do both for free tend to do both poorly. Below are two free programs, one that handles billing and accounting and another that handles time entries, that each do their separate jobs well. For those looking for a program that handles both tasks well, I have also provided two cost-effective examples.

A. GnuCash

GnuCash is the leading General Public Licensed financial software. For a small firm or solo practice, GnuCash may provide the needed invoicing and financial tracking. GnuCash has been recognized for its ability to meet the needs of attorneys, as the Canadian legal co-operative has stated, “The GnuCash software . . . should present a great alternative for lawyers looking for a solid accounting system at low cost [i.e. free].” Additionally, the Minnesota State Bar Association publishes a free trust

---

accounting guide for use with GnuCash.\textsuperscript{3} If you are a solo practice or small firm, you should consider using GnuCash when looking for a financial program.

At first, GnuCash can be intimidating and the tutorials that come with the program are of little help. But a quick Google search will reveal several guides (some at a cost) that will help the new user get started. The program has several ways to import your previous accounting activity and also comes with built-in online banking functionality.

Aside from the standard accounting functions, GnuCash offers several business features including invoicing, project specific accounting, and payment processing. The invoices produced by GnuCash look professional and are easy to create. Finalized invoices will automatically post to your accounts receivable. When entered as paid, the amounts then automatically move into your assets.

Lastly, GnuCash can generate a number of reports for your practice. While you may not use many of these, some are very useful. For example, you can print customer reports, employment reports, profit and loss reports, cash flow, equity statements, and many more.

B. Grindstone

Grindstone is a free desktop application that allows you to create and organize tasks and to track the time you spend on that task. The tasks can be broken down into client and project-based categories with subtasks for billing purposes. A log is created that can be used to copy and paste over into your billing software or directly onto an invoice.

The program functions with two small windows on your desktop. The larger of the two is a list window for managing tasks; the smaller window is a stopwatch feature that allows you to start and stop start time for tasks located in the managing window.

The program has some great features that make it worth trying. One such feature is Grindstone’s ability to detect your time away from the keyboard. So if you are in the middle of drafting Client A’s motion for summary judgment, and Client B calls with an issue that takes thirty minutes to resolve, when you go back to your keyboard Grindstone will ask you what you were doing for the past thirty minutes. This feature along with several others makes Grindstone worth a try.

C. Low Cost Time Keeping and Billing Solutions

As mentioned above, very few programs offer both billing and time tracking at no cost. However, without breaking the bank you can find

several programs that offer both in one package. Below, I briefly discuss two such programs.

The first is **RTG Bills and Timer**. RTG's user interface looks dated, but the program is designed specifically for law firms and is easy to use. Most importantly, RTG’s time tracking service automatically populates into the invoices, making time entry and pre-billing review easier.

**RTG Bills** and **Timer** come with a forty-five-day free trial period to evaluate the software. If it works for your practice, you can purchase it from [rtgsoftware.com](http://rtgsoftware.com) for a onetime license fee of $95.00. However, when new versions of RTG are released, if you want to upgrade your version, you will need to purchase a new license key.

The second program that incorporates time tracking and billing is **Freshbooks**. **Freshbooks** is an online program that prides itself on being user friendly, and it is. But that comes at a cost. **Freshbooks** has a monthly fee starting at $19.95 a month per user with a twenty-five-client limit. On the higher end of the payment scale **Freshbooks** charges $39.95 a month with an unlimited number of clients and two users; each additional user is $10.00 per month.

Because **Freshbooks** is browser based, you can access your accounts from any computer with an internet connection. **Freshbooks** also has an app (MiniBooks) for $14.99, which will allow you to track your accounts and issue invoices on the go.

### III. PRODUCTIVITY SUITE

Microsoft Office is the most widely used of the productivity suites but for the average user it is expensive, unless it came pre-installed on your computer. If you purchased a computer that did not have a copy of Microsoft Office, there are a number of free productivity suites that truly compete with the tried and true Microsoft Office.

A. **Google Drive**

**Google Drive** (formerly Google Docs) is Google’s productivity suite. It is free and all you need is a Google account to get started. **Google Drive** contains simplified versions of what most of us are accustomed to seeing in Microsoft’s Office, such as Word (Docs), Excel (Spreadsheets) and PowerPoint (Presentation). More importantly, **Google Drive** is for the most part compatible with Word, meaning you can save and upload your Microsoft Word, PowerPoint, and Excel documents into Google Drive and vice versa.

Google’s word processor, Docs, may lack some of the functionality that you would need for appellate brief writing, but works just fine for letter and memorandum drafting. When uploading most Word documents the formatting is not an issue; however, some formatting may change during the conversion. While there are some flaws, Google is constantly
updating and improving their products and I imagine that Google will continue to improve Docs.

Spreadsheets is Google’s version of Excel. For the average attorney’s needs, Google Spreadsheets meets or exceeds Excel. Google Presentation is Google’s version of PowerPoint. While it takes some getting used to, it too has the basic functionality to meet the average attorney’s needs.

The great advantage of Google Drive is that it stores all of your saved documents securely online. You operate the programs through your web browser, so you can have access to your documents from any computer with an internet connection or from your mobile device (through either the browser or the Google Drive app). Another benefit of Google Drive is that you can share your documents with other Google accounts. You can control whether that Google account can just view the document or whether they can make changes to it. This ability to collaborate in live time can be invaluable.

B. OpenOffice and LibreOffice

OpenOffice is a productivity suite that will look very familiar to those that use Microsoft Office. Not only does it look familiar, it is a viable replacement for Microsoft Office. OpenOffice is open source software, meaning that the program is free to download and use.

OpenOffice’s word processor is Write. The latest (and last) version of Write resembles Microsoft Word 2003 more than 2010, which has its benefits. However, there are some important differences. For example, the keyboard shortcuts are not the same. For those that used these shortcuts, adapting to new ones can be difficult. That aside, Write provides plenty of functionality and really does hold up to commercial-grade software.

OpenOffice’s spreadsheet program is Calc. Like Google Drive’s Spreadsheet, Calc will meet the needs of most attorneys. Again, Calc mirrors Microsoft Excel 2003. Impress is OpenOffice’s presentation program. Impress does the job, but does not really add to or improve upon PowerPoint. It will meet your basic needs for assembling and editing simple presentations, but it falls short on the layouts and multimedia integration.

You can download your free copy of Open Office at openoffice.org. The company behind OpenOffice was purchased by Oracle in 2009. The sale did not sit well with many of its core developers and in 2010, those developers broke off and created LibreOffice. Oracle later killed the OpenOffice project. You can still get a copy of the last version of OpenOffice, but for future developments LibreOffice may be the top open source alternative to Microsoft Office.

3-7
The current version of LibreOffice makes few improvements on the last version of OpenOffice. However, the presentation software in LibreOffice’s suite is markedly better. It does not feel archaic, but feels much like PowerPoint. LibreOffice also offers some mobile applications that give it functionality on the go, not as much as Google Drive, but an improvement over Microsoft Office. You can download the latest copy of LibreOffice at libreoffice.org.

IV. PHONE SERVICES

For a solo practice or a small firm, office phone systems with service and equipment can be an expensive undertaking. Further, many attorneys may spend a majority of their phone time on their cell phones. Google Voice provides a free alternative to the traditional landline phone and UberConference and FreeConferenceCall.com provide free substitutes for your firm’s conference call needs.

A. Google Voice

Google Voice is a free web-based phone service for Google users. It provides you with a phone number and voice mail access. Google provides the telephone number and services free of cost. You can then link that number up to your cell phone and download the Google Voice app on your tablet, which will allow your incoming calls to ring on your cell phone, computer and tablet devices. In addition to forwarding your calls, Google Voice is packed full of neat features that make it worth considering.

Google Voice offers a visual voicemail. For non-iPhone users, visual voicemail is a listing of the numbers that have left you voicemails. This feature allows you to delete messages or select the message you want to hear without dialing a separate number and dealing with audio prompt to navigate through your voice mails.

Additionally, Google Voice provides voicemail transcriptions, allowing you to read your voicemails, rather than listening. Unfortunately, the transcriptions are more comical than helpful. Google openly admits that the transcription service is not perfect and that it is working to improve it. Even with its shortcomings, you can usually get the gist of the voicemail from the transcription.

Google Voice allows you to have multiple voice mail greetings, which allows you to tailor your greetings. You can select a contact and make a greeting just for that individual or you can place multiple contacts into groups and record a greeting just for members of that group.

Google Voice also allows you to send text messages (SMS) from your computer or from the app downloaded on your smart phone or tablet. When you use the Google Voice app to send text messages, your text-messaging plan is not effected. However, under most plans calls made from Google Voice on your cell phone will use your plan’s minutes.
Google Voice does offer some simple conference calling capabilities. Similar to most landline systems, with Google Voice you can join a number of incoming calls on to the same line. But with this type of conferencing, you have to be available from the first to last call, which sometimes is not possible or practical. Below are two free conferencing services that pick up where Google Voice falls short.

B. **UberConference** and **FreeConferenceCall.com**

Hosting conference calls can be an annoying hassle, but two services make it easy and free. UberConference was started by the brain trust behind Google Voice. It is currently in its Beta form and membership is limited. When approved you receive a dedicated number to use for all your conference calls. UberConference’s lines are limited on the number of callers. Every free account starts with a five caller maximum size, but with some work, you can maximize the free account to accommodate a call of up to seventeen participants.

While the call size is a downside, the draw of UberConference is its user interface. During a call, you can access additional control features by logging into your account from a web browser. UberConference has a unique dashboard that allows the call’s host to control the call, see who has joined the call, and who is speaking at any given time.

UberConference also allows you to mute members of the call, kick them out altogether, or even move into a separate private chat and then join back in to the larger call from the private chat. Additionally, with UberConference you can record each of your conference calls. There are several paid services that cannot match the functionality that UberConference is able to provide at no cost. If you would like to try UberConference, you can get on the waiting list to join by going to UberConference.com.

For those unable to get into UberConference, FreeConferenceCall.com is another free teleconferencing service. While it does not come with the bells and whistles of UberConference, it provides all the features that most attorneys will be familiar with from other dial-in teleconferencing services and allows you to host a call with up to ninety-six participants. FreeConferenceCall.com offers you a permanent conference number, but you have to re-register every 120 days to keep it active. You will lose your number if you forget to re-register.

V. **TEN USEFUL APPS FOR YOUR SMART PHONE AND TABLET**

A. **Billable Hours** – ($1.99) Billable Hours is just that, a mobile time keeping app made for those of us that have to keep up with the six-minute billables. The app takes a little discipline, but once you create the habit, it is easy to use. At $1.99, the app will quickly pay for itself.

B. **Court Days** – ($0.99) Court Days calculates days before or after a particular deadline. The app has each federal district’s civil rules, so it
knows that particular jurisdiction’s court holidays. This app may seem ultra-simple, but sometimes it is better to have Court Days do the counting for you.

C. Fastcase – (FREE) This app puts Fastcase’s legal research service at your fingertips at no cost. Fastcase’s library contains a reliable source of federal law and the primary law from all fifty states, including cases, statutes, regulations, court rules and constitutions, all available on your smart phone or tablet!

D. Dropbox – (FREE) Dropbox is a service that allows you to store and organize files online. Once you have a Dropbox account you can access your uploaded files from their website or your smart phone. The basic account is free and comes with a sufficient amount of storage to meet most needs.

E. Wunderlist – (FREE) Wunderlist is a very simple task management app. It easily allows you to list tasks, place deadlines for each task and group tasks under user created categories. Wunderlist’s greatest asset is that it is available for your smart phone, tablet and desktop. Wunderlist syncs your tasks with each device you use.

F. Sign-n-Send – ($4.99) Sign-n-Send allows you to digitally sign PDF and Word documents and then send those documents to a recipient. The documents are stored and shared on an encrypted server to protect your signature.

G. Dragon Dictation – (FREE) Dragon Dictation is a voice recognition application that dictates straight from your smart phone. The program is based on the Dragon Naturally Speaking dictation software, which has been in the dictation game since 1997. The downside to this app is that it is not entirely hands free. You have to press several buttons to email or text your dictations.

H. Evernote – (FREE) Evernote is a tool that allows you to quickly create and save notes. Evernote operates in your web browser, making it easy to save whole sections of a website or just snippets. The application also offers to OCR (optical character recognition) your photos and images so you can find them later by searching for text in the image, meaning you can take a photo of a whiteboard in a meeting and later locate it based on the text that was written on the board. Evernote is available on your computer, tablet and smart phone. Just like Wunderlist, Evernote syncs with each device.

I. Priority Matrix – ($3.99) Priority Matrix is another “to-do” list app, but this one displays your tasks in a color coded manner, which may work better than other apps if you are a visual person. The app uses the “4-quadrant method” where tasks are placed into color coded quadrants by level of importance, deadlines, or other categories you create.
J. All the Google Apps (Scholar, Voice, Maps, Calendar, Gmail, Drive etc.) – (FREE) The Google apps are not much more than mobile versions of the sites you can access through your smart phone's browser. Still the services Google offers are worth having quick access to on your phone's home screen.
I. FREE SECONDARY SOURCES

A. ABA Journal – Free Access to:
   1. Contains current issues; and

B. Google Scholar – Search Engine
   1. Searches internet for free relevant scholarly articles.
      • Searches both full text articles and abstracts
   2. Con – Note that you may not get a full article because of the abstract.

C. Law.com Dictionary – Provides Free Access to:
   1. Basic definitions of legal terms and concepts.
      • Can search for terms or browse alphabetically
   2. Con – Not as many defined terms and concepts.

D. Legal Information Institute (“LII”) (Cornell University Law School)
      • Overview of legal topics arranged alphabetically
   2. Supreme Court Bulletin.
      a. Keeps you apprised of all pending Supreme Court cases.
      b. Alerts of decisions.
   3. LII Announce.
      • Blog that keeps you up to date on select legal information and research
4. **Get Law.**

   a. Contains collections of federal law, Constitution, **U.S. Code**, C.F.R., Supreme Court, **Federal Rules**, state statutes by topic and the **U.C.C.**

   b. Contains **research options for Kentucky and other states**:

      i. Constitution and legislation:

         (a) Constitution.

         (b) Statutes.

         (c) Recent legislation.

         (d) Pending bills and other legislative information.

         (e) Directory information.

      ii. Judicial opinions:

         (a) Supreme Court (June 1999-present).

         (b) Court of Appeals.

         (c) Court Rules.

         (d) Background and directory information for the Judiciary.

      iii. Regulations and other agency material:

         (a) Administrative code.

         (b) Directory and other state agency information.

E. **Oyez.org** – Collection of Information Related to the U.S. Supreme Court

   - Collection of audio recordings of oral arguments from 1981

F. **LexisNexis® Communities** – Allows Access to:

   1. Legal blogs written by leading legal professionals.

   2. 1,600 legal podcasts.

   3. View top cases.
4. Receive a daily newsletter.
   • Updates to content of interest to you, and keeps current with the latest legal news

5. Offers information in several types of practice areas: bankruptcy, copyright, securities, estate practice & elder law, labor & employment, insurance, immigration, patent, real estate.

II. FREE PRIMARY SOURCES – CASE LAW

A. Pro – Abundance of Free Case Law

B. Con – Does Not Come with Editorial Enhancements and Finding Aids that Are Provided on Westlaw and Lexis

C. U.S. Supreme Court Cases:

<table>
<thead>
<tr>
<th>Source</th>
<th>Dates</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>FindLaw</td>
<td>1893 - present</td>
<td>May browse by year and U.S. Reports volume number, and searchable by citation, party name, and keyword.</td>
</tr>
<tr>
<td>Google Scholar</td>
<td>All</td>
<td>Uses the Google search algorithm to find and rank cases. Use &quot;Advanced Scholar Search&quot; to choose the jurisdiction(s) you want to search.</td>
</tr>
<tr>
<td>Justia</td>
<td>All</td>
<td>Browsable by year and U.S. Reports volume number, and searchable by citation, party name, and keyword.</td>
</tr>
<tr>
<td>Public Library of Law</td>
<td>All</td>
<td>Searchable by citation and keyword. Search can be limited by jurisdiction and date.</td>
</tr>
<tr>
<td>U.S. Supreme Court</td>
<td>1991- present</td>
<td>May browse only. Click &quot;Opinions&quot; on the left, then scroll down and click the &quot;Bound Volumes&quot; link to find cases from 1991-2005.</td>
</tr>
</tbody>
</table>
### D. Reported Federal Circuit Cases

<table>
<thead>
<tr>
<th>Source</th>
<th>Dates</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Circuit Court Pages</td>
<td>Coverage varies by circuit</td>
<td>Find individual circuits using <a href="#">this map</a>.</td>
</tr>
<tr>
<td><strong>FindLaw</strong></td>
<td>Coverage varies by circuit but is generally from the mid-90s forward.</td>
<td>May browse by year and reporter volume number, and search by citation, party name, and keyword. (Circuits have to be searched individually.)</td>
</tr>
<tr>
<td><strong>Google Scholar</strong></td>
<td>1923-present</td>
<td>Uses the Google search algorithm to find and rank cases.</td>
</tr>
<tr>
<td><strong>Justia</strong></td>
<td>1950-present</td>
<td>May browse by year and U.S. Reports volume number, and search by citation, party name, and keyword.</td>
</tr>
<tr>
<td><strong>Public Library of Law</strong></td>
<td>1950-present</td>
<td>Searchable by citation and keyword. Search can be limited by jurisdiction and date.</td>
</tr>
</tbody>
</table>

### E. Federal District Court Cases

<table>
<thead>
<tr>
<th>Source</th>
<th>Dates</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>District Court Pages</td>
<td>Coverage varies by district.</td>
<td>Find individual district court pages using <a href="#">this map</a>.</td>
</tr>
<tr>
<td><strong>Google Scholar</strong></td>
<td>1923-present</td>
<td>Uses the Google search algorithm to find and rank cases.</td>
</tr>
<tr>
<td><strong>Justia</strong></td>
<td>2004-present</td>
<td>Searchable by citation, party name, and keyword. Can limit search by date, court, and lawsuit type. *Does not include all districts.</td>
</tr>
</tbody>
</table>
F. State Court Cases

1. Casemaker (http://www.casemaker.us/) – Provides unlimited access to the members of bar associations that join the Casemaker Consortium.
   a. Available via the Kentucky Bar Association website.
   b. Federal materials:
      i. U.S. Supreme Court (1790-current).
      ii. Courts of Appeals (1930-current).
      iii. U.S. District Court Cases (1932-current).
      v. CFR.
      vi. Court rules.
      vii. Court forms.
   c. State materials.
      i. Case law – historic to current (1924 is average starting point).
      ii. Statutes.
      iii. Codes.
      iv. Court rules.
      v. State constitutions.
      vi. Attorney General opinions.

III. LOW COST CASE LAW RESEARCH INTERNET OPTIONS

A. Pro – Generally, All Provide a “Citator” Service

B. Con – Only Provide a List of Cases in which Citation Appears
   • Does not include qualitative information, such as an indication that a particular case has received negative treatment
C. Fastcase (http://www.fastcase.com)

1. Cost: Appellate subscription = sixty-five/month and 695/year; $95/month or $995/year.

2. Access: Both plans offer access to the Fastcase appellate case law library, as well as state and federal codes and regulations.
   - Premium plans: trial level opinions

3. Types of federal materials:
   a. U.S. Supreme Court (from inception).
   b. U.S. Courts of Appeals (from 1924).
   d. Tax Court (from 1924).
   e. Bankruptcy Courts (from 1979).
   g. CFR.

4. Types of state materials:

Primary law from all fifty states, including cases, statutes, regulations, court rules, and constitutions.

D. Loislaw (http://www.loislaw.com)

Loislaw offers extensive coverage of all types of primary legal materials from all fifty states and federal jurisdictions. Loislaw also provides access to treatises organized by subject or jurisdiction. Several different subscription plans are offered, with prices ranging from $40 to $250.

1. Federal materials:
   a. U.S. Supreme Court Reports.
   c. U.S. District Courts.
   d. U.S. Tax Court.
   e. U.S. Constitution.
g. Public Laws of the United States.

h. Code of Federal Regulations.

i. Federal Register.

2. State materials:

a. Cases.

b. Statutes.

c. Administrative rules and regulations.

d. Court rules.

3. Other features:

a. GlobalCite (lists all citing documents that are carried by Loislaw).

b. Cases, statutes updated daily.

c. Can search by keyword, case name, or citation.

d. Twenty-four hour technical support.

E. VersusLaw (http://www.versuslaw.com)

1. VersusLaw offers three pricing plans, standard, premium, and professional, which range in price from $13.95 to $39.95 per month. Coverage materials varies by jurisdiction. Please see library directory (http://www.versuslaw.com/help/library/LibCatProfessional.aspx) for coverage.

2. Federal materials:

a. U.S. Supreme Court cases.

b. Federal Circuit Court cases.

c. Federal District Court cases.

d. Specialized Federal Courts.

e. U.S. Code.

3. State materials:
   a. State appellate courts.
   b. Selected statutes and regulations.
I. INTRODUCTION

Social networking is the vogue in technology today; the latest evolution of how the Internet is used in people’s – and lawyers’ – lives and daily business. Like other technologies, law practice and lawyers are adopting social media such as Facebook, Twitter, LinkedIn, YouTube, and other services to advertise their services, network with others, communicate with clients and others, and investigate facts and witnesses in their cases. As inevitable with any new technology, the use of social media by lawyers as part of their law practice (as opposed to individual, private use) is subject to Kentucky ethics rules.

As Kentucky lawyers increasingly use social media in their law practice, they will need to be aware of the applicable Rules of Professional Conduct that might affect their use of social media. In general, lawyers use social media like other technology tools – to advertise services, communicate with others, and investigate facts and witnesses. While there are probably other uses not mentioned here, this article focuses primarily on those uses, with particular applications of the Kentucky Rules of Professional Conduct as well as any similar treatment by other jurisdictions.

Readers should keep in mind the following caveats regarding this article and the application of ethics rules generally:

A. Social media is a relatively young and ever-evolving technology, and, accordingly, has not been tackled extensively by legal ethics authorities (Bar organizations, ethical and discipline committees, and academics). The landscape is and constantly will be changing.

B. As noted by the commentary to the Kentucky Rules of Professional Conduct, Kentucky’s ethics rules are “rules of reason.” Common sense should always be one of your guides regarding whether or not to do something with social media in your law practice. Though many attorneys want to argue that the KBA needs to enact wholesale rules changes to deal with “new media,” the current rules actually work and can easily be applied to social media with a little reason and thought.

C. Attorneys – and others – tend to get in trouble with social media when they let the spontaneity and “immediateness” of social media trump their good judgment. Always think before you tweet.

D. When in doubt, seek guidance. The Kentucky Bar Association has an Ethics Committee and the Ethics Hotline. When a problem might arise, use them.
II. WHY USE SOCIAL MEDIA?

A. Marketing – Potential Clients

B. Marketing – Current & Former Clients

C. Discovery

D. Employment Matters

III. MARKETING

A. Social networking is geared to promoting yourself in one form or another either personally or professionally. The end is really the same. It is nothing lawyers haven't been doing for years; it's just a different way of doing it.

B. Not the same as a static “brochure” website.
   1. If all you want to do is put a site up on the web and never think about it again, social networking is not for you and your firm.
   2. Ideally, with social networking, we are talking about dynamic, real-time two-way (or more) communication.

C. Social networking is a generic term for an interactive web/online presence that is an extension of your brick & mortar firm.
   1. Maintain contact with not only your clients, but your entire rolodex/address book.
   2. News about your firm.
   3. Thoughts on legal issues pertinent to your practice.
   4. Other areas of interest; what makes you unique or sets you apart from other lawyers.

D. Carolyn Elefant of MyShingle.com recently wrote an e-book on social networking for lawyers in which she discusses using these tools to develop the three Rs.
   1. Relationships.
      a. Old axiom: “People like to do business with people they like.”
      b. What types of relationships?

i. Online relationships.
   (a) Contacts/followers/friends on the various social networking sites.
   (b) Other members of list servs (e.g. KJA, Solosez.net, etc).

ii. Reinforcement of connections and relationships you have in real life.

iii. While general postings to discussion boards and other such sites have been deemed to not inadvertently create an attorney client relationship, the attorney should be wary of giving out advice and forming an attorney client relationship. Review KBA Ethics Opinion E-403 (March 1998).\(^2\)

iv. Keep in mind the Bar’s restrictions on solicitation to prospective clients & its exemptions. See Rule 7.09.

c. Be careful not to confuse social networking with social marketing. Don’t be like the guy who goes to a Rotary Club meeting and shoves his card into everyone’s hand. You want to take part in the conversation, not shout everyone else down.

2. Reputation.

a. Your social networking profile can be used to build your reputation in your field.

b. Posting to your blog, list serv, or other social media informative articles, links and information related to your particular area of practice.

c. Comments on such topics can establish your expertise in your chosen field. It is one thing to post a link to a new legal opinion; it is another to write an article on the practical application and impact such an opinion will have in practice.

d. Keep in mind that what you post online about yourself (or what others might post about you) can go to your character and fitness. Additionally, it could provide grounds for you to

---

be reported to (or have to report another lawyer to) the KBA under the Rules of Professional Conduct.

3. Referrals.

a. “Top of mind awareness” – people with whom you interact with online (or people they know/interact with) may not need you now, but when they do, you want to be the first lawyer that comes to mind.

b. If you become active on many of the popular social networking sites, you will eventually start to reconnect with people.

i. College or even high school classmates, former employers, family friends, relatives, etc.

ii. Staying connected increases the odds that they will refer potential clients your way.

iii. Again, be wary of giving out free advice or otherwise creating even the appearance of an attorney-client relationship.

c. Reinforce your current client relationships and stay connected with your clients.

i. Many sites allow for private communication between parties rather than a public exchange of posts.

ii. You must protect the attorney-client confidentiality.

(a) A client should always approve your online relationship.

(b) Consider including a clause in your contract where the client approves (private) online communications.

(c) Goes without saying that you should not post information about your client.

iii. Strengthen your ties to your clients. You can show yourself to not just be “Mr. or Ms. Attorney” but a real person who has other interests, a family, etc.

E. Advertising Rules Considerations

1. The Attorney Advertising Rules in Rules 7.01-7.40 apply to the use of social media by attorneys for marketing purposes.
a. **Rule 7.02(1)** defines an “advertisement” as “any information or communication containing a lawyer’s name or other identifying information.” If you have your name and the fact you are a lawyer on your Facebook page or your Twitter profile, you’ve engaged in advertising within the meaning of the ethics rules. If a communication promotes your law practice in any way, it’s advertising, regardless if there’s an “ask” in the communication.

b. The real question is how the ethical rules regarding advertising apply.

2. Keep in mind the general advertising rule in **Rule 7.15** – no communications may be false or misleading.

a. For example, the social media site LinkedIn is most likely exempt from the advertising rules pursuant to **Rule 7.02(1)(d)**, which exempts regularly-published professional directories from the definition of “advertising.”

b. However, LinkedIn allows for connections to “recommend” you and praise your work. Not only would a post of that nature kick a LinkedIn profile out of the exemption, but it would also trigger a duty on the attorney’s part to make sure that the “recommendation” is factual and does not create unjustified expectations in violation of **Rule 7.15(b)**.

3. Be aware of how the submission requirement of **Rule 7.05** and the disclaimer requirements of **Rule 7.25** may apply to the particular type of social media you use.

a. Consider Twitter, the microblogging site which allows users to broadcast posts of 140 characters or less (“tweets”) to followers. If you tweet your thoughts about the law and law practice, those tweets would be advertisements within the meaning of **Rule 7.02(1)**. **Rule 7.25** requires the use of the disclaimer “THIS IS AN ADVERTISEMENT” on all advertisements. Does every tweet need to contain this disclaimer? The current position of the Attorneys’ Advertising Commission is no per the exception in **Rule 7.02(1)(j)**, so long as your Twitter profile page contains the disclaimer. Same for Facebook – wall posts do not have to contain the disclaimer so long as your profile has it.

b. And, consistent with the **Rule 7.02(1)(j)** exception, only your Twitter or Facebook profile must be submitted to the Attorneys’ Advertising Commission pursuant to **Rule 7.05**. You do not have to submit each and every Facebook wall post or tweet.
4. Remember that direct contact using social media must strictly comply with the direct contact requirements in Rule 7.09.

IV. COMMUNICATIONS

A. Communications with Potential Clients

1. It is almost inevitable when using social media that you will receive an enquiry from a person online to represent them regarding a matter. In that case, Rule 1.18 applies.

2. Rule 1.18 Duties to prospective client.
   (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
   
   (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
   
   (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
   
   (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
   
   (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or;
   
   (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
   
   (i) the disqualified lawyer is timely screened from any participation in the matter and is
apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

B. Communications with Clients

1. Communication with clients (or with anyone for that matter) is a communication and writing for purposes of the Kentucky Rules of Professional Conduct. See Rule 1.0(n).

2. Confidentiality. Rule 1.6 governs the lawyer’s obligation to keep information related to representation of the client confidential unless the exceptions set forth under that rule exist.

3. Communications via a direct message or similar means using social media (e.g. direct messages through Facebook or Twitter are possible) is permissible. See KBA Ethics Opinion E-403 (March 1998).

C. Communications with Other Parties and Third Persons

1. Other parties or third persons not represented by counsel:

   a. Lawyers might be communicating via a social media service with another party not represented by counsel for purposes other than representation of their client. If the lawyer is communicating with that person regarding a matter, then Rule 4.3 must be adhered to, and the lawyer should make sure to clarify his role on behalf of his client.

   b. Rule 4.3.

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

2. Other parties or third persons represented by counsel:

   a. Rule 4.2 reads: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of
the other lawyer or is authorized to do so by law or a court order.

b. A lawyer should not use social media (or have a paralegal or insurance adjuster, or any other person use social media) to communicate regarding his or her representation of a client with a person who the lawyer knows is represented by counsel unless he or she has the appropriate consent, court order, or legal authority to do so.

D. Communications with Jurors and the Tribunal

1. Generally, while there is no reason a lawyer could not be connected with a judge or potential juror on a social media site, the lawyer certainly should not communicate with the judge or jury regarding a case for fear of engaging in an improper ex parte communication. This includes not just direct messaging, but “wall posts” and other communications seen by other people.

2. Rule 3.5 reads:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person as to the merits of the cause except as permitted by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law, local rule, or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

3. Two examples underscore this issue.

a. District Judge Carlton Terry, Jr. of North Carolina was issued a public reprimand by the North Carolina Judicial Standards Commission after befriending on Facebook the counsel for one of the parties in a custody case before him
and exchanging messages with the counsel regarding the case.\textsuperscript{3,4}

b. More instances are coming up of jurors using Twitter (or “Tweeting” during trials).\textsuperscript{5} While these particular instances are of juror behavior, the highlight is on the ease with which sending messages via social media about a case can have disastrous effects on individual trials and, ultimately, court management.

E. Communications with Outside World (\textit{e.g.} Trial Publicity)

1. Lawyers using social media may want to use it to highlight matters in which they are involved. In addition to issues regarding confidentiality and honesty, the lawyer who wants to post about their cases should read the Kentucky rule regarding trial publicity as a good measure of what to say or not say regarding a matter.

2. \textbf{SCR 3.130(3.6)} reads:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

\begin{itemize}
  \item[(1)] the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
  \item[(2)] information contained in a public record;
  \item[(3)] that an investigation of the matter is in progress;
  \item[(4)] the scheduling or result of any step in litigation;
\end{itemize}

\textsuperscript{3} Ryan Jones, “Judge Reprimanded for Discussing Case on Facebook,” The-Dispatch, June 1, 2009. Available at \url{http://www.the-dispatch.com/article/20090601/ARTICLES/905319995} (last viewed August 4, 2009).


(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

V. EMPLOYMENT MATTERS

A. Social media is a wonderful method for expanding your recruiting reach. Even legal recruiters are turning to social media to get the word out that jobs are available to a broader audience than traditional publications and headhunters.

B. A good employer will also check social media sites to screening resumes for accuracy. However, be careful to use only publicly-available social media sites. Do not request access to private social media sites or demand passwords as a condition of employment. This heavy-handed practice is coming under increasing scrutiny.
C. Screening potential hires to make sure they “fit” your culture can also be appropriate, but if you delve too far into candidates’ personal lives you might open yourself up to liability under equal employment laws if the potential candidate has posted evidence that he or she is a member of a protected class, and you ultimately decide not to hire the individual. Be sure to document your hiring rationale.

D. When regulating current employee use of social media, use your good judgment and keep intrusions into personal lives appropriate to the job. Regulation and monitoring of off-the-job conduct can be appropriate for an attorney with a government security clearance, but is less appropriate for the average attorney in private practice. Do not delve inappropriately into your employees’ personal lives.

1. For instance, excessive monitoring of an employee’s personal web postings could open an employer up to liability. Suppose that an employer represents to employees it is monitoring private posts, a task impossible to carry out. An employee starts making online threats against a co-worker, and those threats are carried out. Do you as the employer have liability to the victim because you didn’t discover the threats? Possibly, since you represented you were monitoring the posts. Don’t bite off more than you can chew.

2. Always follow up on reports of improper personal postings, but don’t make it a habit to monitor all personal employee posts. Handle the issue through use of a Social Media Policy restricting private use of your firm name, and imposing disciplinary sanctions for violations.

VI. DISCOVERY AND INVESTIGATION OF FACTS AND WITNESSES

A. Be aware that the trend in ethics opinions (and appropriately so) is that a lawyer is not to befriend a represented party (or use third parties to do so) through any electronic means in an effort to influence litigation.

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

1. Under this rule, a lawyer conceivably could not make a fake account on a social media website for the purpose of communicating with/finding out about another party, witness, third person, etc. At least one disciplinary authority has acted on this type of behavior. The Philadelphia Bar Association Professional Guidance Committee, based in part upon rules similar to Kentucky’s Rule 4.1, advised that a lawyer who wanted to have a third party “friend” (a person whose permission was required to be
his or her “friend” through Facebook and MySpace) be a witness, could not do so. Opinion 2009-02 (March 2009).

2. Also, people working on the lawyer's behalf (staff, investigators, etc.) are prohibited from doing this, and could cause the lawyer trouble if the lawyer knew about it. See Rule 5.3.

C. That being said, Google and social media sites are wonderful discovery tools and should be used whenever a new case comes through the doors.

1. Google and search social media sites for your client – including asking them to provide you their site.

2. Google and search social media sites regarding your opponent and other witnesses.

3. Google indexes a great deal of the social networking and social media information that is posted online.

   a. Blogs – The trend of people thinking that the world is interested in every detail of their life leads many people to shoot themselves in the foot.

   b. Youtube videos – Who needs to hire a private investigator in a work comp defense case anymore? Just search Youtube for the worker’s kid’s Youtube channel.

   c. MySpace and Facebook photos – Got a custody case? You might find mom’s cheesecake photos where you can see the kids in the background.

   d. Google profiles – I had a case recently where a witness got up on the stand and proclaimed how religious she was and that she was a deacon’s wife. With a simple Google search, I had found her Google profile was decidedly un-deacon’s-wife-like.

D. Areas of Practice that Benefit from Mining this Information

1. Family law.

2. Personal injury and workers’ compensation (both sides).

3. Criminal defense.

4. Anytime you are trying to track down contact information of a potential witness. The phonebook is going the way of the dodo bird.
VII. MISCELLANEOUS/PARTING THOUGHTS

A. Above all, be honest in using social media. Honesty is a duty of all Kentucky lawyers. See SCR 3.130(4.1).

B. If you manage others who use social media, consider preparing an office policy regarding the use of social media in the office. It can help mitigate any dangers regarding your responsibility and potential liability for the social media habits of staff.

C. Conflicts of interests and “friends.” A lawyer, when deciding whether to represent an individual, should consider whether his “friending” of someone else would give rise to the need to decline representation of the potential client.

VIII. FURTHER REFERENCES

   (Last viewed August 3, 2009).

B. C.C. Holland “Mind the Ethics of Online Networking” Law.com,

I. BRIEF OVERVIEW OF ELECTRONIC DISCOVERY

II. PRESERVATION ISSUES

A. When Does the Obligation to Preserve Electronically-Stored Information Arise?

Generally, the preservation obligation arises when litigation is reasonably anticipated. There may be challenges associated with determining when that occurs, however, outside of instances where a plaintiff has decided to file a lawsuit or a defendant has received notice that suit has been filed. For example, does a demand letter cause the recipient to reasonably anticipate litigation? What about a customer complaint? These questions illustrate the challenges that counsel may face in identifying when the preservation obligation arises and require a careful consideration of the available information and alternatives in each situation. Erring on the side of caution in initiating preservation procedures is wise because, as the Kentucky Supreme Court has stated, “[p]rudent parties anticipate litigation . . . prior to the time suit is formally commenced.” Duffy v. Wilson, 289 S.W.3d 555, 559 (Ky. 2009).

B. Why Should You Move Fast?

With an eye toward avoiding potential disputes over preservation, counsel and parties should move quickly in order to document that the issue of preservation was approached in good faith and taken seriously. In addition, parties may routinely destroy data pursuant to document retention policies and, thus, information may be destroyed after the duty to preserve has attached if one does not act promptly. To that end, if evidence is lost or destroyed at a time when it should have been preserved, that party may face a variety of sanctions. For example, the Kentucky Supreme Court recently held that:

[W]hen it may be reasonably believed that material evidence within the exclusive possession and control of a party, or its agents or employees, was lost without explanation or is otherwise unaccountably missing, the trier of fact may find that the evidence was intentionally and in bad faith destroyed or concealed by the party possessing it and that the evidence, if available, would be adverse to that party or favorable to his opponent. When the trier of fact is a jury, the jury shall be so instructed.

C. What Should Be Included in Written Litigation Hold Notices, and How Often Should They Be Issued?

Though jurisdictions may differ as to whether written litigation hold notices are required, the best practice is to provide such written notice to clients and their employees who may have custody of materials related to the dispute at hand, along with a request that they acknowledge receipt of the notice. In fact, the U.S. District Court for the Western District of Kentucky recently ordered that an adverse-inference instruction be given to the jury to remedy a defendant’s spoliation of software and email materials resulting from its failure to issue a proper litigation hold on the materials. See *KCH Services v. Vanaire, Inc.*, 2009 WL 2216601 (W.D. Ky. July 22, 2009). Further, Judge Scheindlin of the U.S District Court for the Southern District of New York held in 2010 that the failure to issue a written litigation hold constitutes gross negligence. See *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F.Supp.2d 456, 465 (S.D.N.Y. 2010).

In terms of content, commentators suggest that litigation holds should include: the purpose of the notice; a description of the lawsuit or investigation; identification of issues involved that might assist in determining what types of data to preserve; guidelines as to material that should be preserved; clear instructions related to the steps that must be taken to preserve (i.e., the suspension of automatic deletion programs); information related to the importance of preservation and the consequences of failing to preserve; contact information for the person overseeing the litigation and hold efforts; and a request that the recipient inform the contact person if he or she is aware of another person with materials covered by the litigation hold. See, e.g., Alan M. Anderson, "Issuing and Managing Litigation-Hold Notices," *Bench & Bar of Minnesota*, August 2007.

In terms of timing, litigation hold notices should be issued when the duty to preserve arises. In addition, periodic reminders of the litigation hold should be issued throughout the litigation. Finally, if the scope of the information required to be preserved in connection with the litigation changes, a litigation hold notice detailing this change should be issued.

D. What Are the Dangers of Automatic Deletion Programs, and How Should You Address Them?

Under the Federal Rules of Civil Procedure, “[a]bsent exceptional circumstances, a court may not impose sanctions . . . on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” *Fed. R. Civ. P. 37(e).* However, “it is clear that this Rule does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation.” Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority, 242 F.R.D. 139, 146 (D.D.C. 2007). Thus, once a duty to preserve arises, a party must affirmatively act to keep its auto-deletion system from proceeding
unabated. One of the principal dangers of auto-deletion programs in this context is that if, for example, such a program deletes a party’s emails, the party may later be ordered to conduct the costly process of restoring backup tapes in order to locate and produce the emails. See id. at 148. Even worse, if backup data is unavailable, a litigant may be faced with an adverse-inference instruction or other sanctions. Consequently, it is important to promptly address the potential problems created by auto-deletion programs. In a seminal, precedent-setting case on electronic discovery, the U.S. District Court for the Southern District of New York mandated that “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Thus, once the duty to preserve attaches, a party is responsible for the acts of its auto-deletion programs and must take affirmative steps to keep such programs from destroying relevant information.

E. What Should You Focus on When It Comes to the Preservation of Information Located on Social Media and Smartphones?

In the eyes of the law, discoverable content on social media networks and smartphones is no different than discoverable electronic documents or even paper documents. For example, the Advisory Committee notes that the Federal Rules should be “read expansively to include all current and future electronic storage mediums.” Notes of the Advisory Committee to the 2006 Amendments to Fed. R.Civ. P. 34. Thus, once the duty to preserve has attached, counsel should advise of the necessity of preserving relevant information on social media networks and smartphones.

In Kentucky, the potential significance of social media content was recently underscored when the Court of Appeals found that the trial court in a child custody dispute did not abuse its discretion in admitting Facebook pictures of a mother consuming alcohol. Lalonde v. Lalonde, 2011 WL 832465 (Ky. Ct. App. Feb. 25, 2011). For purposes of the preservation obligation, Lalonde illustrates that evidence located on social media can play a critical role and, accordingly, courts will likely take spoliation of such information very seriously.

F. What Potential Consequences Await Those Who Fail to Properly Preserve?

As previously mentioned, if discoverable information is lost or destroyed after the duty to preserve has attached, Kentucky courts may levy civil penalties against that party. See Monsanto Co. v. Reed, 950 S.W.2d 811, 815 (Ky. 1997). Recently, the Kentucky Supreme Court approved the issuance of an adverse-inference jury instruction as a remedy for spoliation. See University Medical Center, Inc. v. Beglin, 2011 WL 5248303 (Ky. Oct. 27, 2011). Even more, one article cites a study finding that – of 401 cases prior to 2010 in which sanctions were sought for failure to comply with electronic discovery obligations – courts awarded

III. PRIVILEGE ISSUES

A. What Privilege Issues Typically Arise in Connection with the Production of Electronically-Stored Information?

Because electronically-stored information is so voluminous, privileged documents may well be inadvertently or mistakenly produced in connection with litigation.

B. What Steps Should Counsel Take to Address or Avoid Those Issues?

In order to avoid the inadvertent production of privileged materials contained in electronically-stored information, counsel must make diligent effort to review the data for privileged documents. This can be particularly challenging given the volume of electronic data that may be necessary for review, including the expense associated with loading and searching electronic records, as well as the attorney time associated with such a review. In addition, preparation of a privilege log is typically required in order for a party to withhold specific documents from its production, including electronic documents, under a claim of privilege. Failure to provide a privilege log may be deemed to constitute a waiver of the privilege, and sufficient information is required to be given to allow the opposing party to test each claim of privilege.

C. What Default Rules Exist Related to the Inadvertent Production of Privileged Information?

Federal Rule of Evidence 502(b) and Federal Rule of Civil Procedure 26(b)(5). Under FRE 502, disclosures do not operate as a privilege waiver if the disclosure is inadvertent, and the holder of the privilege took reasonable steps to prevent the disclosure and to promptly rectify the error. Under Fed. R. Civ. P. 26(b)(5), a party making a privilege claim must notify any party that received the inadvertent disclosure of the privilege claim and the basis for it. A notified party must then promptly return, sequester, or destroy the disclosure and copies of it. The disclosure must not be used until the claim is resolved. If the notified party has already disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the privilege claim has been resolved.
D. What Qualifies as an “Inadvertent” Production?

Inadvertent production is the unintentional disclosure of documents that a party claims are privileged, work product, or trade secret. Courts have found that the burden for proving that disclosure is truly inadvertent lies with the producing party. See Board of Trustees, Sheet Metal Workers’ Nat. Pension Fund v. Palladium Equity Partners, LLC, 722 F.Supp.2d 845, 850 (E.D. Mich. 2010). To avoid privilege being deemed waived on an inadvertent disclosure, the producing party must have taken reasonable steps to prevent the disclosure.

E. Why Is It Important to Consider Entering into a Clawback Agreement on the Front End?

A clawback agreement allows the parties to agree in advance as to the terms of the return of privileged documents that are inadvertently, mistakenly or otherwise produced in the litigation. The terms of a clawback agreement can alter the default rules making it less burdensome to clawback documents. Federal courts may also include a clawback provision in orders. Such an order prevents the disclosure from being a waiver between the parties to the agreement and “in any other Federal or State proceeding.” See FRE 502(d). Accordingly, it is a good practice to request any clawback provision also be included in a protective order, in addition to making the agreement among counsel.

F. What Are the Possible Consequences of an Inadvertent or Mistaken Production of Privileged Information?

The greatest possible consequence related to the inadvertent or mistaken production of privileged information is waiver of the privilege. Of course, the waiver can be specific to the document itself or can be construed as a subject matter waiver of the privilege.

IV. COST SHIFTING

A. What Is Cost Shifting?

A method used by courts and parties for sharing costs among the parties related to the production of documents, including electronically-stored information, in order to protect against undue burden and expense, and to limit overly aggressive and intrusive discovery requests.

B. How Do Parties – with or without Court Approval – Seek to Shift the Cost of Electronic Discovery?

The Federal Rules of Civil Procedure set forth a standard for court-mandated cost shifting. The responding party must show that the information requested is “not reasonably accessible because of undue burden or cost.” Fed. R. Civ. P. 26(b)(2)(B). The burden then shifts to the requesting party, requiring a showing of good cause. The factors for a
showing of good cause are not yet clearly set out by courts, but the Advisory Committee suggests the following:

1. Specificity of the request;
2. Quantity of information available from other and more easily accessed sources;
3. The failure to produce relevant information that seems likely to have existed, but is no longer available on more easily accessed sources;
4. The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
5. Predictions as to the usefulness and importance of the further information;
6. The importance of the issues at stake in the litigation; and
7. The parties’ resources.

See Moore's Federal Practice §37A.36. These factors are similar to the factors in the pre-amendment standard as set out in Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y.2003).

Parties can also seek to shift costs under 28 U.S.C. §1920. 28 U.S.C. §1920 lists categories of costs a court can award under Fed. R. Civ. P. 54(d)(1). Rule 54(d)(1) presumptively entitles a prevailing party to an award of costs. One of the types of costs that can be awarded is for the cost of “making copies of any materials where the copies are necessarily obtained for use in the case.” 28 U.S.C. §1920(4).

Third parties may seek cost shifting under Fed. R. Civ. P. 54. Parties also may shift costs by agreement. And it is not unheard of for parties to unilaterally seek to shift costs (i.e. document dumps), although such maneuvers can result in problems with the opposing party and/or the court.

C. What Have the Courts Had to Say about Cost Shifting in Connection with Electronic Discovery?

Courts have occasionally allowed for cost shifting as an incentive for parties to be more reasonable with their discovery requests. Courts also have allowed for cost shifting when a party asks for a reproduction of documents in a different format after not specifying a format at the outset. Non-parties are typically more likely to obtain cost shifting because courts reason that they have limited control of the scope of litigation and discovery.
V. TRENDS

A. Technology Assisted Review (TAR)

1. What is TAR (or predictive coding), and how does it work?

TAR is computer software that is designed to cut the time, energy and costs involved with electronic discovery. TAR also reportedly improves the accuracy of identifying relevant, useful documents.

When using TAR, the lawyer reviews a “seed set” of documents and determines which documents would qualify as responsive documents. The computer then identifies properties of the documents that the reviewer chose. The computer then uses algorithms and codes to find other documents based on those identified properties. As the reviewer continues to code more sample documents, the computer predicts the reviewer’s coding. The computer “learns” from the reviewer’s decisions and becomes more accurate. When the system’s predictions and the reviewer’s decisions sufficiently coincide, the system has learned enough to make confident predictions for the remaining documents such that no further lawyer review is necessary.

2. When should you consider using predictive coding?

Predictive coding is designed to be used when there is a large volume of electronic data for review. One court, issuing a ruling on TAR, stated that it should be used “where it will help secure just, speedy, and inexpensive determination of cases in our discovery world.” Da Silva Moore v. Publicis Groupe, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012).

3. What types of concerns and issues typically surface when predictive coding is proposed?

a. Is it accurate?

b. Does it result in incomplete discovery?

c. Will opposing counsel agree to TAR? And under what terms?

d. Will the Court authorize its use?
B. The Explosion of the Types of Data, including Social Media

1. What are the most-common types of social media?
   a. Facebook – approximately 900,000,000 users.
   b. Twitter – approximately 140,000,000 users.
   c. LinkedIn – approximately 135,000,000 users.
   d. YouTube – approximately 500,000,000 users.
   e. Pinterest – approximately 104,000,000 users.
   f. MySpace – approximately 70,500,000 users.
   g. Google+ – approximately 65,000,000 users.

2. How is social media being utilized in cases?
   a. Fact evidence.
   b. Communications.
   c. Photographs.
   d. Character (not permitted).
      • Montgomery v. Commonwealth, 320 S.W. 3d 28, 40 (Ky. 2010).
   e. Other Uses.
C. The Benefits of Cooperation among Counsel

1. Early meet and confer.

_Federal Rule of Civil Procedure 26(f)_ requires parties to meet and confer about a discovery plan. The parties must discuss:

a. The subjects on which discovery may be needed;

b. When discovery should be conducted (e.g., the need for phases) and completed;

c. Electronic discovery, including form of production;

d. The process for claiming privilege or work-product protection;

e. Whether the court should alter any set limits on discovery; and

f. Whether the court should enter any case-specific discovery orders.

The parties must attempt in good faith to agree on these proposals, but if they cannot agree then the discovery plan must set forth their respective views.

For the ‘meet and confer’ process to be effective related to electronic discovery, attorneys must be familiar with their clients’ computer systems and use. Attorneys should identify those persons who are most knowledgeable about the client’s computer system and meet with them in advance of the _Fed. R. Civ. P. 26_ conference related to electronic discovery issues.

2. Agreement on key issues.

3. Cost savings.

Cooperation helps by helping both parties save money by identifying:

a. The topics or time periods pertinent for discovery;

b. The sources of electronic data available to search (including sources that are not reasonably accessible);

c. The form of production (including whether to produce metadata);

d. Preservation issues; and
e. The possibility of agreeing to special protocols for privilege review.

VI. CONCLUSION
I. BASIC PRE-TRIAL CONSIDERATIONS

A. Ensure Strict Compliance with All Pre-Trial Scheduling Orders, Including:

1. **CR 8** damages disclosure, to avoid *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999) motion.

2. Expert and medical witness disclosure, complying fully with **CR 26**.

3. Witness list.

4. Exhibit list.

5. Dispositive motions.

6. Motions *in limine*.

7. Objections to depositions or portions thereof.


B. Basic Preparation

1. Voir dire/jury selection.
   a. Obtain juror information sheets from clerk.
   b. Determine Court’s exact voir dire practices and procedures.

2. Visit courtroom in advance to determine:
   a. Physical layout.
   b. Electronic and video capabilities.
   c. Visibility of witnesses, attorneys, exhibits and videos from jury box.

3. Abstract and page index depositions of all witnesses to be called.

4. Subpoena, as necessary, witnesses well in advance.
5. Organize and have sufficient clean copies of all exhibits (be sure to bring exhibit labels).

6. Bring sufficient authorities for any legal issues likely to arise at trial.

7. Review and cue properly any video proof and practice your method for playing at trial.

8. Itemize and redact insurance/collateral source information from all medical expenses (provide to opposing counsel well in advance).

9. Prepare to have witnesses available if schedule moves faster than planned.

10. Organize and practice using all demonstrative evidence.

11. Itemize all tax/wage loss documentation.

II. OPENING STATEMENT

A. Role

1. “The first impression” – this is your first chance to speak to jury directly. Make it count.

2. Two primary functions.
   a. Legal function – assist the jury to understand the evidence to be presented at trial.
   b. Advocacy function – first opportunity to advance your theory of the case.

B. Rules/Considerations

1. No argument – broadly, argument occurs when counsel tells the jury how to reach a decision.

2. Avoid discussing the law – focus on organizing/previewing evidence.


C. Structure/Elements


2. Coherent theme of the case.

3. Focus on primacy – best facts first.

5. Use evidence and details persuasively.

D. Content

1. All facts must be true and provable.
   a. Focus on strongest, central, non-disputed facts.
   b. Consider necessity and provability of questionable evidence.

   a. Key events/actions.
   b. Scene.
   c. Parties.
   d. Motivations.
   e. Damages.

3. Defense case – how will it be addressed?

4. Bad facts – how will they be handled?

5. Introductions of parties and counsel.

E. Delivery

1. Read as little as possible – especially beginning.

2. Simple and straightforward.

3. Move for transition/emphasis.

4. Use visual aids and exhibits.

III. DIRECT EXAMINATION

A. The Role of Direct Examination

1. Introduce undisputed facts.

2. Enhance the likelihood of disputed facts.

3. Lay foundations for the introduction of exhibits.
5. Hold the trier of fact’s attention.

B. The Law of Direct Examination – Considerations
1. Competence of witnesses.
2. Non-leading questions.
4. The non-opinion rule.
5. Refreshing recollection.

C. Planning Direct Examinations
1. Content.
   a. What to include.
   b. What to exclude.
2. Organization and structure.
   a. Start strong and end strong: primacy and recency.
   b. Use topical organization.
   c. Do not interrupt the action.
   d. Give separate attention to the details.
   e. Try not to scatter circumstantial evidence.
   f. Consider defensive direct examination.
   g. Get to the point.
   h. End with a clincher.
   i. Ignore any rule when necessary.

D. Questioning Technique
1. Use short, open questions.
2. Use directive and transitional questions.
3. Reinitiate primacy.
   a. Use general headline questions.
   b. Explain where you are going.
   c. Use body movement.
4. Use incremental questions.
5. Reflect time, distance, intensity.
6. Repeat important points.
7. Use visual aids.
8. Avoid negative, lawyerly, and complex questions.

IV. CROSS EXAMINATION
A. The Role of Cross Examination
B. The Law of Cross Examination
   1. Leading questions permitted.
   2. Limitations on scope.
C. The Content of Cross Examination
   1. Consider the purposes of cross examination.
   2. Arrive at the “usable universe” of cross examination.
      a. The entire universe.
      b. The usable universe.
D. The Organization of Cross Examination
   1. Guidelines for organization.
      a. Do not worry about starting strong.
      b. Use topical organization.
      c. Give the details first.
      d. Scatter the circumstantial evidence.
e. Save a zinger for the end.
   i. It must be absolutely admissible.
   ii. It should be central to your theory.
   iii. It should evoke your theme.
   iv. It must be undeniable.
   v. It must be stated with conviction.

2. A classic format for cross examination.
   a. Friendly information.
   b. Affirmative information.
   c. Uncontrovertible information.
   d. Challenging information.
   e. Hostile information.
   f. Zinger.

E. Questioning Technique

1. Planning for control.
   a. Avoid written questions.
   b. Using an outline.
   c. "Referencing" your outline.

2. Questions that achieve control.
   a. Use incremental questions.
   b. Use sequenced questions for impact.
   c. Use sequenced questions for indirection.
   d. Use sequenced questions for commitment.
   e. Avoid ultimate questions.
   f. Listen to the witness and insist on an answer.
3. Questions that lose control.
   a. Non-leading questions.
   b. “Why” or explanation questions.
   c. “Fishing” questions.
   d. Long questions.
   e. “Gap” questions.
   f. “You testified” questions.
   g. Characterization and conclusions.

4. Reasserting control.
   a. Refusal to agree.
      i. Determine why the witness has refused to agree.
      ii. Retreat to constituent facts.
          a) Mistaken facts.
          b) Compound details.
          c) Imbedded characterizations.
   b. Invited explanation.
      i. Determine why the witness has explained.
      ii. Reasserting control, part one.
      iii. Reasserting control, part two.
   c. Impermissible lack of cooperation.
      i. Obtaining help from the judge.
      ii. Reasserting control by yourself.
          a) Pointed repetition.
          b) Discipline.

F. Ethics of Cross Examination

1. Basis for questioning.
a. Factual basis.

b. Legal basis.

2. Assertions of personal knowledge.

3. Derogatory questions.

4. Discrediting a truthful witness.

5. Misusing evidence.

V. CLOSING ARGUMENT

A. The Role and Function of the Closing Argument

1. The whole story.

2. Use of theory and theme.
   a. Theory.
      i. Logical.
      ii. Believable.
         a) Admissions.
         b) Undisputed facts.
         c) Common sense and experience.
         d) Credibility.
      iii. Legally sufficient.
   b. Theme.

3. What makes it argument.
   a. Conclusions.
   b. Inferences.
   c. Details and circumstantial evidence.
   d. Analogies, allusions, and stories.
   e. Credibility and motive.
   f. Weight of the evidence.
g. Demeanor.

h. Refutation.

i. Application of law.

j. Moral appeal.

B. Format

1. Plaintiff’s argument in chief.

2. Defendant's argument in chief.
   a. Responding to the plaintiff’s argument in chief.
   b. Anticipating rebuttal.

3. Plaintiff’s rebuttal.


C. Structure

1. Topical organization.
   a. Issues.
   b. Elements.
   c. Jury instructions.
   d. Turning points.
   e. Alternative structures.
      i. Chronological organization.
      ii. Witness listing.

2. Other organizing tools.
   a. Start strong and end strong.
   b. Affirmative case first.
   c. Cluster circumstantial evidence and accumulate details.
   d. Bury your concessions.
   e. Weave in witness credibility.
   f. Damages.
D. Content

1. Tell a persuasive story.
   a. Known facts – what happened?
   b. Reasons – why did it happen?
   c. Credible witnesses – who should be believed?
   d. Supportive details – how can we be sure?
   e. Common sense – is it plausible?

2. Tie up cross examination.

3. Comment on promises.

4. Resolve problems and weaknesses.

5. Discuss damages.

6. Use jury instructions.

7. Use verdict forms.

8. Introductions and thanks.

E. Delivery and Technique

1. Do not read or memorize.

2. Movement for effect.

3. Emotion.

4. Visuals.

5. Headlines.

6. Simple, active language.

F. Ethics and Objections

Impermissible argument:

- Statements of personal belief

I. EXPANSION OF TITLE VII RETALIATION CLAIMS

Last January, the United States Supreme Court expanded the right to file Title VII retaliation claims to employees, based on their relationship to other employees who directly engaged in protective activity.


A. Facts: Both Eric Thompson and his fiancé, Miriam Regalado, worked for North American Stainless (NAS). Regalado filed a sex discrimination charge with the EEOC against NAS. Three weeks after receiving notification of Regalado’s charge, NAS terminated Thompson. Thompson filed a charge with the EEOC and subsequently sued NAS in the United Stated District Court for the Eastern District of Kentucky under Title VII claiming that NAS had fired him in order to retaliate against Regalado for filing her charge with the EEOC.

B. District Court: Granted summary judgment to NAS, holding that Title VII “does not permit third party retaliation claims.”

C. Sixth Circuit: Panel reversed and the Sixth Circuit granted rehearing en banc and affirmed by a ten to six vote. The Sixth Circuit reasoned that since Thompson had not “engaged in any statutorily protected activity, either on his own behalf or on behalf of Miriam Regalado,” he “is not included in the class of persons for whom Congress created a retaliation cause of action.”

D. Supreme Court: Reversed. This case presents two questions:

1. Did NAS’ firing of Thompson constitute unlawful retaliation?
2. If it did, does Title VII grant Thompson a cause of action?

E. Did NAS’ Firing of Thompson Constitute Unlawful Retaliation?

1. YES.

2. Court looked to their holding in Burlington N. & S.F.R. Co. v. White, 548 U.S. 53 (2006), where they held that Title VII’s anti-retaliation provision must be construed to cover a broad range of employer conduct.

   a. The anti-retaliation provision of Title VII, unlike the antidiscrimination provision, is not limited to discriminatory actions that affect the terms and conditions of employment.
b. The anti-retaliation provision prohibits any employer action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

3. Applying Burlington, the court believed that a reasonable worker would be dissuaded from engaging in protected activity if she knew her fiancé would be fired.

4. The court declined to identify a fixed class of relationships for which third party reprisals are unlawful; however, it stated that a close family member will almost always meet the Burlington standard and “inflicting a milder reprisal on a mere acquaintance will almost never do so.”

5. The Court held that the test must be applied in an objective fashion.

F. Does Title VII Grant Thompson a Cause of Action?

1. YES.

2. For Title VII standing purposes, the term “person aggrieved” must be construed more narrowly than the outer bounds of Article III.

3. Court looked to the Administrative Procedure Act for the common usage of the term “person aggrieved.” The Act authorizes a suit to challenge a federal agency by any person adversely affected or aggrieved within the meaning of a relevant statute. The Act establishes a regime under which a plaintiff may not sue unless he or she falls within the “zone of interests” sought to be protected by the statutory provision whose violation forms the legal basis for his or her complaint.

4. Title VII’s term “person aggrieved” incorporates the “zone of interests” test, enabling suit by any plaintiff with an interest arguably sought to be protected by the statute, while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to Title VII’s statutory prohibitions.

5. Thompson fell within the zone of interest. He was an employee of NAS and Title VII is meant to protect employees from their employer’s unlawful actions. Additionally, assuming the facts are true, by injuring Thompson, NAS was intending to cause injury to Regalado.

G. So Who Is Protected by Title VII’s Anti-Retaliation Provision?

1. The Supreme Court did not provide a bright line test for who can and who cannot bring a third party retaliation claim. What we do
know is that close or intimate family members of employees who are also employees are protected by the anti-retaliation provision.

2. Lower courts have found that a parent and child, a husband and wife, engaged fiancés, and two people dating are considered close enough to bring a third party retaliation claim under Title VII.

H. What Should Employers Do?

1. Employers with actual knowledge of an employee’s close family and friends should treat these people as if they too are a charging party.

2. Employers should update their employment policies to include explicit language prohibiting discrimination, harassment, and retaliation against an employee who associates with another employee in a protective class.

3. Employers may want to institute a policy requiring employees to disclose to HR any familial or marital relationships with fellow employees.

4. Employers should train managers, supervisors, and human resources staff to understand how to avoid associational discrimination or retaliation.

5. Continue to maintain complete records of all employees’ performance issues.

II. CAT’S PAW THEORY UPHELD

Last March, the United States Supreme Court, in a split decision, held that the “cat’s paw” theory is a valid one. Under the “cat’s paw” theory, an employee can prove discrimination if he/she can demonstrate that the unbiased decision-maker relied on information from the biased supervisor, making it easier for employees to bring discrimination claims against employers. Prior to this decision, employers could assert the defense that the ultimate decision-maker was different from the supervisor who made the discriminatory statement or acted with discriminatory intent.

“Cat’s paw” theory gets its name from Aesop’s Fables about a monkey who persuaded a cat to pull chestnuts out of the fire, so the cat gets burned and the monkey makes off with the chestnuts. In the employment context, the employer gets the legal blame even if the actual decision-maker did not act out of biased intent, but the bias of another employee along the way worked its way into the final decision.

A. Staub v. Proctor Hospital, 131 S.Ct. 1186 (2011).

1. Facts: Staub was employed as an angiography technician by Proctor Hospital and was also a member of the United States
Army Reserve. Staub’s immediate supervisor, Mulally, and Mulally’s supervisor, Korenchuk, were hostile to Staub’s military obligations. Mulally issued Staub a “Corrective Action” disciplinary warning for allegedly violating a company rule that required him to stay in his work area whenever he was not working with a patient. The Corrective Action required Staub to report to Mulally or Korenchuk when he had no patients and his angio cases were completed. Subsequently, Korenchuk told Proctor’s vice president of human resources, Buck, that Staub had violated the Corrective Action. Buck reviewed Staub’s personnel file and decided to fire him. Buck filed a grievance and alleged that Mulally had fabricated the allegation underlying the Corrective Action, but Buck did not follow-up with Mulally regarding this allegation and stuck with her decision.

Staub sued Proctor under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Staub’s claim was not that Buck was motivated by hostility to his military obligations, but that Mulally and Korenchuk were, and their actions influenced Buck’s decision.

USERRA forbids discrimination against an employee because of that worker’s performance of military duties if the military service is a motivating factor in the firing or other adverse action taken. The Court noted that this language is similar to that found under Title VII.

2. District Court: Jury found Proctor liable.

3. Seventh Circuit: Reversed and granted Proctor judgment as a matter of law holding that the decision-maker had relied on more than Mulally’s and Korenchuk’s advice in her decision.

4. Supreme Court: Reversed.

a. Issue: Whether an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision.

b. Holding: If a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.

c. In construing the phrase “motivating factor in employer’s action” under USERRA, the Court started with the premise that when Congress creates a federal tort it adopts the background of general tort law. Intentional torts generally require that the actor intends the consequences of an act,
not simply the act itself. So long as the earlier agent intended, for discriminatory reasons, that the adverse action occur, he or she has the scienter required for USERRA liability. Further, under tort law the decision-maker’s exercise of judgment does not prevent the earlier agent’s action from being the proximate cause of the harm. Nor can the ultimate decision-maker’s judgment be deemed a superseding cause of the harm.

d. A decision-maker’s independent investigation does not negate the effect of the prior discrimination.

e. Both supervisors had acted within the scope of their employment when they took the actions that caused Buck to fire Staub. There was evidence that their actions were motivated by hostility towards Staub’s military obligations, and those actions were causal factors underlying Buck’s decision. Finally, there was evidence that both supervisors had the specific intent to cause Staub’s termination.

f. This opinion only applies to biased intent harbored by a supervisor. The Court noted in a footnote that they expressed no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision.

g. The case was reversed and remanded to the Court of Appeals to determine whether the jury verdict should be reinstated or Staub was entitled to a new trial.

5. Wide reaching effect of decision.

The “cat’s paw” theory will likely be applied to cases outside of USERRA since the court noted the similarities between the anti-discrimination provisions of USERRA and Title VII. In both statutes, in order to prove discrimination, the employee must demonstrate that a discriminating factor was a “motivating factor” in the adverse employment action. So the theory may extend to retaliation and discrimination claims under other anti-discrimination statutes.

6. When do the discriminatory actions of a non-decision maker actually become a motivating factor?

When the discriminatory report of the non-decision maker is simply accepted at face value and is the reason for the adverse employment action.
7. How to avoid “cat's paw” liability?

a. Conduct an independent investigation into the reasons for the employee’s termination – do not rely on the supervisor’s report alone. While the Court stated that an independent investigation would not be a defense, they did indicate that an aggressive investigation would help the employer avoid liability.

b. Questions for employers to consider when conducting an investigation:

i. How have other employees who committed the same infractions been treated?

ii. Has the employee recently engaged in protected activity?

iii. Is there documentation to back up the supervisor’s criticisms?

iv. Did the offense actually occur and was it against the company’s written policy or established practice?

v. Are there extenuating circumstances that should be taken into consideration?

vi. Is there some alternative to firing such as a written warning and performance plans that should be considered first?

B. Romans v. Michigan Department of Human Services, 668 F.3d 826 (6th Cir. 2012).

In a recent Sixth Circuit case, the plaintiff attempted to apply the “cat’s paw” theory in alleging that the investigator’s alleged racial animus was imputed on the ultimate decisionmaker who terminated him.

The court held that the investigator’s racial animus could not be imputed to the ultimate decisionmaker. The court found that the defendant had conducted an independent investigation, which broke the causal chain between the party with the alleged animus and the decisionmaker’s action. The Sixth Circuit stated that while the “Supreme Court had declined to adopt a hard-and-fast rule that a decisionmaker’s independent investigation negates prior discriminatory intent, it has concluded that ‘if the employer’s investigation results in an adverse action for reasons unrelated to the supervisor’s original biased action ... then the employer will not be liable. But the supervisor’s biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor’s
recommendation, entirely justified.” The investigation concluded that plaintiff had violated four work rules, only one of which was related to the party with the alleged animus, and each of which would have independently supported a termination.

Romans demonstrates that an independent investigation can be a mechanism to avoid liability based on the “cat’s paw” theory.

III. EMPLOYEE STATUS CAN INCLUDE VOLUNTEERS

The Sixth Circuit ruled that it will not follow the two-step analysis set forth by the Second Circuit in determining employee status.

Bryson v. Middlefield Volunteer Fire Department, Inc., 656 F.3d 348 (6th Cir. 2011).

A. Facts: Bryson worked as a volunteer firefighter and administrative assistant for the Middlefield Fire Department. Bryson filed charges of sex discrimination and retaliation against Middlefield. Middlefield sent the EEOC an inquiry regarding their status as an “employer” under Title VII. The EEOC concluded that Middlefield was an employer under Title VII because its volunteer firefighters were employees, Middlefield exercised sufficient control over their actions, and they are compensated for their services even if they are not on the payroll. The EEOC concluded that Bryson had been sexually harassed but there was insufficient evidence to support a finding of retaliation.

Bryson filed suit in District Court, alleging, among other things, violations under Title VII. Middlefield moved for partial summary judgment and for dismissal for lack of subject matter jurisdiction on Bryson’s Title VII claims on the basis that it was not an “employer” under the statute because it did not have fifteen employees during the relevant time period. Further, Middlefield argued that the volunteer firefighters were not employees because they received only de minimus benefits for their services.

B. District Court: Granted Middlefield’s partial motion for summary judgment on Bryson’s Title VII claims because the benefits provided to the volunteer firefighters do not constitute significant benefits that would raise a factual issue for the jury.

In arriving at its decision, the District Court relied on the Second Circuit’s two-step test for determining whether an individual is an employee under Title VII. Under the Second Circuit’s test, the plaintiff must establish that she is a “hired party” by showing that she received substantial benefits not merely incidental to the activity performed before the district court may consider the common-law agency test.

C. Sixth Circuit: Reversed and Remanded

1. The Sixth Circuit held that the District Court erred in adding a significant-remuneration requirement as an independent ante-
cedent to the common-law agency test. The Court declined to adopt the Second Circuit’s view that to be a “hired party,” a plaintiff must demonstrate that she received significant remuneration.

2. Remuneration is just one factor to be considered when determining whether an employment relationship exists. This is in line with the Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992), instruction that, when evaluating a particular relationship, all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. Therefore, no one factor is an independent antecedent requirement.

3. The Court relied on the factors stated in Darden in determining whether a person is an employee under the general common law of agency:

   “In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”

4. The Court found that Bryson had set forth evidence showing that the volunteer firefighters received workers’ compensation coverage, insurance coverage, gift cards, personal use of the fire department’s facilities and assets, training, and access to an emergency fund. And, certain volunteer firefighters had received lump sum retirement payments and others an hourly wage.

D. Take Away

1. This decision creates a split with the Second Circuit; therefore, employers must be mindful that their volunteers and interns may be considered employees under Title VII. This decision is particularly problematic in today’s economy when many people are willing to take unpaid positions while they seek out paying ones.
2. What should employers do?
   a. Clarify early the individual’s status.
   b. HR must keep tabs on all forms of compensation; this includes gift cards, which were at issue in the case.
   c. Train your employees that the sexual harassment and antidiscrimination policies apply to both employees and nonemployees.

IV. ADAAA REGULATIONS


The Amendments Act and regulations retain the basic definition of “disability,” but make clear that the interpretation of the term has changed. Disability is still defined in a three-pronged manner. Disability means:

(1) a physical or mental impairment that substantially limits one or more major life activities of the individual (“actual disability”);

(2) a record of a physical or mental impairment that substantially limited a major life activity (“record of”); or

(3) when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not transitory and minor (“regarded as”).

Among other things, the final rule emphasizes that the threshold for establishing a “disability” was lowered by the ADAAA. Congress overturned several Supreme Court decisions that Congress believed had interpreted the definition of “disability” too narrowly, resulting in a denial of protection for many individuals with impairments such as cancer, diabetes, and epilepsy. The ADAAA states that the definition of disability should be interpreted in favor of broad coverage of individuals. EEOC Fact Sheet on Final Regulations Implementing the ADAAA; 76 FR 16978.

A. Substantially Limits

The term “substantially limits” now requires a lower degree of functional limitation than the standard previously applied by the courts. An impairment does not need to prevent, or severely or significantly restrict, a major life activity to be considered “substantially limiting.”

1. The term “substantially limits” is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 29 C.F.R §1630.1
2. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment, as was true prior to the ADAAA. 29 C.F.R. §1630.2

3. With one exception (“ordinary eyeglasses or contact lenses”), the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, such as medication or hearing aids. 29 C.F.R. §1630.2

4. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. 29 C.F.R. §1630.2

B. Major Life Activity

The new regulations provide an expanded and non-exhaustive list of what constitutes a “major life activity” under the ADA. It also specifically rejects the holding of Toyota Motor Mtg., Ky., Inc., v. Williams, 534 U.S. 184 (2002), that a major life activity is determined by reference to its “central importance to most people’s daily lives.”

Accordingly, the term “major” is not to be interpreted strictly, such that it unintentionally creates a demanding standard for finding a disability to exist. To illustrate, lifting is considered a major life activity by the new regulations, regardless of whether lifting is a central part of daily life to the individual claiming to be limited in lifting, or, indeed, to most people’s daily lives. If an employee cannot lift fifteen pounds, but an ordinary person can, that employee may be substantially limited in the major life activity of lifting. However, if heavy lifting is an essential component of the job, and the employee cannot lift fifty pounds, that employee is substantially limited in working because he or she is limited in a class of jobs that requires heavy lifting and is, therefore, eligible for a reasonable accommodation. What this means is that the employee can ask for a reasonable accommodation if he or she cannot lift the fifty pounds, but it does not necessarily mean the employee is a “qualified” individual with a disability under the ADA, which brings a welcome sigh of relief from employers. 29 C.F.R. §1630.2(i); 29 C.F.R. §1630 Appendix (76 FR 17014)

C. The New Regulations Provide an Expanded and Non-exhaustive List of “Major Life Activities” under the ADA, 29 C.F.R. §1630.1(i)

1. The activities include items such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working, major bodily functions, such as functions of the immune system, special sense organs, and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardio-
vascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. 29 C.F.R. §1630.2(i)(i), (ii)

2. To prevail under the Americans with Disabilities Act Amendments Act ("ADAAA"), an employee need only show the existence of an impairment, not that the impairment substantially limits a major life activity. In a recent case in Cincinnati, this distinction took on critical importance. Elizabeth Wells, a nurse at Cincinnati Children’s Hospital (the “Hospital”), sued after she was reassigned to a different department, alleging violations of a myriad of statutes, including the ADAAA. Wells suffered from a gastrointestinal disorder that required her to take several prescription medications. While taking these drugs, Wells exhibited unusual and erratic behavior at work, including a blackout. The Hospital required Wells to undergo a fitness-for-duty exam and random drug screenings. Then, due to concerns about the impact of Wells’ condition on patient safety, the Hospital moved her into a position with lower pay and less prestige. Wells sued. The Court denied the Hospital’s motion for summary judgment on Wells’ disability discrimination claim as it related to the Hospital’s failure to reinstate Wells. Specifically, the Court ruled that a jury could reasonably conclude that the Hospital impermissibly regarded Wells as disabled under the new, less-stringent ADAAA standard. One of the first cases to analyze the ADAAA, this decision exemplifies how the expanded law makes it more difficult for employers to defend disability discrimination claims. Wells v. Cincinnati Children’s Hospital Medical Center, 2012 WL 510913 (S.D. Ohio, February 15, 2012).

D. “Regarded As” Having a Disability Prong Easier to Prove

One of the major changes to the regulations affects those covered under the “regarded as” prong of the definition of disability. Specifically, the regulations make clear that the concepts of “major life activities” and “substantially limits” are not relevant in evaluating a claim under the “regarded as” prong. 29 C.F.R. §1630.2(j)(ii). Practically speaking, an employee suing under this prong need only show that that his/her employer regarded him/her as having a disability, and that the employer discriminated against the employee because of that perception. The employer need not have considered whether a major life activity was substantially limited based on that perception.

E. Nonetheless, not every impairment will constitute a disability. To that end, the regulations clarify that an individual assessment is still necessary prior to making a determination that an individual has a disability. 29 C.F.R. §1630.2(j); Appendix

F. In keeping with Congress’s direction that the primary focus of the ADA is on whether discrimination occurred (29 C.F.R §1630.1), the determination of disability should not require extensive analysis.
G. According to the EEOC, most of the people who will benefit from the amended law and regulations are people with conditions like epilepsy, diabetes, cancer, HIV infection, and a range of mental disabilities. The types of accommodation these individuals will most commonly need are changes in schedule (arrival/departure times or break times), swapping of marginal functions, the ability to telework, policy modifications (e.g., altering for an individual with a disability when or how a task is performed, or making other types of exceptions to generally-applicable workplace procedures), reassignment to a vacant position for which the individual is qualified, time off for treatment or recuperation, or other similar accommodations. 76 FR 16993

V. SOCIAL MEDIA EMPLOYMENT ISSUES

A. Facebook Has over 300 Million Users

Fifty percent of the users log on every day. Seventy-five million registered Twitter users. Easy to hypothesize how many hours are spent social networking while at work.

B. Many Issues Can Arise from Facebook Use

1. Negligent hiring/supervision.
   a. Information may be online which would preclude hiring/retaining an employee. Potential liability for employer.
   b. New trend is to ask for employee/applicant social media password.

2. Discrimination/harassment.
   a. Discrimination.
      i. What you view of an applicant/employee posted on social media sites may contain information regarding age, race, national origin, disabilities, sexual orientation, religion or any other protected classifications.
      ii. How you view/what you view may bring discrimination claims in itself (did not research all applicants/employees – treated differently).
      iii. Difficult to prove employer did not rely on this information, once viewed, when faced with a complaint from an applicant/employee.
b. Harassment.

Employees can harass other coworkers online. Be careful the complaints/comments are not protected activity under the NLRA.

3. Divulgence of trade secrets or proprietary information.

4. Reputational harm to employees and employers.

Applicants/employees may “vent” about an employer online. Can send the wrong message.

5. Privacy pitfalls.

Employees have a privacy interest in the content of information if they have taken reasonable efforts to keep the information private and they derive economic, personal, emotional or other value in keeping the information private. An employer infringes upon this privacy if the employee's interest in keeping the information private from the employer outweighs the employer's interest in obtaining the information. To have a privacy interest in the information, an employee must make reasonable efforts to keep the information private by restricting access.


a. Complaints through social media can be seen as protected activity under the NLRA. Very new area/sensitive issue. See NLRB Report at http://mynlrb.nlrb.gov/link/document.aspx/09031d45807d6567.

An employee can engage in “concerted activities” when he or she acts on behalf and with the authority of other employees. So when an employee posts on his or her Facebook page about poor working conditions or tweets about being poorly compensated, he or she is probably engaged in protected “concerted activities” – so long as the posts are made with the consent and for the benefit of other employees.

b. NLRB looks closely at these issues and the policies implemented to prohibit social media conduct.
C. Have a Social Media Policy to Protect Employer and Employee/Applicant

1. Be reasonable.
2. Be consistent in application.
3. Don't "friend" your employees.
4. Keep a clear line between work and social lives.
5. Beware and be aware of what you might find.
6. Could reveal protected information that could haunt you when/if you need to terminate someone's employment.
7. Never “hack” into someone’s personal blog/facebook page (this includes fake-friending them).¹

VI. NEW GUIDANCE ON EMPLOYERS’ USE OF CRIMINAL RECORDS

This April, the EEOC issued guidance on employers’ use of arrest and conviction records in employment decisions. The guidance is not legally binding, but it incorporates existing court precedent, and proposes best practices. The focus of the EEOC’s guidance is Title VII’s prohibition on race and national origin discrimination. Having an arrest or conviction record is not in itself a protected basis under Title VII. Rather, as the EEOC guidance points out, race or national origin discrimination based on a criminal record can occur under one of two theories:

A. Disparate Treatment Discrimination and Criminal Records

May result if an employer treats individuals of different races or national origins, but with the same or similar criminal histories, differently.

B. Disparate Impact Discrimination and Criminal Records

1. With respect to criminal records, there is Title VII disparate impact liability where the evidence shows that a covered employer’s criminal record screening policy or practice disproportionately screens out a Title VII protected group and the employer does not demonstrate that the policy or practice is job related for the positions in question and consistent with business.

¹ Technically it is a violation of Facebook’s privacy policy for employers to use Facebook as a recruiting tool. The privacy policy states that “any improper collection or misuse of information provided on Facebook is a violation of the Facebook Terms of Service and should be reported...” This provision clearly covers employers who are not in the same network as their potential candidate. In addition to violating Facebook’s Terms of Service, user’s profiles could potentially provide employers information that is illegal to ask in an interview such as the applicant’s race, sexual orientation, age, religion, etc.
2. The EEOC has warned of this before; both in the context of criminal records and credit scores. This guidance does not address credit scores, but be cautious when using credit scores to eliminate applicants or otherwise make employment decisions. Many states have proposed legislation that would prohibit adverse employment actions taken because of a credit score (KY HB 144; did not pass).

C. The guidance places heavy emphasis on the disparate impact of criminal record exclusions. The guidance notes: “national data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact; charges challenging criminal record exclusions.”

D. The guidance strongly suggests that, given the data, employers avoid blanket or across-the-board exclusions. Rather, employers may use criminal background checks when they are “job related and consistent with business necessity.” The guidance provides that there are two circumstances in which the commission believes that employers will meet the “job related and consistent with business necessity defense” consistently:

1. The employer validates the criminal conduct screen for the position in question according to the Uniform Guidelines on Employee Selection Procedures standards if data about criminal conduct as related to subsequent work performance is available and such validation is possible.

2. The employer develops a “targeted screen” considering at least the nature of the crime, the time elapsed and the nature of the job and then provides an opportunity for an “individualized assessment” for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

   a. “Targeted screen.” When evaluating criminal records, the guidance states an employer should first develop a “targeted screen” that considers at least:

      i. The nature and gravity of the offense or conduct;

      ii. The time elapsed since the offense and completion of any sentence or probation; and

      iii. The nature of the job at issue.
“Individualized assessment.” After conducting a “targeted screen,” the EEOC strongly suggests that the employer then provide an opportunity for an “individualized assessment” for those applicants excluded to determine whether the policy as applied is job related and consistent with business necessity. According to the guidance, the individualized assessment consists of:

i. Notice to the individual that he or she has been screened out because of a criminal conviction;

ii. An opportunity for the individual to demonstrate that the exclusion should not be applied due to his or her particular circumstances;

iii. Consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity.

iv. In evaluating the information provided by the employee under the “individualized assessment,” the EEOC suggests that an employer consider:

(a) The facts and circumstances surrounding the offense or conduct;

(b) The number of offenses for which the individual was convicted;

(c) Age at the time of conviction or release;

(d) Any evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, without incidents of criminal conduct;

(e) The length and consistency of employment history before and after the offense or conduct;

(f) Rehabilitation efforts, including education or training;

(g) Employment or character references and any information regarding fitness for the particular position; and whether the individual is bonded.
v. Depending on the circumstances, these “individualized assessments” could potentially be burdensome – the EEOC does not address this fact, and it is unclear whether it will address this issue in the future. The guidance notes that some assessments will be less in-depth than others (e.g., where the crime is closely related to the job).

E. Arrest v. Conviction

The guidance reiterates its existing guidelines about arrest and conviction records.

1. Arrest records alone should not be used to deny employment.

2. Employers may consider any evidence concerning the underlying conduct that disqualifies an individual for a particular position.

3. Conviction records generally could be relied upon as evidence the underlying criminal conduct occurred.

4. By contrast, according to the EEOC, a policy excluding all individuals with criminal records likely would not be justifiable as “job related and consistent with business necessity,” and thus could violate Title VII.

F. Best Practices

The guidance lists a number of “best practices” that the EEOC encourages employers to implement. The EEOC encourages the following:

1. Ask no questions about criminal history on initial employment applications.

2. Develop a narrowly tailored written policy and procedure for screening applicants with respect to criminal conduct.

3. Keep records of resources used to draft this policy.

4. Ensure that third-party providers of background check services comply with federal and state laws, as well as that the information received is accurate before taking action based on it.

5. Train managers, hiring officials, and decision-makers on Title VII’s prohibition on employment discrimination and protecting the confidentiality of records.
G. Application of Other Federal, State and Local Laws

Although employers must comply with state and local law, the EEOC made clear that simply doing so will not shield an employer from federal liability, if a practice is held to violate Title VII. Compliance with other federal laws and/or regulations that conflict with Title VII is a defense to a charge of discrimination under Title VII. State and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. §2000e-7.

VII. CREDIT SCORE DISCRIMINATION


Kentucky court approves one year claim limitations period found in job application. Kentucky employer can shorten the amount of time an employee has to bring a state law-based employment claim. A federal court judge in the Western District of Kentucky upheld a provision in an employment application that limited the claim limitation period to one year. The statutory limitations period for such claims has traditionally been five years. However, the court concluded that Kentucky state law allows contracting parties to limit the time available to a potential plaintiff to bring suit, as long as the time period is reasonable enough to give the aggrieved party time to sue. If you would like to consider including a similar provision in your employment applications, contact a Graydon Head attorney for additional information.
I. INTRODUCTION

The purpose of this presentation is to provide a very basic outline of environmental law issues for the general practitioner. This presentation will describe how the laws, regulations and guidance interpretations at the federal, state and local level work to create a woven fabric of regulatory requirements that apply to a far-reaching scope of individuals, entities, and their activities occurring within the United States and its territories.

II. ENVIRONMENTAL LAW IN THE UNITED STATES: A QUICK HISTORY

In the United States, we have a system of federal, state and local environmental laws, regulations and ordinances. Until the 1970s environmental restrictions were driven by expanding commerce and restrictions to protect commerce.

The River and Harbors Act was passed in 1899 and criminalized the discharge of refuse material of any kind into navigable waters or tributaries in the United States. In 1948, the Water Pollution Control Act authorized the Surgeon General of the Public Health Service, in cooperation with other federal, state and local entities, to prepare comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries and improving the sanitary condition of surface and underground waters. During the development of such plans, due regard was to be given to improvements necessary to conserve waters for public water supplies, propagation of fish and aquatic life, recreational purposes, and agricultural and industrial uses. The original statute also authorized the Federal Works Administrator to assist states, municipalities, and interstate agencies in constructing treatment plants to prevent discharges of inadequately treated sewage and other wastes into interstate waters or tributaries.

In the 1970s, Congress debated the issue of federal versus state regulation of environmental protection. Proponents of state-only regulation believed that environmental concerns in Hawaii were sufficiently different from concerns that would be found in Kentucky, for example to justify allowing each state the autonomy to develop state-specific environmental regulations without the interference of the federal government. Proponents of federal-only regulations wanted to ensure a “level playing field” and not allow any one state to undercut another state for economic development by sacrificing the environment. Congress ended the debate by deciding that the protection of the environment in the United States would have a federal component that would be applicable to all of the states and territories and a state component that would allow each state to develop state-specific protections so long as the state-specific protections are at least as stringent that the federal provisions.

Thus, a regulated company must be aware of the federal laws and regulations and the companion state laws and regulations. Indeed, a regulated company
may face an enforcement action from the federal environmental protection agency, the state equivalent, or both. If that is not enough to confuse and befuddle, the regulated company must also be wary of an enforcement action commenced by an aggrieved “citizen.”

III. MAJOR ENVIRONMENTAL LAWS

A. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) of 1976, which amended the Solid Waste Disposal Act, addresses solid (Subtitle D) and hazardous (Subtitle C) waste management activities. The Hazardous and Solid Waste Amendments (HSWA) of 1984 strengthened RCRA’s waste management provisions and added Subtitle I, which governs underground storage tanks (USTs).

Regulations promulgated pursuant to Subtitle C of RCRA (40 C.F.R. §§260-299) establish a "cradle-to-grave" system governing hazardous waste from the point of generation to disposal. RCRA hazardous wastes include the specific materials listed in the regulations (commercial chemical products, designated with the code "P" or "U"; hazardous wastes from specific industries/sources, designated with the code "K"; hazardous wastes from nonspecific sources, designated with the code "F") and materials which exhibit a hazardous waste characteristic (ignitability, corrosivity, reactivity, or toxicity) designated with the code "D."

Regulated entities that generate hazardous waste are subject to waste accumulation, manifesting, and recordkeeping standards. Facilities that treat, store, or dispose of hazardous waste must obtain a permit, either from EPA or from a state agency that EPA has authorized to implement the permitting program. Subtitle C permits contain general facility standards such as contingency plans, emergency procedures, recordkeeping and reporting requirements, financial assurance mechanisms, and unit-specific standards. RCRA also contains provisions (40 C.F.R. §264(s) and §264.10) for conducting corrective actions that govern the cleanup of releases of hazardous waste or constituents from solid waste management units at RCRA-regulated facilities.

Although RCRA is a federal statute, many states implement the RCRA program. Currently, EPA has delegated its authority to implement various provisions of RCRA to forty-six of the fifty states. Most RCRA requirements are not industry-specific but apply to any company that generates, transports, treats, stores, or disposes of hazardous waste.

1. Solid and hazardous wastes.

   a. Solid waste means any garbage or refuse; sludge from a wastewater treatment plant, water supply treatment plant, or air pollution control facility; and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and
agricultural operations, and from community activities. Solid wastes include both hazardous and nonhazardous waste.

b. A waste may be considered hazardous if it is ignitable (i.e., burns readily), corrosive, or reactive (e.g., explosive). Waste may also be considered hazardous if it contains certain amounts of toxic chemicals. In addition to these characteristic wastes, EPA has also developed a list of over 500 specific hazardous wastes. Hazardous waste takes many physical forms and may be solid, semisolid, or even liquid.

c. Acute hazardous wastes contain such dangerous chemicals that they could pose a threat to human health and the environment even when properly managed. These wastes are fatal to humans and animals even in low doses.

d. Subtitle C of the Resource Conservation Recovery Act (RCRA) creates a cradle-to-grave management system for hazardous waste to ensure proper treatment, storage, and disposal in a manner protective of human health and the environment.

2. Universal waste.

The Universal Waste Rule is designed to reduce the amount of hazardous waste items in the municipal solid waste (MSW) stream, encourage recycling and proper disposal of certain common hazardous wastes, and reduce the regulatory burden on businesses that generate these wastes. Universal wastes include:

a. Light bulbs, mercury-containing fluorescent high pressure, vapor, metal halide and high intensity.

b. Batteries such as nickel-cadmium (Ni-Cd) and small sealed lead-acid batteries, which are found in many common items in the business and home setting, including electronic equipment, mobile telephones, portable computers, and emergency backup lighting.

c. Agricultural pesticides that have been recalled or banned from use, are obsolete, have become damaged, or are no longer needed due to changes in cropping patterns or other factors. They often are stored for long periods of time in sheds or barns.

d. Thermostats, which can contain as much as three grams of liquid mercury and are located in almost any building, including commercial, industrial, agricultural, community, and household buildings.
Universal wastes are generated by small and large businesses that are regulated under RCRA and have been required to handle these materials as hazardous wastes. The Universal Waste Rule eases the regulatory burden on businesses that generate these wastes. Specifically, it streamlines the requirements related to notification, labeling, marking, prohibitions, accumulation time limits, employee training, response to releases, offsite shipments, tracking, exports, and transportation. For example, the rule extends the amount of time that businesses can accumulate these materials on site. It also allows companies to transport them with a common carrier, instead of a hazardous waste transporter, and no longer requires companies to obtain a manifest.

3. Used oil management standards.

Used oil management standards (40 C.F.R. §279) impose management requirements affecting the storage, transportation, burning, processing, and re-refining of the used oil. For facilities that merely generate used oil, the regulations establish storage standards. A facility that is considered a used oil marketer (one who generates and sells off-specification used oil directly to a used oil burner) must satisfy additional tracking and paperwork requirements.

EPA's regulatory definition of used oil is as follows: Used oil is any oil (either synthetic or refined from crude oil) that has been used, and as a result of such use is contaminated by physical or chemical impurities. Simply put, used oil is exactly what its name implies – any petroleum-based or synthetic oil that has been used. During normal use, impurities such as dirt, metal scrapings, water, or chemicals can get mixed in with the oil, so that in time the oil no longer performs well. Eventually, this used oil must be replaced with virgin or re-refined oil to do the job at hand.

4. Underground storage tanks.

An underground storage tank (UST) system is a tank and any underground piping connected to the tank that has at least 10 percent of its combined volume underground. Underground storage tanks containing petroleum and hazardous substances are regulated under Subtitle I of RCRA. Subtitle I regulations (40 C.F.R. §280) contain tank design and release detection requirements, as well as financial responsibility and corrective action standards for USTs.

In 1984, Congress responded to the increasing threat to groundwater posed by leaking USTs by adding Subtitle I to the Resource Conservation and Recovery Act (RCRA). Subtitle I required EPA to develop a comprehensive regulatory program for USTs storing petroleum or certain hazardous substances.
In 1986, Congress amended Subtitle I of RCRA and created the Leaking Underground Storage Tank Trust Fund and established financial responsibility requirements. Congress directed EPA to publish regulations that would require UST owners and operators to demonstrate that they are financially capable of cleaning up releases and compensating third parties for resulting damages.

The following are examples of USTs which are excluded from regulation and, therefore, do not need to meet federal requirements for USTs:

a. Farm and residential tanks of 1,100 gallons or less capacity holding motor fuel used for noncommercial purposes.

b. Tanks storing heating oil used on the premises where it is stored.

c. Tanks on or above the floor of underground areas, such as basements or tunnels.

d. Septic tanks and systems for collecting storm water and wastewater.

e. Flow-through process tanks.

f. Emergency spill and overfill tanks.

Subtitle I of RCRA allows state UST programs approved by EPA to operate in lieu of the federal program, and EPA's state program approval regulations set standards for state programs to meet. States may have more stringent regulations than the federal requirements. People who are interested in requirements for USTs should contact their state UST program for information on state requirements.

B. Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a 1980 law commonly known as Superfund, authorizes EPA to respond to releases, or threatened releases, of hazardous substances that may endanger public health, welfare, or the environment. CERCLA also enables EPA to force parties responsible for environmental contamination to clean it up or to reimburse the Superfund for response or remediation costs incurred by EPA. The Superfund Amendments and Reauthorization Act (SARA) of 1986 revised various sections of CERCLA, extended the taxing authority for the Superfund, and created a free-standing law, SARA Title III, also known as the Emergency Planning and Community Right-to-Know Act (EPCRA).
Hazardous substance release reporting regulations (40 C.F.R. §302) direct the person in charge of a facility to report to the National Response Center (NRC) any environmental release of a hazardous substance which exceeds a reportable quantity. Reportable quantities are defined and listed in 40 C.F.R. §302.4. A release report may trigger a response by EPA, or by one or more federal or state emergency response authorities.

EPA implements hazardous substance responses according to procedures outlined in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (40 C.F.R. §300). The NCP includes provisions for permanent cleanups, known as remedial actions, and other cleanups referred to as "removals." EPA generally takes remedial actions only at sites on the National Priorities List (NPL), which currently includes approximately 1,300 sites. Both EPA and states can act at other sites; however, EPA gives responsible parties the opportunity to conduct removal and remedial actions and encourages community involvement throughout the Superfund response process.

C. Toxic Substances Control Act

The Toxic Substances Control Act granted EPA authority to create a regulatory framework to collect data on chemicals in order to evaluate, assess, mitigate, and control risks that may be posed by their manufacture, processing, and use. TSCA provides a variety of control methods to prevent chemicals from posing unreasonable risk.

TSCA standards may apply at any point during a chemical's life cycle. Under TSCA Section 5, EPA has established an inventory of chemical substances. If a chemical is not already on the inventory, and has not been excluded by TSCA, a premanufacture notice (PMN) must be submitted to EPA before manufacture or import. The PMN must identify the chemical and provide available information on health and environmental effects. If available data are not sufficient to evaluate the chemical's effects, EPA can impose restrictions pending the development of information on its health and environmental effects. EPA can also restrict significant new uses of chemicals based on factors such as the projected volume and use of the chemical.

Under TSCA Section 6, EPA can ban manufacture or distribution in commerce, limit use, require labeling, or place other restrictions on chemicals that pose unreasonable risks. Among the chemicals EPA regulates under Section 6 authority are asbestos, chlorofluorocarbons (CFCs), lead, and polychlorinated biphenyls (PCBs).

D. Federal Insecticide, Fungicide, and Rodenticide Act

The first pesticide control law was enacted in 1910. This law was primarily aimed at protecting consumers from ineffective products and deceptive labeling. When the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) was first passed in 1947, it established procedures for registering pesticides with the U.S. Department of Agriculture and established
labeling provisions. The law was still, however, primarily concerned with the efficacy of pesticides and did not regulate pesticide use.

**FIFRA** was essentially rewritten in 1972 when it was amended by the Federal Environmental Pesticide Control Act (FEPCA). The law has been amended numerous times since 1972, including some significant amendments in the form of the Food Quality Protection Act (FQPA) of 1996. In its current form, **FIFRA** mandates that EPA regulate the use and sale of pesticides to protect human health and preserve the environment.

Since the FEPCA amendments, EPA is specifically authorized to: (1) strengthen the registration process by shifting the burden of proof to the chemical manufacturer, (2) enforce compliance against banned and unregistered products, and (3) promulgate the regulatory framework missing from the original law.

**FIFRA** provides EPA with the authority to oversee the sale and use of pesticides. However, because **FIFRA** does not fully preempt state/tribal or local law, each state/tribe and local government may also regulate pesticide use.

### E. Clean Water Act

Pollutants regulated under the **CWA** include "priority" pollutants, including various toxic pollutants; "conventional" pollutants, such as biochemical oxygen demand (BOD), total suspended solids (TSS), fecal coliform, oil and grease, and pH; and "non-conventional" pollutants, including any pollutant not identified as either conventional or priority. The **CWA** regulates both direct and indirect discharges. The major **CWA** programs are discussed below.

#### 1. NPDES program.

The National Pollutant Discharge Elimination System (NPDES) program controls direct discharges into navigable waters. Direct discharges or "point source" discharges are from sources such as pipes and sewers. NPDES permits, issued by either EPA or an authorized state/tribe contain industry-specific, technology-based and/or water-quality-based limits, and establish pollutant monitoring and reporting requirements. (EPA has authorized forty states to administer the NPDES program.) A facility that intends to discharge into the nation's waters must obtain a permit before initiating a discharge. A permit applicant must provide quantitative analytical data identifying the types of pollutants present in the facility's effluent. The permit will then set forth the conditions and effluent limitations under which a facility may make a discharge.

An NPDES permit may also include discharge limits based on federal or state/tribe water quality criteria or standards that were designed to protect designated uses of surface waters, such as supporting aquatic life or recreation. These standards, unlike the
technological standards, generally do not take into account technological feasibility or costs. Water quality criteria and standards vary from state to state (tribe to tribe) and site to site, depending on the use classification of the receiving body of water. Most states/tribes follow EPA guidelines that propose aquatic life and human health criteria for many of the 126 priority pollutants.

2. Storm water discharges.

In 1987 the CWA was amended to require EPA to establish a program to address storm water discharges. In response, EPA promulgated the NPDES storm water permit application regulations. Storm water discharge associated with industrial activity means the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. These regulations require that facilities with the following storm water discharges apply for an NPDES permit: (1) a discharge associated with industrial activity; (2) a discharge from a large or medium municipal storm sewer system; or (3) a discharge which EPA or the state/tribe determines to contribute to a violation of a water quality standard or which is a significant contributor of pollutants to waters of the United States.

The term "storm water discharge associated with industrial activity" means a storm water discharge from one of eleven categories of industrial activity defined in 40 C.F.R. §122.26. Six of the categories are defined by SIC codes, while the other five are identified through narrative descriptions of the regulated industrial activity. If the primary SIC code of the facility is one of those identified in the regulations, the facility is subject to the storm water permit application requirements. If any activity at a facility is covered by one of the five narrative categories, storm water discharges from those areas where the activities occur are subject to storm water discharge permit application requirements.

As part of storm water permits, facilities are often required to implement pollution prevention plans. This reflects EPA’s commitment to preventing pollution at the source, before it causes environmental problems that cost the public and private sectors in terms of lost resources and funding to correct or remediate environmental damages.

Storm water pollution prevention plans must be prepared in accordance with good engineering practices. The plan should identify potential sources of pollution that may reasonably be expected to affect the quality of storm water discharges associated with industrial activity from the facility. The plan should also describe and ensure the implementation of practices that reduce the pollutants in storm water discharges.
3. Pretreatment program.

Another type of discharge that is regulated by the CWA is discharge that goes to a publicly owned treatment works (POTW). The national pretreatment program (CWA Section 307(b)) controls the indirect discharge of pollutants to POTWs by "industrial users." Facilities regulated under Section 307(b) must meet certain pretreatment standards. The goal of the pretreatment program is to protect municipal wastewater treatment plants from damage that may occur when hazardous, toxic, or other wastes are discharged into a sewer system and to protect the quality of sludge generated by these plants. Discharges to a POTW are regulated primarily by the POTW itself, rather than the state/tribe or EPA.

EPA has developed general pretreatment standards and technology-based standards for industrial users of POTWs in many industrial categories. Different standards may apply to existing and new sources within each category. "Categorical" pretreatment standards applicable to an industry on a nationwide basis are developed by EPA. In addition, another kind of pretreatment standard, "local limits," are developed by the POTW to help the POTW achieve the effluent limitations in its NPDES permit.

Regardless of whether a state/tribe is authorized to implement either the NPDES or the pretreatment program, if it develops its own program, it may enforce requirements more stringent than federal standards.

4. Wetlands.

Section 404 of the CWA establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation. Many normal farming practices are exempt from Section 404.

F. Clean Air Act

The Clean Air Act (CAA) and its amendments, including the Clean Air Act Amendments (CAAA) of 1990, are designed to "protect and enhance the nation's air resources so as to promote the public health and welfare and the productive capacity of the population." The CAA consists of six sections (known as Titles) that direct EPA to establish national standards for ambient air quality and provide for EPA and the states to implement,
maintain, and enforce these standards through a variety of mechanisms. Under the CAA, many facilities will be required to obtain permits for the first time. State and local governments oversee, manage, and enforce many of the requirements of the CAA. The major CAA programs are discussed below.

1. **Title I**

   Pursuant to Title I of the CAA, EPA has established national ambient air quality standards (NAAQSs) to limit levels of "criteria pollutants," including carbon monoxide, lead, nitrogen dioxide, particulate matter, ozone, and sulfur dioxide. Geographic areas that meet NAAQSs for a given pollutant are classified as attainment areas; those that do not meet NAAQSs are classified as non-attainment areas. Under Section 110 of the CAA, each state must develop a State Implementation Plan (SIP) to identify sources of air pollution and to determine what reductions are required to meet federal air quality standards.

   Title I also authorizes EPA to establish New Source Performance Standards (NSPSs), which are nationally uniform emission standards for new stationary sources falling within particular industrial categories. NSPSs are based on the pollution control technology available to that category of industrial source, but allow the affected industries the flexibility to devise a cost-effective means of reducing emissions.

   Under Title I, EPA establishes and enforces National Emission Standards for Hazardous Air Pollutants (NESHAPs), nationally uniform standards oriented towards controlling particular hazardous air pollutants (HAPs). Title III of the CAA further directed EPA to develop a list of sources that emit any of 188 HAPs, and to develop regulations for these categories of sources. To date, EPA has listed 174 categories and developed a schedule for the establishment of emission standards. The emission standards will be developed for both new and existing sources based on "maximum achievable control technology" (MACT). The MACT is defined as the control technology achieving the maximum degree of reduction in the emission of the HAPs, taking into account cost and other factors.

2. **Title II**

   Title II of the CAA pertains to mobile sources, such as cars, trucks, buses, and planes. Reformulated gasoline, automobile pollution control devices, and vapor recovery nozzles on gas pumps are a few of the mechanisms EPA uses to regulate mobile air emission sources.
3. **Title IV.**

*Title IV* establishes a sulfur dioxide emissions program designed to reduce the formation of acid rain. Reduction of sulfur dioxide releases will be obtained by granting to certain sources limited emissions allowances.

4. **Title V.**

*Title V* of the CAA of 1990 created a permit program for all "major sources" (and certain other sources) regulated under the CAA. One purpose of the operating permit is to include in a single document all air emissions requirements that apply to a given facility. States are developing the permit programs in accordance with guidance and regulations from EPA. Once a state program is approved by EPA, permits will be issued and monitored by that state. *Title VI* is intended to protect stratospheric ozone by phasing out the manufacture of ozone-depleting chemicals and restricting their use and distribution.

G. **Emergency Planning & Community Right-To-Know Act**

Authorized by Title III of the Superfund Amendments and Reauthorization Act (SARA), the *Emergency Planning & Community Right-to-Know Act* (EPCRA) was enacted by Congress as the national legislation on community safety. This law is designed to help local communities protect public health, safety, and the environment from chemical hazards.

To implement EPCRA, Congress requires each state to appoint a State Emergency Response Commission (SERC). The SERCs are required to divide their states into Emergency Planning Districts and to name a Local Emergency Planning Committee (LEPC) for each district.

Broad representation by fire fighters, health officials, government and media representatives, community groups, industrial facilities, and emergency managers ensures that all necessary elements of the planning process are represented.

IV. **APPLICATION OF ENVIRONMENTAL LAWS AND REGULATIONS TO A TYPICAL MANUFACTURING FACILITY LOCATED IN KENTUCKY**

A. **Emissions to the Atmosphere**

Requirements applicable to emissions to the atmosphere (even indoor emissions) kick-in when a source has a potential to emit two (2) tons or more per year of pollutants. At the low end of emissions, the state requires a registration. As the emission rates increase, the level of permit requirement increases. Industrial facilities that have no permits or registrations should be prepared to prove that the potential to emit for all sources are below the thresholds for the particular pollutant. The calculations must be based on potential emission, which are often much
higher than emissions derived from actual production levels. Compliance with air emission requirements is monitored by the Kentucky Energy and Environment Cabinet’s Division for Air Quality.

Proving that emissions are below the applicability thresholds for registration or permitting requires an inventory of all air emission points in the factory. Emission points can include such things as: natural gas fired boilers, storage tanks, storage silos, mixing vessels, packaging lines, and loading racks. Calculation of potential emission rates for each emission point will vary depending upon the emission point. For example, for a storage tank that contains a volatile organic compound (VOC), you will need to know the VOC content of the liquid, the size of the storage tank and the annual throughput to calculate the emissions that occur during filling of the tank and emissions from temperature change (for so-called “breathing loss”). To calculate emissions from a tote tank filling line, you will need to know the VOC content of the product and the maximum flowrate on the filling nozzle. Emission factors from governmental and industry standards will then be used to calculate an emission rate to the atmosphere. Baghouses and other small dust collectors (Torit brand, for example) are also potential sources of emissions to the atmosphere. Like the VOC emission calculations, the nature of the solid material (i.e., particle size) and the loading capacity (i.e., the fill-rate) are important to completing an emission calculation. Small gasoline or diesel powered engines that provide back-up electrical power or water pressure for firefighting must also be considered when calculating total pollutant emissions for a facility.

B. Wastewater Discharges

Industrial wastewater is commonly discharged to the local publicly owned treatment works. Under authorization of the federal Clean Water Act, the publicly owned treatment works often issues a license to the owner/operator of the industrial wastewater discharge. The license restricts the volume and composition of the wastewater by pollutant such as biochemical oxygen demand (BOD), chemical oxygen demand (COD), pH and total suspended solids (TSS).

Confirming compliance with the license is pretty easy. You just need to compare the actual effluent flowrate and actual wastewater sampling results to the terms and conditions found in the license and look for discrepancies.

C. Stormwater Discharges

Discharges of stormwater from industrial operations needs to be authorized by a state-issued general stormwater permit. Companies gain authority to discharge storm water under the permit by submitting a Notice of Intent (NOI). The general permit requires that all permit holders prepare a follow a Stormwater Pollution Prevention Plan (SWPPP). As an alternative, a company can make a certification that there is no exposure of stormwater to industrial operations. Typically, a certification
of no exposure cannot be made because the company has some industrial activities that occur outdoors. Examples of industrial activities include the storage of raw materials, equipment and other industrial items. For example, outdoor storage of wooden skids, plastic tote storage containers, solid waste open-top roll-off boxes, are all industrial activities.

First determine if the facility has filed a NOI. If not, has the facility filed a certification of no exposure? If the facility filed a NOI, determine if the facility has prepared and is following the SWPPP. Evaluate compliance against each item found in the SWPPP.

D. Hazardous Waste Accumulation, Storage and Disposal

The accumulation, storage and disposal of wastes that can be classified as “hazardous wastes” are highly regulated activities. Wastes are classified as “hazardous” under several criteria. The most common criteria are characteristics of ignitibility and corrosivity. There are also wastes that are considered “hazardous” because the chemical(s) are on a list prepared by the United States Environmental Protection Agency.

Confirming compliance with the hazardous waste requirements requires a review of all waste streams that are created at the facility. Companies typically overlook several waste streams. For example, wastes that are created in Quality Control / Quality Assurance Laboratory or a Research and Development Laboratory must be evaluated. From experience, we know that chemical wastes from laboratory procedures such as High Pressure Liquid Chromatography and Gas Chromatography are hazardous. Areas such as the maintenance shop should also be inspected for hazardous wastes.

If the facility is generating a hazardous waste, the methods for accumulation, storage and disposal must then be reviewed. For example, accumulation of a hazardous waste can only be in a closed and properly labeled container. A full container of hazardous waste must be shipped off-site for disposal on a schedule that will depend upon the amount of waste that is being generated. The waste storage area must be inspected at least weekly. Waste shipments must be accompanied by a Hazardous Waste Manifest.

E. Community Right-to-Know

This program has two components, a chemical inventory reporting component and a release reporting component. The chemical inventory component is driven by the quantity of a hazardous substance that is maintained on the property at any one time. Typically there is a threshold for reporting of 10,000 pounds, but there are several toxic chemicals that have much lower reporting thresholds. The release reporting component is driven by the amount of a chemical that is used or otherwise processed on-site in one year.
The best way to check compliance with these requirements is to review all of the Material Safety Data Sheets (MSDS) and make a list of all chemicals that come onto the site. The MSDS will identify all of the chemicals that are subject to the Community Right-to-Know requirements. You also need to know the amount of each chemical that you have on-site at any one time and also the amount of the chemical that is used or otherwise processed during the entire calendar year. Be careful to make sure you have identified ALL chemicals. We often see companies overlook the sulfuric acid that is present in battery powered forklifts and in back-up power batteries. The chemical inventory reporting requirement for sulfuric acid is triggered with a mere 500 pounds of sulfuric acid. We typically find that three or four batteries for forklifts will contain enough sulfuric acid to require reporting.

F. Spill Prevention Control and Countermeasure (SPCC)

The United States Environmental Protection Agency has a regulatory program that sets standards for the storage and handling of “oils.” The term “oils” is broader than what first comes to mind as an oil. The term “oils” that is regulated by the SPCC program includes any material that would impart a sheen on water. Consequently, such things as vegetable and mineral oil are regulated in addition to the petroleum-derived oils such as gasoline, diesel fuel, and hydraulic oils. The regulations have several applicability thresholds that must be exceeded before the regulations apply to a particular facility. In order to be subject to the regulation, the facility operator must store at least 1,360 gallons of oil at the facility or have a single storage tank that is greater than 660 gallons in volume. The most important requirement of the SPCC regulations is the requirement to prepare and implement a Spill Control and Countermeasure Plan (SPCC Plan). The main components of an SPCC Plan include an inventory of all tanks and containers of oil in storage or use throughout the facility, the spill control features for each tank or container, and a description of how the tank or container will be used, inspected and maintained so as to minimize the risk of an oil spill.

The first step is to determine if the facility has “oil” in use or storage in quantities that exceed the applicability criteria. To accomplish this determination you must create an inventory of all oil in use or storage throughout the facility. In preparing the inventory, be sure to include:

1. Fifty-five gallon drums of lube and hydraulic oil that are commonly found in the maintenance shops;
2. Hydraulic oil reservoirs (if fifty-five gallons or more) found on equipment (for example, processing equipment, trash compactors, elevators, etc);
3. Gasoline/diesel fuel tanks that serve emergency equipment;
4. Process-related oils that are vegetable, mineral or oil based.
If you determine that the quantity thresholds are exceeded, then proceed to evaluate the SPCC Plan. The plan should include an inventory of the tanks and containers, a description of how the tanks and containers are used, inspected and maintained so as to minimize leaks, a procedure to responding to spills, and for alerting the EPA and local governmental authorities if a spill occurs.

G. Groundwater Pollution Protection

This is a requirement that is unique to Kentucky. Started in the 1990s, the groundwater protection law seeks to protect groundwater from contamination that can arise from industrial operations. There is no applicability threshold like the one found in the SPCC requirements. The basic requirement for the groundwater pollution protection statute is that a company must prepare and follow a Groundwater Pollution Prevention Plan. (GPP Plan). Typically, Kentucky companies make the GPP Plan a part of their SPCC Plan.

Confirm that the facility is following a GPP Plan that is either free-standing or a part of the SPCC Plan. Key elements to a complete GPP Plan include:

1. General information regarding the facility and its operation, including the name of the facility, the address of the facility, and the name of the person responsible for implementing the plan;

2. Identification of all activities that could contaminate groundwater;

3. Identification of all practices chosen for the plan to protect groundwater from pollution;

4. An implementation schedule for the practices selected for the plan;

5. A description of and implementation schedule for employee training necessary to ensure implementation of the plan;

6. An inspection schedule requiring regular inspections as needed to ensure that all practices established are in place and properly functioning;

7. A certification by the person responsible for implementing the plan or a duly authorized representative that the plan complies with the requirements of this administrative regulation, and that the person responsible for implementing the plan has reviewed the terms of the plan and will implement its provisions.

V. APPLICATION OF ENVIRONMENTAL LAWS AND REGULATIONS TO COMMERCIAL REAL ESTATE TRANSACTIONS

This portion of the presentation will provide information on how environmental laws come into play in a real estate transaction. It will cover the Comprehensive
Environmental Response and Compensation Liability Act and how liability for environmental contamination that pre-exists ownership of the land can result in future liability for a future owner. This section will also address the Innocent Purchaser Defense as a means to assess the potential for future liability.

A. Environmental Due Diligence

Real estate and commercial transactions have been impacted by the reality and fear of liability associated with environmental issues. This concern arose shortly after the passage of the Comprehensive Environmental Response, Compensation and Liability Act in 1980 (CERCLA).

CERCLA (42 U.S.C. §9601 et seq, as amended by the Superfund Amendments and Reauthorization Act of 1986) is a hastily drafted law passed in 1980 primarily in response to perceived challenges that arose during efforts to remediate environmental contamination identified at the Love Canal toxic waste site in upstate New York. The law imposes liability for the cleanup of historic releases of hazardous substances, provides limited defenses to liability, defines investigation and remediation procedures to be followed in response to releases of hazardous substances and creation of a trust fund (Superfund) that could be accessed to fund responses to hazardous substance releases.

Commonly called "Superfund," in recognition of the trust fund that would supposedly be available for expenses, the actual impact of the law has been the imposition of liability for owners and operators of the facility, transporters of hazardous substances, and anyone who arranged for the disposal of the hazardous substances. The law imposes joint and several liability on the responsible party and creates a cause of action for cost recovery. The governmental agency and other responsible parties are afforded the opportunity to commence the cost recovery action in federal court.

B. Innocent Purchaser Defense

CERCLA provides very limited defenses to liability for acts of God, acts of war and acts or omissions of a third party who does not have a contractual relationship with the responsible party. However, the responsible party must show that he "(a) exercised due care with respect to the hazardous substances concerned..., and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably be a result from such actions or omissions." 42 U.S.C. §9607(b).

Liability for the release will then turn on the definition of a "contractual relationship." The Superfund law defines "contractual relationship" to include, but not be limited to "land contracts, deeds, or other instruments, transferring title or possession..." However, the landowner can escape the definition by showing that he was an "innocent purchaser." 42 U.S.C. §9601(35)(a).
The "innocent purchaser" defense requires that the landowner show that the property was acquired after hazardous substances were disposed on it and either (1) he did not know or had no reason to know that the hazardous substances were present when the land was acquired; (2) he is a government body that acquired the property by escheat, any involuntary transfer, or through exercises of eminent domain; or (3) the property was inherited. 42 U.S.C. §9601(35)(a). In order to prevail on the "did not know or had no reason to know" component, the owner must satisfy another standard established in the Superfund law. The owner must have made "all appropriate inquiry" into the previous ownership, consistent with good commercial practice. 42 U.S.C. §9601(35)(b).

The Superfund law does not contain a bright line test for satisfying the innocent purchaser test. U.S. EPA has issued guidance that on the issue that can be of some assistance. See, Guidance on Landowner Liability under Section 107(a) of CERCLA, De minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property, 54 Fed. Reg. 34234 (1989). Since the inception of the "innocent purchaser" defense in 1986, case law has yielded results that run the gamut of interpretations of what is required of an "innocent purchaser." In the early day a landowner, who never even visited the property preserved the "innocent purchaser" defense by showing that in 1969 an inspection of the type of property in question was not a customary practice, United States v. Serafini, 706 F.Supp. 346 (M.D. Pa. 1988).

C. Phase I Environmental Site Assessment

Since Serafini, the decisions have been sliding steadily against the owner, now the level of inspection must be very detailed. The standard in the industry for appropriate inquiry has been the Phase I Environmental Site Assessment, (Phase I ESA). In the late 1990s a standards setting organization developed their answer for a Phase I protocol. ASTM "Standard Practice for Environmental Site Assessments, E-1527-97." That standard has been updated and the current ASTM Phas I ESA Standard is ASTM E1527-05. While adhering to this standard practice will go far to establishing the appropriate inquiry test, the ASTM method is not all-inclusive and can fall short of necessary inquiry.

D. AAI Rule

The United States Environmental Protection Agency (EPA) adopted a new rule, called the “All Appropriate Inquiries Rule” or the “AAI Rule,” that significantly changes the way a Phase I Environmental Site Assessment (Phase I ESA) must be conducted. Congress directed EPA to issue this new rule through the Small Business Liability Relief and Brownfields Revitalization Act of 2002. The new rule clarifies the requirements necessary to establish the prospective purchaser defense, adjoining property owner defense, and the innocent landowner defense to Superfund liability. Prospective purchasers, tenants and lenders must ensure that the Phase I ESA they rely upon to guard against Superfund
liability is fully compliant with the new rule which will be appear in the EPA's regulations at 40 C.F.R. §312.

Even though lending institutions and banks have the added protection of the “secured creditors exemption” to Superfund liability, they would be well-advised to apply the AAI Rule as the new standard for pre-loan environmental due diligence. Conformance with the AAI Rule protects the borrower and the lender. Of course, protection for the lender remains a contingency until the borrower defaults on the loan and the lender wants to get full value for the mortgaged property. If the lender does not require conformance with the AAI Rule on the “front end” of the loan, the lender may be faced with the unsavory prospect of having to walk away from the property.

The AAI Rule is more stringent than the ASTM standard that most environmental consultants had previously used to conduct a Phase I ESA. The AAI Rule defines, for the first time, the qualifications that an “Environmental Professional” (EP) must have to perform the environmental investigations. The AAI Rule also requires more extensive interviews and investigations of surrounding properties. The EP must now consider the relationship of the purchase price to the fair market value if the property was not contaminated. The EP must identify and discuss the impact of any “data gaps” that are identified during the investigations. Finally, the EP must declare that he/she qualifies as an EP as defined in the AAI Rule and that the investigation has been conducted in conformance with 40 C.F.R. §312.

Under the new rule, “petroleum” and petroleum products are excluded from the definition of “hazardous substance.” Experience has shown that petroleum contamination can be an important component to property condition issues; therefore, the prospective purchaser, tenant or lender should seriously consider requiring that the EP include petroleum and petroleum products in the Phase I ESA investigation.

E. Phase II Investigations

The results of a Phase I will often trigger the recommendation for environmental media (soil and groundwater) sampling and analysis. Now the cost will escalate, Phase II investigations can range from the $10,000s to the $100,000s. Before a Phase II is authorized, the contractor should be required to clearly state the analytical parameters to be investigated and the evaluation criteria.

F. Environmental Audits

Compliance with applicable environmental laws and regulations is now expected by consumers, investors, and employees. As if satisfying expectations of the public were not enough to motivate decision making for compliance, corporate representatives need only consider the downside of getting caught with a compliance violation.
Enforcement for violation of environmental laws should continue to be a concern to businesses. In 1998, the United States Environmental Protection Agency (U.S. EPA) referred 266 environmental criminal cases to the United States Department of Justice. Criminal fines totaled nearly $100 million. Individually, corporate officers and employees faced incarceration in accordance with Criminal Sentencing Guideline. Civil penalties arising from 411 cases in 1998 amounted to nearly $100 million. And that is just federal enforcement activities. Under our system of environmental laws and regulations, state and local environmental protection agencies can bring enforcement actions to collect criminal, civil and administrative penalties. Finally, all major federal environmental laws provide citizens authority to commence a federal lawsuit to correct environmental law violations and collect penalties and costs associated with the litigation.

A thorough environmental audit prior to completing any acquisition of a manufacturing facility will allow the new owner the opportunity to avoid significant liabilities. An environmental audit consists of a systematic evaluation of facility operations, management practices, and recordkeeping against applicable federal, state and local environmental laws, regulations, ordinances, permits, policies and procedures.

The justifications for an environmental audit are many:

1. Federal and state environmental protection agencies have developed incentives for voluntary assessment of environmental compliance, disclosure of non-compliance issues, and prompt correction. Incentives range from complete amnesty from any penalty to a penalty limited to recoupment of economic benefit derived from the non-compliance.

2. All major federal environmental laws give citizens the right to bring an enforcement action to redress a violation of environmental laws, if the violations are ongoing. If the violation condition has been corrected, a claim by a citizen cannot be brought. A self-evaluative environmental audit identifies the violation and permits correction before the violation can become identified by a citizens group.

3. An environmental audit can prevent potential negative publicity that accompanies an enforcement action. Corporate image suffers when a regulatory enforcement action is brought. An environmental audit identifies potential exposure issues for correction before the issue is aired in the public forum.

4. Owners, shareholders, officers and directors all expect a high level of conformance to the myriad of environmental laws and regulations.

---

1 More information on EPA’s Audit policies and procedures can be found at [http://www.epa.gov/compliance/incentives/auditing/index.html](http://www.epa.gov/compliance/incentives/auditing/index.html). Kentucky’s Environmental Audit Privilege statute can be found at [KRS 224.01-040](http://www.epa.gov/compliance/incentives/auditing/index.html).
An environmental audit can be the metric by which this expectation is evaluated.

5. In the remote situation that an enforcement action is brought, especially a criminal enforcement action, federal sentencing guidelines provide for penalty mitigation when the defendant has an effective program to detect and correct violations of law.

6. Environmental audits facilitate a small businesses' (i.e., less than 100 employees) use of the Small Business Regulation Enforcement Fairness Act of 1996.

7. The time to negotiate corrective measures with the seller is during initial contract negotiation and the due diligence period, not after the acquisition.

VI. ENVIRONMENTAL INSURANCE

After abandoning environmental issues by working the "absolute pollution exclusion" into Comprehensive General Liability (CGL) policies, insurance companies came back into the market offering policies that were tailored to specifically address environmental contamination. The products generally fit three categories: Pollution Legal Liability, Remediation Cost Cap, and Secured Creditor Environmental Liability Protection.

A. Pollution Legal Liability Policy

This policy provides the insured levels of protection against costs for bodily injury, property damage, and clean-up costs resulting from property contamination. Contamination that exists before the policy is issued may be covered, provided the contamination was not discovered or suspected during the insurer's due diligence process. Therein lies one of the problems with environmental insurance: the insurer will often require that the insured conduct an extremely exhaustive investigation. And if the investigation yields any inkling of actual or potential environmental contamination, the insurer will exclude the contamination from insurance coverage.

If the due diligence hurdle is jumped, the insured then must consider the amount of retainage, i.e. the deductible and the length of the time for coverage. Environmental liability policies are written as "claims made" policies which means the insurer will only provide coverage if the claim occurs during the policy time period. If the time passes, there will be no coverage. This concept is different from the standard for CGL policies. CGL policies are occurrence based; if the events that gave rise to the loss occurred during the CGL policy, there will be coverage even if the losses/claims associated with the events are not asserted until many years after the policy expires.

While there is no precise formula for calculating the premium for an Environmental Liability Policy, expect to spend a great deal of money. A $1
million policy, with a $25,000 retainage, and a ten-year term can require a
single premium of $50,000.

B. Remediation Cost Overrun Policy

The basic purpose of the Remediation Cost Overrun Policy is to provide
protection for the insured who must conduct some type of remediation.
The insurer will evaluate the investigation reports, remediation plan, and
cost estimate to complete the remediation. Then, the insurer will write an
insurance policy that will protect the insured from cost overruns. Again, the
policy is a claims-made product that must be in effect when the loss
occurs. The cost for such a product can be $50,000 for every $1 million in
expected remediation costs.

C. Secured Creditor Policy

The purpose of this insurance product is to protect the insured's creditor in
the event of loan default and third-party claims for bodily injury, property
damage and cleanup costs. This policy would benefit the lender when the
company is forced into bankruptcy as a result of environmental liability.

Insurance sales people have touted this product as a substitute for
traditional pre-acquisition due diligence. Don't be fooled, U.S. EPA will not
accept an insurance policy as the necessary "appropriate inquiry" that will
allow the landowner to satisfy the "innocent purchaser" defense. Indeed, a
landowner who succumbs to funding an insurance policy to protect the
lender and foregoes the Phase I assessment is putting a bulls eye on his
back.

D. Policies are Untested

These environmental insurance products are relatively young, having been
developed over the past ten years. Consequently, there is no reliable
history of payments being made to insureds under the policy. Again, with
these policies being claims-made products, it may take many, many years
before a reliable history can be established.

VII. APPLICATION OF ENVIRONMENTAL LAWS AND REGULATIONS TO
RESIDENTIAL REAL ESTATE TRANSACTIONS

A. Lead-Based Paint

Exposure to lead was first regulated in the workplace environment by the
Occupational Safety and Health Administrations in the early 1970s.
Health researchers then turned their attention to children. Researchers
found that children were especially susceptible to lead poisoning.

1. Disclosure requirements.

In 1992, Congress passed the Residential Lead-Based Paint
Hazard Reduction Act of 1992 (Lead Hazard Act) as an adjunct to
the Toxic Substances Control Act. The act authorized the United States Environmental Protection Agency (EPA) to promulgate regulations regarding the “disclosure of lead-based paint hazards in target housing which is offered for sale or lease.” 42 U.S.C. §4852(a)(1). EPA promulgated the Real Estate Notification and Disclosure Rule (Disclosure Rule) in 1996. The Disclosure Rule can be found at 40 C.F.R. §745(F), and 24 C.F.R. §35(A). Under the Disclosure Rule, lessors and sellers are required to provide lessees and purchasers of “target housing” with certain information. “Target housing” is defined as “any housing constructed prior to 1978…” 40 C.F.R. §745.103.

The Disclosure Rule requires a Lead Warning Statement with the following language:

Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

The text of the regulation is clear that “[e]ach contract to lease target housing shall include a Lead Warning Statement with the following language...” 40 C.F.R. 745.113(b)(1). There is no room to deviate. Recently, the EPA successfully prosecuted a landlord for violating this Lead Warning Statement regulation. In Vidiksis v. EPA, 612 F.3d 1150 (11th Cir. 2010), a Georgia landlord was sued by the EPA in an administrative action on sixty-nine violations of the act. The landlord appealed the adverse decision initially to the EPA’s Environmental Appeals Board and then to the Eleventh Circuit Court of Appeals where the administrative decision was upheld. The Vidiksis decision provides some valuable lessons to us all.

There shall be no deviation from the precise language of the Lead Warning Statement as provided in the regulation. Vidiksis had a real estate agent prepare the lease agreement that had a “Lead Paint Notice” that did not follow the prescribed language. Additionally, the lease did not effectively disclose Vidiksis’ knowledge or lack of knowledge of the presence of lead-based paint. In addition to suing the landlord, EPA also sued the real estate agent. The real estate agent settled with EPA and paid a civil penalty of $5,000.
2. Building contamination/renovation issues.

Housing built before 1978 is targeted because the Consumer Product Safety Commission banned lead-based paints from residential use in 1978. By U.S. EPA's estimation, upwards of 64 million houses may contain lead-based paint that may pose a hazard to occupants. According to U.S. EPA, both interior and exterior painted surfaces may pose a hazard if coated with lead-based paint. Contractors must now follow certain requirements:

a. Work practice requirements.

i. Work-area containment.

ii. Prohibits paint removal practices that create too much dust and fumes; open-flame burning, heat guns > 1,000 F, power tools that do not have HEPA filters.

iii. Thorough cleaning followed by verification testing to confirm all lead has been removed.

iv. Not required for “minor” work; less than six sq. ft. per interior room or twenty sq. ft. per exterior project.

v. “Minor” work exclusion does not apply to replacement window work.

b. Exemptions.

i. “Do-It-Yourselfer” Homeowners are exempt.

ii. Homeowner can waive the contractor requirements with a signed acknowledgment, provided:

   (a) No child under age six lives in residence.

   (b) No woman who is pregnant in residence.

   (c) Not a child-occupied facility, i.e. day care.

But note, the exemptions may cause problems when the property is sold.

B. Mold

Considered distinct from the plant or animal kingdom, molds lack stems, roots, leaves, and chlorophyl, so they must rely upon a host of plant or
animal organic matter to survive.² Mold will take one of two structural forms: yeast forms which grow as single cells and reproduce by cell division; and hyphal forms which grow as a network of interconnecting tubes.³ The mycelium, hyphal fungal body, consists of filaments known as hyphae. Some of these hyphae penetrate the organic host material to absorb food. Other clusters of hyphae grow upwards and form sporangia clusters. When ripe, the sporangia open up and release spores. Molds reproduce by emitting spores which travel in the air currents seeking other suitable surfaces to colonize. If the mold spore lands on a receptive surface, with the right combination of high moisture content and warm temperature, it will colonize into a new mold growth. Indeed, spores are ubiquitous in our atmosphere. Consequently, the success of mold colonization will depend upon the availability of suitable host material and a warm, moist environment.

Building materials such as carpet, wallboard and cellulose insulation present an excellent host opportunity for mold colonization. Moisture, the other necessary ingredient for mold, can arise from any number of sources: floods, pipe leaks, sewage overflows, faulty roof flashing, and trapped condensation, represent the most common sources.

1. Human response to mold spores.

Mold hyphal walls and spores consist of microscopic cells that will enter the human respiratory system; nose, bronchial tree and lungs.⁴ These cells consist of organic proteins and glycoproteins. In some people, these proteins can be inflammatory to the respiratory system. Phil Lieverman, MD and John A. Anderson, MD, Allergic Diseases (Humana Press, 1997). Depending upon the individual’s sensitivity, the physical response to this irritant might include sneezing, runny nose, and red, watery eyes. In severe sensitivity cases, the individual will experience asthma, the involuntary constriction of the lung bronchioles and alveolae. When the person is removed from the source of allergen, normal lung function will occur, usually in one to four hours. A person’s sensitivity to mold proteins and glycoproteins can be tested using a simple skin test where a low concentration extract of mold is injected under the epidermis. If a welt or wheel of irritation forms, the individual would be deemed allergic to mold protein and glycoproteins.

In addition to the mold proteins that create an allergic reaction, some molds also produce another chemical that creates a toxic response

---

² Molds in the Environment, Centers for Disease Control and Prevention, wmv.cdc.gov/infectiousdiseases/molds.htm.

³ See generally, Glenn J. Lawlor, MD, Jr., Thomas J. Fischer, MD, and Daniel C. Adelman, MD Manual of Allergy and Immunology, Little Brown & Company, 3d ed. 1995.

in organisms. Labeled mycotoxins, these organic chemicals have been blamed for a myriad of human health problems. In at least one mold exposure outbreak in Cleveland, Ohio, health care providers identified mold-induced bleeding lungs in several children. Pulmonary hemosiderosis, bleeding in the lungs, is accompanied by bloody noses and the coughing up of blood. If not treated, the condition can be fatal. Some of the more notable mycotoxin producing molds include *Stachyboys*, *Aspergillus flav's*, and *Fusarium*.

2. Mold exposure potential.

The outdoor and indoor air we breathe will contain mold spores and mycotoxins in varying levels depending upon innumerable variables. For some, these "ambient" exposures will induce allergic or asthmatic reactions. The population of people who will experience adverse reaction to mold will increase when exposed to mold growth in a commercial or residential setting. Mold will have the opportunity to grow unchecked indoors whenever the key components for mold growth exist, *i.e.*, organic surface to serve as the food source, high moisture content and warm incubator temperature. Uncontrolled growth of mold in homes and commercial buildings often occurs after cellulose-containing building materials become saturated with water. Flooding, sewer back-ups, and faulty construction are common examples of conditions that will result in moisture-laden cellulose building materials.

3. Legal issues.

The concern, and at times reality, of health effects arising from exposure to mold has given rise to the recent propagation of mold-related legal issues. This portion of the article will detail the various legal disciplines that have hosted mold litigation theories or have had to undergo adjustments to avoid mold litigation.

a. Construction law.

Commercial or residential building owners who believe their structure has been improperly constructed resulting in mold exposure risks to occupants might sue the builder or developer under any number of construction law theories including breach of contract, breach of warranty, fraud, and misrepresentation. In the case of *Mandelli v. Kendal Homes Corp.*, 631 N.W.2d 846 (Neb. 2001), homeowners sued their builder to recover for injuries arising from exposure to mold that was present due to alleged defective construction. The builder achieved summary judgment at the trial court, but was reversed by the state supreme court with a finding that the evidence supported a conclusion that the contractor had failed to
build the home in a workmanlike manner. The identified construction defects included the absence of tar paper between the wall sheathing and the brick veneer, absence of flashing between the roofline and the exterior walls, and excessive bee holes and cracks in the brick veneer mortar.

b. Real estate/contract law.

When the property owner discovers mold contamination, after acquiring the structure by contract, the aggrieved owner will likely review the purchase contract with an eye towards supporting a lawsuit against the seller. Contracts often contain representations and warranties that the structure does not contain any toxic or hazardous substance. Toxic mold could be interpreted to fit the category, toxic or hazardous substance. The purchaser will likely also allege that the seller failed to disclose a known latent defect, for example, past water damage.

Pre-acquisition due diligence investigations of structures should include, at a minimum, a thorough inspection for the tell-tale signs of mold contamination: black or dark colored mold growth on building components, musty or earthy odor, evidence of flood or water damage. Additionally, the seller should be questioned about any history of flooding or water leakage. If information reveals a history of water damage or actually mold contamination, a more invasive Phase II investigation would be warranted. Under Phase II, it may be necessary to look behind the walls and to collect air samples to determine mold spore concentration levels.

c. Landlord/tenant law.

If exposure to mold spores or mycotoxins arise from habitation of rental property, the landlord can expect to be sued under any number of legal theories. Invariably, the lease agreement will require that the landlord maintain the rental property in a minimally safe, habitable manner. Additionally, traditional tort theories such as negligence, and in the extreme condition, wrongful death claims, would also be asserted against the landlord. For example, owners of a federally subsidized housing project in New York were sued by more than 150 families who live in the apartment complex. The litigants claim they have lived with pervasive mold growth for years. Their efforts to clean the infestation were futile and their pleas to building managers to address the mold went unheeded.

In 2001, two apartment tenants secured a judgment of nearly $1,000,000 from a Delaware landlord. See New Haverford Partnership v. Stroot, 772 A.2d 792 (Del. 2001). The tenants had experienced leaks in their ceilings and whenever the tenant above showered, black water ran out of small holes in the ceiling. Eventually, that ceiling collapsed, revealing mold growth. The tenants had suffered allergies and asthma conditions since childhood, but the frequency and severity of medical treatment increased when they took up residency in the apartment. The tenants pursued three theories of tort liability: (1) negligence based on the landlord’s failure to maintain safe and sanitary conditions in the apartment; (2) negligence per se based on alleged violation of the county building code; and (3) negligence per se based on alleged violations of the state’s landlord tenant code which requires landlords to maintain their building in a safe and sanitary condition.
During its 2012 regular session the legislature passed, and the governor signed, three bills affecting probate and trust law practice. These were HB 155, a sort of “omnibus” bill addressing a range of issues of importance to the trust and estate bar, HB 71, which waives probate fees for the estates of servicemen who died in the line of duty, and HB 156, which authorizes informal periodic settlements by personal representatives.

I. HB 155

HB 155 contains the following provisions:

- An amendment to KRS 386.454 to permit a trustee or personal representative to make adjustments between principal and income without first obtaining court approval, provided appropriate notice is given to the beneficiaries of the trust.

- An amendment to KRS 386.454 to create a Kentucky unitrust statute.

- A new section of KRS Chapter 386 authorizing a trustee of a trust to exercise a power to distribute principal by distributing principal to a second trust, including a trust created by the trustee for the purpose of receiving the distribution.

- Amendments to KRS 386.810 and KRS 395.195 to authorize trustees and personal representatives to take action so as to cause discretionary distributions of income or principal to include realized capital gains.

- Amendments to KRS 386.810 and KRS 395.195 to authorize trustees and personal representatives to take action so as to cause discretionary distributions of income or principal to include realized capital gains.

- A new statute authorizing the district court to create a special needs “pay back” trust for the benefit of a disabled individual.
A. Amendments to KRS 386.504 and KRS 386.454. HB 155 Sections 1 & 2.

KRS 386.454 is a part of the Kentucky Principal and Income Act and authorizes trustees under certain circumstances to reallocate principal to income. Current law provides that such adjustments may be made if the trustee elects to have the Prudent Investor Rule of KRS 286.3-277 apply to the trust, the trustee concludes that he cannot satisfy his duty to treat the income and remainder beneficiaries impartially, and the trustee receives court approval to make the adjustment. The purpose of the statute is to allow trustees to invest the assets of the trust for “total return” regardless of whether the return is classified as income or principal for trust accounting purposes while still insuring the income beneficiary a reasonable income from the trust. In theory, the statute permits a trustee to shift the trust’s investment portfolio towards equities and make up any shortfall in income for the income beneficiary by reallocating principal to income. Such a reallocation is referred to by the statute as an “adjustment.” KRS 386.454(2) also authorizes the trustee to use an “adjustment method” including “an adjustment method such as an annual percentage distribution if the percentage is not less than three percent (3%) nor more than five percent (5%) of the fair market value of the trust assets determined annually.” The example of an “adjustment method” mentioned in the statute is a so-called “unitrust” and is a popular way of resolving disagreements between income and remainder beneficiaries about the appropriate investment allocation of the trust’s assets. If the income and remainder beneficiaries are not related, the income beneficiary may demand that the trustee invest the trust’s assets primarily for income while the remainder beneficiaries may demand that the trustee invest the trust’s assets primarily for growth. Converting an income only trust to a unitrust is one way of resolving such a conflict.

The Kentucky Principal and Income Act is based on the Uniform Principal and Income Act. However, the requirement of KRS 386.454 that court approval must be obtained for any adjustment between income and principal is a non-uniform provision. Kentucky is the only state which requires court approval for an adjustment. In practice, this has meant that the adjustment option of the statute is almost never used. HB 155 deletes the requirement of obtaining court approval for an adjustment. Instead, the proposal requires the trustee to provide notice to the beneficiaries of the trust. Notice must be given by certified mail, restricted delivery. Only if a beneficiary objects to the proposed adjustment or if the trustee is unable to obtain delivery of the notice upon a beneficiary by certified mail must the trustee obtain approval from the court.

Because of the requirement to secure court approval, the adjustment provisions of KRS 386.454 have been used almost exclusively to convert income only trusts to unitrusts. Unfortunately, the unitrust provision of KRS 386.454 is deficient in not expressly authorizing a “smoothing” provision pursuant to which the amount of the unitrust payment is based upon an average of the trust’s value over two or more preceding years. Such a provision significantly improves the operation of the unitrust by ameliorating the effects of market volatility on the trust’s payout to the income beneficiary. Because the statute does not specifically authorize a smoothing provision, the IRS has taken the position informally with at least one Kentucky taxpayer that
converting an income only Kentucky trust to a unitrust that includes a smoothing provision results in adverse income and gift tax consequences. New KRS 386.454(3) fixes this problem by expressly authorizing a unitrust conversion with a smoothing provision.

B. Amendment to KRS 386.502 Clarifying the Effective Date of the Kentucky Uniform Principal and Income Act. HB 155 Section 3.

KRS 386.502 currently provides that the Kentucky Principal and Income Act other than KRS 386.454 applies to all trusts administered under Kentucky law regardless of when created unless the trust instrument provides otherwise. Section 4 of HB 155 eliminates the reference to KRS 386.454 clarifying that all provisions of the Kentucky Principal and Income Act apply to a Kentucky trust regardless of when created.

C. Kentucky Decanting Statute. HB 155 Section 4.

Over the past several years, at least eleven states have adopted so-called “decanting” statutes authorizing trustees to modify trusts in certain specified circumstances by exercising a principal distribution power to transfer principal to a different trust. Those states that have adopted decanting statutes include Alaska, Arizona, Delaware, Florida, Indiana, Nevada, New York, North Carolina, Ohio, South Dakota, and Tennessee. The primary objective of these statutes is to permit a trust to be modified to address changes in circumstances not anticipated by the grantor at the time the trust was established. One example of when such power would be useful is a trust created by a grandparent for an infant grandchild who at the time the trust terminates, say age twenty-five, suffers from a drug problem. The trustee might conclude that the grandchild would be better served if the property were retained in trust until the grandchild resolved his problem. Under current law, there would be no means by which the trustee could do so. Another common example is a tax law change that is not anticipated by the grantor that applies to the trust in a punitive fashion because of the manner in which the trust is drafted. For example, in order to hold S corporation stock a trust must have certain provisions specified by the Internal Revenue Code or, alternatively, elect to be treated as an “electing small business trust” and pay tax at the highest bracket as a price for making the election. Either of these examples could be resolved by the trustee distributing the trust principal to a new trust whose provisions were substantially similar to the old trust but with additional provisions that addressed the mentioned problems. In neither of these cases would a decanting frustrate grantor intent.

Section 4 of HB 155 provides that if a trustee has a power to invade principal, then the invasion power may be exercised by the trustee distributing trust principal to a new or different trust, including a trust created by the trustee to receive the distribution. Written notice of the proposed exercise of the power must be given by certified mail, restricted delivery, to all income beneficiaries and all members of the oldest generation of remainder beneficiaries. Alternatively, the trustee or a beneficiary may proceed directly to the district court to obtain approval of a proposed decanting in accordance with KRS 386.450(3), which provides for notice to all current beneficiaries and all
reasonably ascertainable remainder beneficiaries in the oldest generation. 

**KRS 386.450(10)** provides that “notice” as used in **KRS 386.450(3)** means written notice of the time and place for the hearing that is placed postage prepaid in the United States mail thirty days prior to the hearing to the last known address of the party to receive notice. As a result, the notice provisions are less stringent if the decanting is effected with approval of the district court than if the trustee proceeds without such approval. If any beneficiary objects, he or she may institute a proceeding in district court pursuant to **KRS 386.675**. After such a proceeding was commenced, the decanting power could not be exercised without approval of the district court. If the district court approves the exercise of the power over the beneficiary’s objection, the beneficiary may file an adversary proceeding in circuit court pursuant to **KRS 24A.120(2)**.

D. Amendments to **KRS 386.810** and 395.195. **HB 155**, Sections 5 and 6.

**KRS 386.810** is Kentucky’s version of the Uniform Trustee’s Powers Act. **KRS 395.195** lists the powers of a personal representative. **Section 5 of HB 155** adds a new subsection to each statute authorizing the trustee to cause gains from the sale of trust assets to be treated as a part of income for federal income tax purposes, including the power to allocate gains to income for the purpose of making discretionary distributions. One objective of the amendment is to ameliorate the punitive effect on trusts of the new 3.8 percent Medicare surtax on investment income which is part of the new federal health care law and which will become effective in 2013. With respect to individuals, the surtax kicks in at $250,000 of taxable income for married taxpayers filing jointly and at $200,000 of taxable income for single taxpayers. However, for trusts the tax begins to apply at the point at which the trust enters the maximum income tax bracket, which occurs for 2011 at $11,350 of taxable income. The surtax defines investment income as including capital gains. The amendments made by **section 5 of HB 155** will make it easier for a trustee to cause such gains to be included for tax purposes as a part of distributions otherwise payable to a beneficiary so that they are subject to the surtax only if the beneficiary has sufficient income to reach the higher threshold at which the tax applies to individuals. The amendments are drafted in such a way that they will not permit a trustee to reallocate principal to income and thereby frustrate grantor intent. Inclusion of gains in income is permitted by the amendments only for the purpose of making a “discretionary” distribution of income, which would be subject to the trust provisions specifying the purposes for which such distributions can be made, or to income increased by an adjustment pursuant to **KRS 386.454**, to a unitrust payment or to a distribution of principal. The amendments do not permit distributions beyond what is authorized by the trust instrument, but would only affect the tax character of the distribution in the hands of the beneficiary.
E. Amendments to KRS 381.180. HB 155, section 7.

KRS 381.180 sets forth the rules governing spendthrift trusts. Section 7 of HB 155 amends the statute in two respects. The first relates to “grantor” trusts and the second relates to inter vivos “qualified terminable interest property” trusts.

A grantor trust is a trust that is treated as “owned” by the grantor for federal income tax purposes. If a trust is “owned” by the grantor, then all income, deductions and credits of the trust are reported directly on the grantor’s income tax return as if the trust did not exist. This tax result obtains regardless of whether the trust distributes any property to the grantor, and regardless of whether the grantor is a beneficiary of the trust. Grantor trusts are commonly encountered in estate planning. For example, because of restrictive rules relating to the ownership of S corporation stock by trusts, when a trust is indicated for a gift of such stock the trust is often structured as a grantor trust. Use of a grantor trust avoids the restrictive S corporation ownership rules during the grantor’s lifetime. Such a trust, if properly drafted, is not includable in the grantor’s estate for federal estate tax purposes. However, use of a grantor trust means that the trust’s taxable income will be reportable by the grantor even though that income is distributed to someone else. Prior to 2004, it was common to include in grantor trusts a provision authorizing the trustee to distribute trust property to the grantor to reimburse him for the tax on trust income taxed, but not distributed, to him. However, in 2004 the IRS issued Rev. Rul. 2004-64 which holds that such a reimbursement provision will cause the trust property to be included in the grantor’s gross estate if under state law the provision results in the grantor’s creditors being able to attach the trust’s property to satisfy their claims. The amendment to KRS 381.180 clarifies that a reimbursement provision in a grantor trust will not, by itself, result in the grantor’s creditors being able to reach the trust’s property to satisfy their claims. New KRS 381.180(7)(c).

Federal tax law provides for a gift tax marital deduction for property contributed to a trust all of the income of which must be distributed to the grantor’s spouse, for life. The price for the deduction is inclusion of the trust in the spouse’s estate. Trusts of this type are referred to as inter vivos “qualified terminable interest property” trusts, or inter vivos “QTIP” trusts. They are commonly used to equalize the net worth of a married couple so as to enable the family to make use of the poorer spouse’s federal estate tax exemption. IRS regulations provide that if, subsequent to the spouse’s death, the trust property remains in trust for the benefit of the grantor the property will not be taxed in the grantor’s estate, provided a marital deduction is not claimed for the trust in the donee spouse’s estate. 26 C.F.R. §25.2523(f)-1(d)(1) and 26 C.F.R. §25.2523(f)-1, ex. 11. This rule is an exception to the general rule that a grantor’s estate will include property placed in trust by the grantor if the grantor is entitled to the income from the trust property at the time of his death. However, in order to obtain the benefit of this rule the trust property must not be reachable by the grantor’s creditors. If the creditors can reach the trust property, then the trust will be included in the grantor’s estate on the theory that he could access the trust by borrowing and then relegating his creditors to the trust for repayment. New KRS 386.180(8) provides that a
grantor’s creditors may not reach an inter vivos QTIP trust merely because the grantor retains an interest in the trust subsequent to the spouse’s death. In addition, new KRS 386.180(8)(c) provides that the grantor’s creditors may not reach an irrevocable trust for the spouse of the settlor (regardless of whether the trust qualifies as QTIP under the federal tax law) if the grantor is a beneficiary of the trust only after the death of the settlor’s spouse. This provision means that a “credit shelter” type trust can be created during the settlor’s lifetime (for example, to take advantage of the $5 million gift tax exemption in effect for 2012) for the benefit of the settlor’s spouse and the settlor can receive an interest in the trust after the spouse’s death, e.g., as a result of the exercise of a special power of appointment by the spouse, without the settlor’s interest in the being reachable by his creditors.

F. New KRS Chapter Granting Specific Authority in the District Court to Create a Self-Settled Special Needs “Pay Back” Trust. HB 155, sections 8-18.

42 USC §1396p provides that a trust created with the assets of a disabled individual under the age of sixty-five will not be treated as an asset of the individual for the purpose of determining eligibility for Medicaid if the trust provides that upon the death of the individual the state will receive all amounts remaining in the trust up to an amount equal to the total medical assistance paid on behalf of the individual by the state’s Medicaid plan. The statute further provides that the individual’s parent, grandparent, legal guardian, or a court must create the trust. It will often be the case that neither a parent nor grandparent is living and able to create the trust on behalf of the disabled individual, meaning either that a legal guardian must be appointed or a court petitioned to create the trust on behalf of the individual. No Kentucky statute specifically authorizes the court to create such a trust for a disabled individual. Sections 8-18 of HB 155 grant specific authority to the district court to create such a trust upon petition of an interested individual, thereby providing a mechanism for disabled individuals to avail themselves of this federal benefit.

II. HB 156: INFORMAL PERIODIC SETTLEMENTS

KRS 395.605 authorizes the fiduciary of any estate to file an informal settlement if the fiduciary is the sole beneficiary or if the informal settlement is accompanied by a verified waiver by all of the beneficiaries of the estate, or by all of the residuary beneficiaries if the specific legatees have receipted for their bequests or the settlement is accompanied by the cancelled check delivered in satisfaction of the specific bequest. HB 156 amends the statute by making its provisions applicable to periodic settlements. Some of the items which the statute directs the fiduciary to file with an informal settlement make sense only in the context of a final settlement, such as proof that all estate and inheritance taxes have been paid, the amount of the attorney’s fee and a statement that all beneficiaries have received their share of the estate. The amendment does not address how these requirements are to apply to an informal periodic settlement. A rule of reasonableness will have to be applied by the district courts in applying the requirements of KRS 395.605 to an informal periodic settlement.
III. **HB 71: WAIVER OF PROBATE FEES IN CERTAIN CASES**

HB 71 amends KRS 61.315 by adding a new subsection (6) which provides that all probate fees are waived for the estates of Kentucky servicemen killed in the line of duty. In addition, estates of metropolitan or urban-county correctional offices, jailers, deputy jailers, police officers, fire fighters, and Kentucky National Guardsmen killed in the line of duty are similarly exempted from the burden of paying probate fees. The fees waived include fees assessed to open a probate matter, recording fees for a will, and law library fees.
This year’s update includes relatively few cases.

The first case for discussion is Commonwealth Bank & Trust Co. v. Young, 361 S.W.3d 344 (Ky. App. 2012). The case involved allegations typical of a blended family, but the issue before the Court was whether a declaratory judgment action and an action to bring assets back into the trust violated the *in terrorem* clause. The trial court granted a partial motion on the pleadings to the effect that the action did not violate the clause and the court designated the order as “final and appealable.” *Id.* at 350. The first question the Court had to decide is whether the court erred in making that designation. The Court of Appeals held that the court “acted well within its broad discretion” and that the issue was severable from the other issues before the trial court. *Id.* at 351. In essence, the Court based its decision on the fact that if the action did violate the no-contest clause, there would be no reason for it to continue.

That left the Court to decide whether the action violated the no-contest clause. The Court first turned to the leading case of Dravo v. Liberty Nat. Bank & Trust Co., 267 S.W.2d 95 (Ky. 1954). *Id.* at 352. The Court then turned to a Court of Appeals decision that was covered at length in this presentation last year, Ladd v. Ladd, 323 S.W.3d 772 (Ky. App. 2010). In *Ladd*, the party “pled and argued that she is not contesting the validity of the Trust . . . [but] [i]nstead she is seeking a determination” about assets to include in the trust. *Id.* at 353 (*quoting* *Ladd*, 323 S.W.3d at 780).

It seems that *Ladd* gave support to the ability of parties to use declaratory judgment actions to get around no-contest clauses. The *Commonwealth Bank* case provides further support for following that strategy.

The next case is an unpublished decision arising from a large, complex estate. Though unpublished, Kincaid v. Kincaid, No. 2009-CA-002202-MR, 2011 WL 3862153 (Ky. App. Sep 2, 2011), addresses two important topics. The first is a caution to trial courts not to seal records as willingly as they have been. The Court summarized the procedure trial courts should implement before doing so:

1. There must be a hearing;
2. The trial court must consider less restrictive means;
3. The burden of proof is upon the party seeking closure and it must be established that:
   a. the right or interest sought to be protected is sufficiently important to warrant the extraordinary protection of the closed court;
   b. the asserted right or interest probably cannot be adequately protected by less restrictive alternatives to closure; and
   c. the right or interest he seeks to protect will be protected by a closed proceeding.
Kincaid, slip op. at 7-8 (citing Lexington Herald-Leader Co., Inc. v. Meigs, 660 S.W.2d 658, 664 (Ky. 1983). The Court of Appeals went on to unseal all the records in the case before it and urged the Supreme Court to follow the lead of states like California and adopt a Rule of Civil Procedure. Id. at 8-9.

The more substantive issue before Kincaid was whether the members of the advisory committee in a very complicated case could be compensated. The Court ultimately decided the case without deciding whether advisory committee members could be paid directly from the estate. Rather, the Court held that the Executor was “entitled to supplement its executor fee to which it is entitled pursuant to KRS 395.150 and KRS 395.195(18) for the purpose of compensating the advisory committee members for their sixteen years of service as advisors to the Bank, as executor and trustee.” Id. at 25. The Court reasoned that the will and KRS 395.195(18) allow a personal representative to employ advisors. The Court also noted that the executor had reduced its fee substantially based on the expectation that the advisors would be paid. There also seemed to be an equitable argument at play in that the estate had grown significantly during the lengthy administration and not compensating the advisors would have turned them into volunteers.

After those two cases, it is already time to turn away from strictly probate cases and look at related practice areas.

The first case we find is Anderson v. Pete, 2011 WL 4633096 (Ky. App. Oct. 7, 2011) (No. 2010–CA–000472–MR, Oct. 7, 2011). This case involves a legal malpractice claim against the lawyer who brought a wrongful death claim but “did not include claims of loss of consortium/parental love and affection for the [decedent’s] children.” Slip op. at 3. The original wrongful death case was dismissed. The case at issue here was the children’s malpractice claim against the lawyer. The trial court granted the lawyer’s motion for summary judgment because the children did not have privity with the lawyer. Id. at 4.

The Court cited a case discussed in this seminar, Branham v. Stewart, 307 S.W.3d 94 (Ky. 2010), to support its conclusion that the lawyer did owe duties to the minor children. The Anderson Court also based its decision on the affidavit of the children’s mother, in which she stated that she understood the lawyer to be representing the children based on the lawyer’s comment that half of the recovery would be held for the children’s benefit. Anderson, slip op. at 7. The mother’s expectation was important because “the attorney-client relationship need not necessarily arise by contract . . . [but may] be born of a ‘reasonable belief or expectation’ on the part of the would-be client that the attorney has agreed to undertake the representation.” Id. at 6 (citing Lovell v. Winchester, 941 S.W.2d 466, 468 (Ky. 1997)).

The facts of this case seem quite different than those of a potential malpractice claim by estate beneficiaries, but the Anderson Court stated that “[i]ndeed, there is no privity requirement for legal malpractice actions in Kentucky.” Id. at 9 (quoting Sparks v. Craft, 75 F.3d 257, 261 (6th Cir. 1996)).

Ritchie R. Rednour, II, was the sole member of both LLCs. An employee of Rednour Properties, LLC, made the original contact with the Spangler, LLC and then Mr. Rednour met to sign the contract.

The contract incorrectly “listed Rednour Properties as the owner of the property, although it was actually owned by Rednour Blake at the time the contract was executed.” *Id.* at 15. Mr. Rednour “signed the contract without specifying that he was acting in a corporate capacity.” *Id.* at 16. Furthermore, the Court noted that “Rednour admits to having set up the LLCs for tax purposes.” *Id.* Based on that limited analysis, the Court described the entities as “dummy” corporations and stated that it was “unable to discern any difference between Rednour and his various LLCs.” *Id.*

This opinion would be more troubling if it were published, as the Court of Appeals intended it to be. However, when it denied discretionary review, our Supreme Court also ordered that it not be published. Hopefully, it will be unfollowed as well as unpublished” as it could bring the benefit of single member LLCs into serious question.
I. INTRODUCTION

A. Because of the law's exemptions, Kentucky's current inheritance tax does not apply to many estates.

B. Because of the law's tax rates, when it applies, it is likely to be significant and cannot be forgotten in the process of creating a client's estate plan.

C. This presentation briefly discusses the recent history of Kentucky's inheritance and estate tax, significant provisions of the laws, filing requirements, some planning techniques and helpful resources.

D. It is impossible to discuss all of the features and intricacies of the Kentucky inheritance tax in the time provided for this presentation. As a result, only select topics of particular interest will be presented.

II. INHERITANCE VS. ESTATE TAXES

A. Inheritance Taxes

1. The overall size of the estate does not matter.

2. Tax depends on the relationship of the recipient of property to the decedent.

   a. The amount of the tax is based on who receives property as a result of the decedent's death.

   b. The closer the recipient is related to the decedent the higher the exemption and the lower the tax rate.

B. Estate Tax

1. Generally, the size of the estate determines the tax.

2. With a few exceptions (surviving spouse and charities) the relationship of the recipient of property to the decedent does not affect the calculation of tax.
III. KENTUCKY ESTATE TAX

A. Although beyond the scope of this presentation, Kentucky has an estate tax.

B. **KRS 140.130** imposes an estate tax "on all estates equal to the amount by which the credits for state death taxes allowable under the federal tax law exceeds the tax levied under **KRS 140.010**, less the discount allowed under **KRS 140.210**, if taken by the taxpayer."

C. Because the state death tax credit currently does not exist under the federal estate tax law, the Kentucky estate tax is no longer relevant but if the state death tax credit comes back as scheduled, the Kentucky estate tax will automatically apply.

D. When applicable, the Kentucky estate tax imposes a "sponge" or "pick-up" tax. Except for the loss of the 5 percent discount, if taken, this tax doesn't cost the estate anything. It simply shifts the receipt of funds from the federal government to the state. If Kentucky did not impose the tax, the federal estate tax payable would be increased because the benefit of the state death tax credit would be lost.

IV. KENTUCKY INHERITANCE TAX

A. Imposed by **KRS 140.010**, et seq. See **Appendix** for an electronic link to this chapter.

B. History

1. Initially enacted in 1906.

2. In 1995 significant changes were made to the statute. These changes eventually eliminated the applicability of the inheritance tax to most estates.

   a. Brothers, sisters, half-brothers and half-sisters were moved from Class B Beneficiaries to Class A Beneficiaries.

   b. An exemption from tax equal to the total inheritable interest received by a Class A Beneficiary was phased in over a three-year period.

   c. As a result of this legislation, for decedents dying after June 30, 1998, Kentucky imposes **no** inheritance tax on amounts received by a Class A Beneficiary.

3. In earlier years, Kentucky's inheritance tax was very significant, even for amounts passing to a surviving spouse.
4. For example, with respect to decedents dying in the late 1970s and the 1980s, the applicable exemptions and rates were:

<table>
<thead>
<tr>
<th>Beneficiaries</th>
<th>Exemption</th>
<th>Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>CLASS A – Including, for example</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Surviving spouse</td>
<td>$50,000</td>
<td>5-10 percent</td>
</tr>
<tr>
<td>Infant child</td>
<td>$20,000</td>
<td>3-10 percent</td>
</tr>
<tr>
<td>Parent, adult child, step-child, grandchild</td>
<td>$5,000</td>
<td>2-10 percent</td>
</tr>
<tr>
<td>CLASS B – Including, for example, brother, sister, niece and nephew</td>
<td>$1,000</td>
<td>4-16 percent</td>
</tr>
<tr>
<td>CLASS C – Educational, religious or other institutions, societies or associations not exempted by KRS 140.060 and all persons not included in Classes A or B</td>
<td>$500</td>
<td>6-16 percent</td>
</tr>
</tbody>
</table>

C. Current Classification of Beneficiaries

1. KRS 140.070.

2. Class A Beneficiaries are: parents, surviving spouse, children by blood, stepchildren, children adopted during infancy, children adopted during adulthood who were reared by the decedent during infancy, grandchildren who are the issue of a child by blood, the issue of stepchildren, the issue of children adopted during adulthood who were reared by the decedent during infancy, the issue of children adopted during infancy, brothers, sisters, and brothers and sisters of the half blood.

a. Once a step-child always a step-child? If husband and wife divorce, are the children of the wife still the step-children of the husband? Informally, the Revenue Cabinet said yes.

b. Planning opportunity: If a client, an aunt for example, raises an individual while that individual is a minor, and desires to leave assets to that individual at the client's death, consider an adult adoption. That would convert the individual (in this case the niece or nephew) into a Class A Beneficiary and could save significant inheritance taxes. For example, $22,960 of inheritance taxes are payable in connection with a $200,000 bequest to a niece or nephew (a Class B Beneficiary) but no inheritance tax is payable in
connection with a $200,000 bequest to a Class A Beneficiary.

3. Class B Beneficiaries are: nephews, nieces, nephews and nieces of the half blood, daughters-in-law, sons-in-law, aunts, uncles, and great-grandchildren who are the grandchildren of a child by blood, of a stepchild or of a child adopted during infancy.

- The niece or nephew of one spouse is not the niece or nephew of the other spouse. Estate of Mary L. Connolly, Kentucky Board of Tax Appeals, File No. K89-R-1090, 1990 Ky. Tax LEXIS 67 (1990).

4. Class C Beneficiaries are: organizations and entities not exempted by KRS 140.060 and individuals not included in the definition of either Class A or Class B Beneficiaries.

D. Current Rates and Exemptions

<table>
<thead>
<tr>
<th>Beneficiaries</th>
<th>Exemption</th>
<th>Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>CLASS A</td>
<td>Total Inheritable Interest</td>
<td></td>
</tr>
<tr>
<td>CLASS B</td>
<td>$1,000</td>
<td>4%-16%</td>
</tr>
<tr>
<td>CLASS C</td>
<td>$500</td>
<td>6%-16%</td>
</tr>
</tbody>
</table>

E. Examples of Tax

1. A $200,000 bequest to a Class B Beneficiary, a daughter-in-law or son-in-law for example, would result in an inheritance tax of $22,960 and bequests in excess of $200,000 would be taxed at a marginal rate of 16 percent.

2. A $200,000 bequest to a Class C Beneficiary, a friend or unmarried domestic partner for example, would result in an inheritance tax of $28,670 and bequests in excess of $200,000 would be taxed at the marginal rate of 16 percent. In fact, a bequest in excess of $60,000 would be taxed at a marginal rate of 16 percent.

F. Property Subject to Tax

1. In general, all property which a resident decedent owned or had an interest in at the time of death is included in the decedent's gross estate and reportable on the decedent's inheritance tax return.
2. Special assets.

a. Real estate which is owned by a resident decedent but not located within the state of Kentucky is not subject to the provisions of the Kentucky inheritance tax. KRS 140.010.

b. Certain military benefits are not taxable. KRS 140.015.

c. Transfers in contemplation of death must be included on the decedent's inheritance tax return and are treated as transferred to the transferee at the death of the transferor.

i. KRS 140.020(2) provides: that "[e]very transfer made within three (3) years prior to the death of the grantor, vendor or donor of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed **prima facie** to have been made in contemplation of death within the meaning of this chapter. If a transfer was made more than three (3) years prior to the death of the decedent it shall be a question of fact, to be determined by the proper tribunal, whether the transfer was made in contemplation of death." (Emphasis added)

ii. **Beware:** The instructions to the Kentucky inheritance tax return quotes the statute "in part" but leaves out the words "**prima facie.**" The instructions read as if all gifts made within three (3) years of death are included in the decedent's gross estate and taxable to the transferee. Although the form requires that all transfers made within three (3) years of death be disclosed, that does not make all of the transfers taxable. It simply raises a rebuttable presumption.

iii. Although the statute implies that transfers made more than three (3) years prior to death can be "made in contemplation of death," there is no requirement that these transfers be disclosed. As a result, it is doubtful that they would become known to the Revenue Cabinet.

iv. KRS 140.020(3) provides that "[t]here shall be no presumption of contemplation of death as to certificates of deposit jointly owned and all such certificates of deposit shall be taxed pursuant to KRS 140.050." This provides a unique planning opportunity which will be discussed later.
d. Life insurance proceeds are not taxable unless they are payable to the insured or the estate of the insured. **KRS 140.030(2)**.

i. Insurance proceeds payable to a designated beneficiary pass tax-free.

(a) This includes the trustee of a testamentary or *inter vivos* trust.

(b) **Planning opportunity:** Be sure all life insurance proceeds are payable to a designated beneficiary.

ii. Proceeds payable under certain government provided life insurance policies also pass tax free even if they are payable to the insured or the insured's estate.

e. Property owned jointly with right of survivorship is included in the decedent's gross estate but only to the extent of the decedent's fractional ownership of the property. **KRS 140.050**. This is the case regardless of who contributed to the purchase of the property or deposited funds into the account.

i. For example, if the decedent and one other person own a joint and survivor bank account, only 50 percent of the account is included in the gross estate of the decedent, even if the decedent made all of the deposits into the account. If the decedent and two (2) other people own the account, only one-third is included.

ii. This appears to be the case even if the survivor provided all of the consideration. As a result, care should be taken in putting accounts in joint names with right of survivorship. If all of the funds are provided by one owner and that owner survives, he or she could be required to pay inheritance tax in connection with the receipt of funds which he or she deposited. On the other hand, if the contributing owner dies, all of the funds will be received by the survivor but he or she will be required to pay inheritance tax on only one-half of the proceeds.

iii. If the asset is put into joint names with right of survivorship or is acquired within three (3) years of the decedent's death, the portion excluded from the decedent's gross estate under **KRS 140.050** (the joint and survivorship statute) might be included.
under KRS 140.020 (the transfers in contemplation of death statute).

f. Qualified plans and IRAs.

i. Annuities or other payments receivable by a beneficiary, other than an executor, from a qualified plan are excluded from taxation to the extent attributable to employer's contributions. KRS 140.063.

- It is unclear whether contributions to a 401(k) plan pursuant to an employee's election would be treated as employer or employee contributions but according to the Revenue Cabinet, these contributions are treated as employee and not employer contributions. This would result in a portion of the distribution being subject to inheritance tax.

ii. Amounts receivable by a beneficiary (other than the executor) as an annuity under an IRA are excluded from taxation. KRS 140.063(3).

(a) This exclusion only applies to the extent the amounts in the IRA are attributable to tax deductible or rollover contributions. KRS 140.063(4).

(b) For these purposes an annuity is defined as "an annuity contract or other arrangement providing for a series of substantially equal periodic payments to be made to a beneficiary (other than the executor) for his life or over a period extending for at least thirty-six (36) months after the date of the decedent's death." KRS 140.063(4).

- According to the Revenue Cabinet, the beneficiary could make an arrangement with the IRA custodian (after the decedent's death) to receive the IRA proceeds in a series of substantially equal periodic payments for his life or over a period extending for at least thirty-six (36) months and this would allow the proceeds to be excluded from the decedent's gross estate.
iii. Because all amounts attributable to employer contributions which are received pursuant to the terms of a qualified plan are excluded from taxation and only "annuities" receivable from an IRA are excluded, consideration should be given to leaving benefits in the qualified plan rather than rolling them over into an IRA.

g. Property subject to a power of appointment.

i. KRS 140.040 provides that property subject to a power of appointment held by a decedent is included in the gross estate of the decedent as if he or she owned the property itself.

ii. This applies to property subject to a special power of appointment as well as property subject to a general power.

iii. This statute applies whether or not the power is exercised by the holder of the power.

iv. The taxation of property subject to a power of appointment is discussed below in connection with a planning opportunity which uses powers of appointment to save inheritance tax.

G. Valuation of Assets and Calculation of Inheritable Interests

1. Assets are valued as of the date of the decedent's death. Kentucky does not have an alternate valuation date.

2. Life estates are valued using the appropriate mortality tables and an assumed interest rate of 4 percent. KRS 140.100.

3. 103 KAR 2:005 sets forth the life expectancy table to be used in valuing assets included in the decedent's gross estate and the value of transfers made as a result of a decedent's death. See Appendix for an electronic site to this regulation.

4. A table to be used to value life estates is included in the instructions to the inheritance tax forms. See Appendix for an electronic link to these forms and instructions.

5. KRS 140.110(1) provides in part that "[i]n the case of estates in expectancy which are contingent or defeasible, a tax shall be levied at the rate which, on the happening of the most probable contingencies or conditions named in the will, deed, trust agreement, contract, insurance policy, or other instrument, would be applicable under the provisions of this chapter."
• This provision could be very helpful in establishing a lower tax at the decedent's death.

6. If a decedent's will provides that the inheritance tax is payable from the residuary estate, the Revenue Cabinet takes the position that there is an additional bequest to a non-residuary beneficiary. This additional bequest is the amount of the tax paid from the residuary estate as a result of bequest, etc., to the non-residuary beneficiary. This would include tax on the tax, etc.

   a. Calculation of the total tax due (including all of the tax on the tax) requires an algebraic calculation:

      i. \[ A = (B+A-C) \times D+E \]

         (a) “A” is the total tax due.

         (b) “B” is the amount of the specific bequest or other amount to which the beneficiary is entitled.

         (c) “C” is the breakpoint in the tax calculation (the amount above which the marginal tax rate will apply).

         (d) “D” is the marginal tax rate.

         (e) “E” is the tax from the table attributable to the amount of the bequest, etc. below the breakpoint.

   ii. For example, under Betty's will, Tom (an unrelated neighbor—a Class C Beneficiary) receives a specific bequest of $150,000. Betty's will provides that all inheritance taxes are to be paid from Betty's residuary estate and directs Betty's Executor not to seek payment or reimbursement from Tom. There is no federal estate tax.

      (a) The tax table provides that for distributive shares to a Class C Beneficiary above $60,000, the tax would be $6,270 plus 16 percent of the excess over $60,000.

      (b) As a result, the tax, under the above formula, would be calculated as follows:

         i) Step 1: \[ A = (\$150,000+A-$60,000) \times 16\% + \$6,270. \]
ii) Step 2: \[ A = (90,000 + A) \times 16\% + 6,270. \]

iii) Step 3: \[ A = 14,400 + 0.16A + 6,270. \]

iv) Step 4: \[ A = 20,670 + 0.16A. \]

v) Step 5: \[ 0.84A = 20,670. \]

vi) Step 6: \[ A = 20,370/0.84 \text{ or } 24,607.14. \]

vii) The total tax is $24,607.14 and the total bequest is considered to be $174,607.14 or $150,000 + $24,607.14.

(c) To prove this is correct, calculate the tax on a bequest of $174,607.14.

i) Under the table the tax is: \[ (174,607.14 - 60,000) \times 16\% + 6,270. \]

ii) The tax is $24,607.14.

b. The Revenue Cabinet's position is being challenged in Estate of Mildred L. McVey, Kentucky Board of Tax Appeals, File No. K10-R-22, 2011 Ky. Tax LEXIS 139 (2011). This case is discussed below.

H. Calculation of Inheritance Tax

1. The exemption applicable to Class B and C Beneficiaries is applied against the lowest tax bracket or brackets. \textbf{KRS 140.080(1)}.  

2. Use the tax tables provided in the instructions to calculate the tax. This will assure that the exemption is properly taken.

3. Under current federal estate tax law, Kentucky estate and inheritance taxes paid as a result of a decedent's death are deductible in calculating the federal estate tax payable. In addition, federal estate taxes paid (or estimated) in connection with a decedent's death are deductible in calculating the Kentucky inheritance due.

   a. The amount of each tax depends on the amount of the other tax.

   b. These inter-related calculations require the development of algebraic formulas and the use of simultaneous equations.
This probably requires a computer program which can quickly make a series of calculations. This can be done using Excel's iterative calculation feature.

I. Liability for Tax and Payment

1. Unless the decedent's will provides otherwise, the ultimate liability for inheritance tax falls on the recipient of the assets which account for the tax.

2. Even though the recipient of the property is ultimately responsible for the tax, KRS 140.190 provides that "[a]ll personal representatives, trustees, and beneficiaries shall be personally liable for the taxes until they are paid, but only to the extent that property from the estate come into their hands, and in no case shall the personal representative ortrustee be liable for a greater sum than passes through his administration."

3. As a result, the personal representative is required to pay the full amount of the inheritance tax due, even taxes with respect to assets which do not pass through the decedent's estate (for example amounts received by surviving joint tenants, beneficiaries of IRAs and transfer on death beneficiaries). The personal representative would then have to collect the taxes from the individual liable for the tax in order to satisfy his or her obligations to the beneficiaries of the estate.

4. Taxes are due eighteen (18) months after the date of the decedent's death. KRS 140.210.

5. If the taxes are paid within nine (9) months of the decedent's death, a five percent (5%) discount is allowed. KRS 140.210.

   • Even if the tax return is not filed within nine (9) months of the decedent's death, the five percent (5%) discount can be taken with respect to taxes paid to the Revenue Cabinet within the nine (9) month period.

6. Under KRS 140.222, a beneficiary who owes more than $5,000 in inheritance taxes can elect to pay the tax in ten (10) equal annual installments.

   a. The first installment is due at the time the return is filed.

   b. Interest is charged on the deferred tax at the interest rate defined in KRS 131.010(6). Interest begins to accrue eighteen (18) months after the date of the decedent's death.

   c. This election is made on a form prescribed by the Revenue Cabinet.
d. A bond or other security may be required. KRS 140.224.

e. When this election is filed and the first installment paid, the personal representative is relieved from further liability with respect to the deferred taxes.

J. Required Forms and Related Documents

1. Applicable forms and instructions can be found on the Revenue Cabinet's website. See Appendix for an electronic link to these forms.

2. Form 92A200 is required in most instances where an inheritance tax return must be filed.

3. In certain uncomplicated situations, Form 92A205 may be filed.

4. If all assets pass to Class A Beneficiaries and exempt organizations and no federal estate tax return is filed, no inheritance tax return is required. In this case, an affidavit is required to be filed with the District Court when the estate is closed. See Appendix for an electronic link to a form affidavit.

5. If real estate is included on the return, Form 92A204, Real Estate Valuation Information Form, is required to be filed with the return.

6. If a beneficiary elects to pay his or her inheritance tax in installments, Form 92A928 is required to be filed with the return.

K. A Case to Watch and Planning Opportunities

1. Estate of Mildred L. McVey (cited above).

   a. Mildred McVey's Will contained the following provision:

   "Any death or inheritance taxes payable at my death on my estate whether on property passing under this Will or otherwise shall be paid out of my residuary estate as a cost of administration and shall not be charged in any way to any beneficiary or recipient of my estate."

   b. Because of the language in Ms. McVey's Will, the Estate deducted the inheritance tax liability as a debt of the Estate. The Revenue Cabinet disallowed this deduction. The taxpayer appealed this disallowance. The Board of Tax Appeals found for the taxpayer and reversed the decision of the Revenue Cabinet.
c. The Revenue Cabinet also adjusted the distributive share of certain beneficiaries to reflect the "bequest of tax" provided for in Ms. McVey's Will. The taxpayer also appealed these adjustments. Again, the Board of Tax Appeals found for the taxpayer and reversed the decision of the Revenue Cabinet.

d. The Revenue Cabinet has appealed this decision to the Franklin Circuit Court. Although briefs have been filed, no decision on the appeal has been rendered as of July 19, 2012.

e. The Revenue Cabinet has informally indicated it will not follow this decision until the appellate court rules. Apparently some taxpayers are filing protective refund claims in the event the decision of the Board of Tax Appeals is ultimately upheld.

2. Gifts in contemplation of death and KRS 140.020(3).

a. As described above, accounts placed in joint names with right of survivorship within three (3) years of the decedent's death could result in the entire account being taxed to the surviving joint tenant, one-half (½) because it is treated as received from the decedent and taxable under KRS 140.050, and one-half (½) because the account was placed in joint names in contemplation of death and is, therefore, taxable under KRS 140.020(2).

b. But, KRS 140.020(3) provides that there is "no presumption of contemplation of death as to certificates of deposit jointly owned and all such certificates of deposit shall be taxed pursuant to KRS 140.050."

c. Therefore, if a certificate of deposit is acquired in joint names with right of survivorship, even on the day before death and in contemplation of death, only one-half (½) of the value of the certificate of deposit will be taxable and it will be taxable under KRS 140.050. No part of the certificate of deposit will be taxed under KRS 140.020 as a transfer in contemplation of death.

3. Using powers of appointment to reduce taxes.

a. KRS 140.040(2) provides as follows:

   In the case of a power of appointment which passes to the donee thereof at the death of the donor, under any instrument, and if the donor dies on or after April 24, 1936, the transfer shall be deemed to take place, for the purpose of taxation, at the time of the
death of the donor and the assessment be made at that time against the life interest of the donee and the remainder against the corpus. The value of the property to which the power of appointment relates shall be determined as of the date of the death of the donor and shall be taxed at the rates and be subject to the exemptions in effect at the death of the donor. The determination of the applicable rates and exemptions (in effect at the death of the donor) shall be governed by the relationship of the beneficiary to the donee of the power of appointment. In the event the payment of the tax at the death of the donor should operate to provide an exemption for any beneficiary of a donee not authorized by KRS 140.080, then such exemption shall be retrospectively disallowed at the time of the death of the donee. It is further provided that the remainder interest passing under the donee’s power of appointment, whether exercised or not, shall be added to and made a part of the distributable share of the donee’s estate for the purpose of determining the exemption and rates applicable thereto. (Emphasis added)

b. This statute provides that powers of appointment are taxed in the estate of the creator of the power.

c. Assume a client with a $1 million net estate wants to leave the estate to her niece. If an outright bequest of $1,000,000 is made to the niece, the inheritance tax would be $150,960 (disregarding the discount for early payment).

i. If the estate were left in a trust which provided income to the niece for life and gave niece a broad special power of appointment, significant tax savings could result.

(a) If niece was fifty years of age at the death of client (niece’s aunt), the value of niece’s life estate would be $690,228 and the tax on the income interest would be $101,396.48.

(b) What is the tax on the remainder interest? The underlined sentence in the above quotation states that the tax is computed based on the rates and exemptions in effect at the death of the donor (the aunt) and shall
be “governed by the relationship of the beneficiary to the donee of the power of appointment.” (Emphasis added). The identity of beneficiary of the power of appointment is unknown at the time of the donor’s death. The policy of the Revenue Cabinet is to compute the tax based on the most likely person to whom the donee will appoint the property. If the donee of the power (the niece in this example) is married or has children when her aunt dies, the most likely beneficiary will be assumed to be either her spouse or her children, both Class A Beneficiaries. Computing the tax based on the relationship between the donee and the beneficiary means that the tax on the remainder will be zero if the spouse or children of the donee are assumed to be the applicable beneficiaries: gifts to Class A Beneficiaries are exempt from tax.

(c) If the donee (niece) ultimately appoints the property to someone other than a Class A Beneficiary, the tax would be retroactively imposed at the time of the donee’s death. However, in virtually all cases, that is unlikely to occur.

ii. Assuming the donee of the power of appointment (the person who receives the property subject to the power of appointment) is a Class A Beneficiary with respect to the life tenant (the niece), leaving the estate to the niece in trust would, in this example, save $49,563.52 in tax. If the niece was age sixty at the time of her aunt's death, the savings would be $68,741.76.

V. COMMON MISTAKES REPORTED BY THE REVENUE CABINET

A. In preparing for this presentation, I asked a representative of the Revenue Cabinet for a list of common mistakes made in connection with inheritance tax returns.

B. The Cabinet's List Included:

1. Will not attached;

2. Real Estate Valuation Information Form not included;

3. County assessed value not provided on Real Estate Valuation Information Form;
4. Omitted assets – There is a difference between taxable assets and probate assets. Probate assets are assets that pass per terms of the will or intestate law. Taxable assets are survivorship property, gifted property, trust property, etc., and include probate assets;

5. Omission of the date items are placed in joint names. These dates must be included on the Jointly Owned Assets Schedule;

6. Assets not identified properly;

7. Errors made in determining whether there is a bequest of tax based on the wording in the will and/or trust agreement;

8. Incomplete schedules or schedules not attached;

9. Incorrect calculation of distributions;

10. Incorrect tax computations;

11. Incorrect classification of beneficiaries;

12. Survivorship property not properly distributed;

13. Return not signed by executor/administrator/beneficiary and preparer (Note: If more than one executor/administrator, only one signature is required).

C. Care Must Be Used in Filing These Returns

VI. CONCLUSION
<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>ELECTRONIC CITE</th>
</tr>
</thead>
<tbody>
<tr>
<td>KRS Chapter 140, Kentucky Inheritance Tax Statutes</td>
<td><a href="http://www.lrc.ky.gov/KRS/140-00/CHAPTER.HTM">http://www.lrc.ky.gov/KRS/140-00/CHAPTER.HTM</a></td>
</tr>
<tr>
<td>103 KAR 2:005</td>
<td><a href="http://www.lrc.ky.gov/kar/103/002/005.htm">http://www.lrc.ky.gov/kar/103/002/005.htm</a></td>
</tr>
<tr>
<td>Kentucky Revenue Cabinet's Inheritance and Estate Tax Cite</td>
<td><a href="http://revenue.ky.gov/individual/inherittax.htm">http://revenue.ky.gov/individual/inherittax.htm</a></td>
</tr>
</tbody>
</table>
I. THE ATTORNEY’S ROLE AS ZEALOUS ADVOCATE

Nothing is more sacred than the attorney’s role as zealous advocate. Although the exact parameters of that role are up for debate, responsibilities to clients are crystal clear. When we practice law within the bounds of our professional responsibility then every attorney zealously advocates on behalf of a client. Ky. SCR 3.130 (Preamble IX). Justice is done when all the attorneys take this to heart. The precise and exact definition of zealous advocate may be up for debate as to the lengths an attorney may go. However, the Rules of Professional Conduct flush out what zealous means.

The Lawyer has an obligation to zealously “protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.” Ky. SCR 3.130 (Preamble X).

A Lawyer’s zeal is based on effective diligence, communication, competence, adhering to confidentiality, loyalty and independent judgment not distorted by impermissible conflict of interest. Zealousness is tempered with candid advice and independent professional judgment, looking while considering moral, economic, social and political factors. Competence and diligence requires one to uphold the ideals of effective attorneys, the importance of trials and effective assistance of counsel embodied in the Fifth, Sixth and Fourteenth amendments to the United States Constitution and Kentucky’s Constitutional protections under Section 1, 7 and 11.

Zeal centers also in ensuring attorney loyalty to a client’s interests whether through writing a contract, estate planning, guardianship or as corporate counsel. The client relationship should always be clearly defined. Zeal is not just in the courtrooms but at the negotiation table and in the drafting of wills, trusts and guardianships.

Basically, the lawyer’s duty of zealous advocacy works within the bounds of the law including rules, procedures and rights while advocating for clients’ wishes by seeking what the client wants through counseled direction. However, a lawyer may indeed get perplexed with the proper role of zealousness when taking on the role of a guardian ad litem where at times a mixture of zealous representation may conflict with a role that centers on the “best interests” of a particular person.
II. WHEN MAY A GUARDIAN AD LITEM BE USED

A. **KRCP 4.04(3)**

Allows for personal service of an unmarried infant or a person of unsound mind where they have no guardian, parent, or other such person known to have control of the infant or person of unsound mind, then the clerk is allowed to appoint a guardian ad litem to serve on their behalf.

B. **KRCP 4.07(3)**

Requires a warning order attorney, when having knowledge that the defendant is an unmarried infant or a person of unsound mind, to become the guardian ad litem.

C. **KRCP 17.03**

Allows for appointment by the Court or clerk of a guardian ad litem for purposes of defense to any actions involving unmarried infants and persons of unsound mind.

D. **KRS 199.480**

In an adoption, a guardian ad litem may be appointed where the biological parents are not parties to the action.

E. **KRS 209.110**

In order to protect vulnerable adults, an emergency petition may be filed requesting emergency protective services for a vulnerable adult; a guardian ad litem is appointed.

F. **KRS 387.305**

A guardian ad litem may be appointed in proceedings concerning guardianships and conservatorships.

G. **KRS 388.250**

The Veterans Guardianship Act utilizes a guardian ad litem as related to proceedings under the Veterans Guardianship Act.

H. **KRS 394.190**

A guardian ad litem shall be appointed where infants or mentally disabled persons have interests or are involved in the probate of wills.

I. **KRS 620.100**

Utilizes court appointed special volunteers to serve the “best interests of the child.”
J. **KRS 625.041**

Termination of parental rights actions will have guardian ad litem to represent the best interests of a child.

### III. THE STATUTORY ROLE OF THE GUARDIAN AD LITEM

A. **KRS 209.110(2)** states that the guardian ad litem's duties include personally interviewing the adult, counseling the adult with respect to the Adult Protection chapter, informing of his or her rights and providing competent representation at all such proceedings and other duties as ordered by the Court. **KRS 209.110(4)** allows for the adult's “representative” to present evidence and cross-examine witnesses.

B. **KRS 388.250** describes the role of a guardian ad litem in the Uniform Veterans Guardianship Act as protecting the interests and rights of mentally disabled beneficiary and ensuring that such beneficiary has the right to demand a jury trial.

C. **KRS 387.305** delineates the duties of a guardian appointment pursuant to **KRS Chapter 387** and the Juvenile Code and states that the GAL’s main role is to advocate for the client’s best interest in the proceeding to which he or she is appointed. This may include attending properly to the preparation of the case, summoning witnesses, and requesting depositions.

D. **KRS 625.041** appoints a GAL to represent the best interests of a child and a reasonable inference is that the GAL should look at the best interests standards as set out in **KRS 625.090(3)** (Grounds for Termination) and perhaps even the best interests analysis required in **KRS 403.270(2)**.

### IV. THE ROLE OF THE GUARDIAN AD LITEM THROUGH THE EYES OF THE COURT

A. The GAL defends the interests of an infant or person of unsound mind but does not necessarily act as their lawyer to sue on their behalf. **Sparks v. Boggs**, 839 S.W.2d 581, 582 (Ky. App. 1992) relying on **Jones By and Through Jones v. Cowan**, 729 S.W.2d 188, 189 (Ky. App. 1987).

B. The obligation of the GAL is standing as the person they defend (minor or a person of unsound mind) and determining what their rights are, what are their interests and what does the case require for a defense. The importance lies in the substance of the current case including its purpose, statutes involved and anything required by the “litigation at hand.” **Goldfuss v. Goldfuss**, 609 S.W.2d 696, 698 (Ky. App. 1980).

C. The parameters of a GAL's purpose and duties are determined by the context of the relevant statutes and rules involving the case to which they were appointed. The statute determines the GAL's roles and duties. **Cabinet for Human Resources v. S.R.J.**, 706 S.W.2d 431, 433-4 (Ky.
App. 1986) (overruled on other grounds by Guffey v. Cann, 766 S.W.2d 55 (Ky. 1989)).

D. The GAL is one who is there to protect a ward and mount defenses and stand as both fiduciary and lawyer while at the same time act as an arm of the Court to represent the ward’s interests. The GAL represents a position of trust and confidence to his ward and to the Court. Black v. Wiedeman, 254 S.W.2d 344, 346 (Ky. 1952); S.J.L.S. v. T.L.S. 265 S.W.3d 804, 811 (Ky. App. 2008).
Representation of clients with diminished capacity is an essential component of elder law practice. In cases where an elder law attorney is able immediately to discern the presence of diminished capacity during an initial interview, the representation can be directed so as to regularize the relationship, either through appointment of an attorney-in-fact (if the client still has sufficient capacity to do so) or by petitioning for appointment of a guardian or conservator to make decisions and manage the client's affairs. Unfortunately, in real life, where litigation is involved, a practitioner is often confronted with either an unexpected and sudden decline in a client's capacity or is asked to step into a lawsuit where an incapacitated client's rights are already at issue and time is of the essence. In such cases, where the client is incapable of assisting counsel in preparing the case or is unable to make decisions concerning case management, the filing of a petition for conservatorship places the attorney, who is supposed to be litigating on the client's behalf, in an adverse role to the client.

Even if another party, such as a relative, is available to independently pursue the guardianship or conservatorship, such proceedings are still unavoidably cumbersome and lengthy, thus delaying the progress of the already pending litigation. Examination by at least one physician may be required, which the client may resist. Pursuit of such

---


2 Model Rules of Prof'l Conduct R. 1.14 (2006). The rule authorizes a lawyer to seek appointment of a general guardian in the case of exigent circumstances that may otherwise result in irreparable harm. Id. cmt. 9. An attorney may file a petition seeking appointment of a general guardian or conservator for his own client when absolutely necessary to preserve the client's interests. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-404, at 6-7 (1996). However, the attorney may not represent any other party petitioning for such appointment, nor may the attorney himself seek to be appointed as guardian or conservator. Id. at 7-8.


proceedings adds to the expense of the representation. Finally, the granting of a conservatorship or guardianship will subject the client to a loss of autonomy that otherwise might have been avoided.\(^6\)

As an alternative to general guardianship, federal\(^7\) and state\(^8\) court rules provide for appointment of a guardian ad litem for purposes of representing the client within the context of the individual lawsuit only. However, unlike the statutory schemes which govern guardianships and conservatorships, the rules for appointment of a guardian ad litem provide virtually no guidance concerning the process that is to govern such appointments, when such appointments are appropriate, who is qualified to be appointed, the role the appointee is to play in the litigation, and other such critical issues.\(^9\) This lack of guidance raises concerns about the potential for violation of an elderly, incapacitated person's due process rights in connection with guardian ad litem appointments, as the guardian ad litem is charged with managing the litigation and potentially authorized to compromise and settle the incapacitated person's rights in connection with whatever cause of action is being litigated on that person's behalf.\(^10\)

Consider the case of Ms. Oldage, age eighty-two, who accompanied by her niece consults a lawyer. Ms. Oldage is frail and a little confused but still able to coherently relate to the attorney the events that brought her to his office. A lonely widow, with no close relatives, she had become enamored with a fifty-year-old handyman who offered to repair her


\(^7\) Fed. R. Civ. P. 17(c).

\(^8\) Although a majority of the states have adopted the Federal Rule without modification, twenty-three states have made some revision and/or addition. See R. Ala. Sup. Ct. 17(d); Ark. R. Civ. P. 17(b); Cal. Code Civ. Proc. §372; Ind. R. Trial P. 17; Ky. Ct. R. 17.03; Md. R. Civ. P. 3-202; Mich. Ct. R. 2.201; Minn. R. Civ. P. 17.02; Miss. R. Civ. P. 17(c); Mont. R. Civ. P. 17(c); N.Y. C.P.C.R. 1202 (Consol. 2005); N.C. R. Civ. P. 17(b); N.D. R. Civ. P. 17(b); Or. R. Civ. P. 27(B); Pa. R. Civ. P. 2053; S.C. R. Civ. P. 17; Tenn. R. Civ. P. 17.03; Tex. R. Civ. P. 173.4; Utah R. Civ. P. 17(b); Va. Code Ann. 8.01-9 (Supp. 2000); W. Va. R. Civ. P. 17(c); Wis. R. Civ. P. 803.01(3).


bathroom fixtures without charge. A few months later, the helpful handyman moved in with the widow, despite the fact that he was already married to a woman his own age (a fact he did not disclose to Ms. Oldage). Soon, the handyman's name was listed beside hers on all of her bank accounts, and he was the one writing all of the checks, most of which were payable to cash or to himself. Finally, when the money in the bank accounts ran out, the handyman took Ms. Oldage to see a friendly real estate investment company, telling Ms. Oldage that she needed to take out loans against her rental properties and then, several months later, her home. The “loans” turned out to be purchases (at discount prices) of each property, with the investment company representative stating that he had been told by the handyman that Ms. Oldage needed money to pay bills. The helpful handyman then cashed the checks from these sales and disappeared, leaving Ms. Oldage alone to face the action for eviction brought by the friendly real estate investment company. The attorney files suit to enjoin the eviction and seeks rescission of these transactions; he is successful in keeping Ms. Oldage in her home during the ensuing two-year pendency of the proceedings. Now, a settlement offer has been made. The attorney has arranged to meet with Ms. Oldage in his office. The niece, who was in her fifties, regrettably died in the interim.

Ms. Oldage is more frail after two years and no longer can relate the events connected with the financial exploitation as she once could. She has turned to her neighbor across the street, another man in his fifties, who accompanies her to your office. He insists on being present for discussion of the settlement offer, and Ms. Oldage, when asked, confirms that she wants him there. He interrupts repeatedly and discusses Ms. Oldage's exploitation. The attorney cannot discuss the settlement offer alone with his client because she wants the neighbor present and, in fact, wants him to decide whether or not to accept the offer.

What can the attorney do? Can he allow the neighbor to decide? Is it time to withdraw? Is it permissible for the attorney to file a petition for general guardianship or conservatorship against his own client? Would appointment of a guardian ad litem to assess the suitability of the settlement offer be appropriate? Can the attorney ask for such appointment?

An elder law attorney may also find herself appointed as a guardian ad litem, with all its ethical and practical complexities. Consider the case of an elderly prison inmate with Alzheimer's disease who is being sued for divorce. The inmate's interest in marital property and possible allocation of a portion of his pension rights to the wife are at issue. The court appoints you to act as the inmate's guardian ad litem pursuant to your state's version of Federal Rule of Civil Procedure (hereinafter Federal Rule) 17(c). Are you to function as a substitute for a registered agent for service of process – someone who can accept service of legal papers on behalf of the incapacitated inmate so that the estranged

---

11 See Model Rules of Prof'l Conduct R. 1.16 cmt. 6 (2006) (stating that a client with “severely diminished capacity” may “lack the legal capacity to discharge the lawyer,” thus leaving the lawyer to consult Model Rule 1.14 for guidance).

12 See Model Rules of Prof'l Conduct R. 1.14 (2006). Although this rule specifically deals with clients with diminished capacity, it provides less than a crystal clear guide for the attorney's behavior. Id.

13 See Fed. R. Civ. P. 17(c).
spouse can proceed with her lawsuit? Are you obligated to look after the inmate’s best interests? Are you to function as legal counsel so as to defend against the divorce?

These two hypothetical situations, widely divergent as they are, illustrate the difficulties that face elder law practitioners attempting to provide legal representation to clients with diminished capacity. Both of these elderly individuals clearly are in need of assistance even though they have not been formally adjudicated as lacking capacity.

Guardians Ad Litem

**Federal Rule 17(c)** provides:

> Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.\(^{14}\)

Most states have enacted a rule patterned after the Federal Rule, some with significant revisions that will be discussed below in the section addressing the qualifications for appointment of guardians ad litem.\(^{15}\) The Tennessee state civil procedure rule changes the Federal Rule language slightly, substituting the phrase “whenever justice requires” for the “as it deems proper” language of the Federal Rule.\(^{16}\) Since the court’s determination of what is proper presumably is in accord with the requirements of justice, the two versions appear to be equivalent, but the reference to the notion of justice adds a valuable nuance when one considers the proper role of guardians ad litem appointed pursuant to **Federal Rule 17**. A guardian ad litem who simply functions to facilitate litigation by accepting service of process or signing off on settlements would not seem to be what “justice requires,” but such a placeholder concept of the role might suffice for what a court “deems proper.”\(^{17}\)

---

\(^{14}\) *Id.*

\(^{15}\) *See infra* text accompanying notes 85-92.

\(^{16}\) *Tenn R. Civ. P. 17.03.*

\(^{17}\) In actuality, the Tennessee Supreme Court held that the “whenever justice requires” language in Tennessee’s Rule 17.03 does not impose any more rigorous standard than that found in the federal rule. In *Gann v. Burton*, 511 S.W.2d 244 (Tenn. 1974), the court held that the “whenever justice requires” language “places the appointment of the guardian ad litem within the sound discretion of the trial judge.” *Id.* at 246. In a case where a minor was represented by counsel, the trial court declined to appoint a guardian ad litem. *Id.* The Supreme Court found that this refusal did not result in any prejudice to the minor and was at most a “hypertechnical” and harmless error. *Id.* at 247. As Professors Banks and Entman have written, the result is “troubling,” as it leaves the attorney who is representing the incompetent party with “no responsible party” to look “to make litigation decisions ... and to protect ... against overreaching ....” Robert Banks, Jr. & June Entman, *Tennessee Civil Procedure*, §6-1(o) (Matthew Bender 2006). As Banks and Entman say, “[A] more satisfactory
The section below begins by discussing the role of the guardian ad litem within the context of an adversarial legal system. Next, the substantive standards that should be used in deciding when appointment is appropriate are examined, and the procedural due process issues are considered. Qualifications required for appointment to the role of guardian ad litem are explored, and the guidelines that exist to govern performance of the guardian ad litem role are surveyed among the states. The final section provides a brief reflection on the models available for substitute decision making.

The conclusion proposes, to the extent that insufficient guidance appears to exist, guidelines derived from what appears to work for those guardians ad litem appointed to represent juveniles and for those appointed to act as guardians ad litem within the context of guardianship or conservatorship proceedings, as well as from policy considerations relevant to the relatively limited context of litigation.

Background

The American legal system is predicated on the notion that a contest between fully adversarial parties, forced to confront each other within a system of evenly applied procedural and evidentiary rules before an impartial trier (or triers) of fact, will achieve a just outcome. Obviously, when one of the parties is not capable of pursuing or protecting her legal interests due to impairment, the system is dysfunctional. The concept of a "next friend" or guardian ad litem to substitute for the impaired or incapacitated adversary is necessary to preserve the integrity of the theoretical construct of American jurisprudence.

Unfortunately, as integral as it would appear to be on a theoretical basis, in practice, the concept has remained elusive and ill-defined. Professor Joan O'Sullivan has noted that the guardian ad litem appointed in cases involving petitions for conservatorship or guardianship "acts as the 'eyes of the court' to further the 'best interests' of the alleged incompetent," but that the role often is "so unclear that the attorney may choose" to define the role as he or she sees fit. Professors Lidman and Hollingsworth describe a similar reading of Rule 17.03 would be that appointment of some representative other than the litigation attorney is mandatory. Id.


Johns, supra note 5 at 37.


Id. at 688.
elasticity in the parameters of the guardian ad litem role in child custody cases.\textsuperscript{23}

Black's Law Dictionary defines a guardian ad litem as “[a] guardian, [usually] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party.”\textsuperscript{24} Under the former Equity Rules that preceded the Rules of Civil Procedure, the focus of such an appointment was clearly to provide substitution for the role of the litigant with the emphasis on defense or prosecution of lawsuits, even for those under guardianship.\textsuperscript{25} It is here that the rule suggests the appropriateness of oversight by the court itself, stating that while incapacitated persons may sue by “their guardians, if any, or by their prochein ami, [this is] subject . . . to such orders as the court or judge may direct for the protection of infants and other persons.”\textsuperscript{26} The Equity Rules have been superseded by the Rules of Civil Procedure,\textsuperscript{27} but the former language is important because it indicates that the problem of adequate protection of and decision-making for those who have diminished capacity within the legal system is of long standing.

Much of the litigation about guardians ad litem, however, revolves around the issue of when and whether the appointment of the guardian ad litem is required.\textsuperscript{28} Consideration of the actual role played by the guardian ad litem once appointed has received much less judicial treatment,\textsuperscript{29} but it appears to be no less important in terms of preserving the integrity of the legal system.


\textsuperscript{24} Black's Law Dictionary 725 (8th ed. 2004).

\textsuperscript{25} See 28 U.S.C. §723, Equity Rules Reference Table, at 3255 (1946); Bryant Bros. Co. v. Robinson, 149 F. 321, 330 (5th Cir. 1906) (holding that “the equity rules [adopted pursuant to Rev. St. U.S. §917] have the force and effect of law”). Equity Rule 70 read as follows:

Guardians ad litem to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their prochein ami; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.


\textsuperscript{26} E.H. Schopler, Annotation, Federal Civil Procedure Rule 17(c), Relating to Representation of Infants or Incompetent Persons, 68 A.L.R.2d 752, 752 n.1 (1959).

\textsuperscript{27} Fed. R. Civ. P. 86(a) advisory committee's note.

\textsuperscript{28} See Schopler, supra note 26, at 753-59 n.12.

\textsuperscript{29} See, e.g., Schopler, supra note 26 (listing no cases that address the guardian ad litem’s role in the proceedings).
When Appointment Is “Proper”

Determining the appropriateness of the appointment of a guardian ad litem for an adult is controversial. Unlike minors, who as a matter of law are deemed incapable of decision making and are properly within the domain of the state's parens patriae authority, the case for assisting and thus intruding into an adult's life is much less clear, especially when there has been no adjudication of incompetence or diminished capacity. The adult's constitutional right to autonomy precludes intervention if the adult is in no way incapacitated.

However, as anyone who represents older persons knows, capacity is seldom an all or nothing proposition. Where clients are either totally lacking in decision-making ability or totally competent, the client's status is easily determinable and decisions concerning implementation of protective measures are clear cut. If the client is in a coma, for example, the need for a guardian ad litem is obvious. The difficult cases involve those that fall within the fluctuating capacity continuum of the client who is able to comprehend some things but not others, and who consequently is capable of making some decisions but not others. The client's capacity and decision-making capability may itself be in flux, depending on the time of day, side effects of medications, familiarity with surroundings, stress, and myriad other factors.

The California Court of Appeals engaged the issue of the proper evidentiary standard to justify appointment of a guardian ad litem in the case of Kern County Dep't of Human Services v. Taylor D. (hereinafter In re Sara D.). In re Sara D. involved a petition for dependency based on two counts of dependency and neglect of Sara D., a six-year-old alleged to be out of her mother's control. The mother, Taylor D., was alleged to suffer from bipolar disorder and personality disorder.

30 See Wright, supra note 20, at 66-67.


32 Wright, supra note 20, at 55-56.

33 See Johns, supra note 5, at 62-63.


35 Id. at 5-9.

36 Id. at 27-30.

37 104 Cal.Rptr.2d 909 (Ct. App. 2001).

38 Count I asserted that the mother was “unable to control” the child's “extreme behavior,” putting the child at risk of “serious harm or illness.” Id. at 911. The home environment also was alleged to constitute a “health and safety hazard.” Id. The second count alleged that “Sara has suffered or is likely to suffer serious emotional damage as a result of [her mother's] conduct.” Id.

39 Id.
made it difficult for the mother's court-appointed counsel to represent her.\textsuperscript{40} The court-appointed counsel, therefore, asked the court either to allow him to withdraw (making him the second attorney to do so) or to appoint a guardian ad litem.\textsuperscript{41} At a conference in chambers, requested and attended only by the attorneys, the court considered a report from the mother's therapist, which diagnosed her as suffering from borderline personality disorder and found it to be consistent with the court's previous observation of the mother's behavior.\textsuperscript{42} The court also considered that a previous attorney had already withdrawn as counsel, that a contested matter concerning jurisdiction was before the court and required resolution, and that it would be in the mother's best interests to have a guardian ad litem appointed to assist the mother's counsel in preparing and explaining the proceedings to her.\textsuperscript{43} The case was set for a hearing, and the mother, her attorney, and the guardian ad litem were present at this hearing.\textsuperscript{44} However, no proof was presented.\textsuperscript{45} Instead, the mother's attorney notified the court that he consulted with the mother's therapist and the guardian ad litem, who had approved a decision to settle the case.\textsuperscript{46} Because the case had been settled with an agreement to amend some aspects of Count I and to eliminate the allegations of Count II, the attorney did not contest the allegations of Count I relative to the mother's inability to control the child.\textsuperscript{47} Two weeks later, at the conclusion of the dispositional hearing, the court heard testimony from the mother and father, and the court granted both physical and legal custody of the child to the father and supervised visitation to the mother.\textsuperscript{48}
On appeal, the mother challenged the appointment of the guardian ad litem on grounds of insufficient evidence and deprivation of due process rights. The first issue concerned the proper evidentiary standard for such appointments, and the appellant mother argued for imposition of the same standards as those used for appointment of a conservator. The State argued for use of the standard employed to determine whether a defendant was mentally incompetent to defend against criminal proceedings. The court analyzed California precedent and determined that neither test had been used exclusively, or was mandated for exclusive use by child custody statutes, to determine when appointment of a guardian ad litem was warranted. The court then held that if a preponderance of the evidence existed in the record to support either standard, then appointment of the guardian ad litem was justified. Under the record presented in In re Sara D., the appellate court found that the evidence was not sufficient to support either standard because the court below had relied on the conclusory statements of the mother's counsel.

In re Sara D. is instructive because it highlights the often unspoken divergence in the standards employed when courts determine whether appointment of a guardian ad litem is “proper.” As articulated under California law, the conservatorship standard looks to the person's ability to conduct daily affairs and engage in ordinary decision making. The criminal competency standard, on the other hand, is directed toward the person's ability to

---

49 Id.

50 Id. The standards for appointment of a conservator under the applicable California statute are either that the person is “unable to provide properly for his or her personal needs for physical health, food, clothing or shelter,” Cal. Prob. Code §1801(a) (West 2002), or is “substantially unable to manage his or her own financial resources or resist fraud and undue influence,” Cal. Prob. Code §1801(b).

51 In re Sara D., 104 Cal.Rptr.2d, at 912-13. The California criminal code states a person “is mentally incompetent ... if, as a result of mental disorder or developmental disability, the [person] is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.” Cal. Penal Code §1367(a) (West 2000).

52 In re Sara D., 104 Cal.Rptr.2d, at 913-14.

53 Id. at 914.

54 Id. at 919.

55 In the first place, the appointment of a guardian ad litem under Rule 17(c) is not mandatory, but rather it is within the court's discretion. Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35, 39 (5th Cir. 1958); United States v. Noble, 269 F.Supp. 814, 815 (E.D.N.Y. 1967). Where the interests of the incapacitated litigant appear to be adequately protected, no guardian ad litem appointment is necessary. Roberts, 256 F.2d at 39. The Tennessee Supreme Court, in interpreting Tennessee's Rule 17.03, held that the “whenever justice requires” language requires the court to “evaluate the total situation surrounding the infant or incompetent and then, if justice requires, a guardian ad litem must be appointed.” Gann v. Burton, 511 S.W.2d 244, 246 (Tenn. 1974). Even then, the appointment remains “discretionary.” Id. at 246-47.

understand and assist in litigation. The latter approach, with its emphasis on navigating the courtroom environment, actually appears to be the more appropriate standard for a guardian ad litem appointed pursuant to Federal Rule 17(c) or one of the equivalent state rules, and it should be the standard used to inform the court's sound discretion of when appointment is “proper.”

What Process Is Due

In addition to the substantive issue of when appointment of a guardian ad litem is appropriate, procedural due process concerns are raised by a court's appointment of a guardian ad litem. Federal Rule 17(c) contains no procedure governing such appointments. As noted above, the Federal Rule simply directs the court to act to make an appointment “as it deems proper” when there is no representative. Examination of much of the case law indicates that guardian ad litem appointments are often made almost reflexively upon receipt of any assertion of diminished capacity. In Neilson v. Colgate-Palmolive Co., this lack of procedure resulted in a challenge to the appointment of the guardian ad litem on due process grounds. The case illustrates the tension between the client's right to autonomy and need for protection. The plaintiff, Francine Neilson, was a former employee of Colgate-Palmolive (hereinafter Colgate), suing under Title VII alleging employment discrimination and retaliation. During the course of the proceedings, Ms. Neilson's counsel withdrew, referencing a “deteriorating relationship” with Ms. Neilson that was precluding the firm from providing “effective representation.” Several months following the withdrawal, Colgate discovered that Ms. Neilson had been ordered to undergo inpatient psychiatric treatment following her discharge from Colgate. The employer filed motions under Federal Rule 35, seeking a psychiatric examination of Ms. Neilson, and under Federal Rule 17(c), seeking appointment of a guardian ad litem for her. Ms. Neilson was unrepresented and appeared pro se. The federal district court

58 Johns, supra note 5 at 69.
59 See Fed. R. Civ. P. 17(c).
60 Id.
61 Schopler, supra note 26 at 760; see also Thomas v. Humfield, 916 F.2d 1032, 1034 (5th Cir. 1990) (psychiatrist selected by defendant determined plaintiff was incompetent).
62 199 F.3d 642 (2d Cir. 1999).
63 Id. at 651-54.
64 Id. at 646. Ms. Neilson alleged discrimination based on race and sex. Id. Although she was the mother of an adult son, she did not bring suit under the Age Discrimination in Employment Act. See id. at 646, 648.
65 Id. at 646.
66 Id. at 647.
67 Id.
granted the motion for psychiatric examination at Colgate's cost, and ordered Ms. Neilson to comply with the order or face dismissal of her lawsuit.\textsuperscript{69} Ms. Neilson complied, and the court-appointed psychiatrist found that she was seriously delusional and suffering from “a severe Chronic Paranoid Disorder.”\textsuperscript{70} The psychiatrist recommended that Ms. Neilson “be found incompetent” and noted that she had asked “that a [g]uardian be appointed to pursue the litigation,” apparently during the psychiatric examination.\textsuperscript{71}

The court issued an order setting a hearing date to consider the psychiatrist's recommendation and to decide on the \textit{Federal Rule 17(c)} motion.\textsuperscript{72} As part of the order, the court extended to Ms. Neilson the option to consent to the appointment of the guardian ad litem in writing.\textsuperscript{73} Ms. Neilson wrote a letter in response, stating that she consented to the “appointment of a guardian ad litem in addition to an attorney.”\textsuperscript{74} Ms. Neilson ended her letter by stating that she was “not competent to litigate this case.”\textsuperscript{75} On the date originally set for the hearing on the motion for appointment of a guardian ad litem, the court appointed a guardian ad litem and cited the psychiatrist's report, Ms. Neilson's consent, and its own findings as support for the order of appointment.\textsuperscript{76}

Assuming that Ms. Neilson was competent to give informed consent to the appointment of the guardian ad litem, it is clear that her consent was conditioned on concurrent appointment of legal counsel. This is an indication that Ms. Neilson recognized her shortcomings as a legal advocate on her own behalf and that she desired the appointment of someone who would aggressively pursue her claims of discrimination. Unfortunately, in general there is no right to free legal counsel in civil cases, even for the indigent.\textsuperscript{77} The

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.} at 647-48. Defendant Colgate was ordered to pay the first $10,000 of the guardian ad litem's fees, indicating that it may have been as much in Colgate's interests to have a substitute decision-maker as it was in Ms. Neilson's interests, at least from the standpoint of getting the case resolved. \textit{Id.} at 648.

\textsuperscript{77} See \textit{Lassiter v. Dep't of Soc. Serv.}, 452 U.S. 18, 25-26 (1981) (limiting an indigent's “right to appointed counsel” to those situations involving the potential for loss of liberty in the event the indigent party does not prevail). Courts may elect to appoint counsel in cases where fundamental rights are at stake, such as deprivation of medical treatment amounting to a violation of the Eighth Amendment, or pursuant to statutory authority. See \textit{Johnson v. Doughty}, 433 F.3d 1001, 1006-07 (7th Cir. 2006).
record does not suggest that Ms. Neilson was unable to afford counsel. She simply failed
to retain substitute counsel to replace the attorneys that had withdrawn.\textsuperscript{78} To the extent
that her consent may have been predicated on the misconception that both counsel and a
guardian ad litem would be appointed for her, it would seem to be voidable.\textsuperscript{79}

The dissenting opinion details attempts Ms. Nielson made to communicate to the court her
desire for appointment of legal counsel to represent her.\textsuperscript{80} In a later letter to the court, Ms.
Neilson suggested her consent was the product of duress and was issued because she
was afraid that her lawsuit would be dismissed unless she agreed.\textsuperscript{81} As a consequence,
the majority opinion declined to uphold the guardian ad litem appointment on the basis of
Ms. Nielsen’s consent.\textsuperscript{82} Instead, the court concluded that the procedural defects present
in the case, the lack of notice and opportunity to be heard, provided “reasonable” notice,\textsuperscript{83}
and were remedied by the trial court’s subsequent monitoring of the guardian ad litem’s
performance.\textsuperscript{84}

The actual performance of the guardian ad litem thus becomes relevant in evaluating the
correctness of this holding. The court-appointed guardian ad litem conducted an
investigation and determined that Ms. Neilson’s case was not “triable” due to her mental
illness.\textsuperscript{85} The guardian ad litem engaged in settlement discussions with counsel for
Colgate, and within two months an agreement had been reached and was announced to
the court by the guardian ad litem and counsel for Colgate at a status conference.\textsuperscript{86} A third
lawyer was present, the attorney for Ms. Neilson’s son, who had filed a petition seeking to
be appointed as general guardian for his mother in state court.\textsuperscript{87} Under state law, once he
was appointed as general guardian, the son would be the appropriate party to make

\textsuperscript{78} See Neilson, 199 F.3d at 648.

\textsuperscript{79} 49 C.J.S. Judgments §372 (1997).

\textsuperscript{80} Neilson, 199 F.3d at 660-61 (Sotomayor, J., dissenting).

\textsuperscript{81} Id. at 660.

\textsuperscript{82} Id. at 653 n.5.

\textsuperscript{83} Id. at 653.

\textsuperscript{84} Id. at 652.

\textsuperscript{85} Id. at 648. Specifically, the guardian ad litem consulted with the court-appointed psychiatrist, who
opined that “Nielson’s paranoid ideation was present early in her employment with Colgate and
may have been present all of her life; ... by 1993, it had consolidated into a full-blown paranoidal
delusional system; and ... a delusional psychosis has persisted ever since, centering on Colgate
but incorporating into it anyone else who impacts on her life.” Id. at 648 n.2.

\textsuperscript{86} Id. at 648. The guardian ad litem negotiated a settlement that released all of Ms. Neilson’s civil
rights claims, including her statutory right to attorney’s fees, in return for Colgate’s pledge to
“coordinate fully and use its best efforts to assist” Ms. Neilson in applying for disability benefits, to
pay her $2,500 per month until she either received such benefits or turned sixty-five, whichever
came first, and to fund up to $50,000 of amounts expended in her attempt to obtain such benefits.
Id. at 648-49.

\textsuperscript{87} Id. at 648.
decisions for his mother pertaining to the lawsuit. The son's lawyer asked the court to postpone final approval of the proposed settlement until the court proceedings required for appointment of his client as general guardian were concluded. As further support for this request, an affidavit from Ms. Neilson's former counsel asserted that Ms. Neilson's case was eminently “triable” and that a more favorable settlement than the one being proposed should be considered based on this fact. Despite this, the court approved the settlement brokered by the guardian ad litem without waiting for the appointment of the general guardian. A general guardian subsequently was appointed for Ms. Neilson (a person other than the son), and the guardian appealed the order approving the settlement.

The first issue on appeal was whether the guardian had standing to file on behalf of Ms. Neilson. The federal appellate court determined that the guardian did have standing under Federal Rule of Appellate Procedure 43 and found that Ms. Neilson had a constitutionally protected liberty interest in both “avoiding the stigma of being found incompetent” and “in retaining personal control over the litigation.” She could not be deprived of these interests without proper procedural due process pursuant to the Fifth Amendment. In determining what process was due to Ms. Neilson, the court referred to Mathews v. Eldridge. In analyzing the first factor under Eldridge, the court apparently

---

88 N.Y. C.P.L.R. §1207 (Consol. Supp. 2005). In fact, the New York rule does not permit application for settlement by a guardian ad litem; a general guardian or guardian of the property must be appointed in order to pursue settlement on behalf of the litigant. Id.

89 Neilson, 199 F.3d at 649.

90 Id.

91 Id. The dissent notes that this holding was in derogation of New York’s rule and was apparently based on the trial court’s generalized concern that the case would be unduly delayed if the parties were required to wait until a general guardian could be appointed and have time to review the proposed settlement. Id. at 664 (Sotomayor, J., dissenting). The dissent further notes that this fear appeared unfounded, since the general guardian was appointed just nine days after the settlement was approved. Id. at 664 n.5. In addition, the dissent noted that the guardian ad litem had apparently had “very little interaction with Neilson and thus had virtually no first-hand knowledge of her personal situation or financial means.” Id. at 664.

92 Neilson, 199 F.3d at 649-50.

93 Id. at 650.

94 Id. at 651.

95 Id.

96 Id. The Eldridge Court established a balancing test for determining the constitutional adequacy of procedures intended to satisfy due process. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). Courts must weigh the following three factors: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” Id. at 335.
agreed that Ms. Neilson's liberty interests were in fact important and compelling.\textsuperscript{97} The third factor, the government's interest, is not specifically discussed, but presumably lies in efficient, expeditious, and low cost administration of the judicial process.\textsuperscript{98} Ms. Neilson's position on appeal was that a formal evidentiary hearing should have been conducted before appointment of the guardian ad litem.\textsuperscript{99} Under the second \textit{Eldridge} factor, which concerns the analysis of “the risk of erroneous deprivation” using the existing procedure versus the “probable value . . . of additional or substitute procedural safeguards,”\textsuperscript{100} the court found this level of procedure to be unnecessary in this case.\textsuperscript{101} In the first place, the court found that because Ms. Neilson was now being represented at the appellate level by a guardian, she could not be heard to challenge as erroneous her status at the trial level as someone “judicially found to be incompetent” for purposes of appointment of a guardian ad litem.\textsuperscript{102} Logically, the happenstance of a subsequent appointment of a general guardian for a litigant would not appear to mandate a finding that the litigant was incompetent at any point prior to the appointment. Even more importantly, such a subsequent appointment would not appear to rectify any due process deficits that may have existed in the procedures used by the trial court for appointing a guardian ad litem. Nevertheless, the appellate court treated the lack of due process as a sort of harmless error, particularly since the district court had imposed “post-appointment safeguards” which were sufficient, in the court's opinion, to cure any due process deficits occasioned by the lack of a hearing and deprivation of the right to examine the expert's report, which was being considered by the court as evidence in support of the appointment.\textsuperscript{103} The safeguards contemplated by the appellate court evidently consisted of the district court's ability to remove the guardian ad litem and its oversight in approving the final settlement arranged between the guardian ad litem and Colgate.\textsuperscript{104} How these measures could in any way remove the constitutional infringement on Ms. Neilson's right to decide what was in her own best interests is not explained.

In short, the majority's discussion of the \textit{Eldridge} factors and its determination that sufficient due process was afforded to Ms. Neilson simply is not convincing. The dissent took issue with both the quality of the notice provided to Ms. Neilson to alert her to the district court's contemplated appointment of a guardian ad litem and the lack of an opportunity for Ms. Neilson to be heard in opposition to such an appointment.\textsuperscript{105} The dissent further noted that the trial court's oversight after the guardian ad litem's

\textsuperscript{97} \textit{Neilson}, 199 F.3d at 651.

\textsuperscript{98} See \textit{Eldridge}, 424 U.S. at 335.

\textsuperscript{99} \textit{Neilson}, 199 F.3d at 651-52.

\textsuperscript{100} \textit{Eldridge}, 424 U.S. at 335.

\textsuperscript{101} \textit{Neilson}, 199 F.3d at 654.

\textsuperscript{102} \textit{Id.} at 652.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.} at 652-56.

\textsuperscript{105} \textit{Id.} at 659 (Sotomayor, J., dissenting).
appointment did not operate to cure the procedural defects. The dissent argued that at minimum Ms. Neilson should have been “informed that she had a liberty interest at stake . . . that if she was found incompetent and a guardian ad litem was appointed, she would lose all authority to make decisions concerning her own case.”

The In re Sara D. court, discussed above, also observed that no case law set out the proper procedures to be followed in appointing a guardian ad litem. The In re Sara D. court found this to be understandable since most appointments are either a matter of law, as when appointments are made for minors, or are consensual. In situations where there is no consent, or there can be no valid consent due to the litigant's alleged diminished capacity, the court found the absence of procedural guidelines to be troubling, since the appointment of a guardian ad litem generally confers “broad powers” on the one appointed. The guardian ad litem essentially takes on the decision-making role with power to “control the lawsuit.” Without attempting to issue a ruling that would govern all parental rights cases, the court determined that due process at least required an explanation by the court to the mother of why a guardian ad litem was being sought and required an informal hearing where the litigant for whom a guardian ad litem was being requested could be heard in opposition to the request. Even these minimal procedural safeguards were not accorded to the mother. Of course, all litigants, not just those involved in child custody cases, are adversely affected by the loss of decision-making control and the stigma of a finding of diminished capacity. Therefore, the absence of minimal procedural safeguards governing the appointment of guardians ad litem pursuant to Federal Rule 17(c) and similar state rules should be rectified to protect the due process rights of all litigants whose capacity may be questioned.

---

106 Id. at 660-61. Judge Sotomayor, the author of the dissent, noted that Ms. Neilson repeatedly asked for appointment of counsel, and had she understood that she had a choice with respect to the appointment of the guardian ad litem, she might well have taken different steps that would have preserved her cause of action. Id. at 660. Instead, her discrimination claims were jettisoned without any meaningful examination of the merits, particularly with respect to her claim of retaliation. Id. at 663, 665-66.

107 Id. at 659.

108 In re Sara D., 104 Cal.Rptr.2d 909, 914 (Ct. App. 2001).

109 Id.

110 Id. These powers include “controlling procedural steps necessary to the conduct of the litigation, making stipulations or concessions with court approval, waiving the right to a jury trial, and controlling trial tactics.” Id.

111 Id.

112 Id. at 917-18.

113 Id. at 917.

Qualifications for Appointed Guardians Ad Litem

In addition to the lack of procedural guidance, Federal Rule 17(c) is bereft of any qualification criteria for those appointed as guardians ad litem. This is not entirely true of the state rules. Several states require that guardians ad litem be attorneys, and several states require the person appointed be “competent,” “responsible” and “discreet.” Finally, a couple of states impose restrictions designed to preserve impartiality and objectivity, and a few states require the posting of a bond by the guardian ad litem where the litigant’s financial interests may be impacted. This hodge-podge of miscellaneous provisions does not come close to providing any uniform standard.

In an excellent article examining the lack of procedural safeguards that have plagued conservatorship and general guardianship proceedings, attorneys Susan Haines and Jack Campbell point out that even where states have provided for appointment of a guardian ad litem to protect the interests of the respondent in such proceedings, there is generally no requirement that the person so appointed “possess any special skills, knowledge, training, experience, or even that he or she be an attorney.” The Uniform Guardianship and Protective Procedures Act of 1997 provides a modicum of additional guidance by suggesting that “the court shall . . . appoint a [visitor],” and “the [visitor] must be an individual having training or experience in the type of incapacity alleged.” This suggests that the visitor or guardian ad litem need not be an attorney but must be someone familiar with Alzheimer’s Disease, if that were the incapacity involved, or with terminal cancer, if it had led to physical debilitation sufficient to require appointment of a general guardian. The comments submitted by the drafting committee recommend that the “visitor” be a “physician, psychologist, . . . nurse, social worker, or individual with pertinent expertise.” Such a requirement is definitely logical within the context of

115 See Fed. R. Civ. P. 17(c).


118 See R. Ala. Sup. Ct. 17(d) (stating that the guardian ad litem cannot be related by blood or marriage or be nominated by plaintiff's attorney); S.C. R. Civ. P. 17 (stating that the guardian ad litem cannot possess adverse interests or be "connected with" the adverse party's lawyer).

119 See Minn. R. Civ. P. 17.02; Miss. R. Civ. P. 17(c).


123 Id.

124 Id.
guardianship proceedings and might be desirable within the wider context of all litigation involving an incapacitated party since the difficulty in effectively communicating with the incapacitated adult is generally one of the issues that results in the need for appointment of the guardian ad litem in the first place. However, unless courts establish permanent paid positions for such individuals, the cost and scheduling difficulty of securing appointments of individuals with this level of qualification would be prohibitive.

In addition, in the absence of legislation or regulation by the various credentialing bodies, imposing a duty upon such individuals to serve, courts would have no authority to appoint doctors, psychologists, nurses, social workers, and others as guardians ad litem without securing contractual agreements with them to do so. In the best of all possible worlds, contract physicians, psychologists, nurses, and social workers would be available to the court for appointment as guardians ad litem. In the real world, guardians ad litem will need to be either lawyers or possibly lay persons with sufficient training to be conversant in legal procedures and terminology, so as to fulfill the need for someone who can assist the attorney representing the incapacitated adult in making decisions vital to the case. Alabama's rule, for example, requires that the guardian ad litem possess the qualifications necessary "to represent the minor or incompetent person in the capacity of an attorney or solicitor." Providing lawyers with continuing legal education on issues of diminished capacity and the types of physical and mental impairments that may be expected to lead to diminished capacity is critical. Ideally, this might lead to a program of certification for guardians ad litem, the development and implementation of which would enhance the quality of and provide uniformity in the standards of eligibility for those appointed as guardians ad litem.

Guidelines for Performance of the Guardian Ad Litem

Federal Rule 17 sets out no specific guidelines to govern the guardian ad litem's performance following appointment. This is in contrast to the standards set out for guardians ad litem appointed in child neglect, abuse, and dependency cases, which now envision that the guardian ad litem will function as a lawyer, advocating the position of the

---

125 See Johns & Krooks, supra note 40, at 199.


127 R. Ala. Sup. Ct. 17(d).

128 Excellent materials on capacity assessment have already been developed by the American Bar Association in conjunction with the American Psychological Association. Handbook for Lawyers, supra note 34. These materials could be used on an interdisciplinary basis to educate attorneys and non-attorneys alike.

129 See Fed. R. Civ. P. 17(c).
best interests of the child\textsuperscript{130} or those provided under the Uniform Guardianship and Protective Proceedings Act, which require in-person visits to the respondent, investigation of the respondent's personal and financial circumstances, and issuance of reports and recommendations relating to same.\textsuperscript{131}

Case law posits that courts that have appointed a Federal Rule 17 guardian ad litem have a “continuing obligation to supervise the guardian ad litem’s work.”\textsuperscript{132} Any substantive decisions made by the guardian ad litem on behalf of the incapacitated litigant and any settlement recommended by the guardian ad litem are subject to the court's approval.\textsuperscript{133} In addition, the court that appointed the guardian ad litem can act to remove the guardian ad litem.\textsuperscript{134} In Neilson, for example, the district court was called upon to review the guardian ad litem's work and to assess whether or not the guardian ad litem should be removed in accord with the request made by Ms. Neilson and her son's attorney.\textsuperscript{135}

Approval and removal are options available to the court and represent the court's responsibility to protect the interests of an incapacitated party by monitoring the performance of the agent that the court has appointed to protect that party.\textsuperscript{136} Neither option provides any specific guidance for the conduct of the guardian ad litem in effectively performing his or her role. Guardians ad litem appointed for minors and those appointed within the context of general guardianship and conservatorship proceedings receive much greater guidance pursuant to statute and/or court rule;\textsuperscript{137} the lack of any corollary guidelines for Federal Rule 17 guardians ad litem is an anomaly that should be corrected.\textsuperscript{138} Since custody of the litigant and control of his or her assets is not at issue in litigation outside of proceedings for guardianship or conservatorship, the plethora of reports that are required within that context would be superfluous and should not be imposed within the context of Federal Rule 17 appointments.

The Tennessee Supreme Court listed the tasks to be performed by a guardian ad litem as follows: (1) to be responsible for costs and liable for judgment, (2) to be the one against whom the court can make and enforce orders, (3) to be subject to punishment for

\begin{itemize}
  \item \textsuperscript{130} See ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, supra note 23; see also Andy Shookhoff & Susan L. Brooks, "Protecting Our Most Vulnerable Citizens", Tenn. B.J., June 2002, at 14.
  \item \textsuperscript{131} U.G.P.P.A. §§305(c)-(e).
  \item \textsuperscript{132} Neilson v. Colgate-Palmolive Co., 199 F.3d 642, 652 (2d Cir. 1999).
  \item \textsuperscript{133} Dacanay v. Mendoza, 573 F.2d 1075, 1079 (9th Cir. 1978); Noe v. True, 507 F.2d 9, 12 (6th Cir. 1974).
  \item \textsuperscript{134} Neilson, 199 F.3d at 652.
  \item \textsuperscript{135} ld. at 664-66.
  \item \textsuperscript{136} ld. at 652.
  \item \textsuperscript{138} See supra notes 21-23 and accompanying text.
\end{itemize}
constituted in the event of disobedience or violation of court orders, (4) and, perhaps most importantly, to look after, take care of, and protect the interests of the incapacitated litigant. To adequately discharge these duties, Federal Rule 17 guardians ad litem, at minimum, should meet with the incapacitated litigant and with those family members or acquaintances who are familiar with the litigant and conversant with the litigant's background, beliefs, and preferences. To the extent possible, the guardian ad litem should elicit from the litigant as much guidance as the litigant is able to provide concerning the lawsuit and how the litigant would like it to proceed. A summation of the guardian ad litem's findings after this investigation of the litigant's circumstances should be submitted confidentially to the court; should there be questions raised later, the report would establish the information and factors upon which the guardian ad litem will have relied in making his or her determinations on behalf of the litigant.

Standards for Decisionmaking

Federal Rule 17(c) sets out no specific standard for making decisions on behalf of the incapacitated person. The two available standards for exercising decision making on behalf of another person are best interests and substituted judgment. The best interests standard is conservative and works to preserve the status quo concerning personal lifestyle and finances and seeks to implement traditional medical advice when pertinent to safeguard the health and well-being of the individual. The best interests standard also seeks to preserve the assets of the individual so as to maximize security, stability, and financial well-being. These things obviously are desirable from a fiduciary standpoint and from the standpoint of one to whom the minor's care is entrusted. Within the context of litigation involving an adult, however, a solely best interests approach may not be appropriate because considerations that may cause someone to bring a lawsuit are not always grounded in the person's best interests. Parties may seek a declaratory judgment and injunctive relief, for example, to rectify a past wrong and to prevent such wrongs in the future, considerations which may not affect the individual party's present best interests at all.

In Neilson, discussed above, Ms. Neilson's pursuit of her discrimination claims never may have been in her "best interests," at least from the standpoint of the court-appointed psychiatrist that examined her. The psychiatrist believed that Neilson's allegations were "the product of [her] illness," and continuing to pursue the suit only fueled and strengthened her paranoia. Be that as it may, Ms. Neilson took the initiative to contact

139 Rankin v. Warner, 70 Tenn. 302, 304-05 (1879).
140 See Fed. R. Civ. P. 17(c).
142 Id. at 506.
143 Id.
144 Neilson v. Colgate-Palmolive Co., 199 F.3d 642, 648 (2d Cir. 1999).
145 Id.
an attorney to file a lawsuit prior to her hospitalization, and at least one lawyer from the firm continued to believe in the viability of her legal claims, particularly as to the issue of retaliation. Clearly, Ms. Neilson was at least partially motivated by her desire to vindicate her rights and to redress the wrong she felt had been inflicted upon her by Colgate. This motivation represents a critical component of her personal values and beliefs. In cases involving vindication of personal rights of adults, as was the situation with Ms. Neilson, implementation of a substituted judgment standard seems more appropriate than that of a best interests standard for purposes of decision making on behalf of the incapacitated litigant.

As suggested in the previous section, a guardian ad litem should determine the values and beliefs of the incapacitated litigant to approximate the judgments that the person would have made. To accomplish this, he or she should first consult with the litigant (to the extent that the litigant is able to communicate), then interview all available family members, friends, and other associates, and consult with any other sources such as social workers, ministers, and others familiar with the litigant and the litigant's beliefs. Although substituted judgment has been used most often in situations involving health care decision making, the factors that have been developed within that context can easily be adapted to fit the arena of litigation. The guardian ad litem's inquiries to the various information sources concerning the incapacitated litigant should ascertain: (1) her expressed wishes, (2) her religious beliefs, if relevant to the decision, (3) the effect the decisions will have on her close relatives, (4) the risk of adverse impact of the proposed decision versus probability of desired outcome, and (5) the effect this risk/benefit analysis would have had on the litigant's continued wish to pursue the proposed course of action based on her past history of decision making.

In most cases, having conducted the investigation, the guardian ad litem will be able to reasonably determine the litigant's wishes and desires for purposes of exercising substituted judgment. Alternatively, if the litigant's wishes or desires either cannot be determined or are irrational, the information obtained will provide a basis for deciding the course that will be in the litigant's best interests.

Conclusion

Shouldering the responsibility for decision making and safeguarding the interests of an incapacitated client is a daunting task, even within the relatively restricted context of a single lawsuit. Representation of older clients necessarily entails situations of

---

146 Id. at 665-66.
147 Id. at 646.
148 Frolik & Barnes, supra note 141, at 507-08.
149 See M. Garey Eakes et al., "Planning Lessons Learned from End-of-Life Disputes", 17 NAELA Q. 21, 22 (2004) (citing the substituted judgment factors from Brophy v. New England Sinai Hospital, Inc., 497 N.E.2d 626, 630 (Mass. 1986): “(a) Mr. Brophy's expressed preferences; (b) [h]is religious convictions and their relation to refusal of treatment; (c) [t]he impact on his family; (d) [p]robability of adverse side effects; [and] (e) [p]rognosis - both with and without treatment”).
diminished capacity and loss of decision-making ability; when this occurs in the middle of litigation, recourse to appointment of a guardian ad litem pursuant to Federal Rule 17(c) or one of its state equivalents is virtually unavoidable.\textsuperscript{151} The paucity of guidance for such appointments begins with the Rule itself, which sets only the vaguest criteria for when appointment is appropriate, establishes no procedures for ensuring due process in such appointments, provides no guidance for who should be appointed, and creates no standards for the role itself.

As argued above, the importance of the role of a guardian ad litem for those in need of such protection mandates that these deficits be addressed. Recommendations include amendment of Federal Rule 17(c) as follows: (1) to establish that appointment of a guardian ad litem is only proper when the litigant is unable to understand the nature of the proceedings and is unable to assist in the management of the case, (2) to provide adequate due process procedures to ensure that the litigant is advised of what is going on and of her right to oppose the appointment, (3) to create qualifications for persons appointed as guardians ad litem, so that at a minimum such persons would be required to have training in the law or experience relating to incapacitated persons, (4) to incorporate guidelines for performance by the guardian ad litem, and finally, (5) to explicitly declare the standard to be used for making decisions on behalf of the incapacitated litigant. If such changes are implemented, or similar changes designed to address the problems that exist, the role of the guardian ad litem may be transformed from one of an elusive and amorphous character to one that truly is what justice requires.

I. POWERS OF ATTORNEY AND ARBITRATION


William Rhodes spent six months as a patient of Kindred Hospital in 2009, during which time he was incapacitated. Shortly after his death, his daughter Sheran Smith sued Kindred for negligence, medical negligence, corporate negligence, violations of long-term resident’s rights, and wrongful death. In response, Kindred produced an ADR (“Alternate Dispute Resolution”) agreement between Rhodes and the Hospital signed by Smith upon Rhodes’ admittance to the Hospital. The agreement required the signer to indicate in what legal capacity they were signing the document. Smith did not indicate what her legal capacity was to sign for her father. Kindred moved to dismiss the complaint. The trial court denied the motion stating that Smith’s signature alone coupled with her status as a relative was insufficient to establish an agency relationship. It also took issue with the inaccurate legal advice the agreement provided.

On appeal, the court stated that the enforcement of the agreement is a matter of contract law and whether Smith had actual or apparent authority to sign the ADR on behalf of her father. Smith did not have actual authority because there was no manifestation by Rhodes that she may act on his behalf. Likewise, she did not have apparent authority, which arises when the principal holds out the agent as having certain authority to act. Rhodes was incapacitated and was therefore unable to hold out to Kindred that Smith possessed any authority to act on his behalf. There is no case law that holds that a familial relationship creates apparent agency as argued by Kindred. Judgment affirmed.

Practice Note: Make sure all Power of Attorney documents you draft do not allow the Attorney-in-Fact to agree to any type of ADR. Preserve the right to trial by jury.

II. NURSING HOMES (DISCHARGE AND COLLECTION OF AMOUNTS OWED)


Geneva King was a private pay resident of River Valley awaiting approval of Medicaid benefits for her nursing home care. Geneva’s daughter, Diana, was listed as the party to whom the nursing home was to bill statements and correspondence. When Geneva filed for Medicaid in June 2009, she stopped making private payments to the nursing home. Her Medicaid benefits were denied, so she reapplied and was denied again. On January 4, 2010, Diana received a notice that Geneva would be discharged on February 4, 2010, if the payment of $41,683.55 was not received. Geneva filed an appeal of the denial of Medicaid benefits and
an administrative hearing was scheduled for January 28, 2010, which resulted in the ALJ’s final order that the nursing home’s actions were lawful and the discharge of Geneva was affirmed. On February 4, 2010, Geneva filed a petition with the circuit court appealing the ALJ’s final order and seeking an injunction to stay the discharge until review of the ALJ’s order. On July 19, 2010, the trial court affirmed the final order of the ALJ and dissolved the injunction. Geneva appealed.

Upon review, the appeals court confirmed the ALJ’s order. The appellate court acknowledged the Kentucky Administrative Regulation, which authorized discharge for non-payment if the Medicaid application was denied. The appellate court did not find that the regulation required the nursing home to wait through the Medicaid appeals determination period. Once the original application was denied, they could issue a valid discharge notice. The Appeals court stated that the nursing home did not fail to comply with the regulations nor did they fail to sufficiently prepare Diana’s residence for Geneva’s transfer.

The Supreme Court has denied cert.


Somerset Manor, LLC, d/b/a Somerset Nursing and Rehabilitation Facility (SNRF), appealed from a Pulaski Circuit Court judgment which held that KRS 404.040 does not impose a duty on a wife to pay the nursing home expenses of her late husband. The SNRF challenged the court’s interpretation of the statute, which it claimed was unconstitutional and violated “common sense.”

The decedent had incurred an outstanding balance on his account at the SNRF. The SNRF filed a claim against decedent’s estate, which consisted of $7,700.00, arguing that the statute imposed a duty on the decedent’s wife to provide for the necessaries of her spouse, making her individually liable for the remaining debt.

The statute provided that the husband shall not be liable for any debt or responsibility of the wife contracted or incurred before or after the marriage except to the amount of value of the property he received from or by her by virtue of marriage.

The circuit court noted that some courts in other jurisdictions have held that the common law doctrine of necessaries violates the equal protection clauses of the state and federal constitution, expanding the doctrine to apply to both spouses or eliminating the doctrine. In Kentucky, the doctrine has been codified, and the rules of statutory construction had to be applied, which makes only husbands liable for the necessaries of their wives.

The court agreed with the circuit court that construing the statute to impose a reciprocal duty would constitute an impermissible infringement.
on the role of the legislature. The Court reasoned “when the express language of a statute is clear and unambiguous, the court is without authority to construe the statute otherwise.”

It’s a good day to be a lady in Kentucky.


Kentucky is one of the states that does have a filial responsibility law on the books. Although it hasn’t happened here yet, facilities in other states are starting to use these statutes to attempt to collect. A Pennsylvania appeals court found a son liable for his mother’s $93,000 nursing home bill under their state’s filial responsibility law.

John Pittas’ mother entered a nursing home for rehabilitation following a car crash. She later left the nursing home and moved to Greece, and a large portion of her bill at the nursing home went unpaid. She applied to Medicaid to cover her care, but that application is still pending.

Meanwhile, the nursing home sued Mr. Pittas for nearly $93,000 under the state’s filial responsibility law, which requires a child to provide support for an indigent parent. The trial court ruled in favor of the nursing home, and Mr. Pittas appealed. Mr. Pittas argued in part that the court should have considered alternate forms of payment, such as Medicaid or going after his mother’s husband and her two other adult children.

The Pennsylvania Superior Court, an appeals court, agreed with the trial court that Mr. Pittas is liable for his mother’s nursing home debt. The court held that the law does not require it to consider other sources of income or to wait until Mrs. Pittas’ Medicaid claim is resolved. It also said that the nursing home had every right to choose which family members to pursue for the money owed.

III. PROBATE, WILLS, AND ESTATES

A. Copley v. Copley, 2011 WL 6003919 (Ky. App., Dec. 2, 2011). Unpublished. (Disinheritance of children was valid and testator was not subject to undue influence.)

This case concerns the will of Daniel H. Copley, decedent, who died on March 3, 2008. The will was probated on March 18, 2008. Danita Copley, decedent’s daughter, was named the Executrix of the estate. The will provided for Danita and Caroline Copley, decedent’s widow, specifically omitting decedent’s other two children: (1) Justin Copley and (2) Melissa Howell. On October 7, 2009, Justin and Melissa filed a complaint against Danita and Caroline, seeking to set aside the probated will. Nearly a year later, on September 7, 2010, Danita filed a motion for summary judgment, which the circuit court granted on September 23, 2010. Subsequently, Justin and Melissa filed a motion to alter, amend, or vacate the summary judgment; however, this request was denied on November 3, 2010, and
Justin and Melissa appealed, arguing the following: (1) that certain language in the will was irregular and ambiguous; (2) that Daniel lacked the capacity to execute his will because he was of unsound mind and impaired mentally at the time he executed the will; and (3) that the will was invalid and void because Danita exerted undue influence on her father.

On appeal, the court discussed each of Justin and Melissa’s arguments individually. First, concerning the claim that the will was ambiguous, the appellate court determined the will obviously expressed Decedent’s intention to exclude Justin and Melissa from receiving anything under it, holding that the language of the will clearly indicated that Justin and Melissa were omitted from it. Second, concerning whether or not Decedent’s mental capacity was questionable at the time the will was executed, the court noted that witnesses testified that Decedent was of good mind when he made and executed his will. Consequently, the court held that Justin and Melissa failed to show that a genuine issue of material fact existed as to Decedent’s testamentary incapacity. Finally, the court held the assertions that Decedent was subject to undue influence were unsupported by any evidence or witnesses. In sum, the appellate court found that Justin and Melissa’s complaints of mental incapacity and undue influence were simply the result of the fact that Decedent left most of his estate to Danita. Therefore, noting that the law allows a testator to convey the bounty of his estate to whomever he chooses, the appellate court determined that the trial court did not err in granting summary judgment. Specifically, the appellate court reasoned that parties who oppose a properly supported motion for summary judgment may not rest their opposition to the motion upon mere allegations or denials; instead, they must set forth specific facts showing that there was a genuine issue for trial. In conclusion, summary judgment was properly granted.


Holly and Kenneth Stull were married in 1976 and Kenneth adopted Holly’s daughter, Kristen Shay McGill (Shay). Subsequently, in 1985, Kenneth and Holly purchased an AXA life insurance policy and paid for it in monthly premiums from their joint marital property until 2000; in 2000, Holly filed a petition for divorce, the parties separated, and Kenneth moved out of the marital home. Kenneth then changed the mailing address for the policy and instructed that the premium be paid from his personal bank account. In 2001, Kenneth converted the AXA policy to a paid-up extended term policy; under this arrangement, the monthly premium would be withdrawn from the accumulated cash value of the policy until it was depleted. Thereafter, in 2002, Kenneth was diagnosed with multi-system atrophy. That same year, he executed a will in which he named Shay as the sole heir of his entire estate. In 2004, Kenneth was diagnosed with Lewy body dementia, after which he began to suffer physical and cognitive decline. On May 9, 2004, Kenneth contacted his
investment advisor, Brad Sublett, who later testified that Kenneth inquired as to the beneficiary of the AXA policy and how long it would continue under the paid-up extended term. Sublett further testified that he informed Kenneth that Holly was the beneficiary and that the policy would be paid until the date identified on his annual report. Later, in December of 2006, Kenneth and Holly entered into an agreement ("agreement"), which included the following provision: "Ken shall have as his own free and clear of any claim of Holly, the following: ... (e) All life insurance policies on his life, if any." Interestingly, in August of 2007, Sublett contacted Holly and informed her that she was the named beneficiary on the AXA policy; however, Holly testified that she did not disclose the existence of the 2006 agreement to Sublett. Accordingly, Holly filed a claim for the life insurance proceeds in which she identified herself as Kenneth's wife, and on September 7, 2007, Holly received the insurance proceeds. Thereafter, in June of 2008, Shay, as executrix of Kenneth's Estate, filed a complaint against Holly, alleging that Holly had breached the 2006 agreement by claiming and receiving the insurance policy proceeds; that she had committed fraud by identifying herself as Kenneth's wife in the claim for the proceeds; and that she had violated KRS 304.47-020 by committing a fraudulent insurance act. Both parties filed for summary judgment; the trial court granted summary judgment to Kenneth's estate.

On appeal, Holly argued that the trial court erred by awarding summary judgment to Kenneth's estate. She maintained that the 2006 agreement failed to divest her of any beneficiary expectancy because the language of the agreement did not specifically state so. The appellate court agreed, reasoning that the agreement between Holly and Kenneth did not specifically address the right to beneficiary expectancy; it only addressed ownership over the policy itself. This distinction was pivotal. As owner of the policy, Kenneth retained the discretion to continue the policy, cancel it, increase it, change the beneficiary, or even cash it. He chose not to make any changes. In conclusion, the court of appeals held that the trial court erred by adjudging that the 2006 agreement divested Holly of any beneficiary expectancy; therefore, Kenneth's estate was not entitled to judgment as a matter of law, and the August 4, 2010, summary judgment was inappropriate.

IV. MEDICAID- RESOURCES

A. Sable v. Velez, 437 Fed.Appx. 73 (3rd Cir. 2011). (Federal District Court in New Jersey holds that New Jersey may consider promissory notes as available resources.)

In a long-running case that has bounced back and forth between two federal courts, the Third Circuit Court of Appeals ruled that New Jersey's Medicaid agency may analyze promissory notes as trust-like devices and count the notes as available resources.

A group of New Jersey residents lent money to close relatives in return for promissory notes. After the individuals applied for Medicaid, the state
denied their applications, claiming that the promissory notes were trust-like instruments that qualified as available resources.

The residents filed suit in federal district court seeking to enjoin the state from counting the notes as available resources. The district court denied the request for preliminary injunction, holding that there was nothing in the Medicaid Act or the POMS that prevented the state from analyzing promissory notes as a trust-like device if the situation warranted it. The residents appealed to the U.S. Court of Appeals for the Third Circuit, which vacated and remanded, holding the district court committed legal error when it analyzed the notes as trust-like devices without first determining whether they would be counted as resources under the regular resource-counting rules. The court agreed with the plaintiffs' argument, which was based on the federal statutory requirement that the Medicaid program may not use eligibility rules that are more restrictive than those used by the SSI program (see 42 U.S.C. 1396a(a)(10)(c)(i)(III)).

The district court again denied the preliminary injunction, holding that the relationship of the parties and the terms, amount and timing of the loans indicated that the loans were not bona fide cash loans or promissory notes. The residents appealed.

In a ruling that was "not precedential," the U.S. Court of Appeals for the Third Circuit affirmed, holding that the Medicaid applicants are not entitled to a preliminary injunction because they "failed to show that it was more likely than not that their notes would be considered cash loans or promissory notes under the regular SSI resource-counting rules or that their notes should not be considered trust-like devices."

B. Hedlund v. Wisconsin Dept. of Health Services, 2011 WL 4835721 (Wis. App. Oct. 13, 2011). (Wisconsin court holds that family trust created by children for parents' benefit is an available resource.)

In June of 1991 (and again in January 1992), Hedlund and her husband transferred all their real property and financial assets, except for one checking account, to their three children. That same day, the children created the Clarence and Lucille Hedlund Family Trust, into which the children transferred all of the aforementioned assets from their parents. The trust instrument provided that its purpose was to provide for the support and welfare of Clarence and Lucille Hedlund and that its income and corpus were to be used only when no other funds were available and to supplement any funds the beneficiaries are entitled to receive as social security and medical assistance benefits.

Hedlund’s husband died. In June 2008, Hedlund entered a nursing home and submitted an application for medical assistance, which was denied because the trust was considered an available asset. Hedlund’s assets exceeded the asset limit for medical assistance eligibility. Hedlund contested this decision at a hearing before an ALJ, who affirmed the denial. Hedlund filed a petition for review of this decision in circuit court.
and the circuit court also affirmed. Thus, the primary issue on appeal was the availability of the trust in determining her eligibility for Medicaid.

The appellate court first looked to the language of the applicable statute, i.e. Wis. Stat. section 49.454, and determined that it applied to a trust if (1) assets of the individual or the individual's spouse were used to form all or part of the corpus of the trust; and (2) if a certain person(s) established the trust. In this case, Hedlund argued that her children’s assets were used to form the trust. The appellate court, however, rejected this argument, reasoning that Hedlund’s proposed construction of the statute was unreasonable because it excluded all trusts that come within the category plainly established in section 49.454(1)(a)4. Moreover, Hedlund’s construction was inconsistent with the purpose of the medical assistance program, which serves to provide appropriate health care for eligible persons. The appellate court therefore concluded that “assets of the individual,” within the meaning of Wis. Stat. section 49.454, are not restricted to assets that are legally owned by the individual at the time the trust is established.

Having determined that the assets used to form the corpus of the Hedlund trust were the assets of Hedlund and her husband, the question then became whether the trust was established by the children, “at the direction or upon the request of Hedlund.” The fact that all relevant transactions occurred on the same day led the ALJ to infer that Hedlund transferred her assets to her children for the purpose of establishing the trust for her and her husband’s benefit. The appellate court found this inference to be reasonable.

In conclusion, Wis. Stat. section 49.454 applied to Hedlund’s trust, which was therefore available to Hedlund for purposes of determining medical assistance eligibility.


Becky Hutcherson appealed a district court decision affecting her father, John, the community spouse (CS), and her mother, Betty, the institutionalized spouse (IS). The decision allowed the Arizona Health Care Cost Containment System Administration (the State) to recover, as a remainder beneficiary against CS, annuity for the Medicaid medical costs of IS. The Ninth Circuit Court affirmed and further held that the State’s recovery was not limited to the amount it paid for the IS’s medical costs as of the date of the CS’s death.

IS entered into a nursing home and applied for Medicaid, but did not qualify because the Hutchersons had too much in assets. CS spent down his assets by purchasing a $100K annuity. The annuity paid him $2,781 monthly for thirty-six months; the State was listed as the first position remainder beneficiary, with IS in second position. CS died when the annuity value was $75K. The State elected to keep receiving the monthly
benefits. At the time of CS’s death, the State had paid $23,840 for IS’s care and continued to pay $2,552 each month for her care. The State deducted the monthly cost from the annuity benefit and applied the difference to the amount paid prior to CS’s death. When IS stopped receiving Medicaid assistance, the annuity was used to pay off the remaining balance of the $23,840, at which time the State released its claim. In total, the State received $60,840 before Becky received the remaining value as secondary beneficiary. Becky filed suit, asserting the State was not entitled to recover from CS’s annuity at all or, at the very least, not for IS’s care after CS’s death.

The analysis by the Ninth Circuit Court centered around the interpretation of 42 U.S.C. §1396p(c)(1)(F)(I), as amended in 2006. That statute states that spouses may purchase an annuity to spend down their assets if “the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual.” The court held that by its plain terms, the provision allows the State to recover the expenses incurred on behalf of an IS, in this case, Betty. Congress's label of the 2006 amendment as a “technical correction” did not defeat the plain language of the statute. Nothing in the statutory language was inconsistent with permitting the State to recover from the annuity expenses incurred after CS’s death. That interpretation was the most consistent with the statutory scheme and purpose.

D. Appeal from Lopes v. Starkowski, 2010 WL 3210793 (D. Conn. August 12, 2010). (HHS argues in its amicus brief in Second Circuit that the income stream in a non-assignable annuity is not an asset.)

In a case in which the State of Connecticut is trying to treat the income stream from a community spouse’s annuity as an available asset, the U.S. Department of Health and Human Services (HHS) has filed an amicus brief with the U.S. Court of Appeals for the Second Circuit that is highly favorable to the Medicaid applicant's position that the annuity is not an asset. Lopes v. Starkowski (2nd), appeal from Lopes v. Starkowski 2010 WL 3210793 (D. Conn. August 12, 2010).

Amelia Lopes purchased an annuity after her husband moved to a nursing home. She received a letter from the annuity company saying that no part of the annuity was assignable, including periodic payments. When Mr. Lopes applied for Medicaid, the state of Connecticut identified a potential buyer of the annuity's income stream and directed Mrs. Lopes to attempt to sell the annuity. Mrs. Lopes refused, and the state denied Medicaid benefits to Mr. Lopes.

Mr. Lopes appealed, and the U.S. District Court for the District of Connecticut granted his motion for summary judgment, holding that the annuity was non-assignable and could not be characterized as an asset. The court further found that even if the income stream were assignable, “it would be incongruent with the principles of [Medicaid law] to permit a
state to characterize even an assignable income stream as an asset.” The State appealed.

The Second Circuit Court of Appeals asked HHS to submit an amicus curiae brief and to answer two questions: (1) What does the law say? and (2) What are the policy implications of deciding in favor of Mr. Lopes or the State of Connecticut?

In its nineteen-page response, HHS said that “there is nothing on its face suspicious, illegal, or otherwise contrary to the policy expressed in the Medicaid provisions of the Social Security Act in treating an irrevocable and non-assignable annuity as the community spouse’s income rather than a resource attributable to the couple.” Commenting on the policy implications of a decision in favor of the community spouse, the agency noted that while Medicaid will undoubtedly pay more, this result is consistent with provisions of the Medicaid statute designed to protect community spouses from impoverishment.

HHS concluded that “if the [Second Circuit] determines that Mrs. Lopes’ annuity is non-assignable, the district court’s decision should be affirmed.”

V. MEDICAID-TRANSFERS

A. Marino v. Velez, 406 Fed.Appx. 651 (3d Cir. Jan. 10, 2011). (New Jersey Medicaid applicant’s penalty period does not begin until returned assets are spent down.)

The U.S. Court of Appeals, Third Circuit, ruled that a New Jersey Medicaid applicant who transferred assets and then had some of the transfers returned cannot get credit toward her penalty period for the time before the transfers were returned because she was resource-eligible.

Beatrice Marino, a New Jersey nursing home resident, made several gifts to family members totaling $192,000. In February 2009, Ms. Marino applied for Medicaid. The state informed her that a penalty period would be imposed due to the transfers. Subsequently, Ms. Marino’s family members returned $89,000. The state reduced the penalty period but declared that it would not begin until April 1, 2010, the date that Ms. Marino’s resources would be below the $4,000 resource limit.

Ms. Marino filed a claim in federal court and asked for a preliminary injunction, arguing the state violated the Medicaid act by "tolling" her penalty period. The U.S. District Court for the District of New Jersey denied the injunction, finding that because Ms. Marino was not deemed eligible for Medicaid until after she had spent down the funds from her returned gifts, her penalty period would not begin to run until April 1, 2010. Ms. Marino appealed, arguing her penalty period should have begun in March 2009 when she became resource eligible and ended in June 2009 when her family returned her money and then begun again on April 1, 2010.
The U.S. Court of Appeals, Third Circuit affirmed, holding that the penalty period should not begin to run until April 1, 2010. According to the court, because Ms. Marino asked the state to recalculate her penalty based on the returned gifts and treat the gifts as though they had remained her property, she "cannot now claim that she should get credit toward her recalculated penalty period for those months, even though she remained technically resource-eligible for Medicaid."


A federal district court ruled that when a Medicaid applicant transferred money to her daughter with the intention that the daughter pay for her care during the resulting penalty period, she created a trust-like device, so the money is still an available resource.

Helen Pfeffer moved into an assisted living facility in Arizona. On the advice of counsel, she transferred $92,000 to her daughter and applied for Medicaid. Her daughter used the funds to pay privately for her care. The state denied Ms. Pfeffer Medicaid benefits and did not impose a penalty period, claiming that because the transfer to her daughter was not a gift, it was an available resource.

When the state denied Ms. Pfeffer's appeal, she filed suit in federal court and asked for a preliminary injunction for immediate benefits until the case is resolved. Ms. Pfeffer argued the money was a gift, so a penalty period should apply. The state argued the transfer of funds created a trust-like device, which meant the funds were an available resource.

The U.S. District Court for the District of Arizona denied the preliminary injunction, holding that Ms. Pfeffer did not show a likelihood of succeeding on the merits because the transfer was actually an arrangement that was similar to a trust. According to the court, the fact that Ms. Pfeffer's daughter used the transferred funds only to pay for Ms. Pfeffer's care indicated that she was holding the funds for Ms. Pfeffer's benefit.


In 2009, the Minnesota legislature amended the state's Medicaid law in an effort to prohibit attempts to obtain Medicaid benefits through the divesting of assets coupled with partial repayment during the penalty period. The new statute, effective January 1, 2011, stated that a penalty period could not be adjusted if less than the full amount of the transferred asset or the full cash value of the transferred assets was returned. Because of the Affordable Care Act’s Maintenance of Effort (MOE) requirement, the state sought amendment of its state plan by the Centers for Medicare & Medicaid Services (CMS). CMS approved, stating that changing asset transfer requirements would comply with the MOE
requirement because such a change would affect benefits rather than eligibility. The state’s plan was changed accordingly.

Plaintiff applied for long-term care benefits in November 2011. Within the five-year look-back period, she had transferred monies to her son who was only able to make partial repayment. Plaintiff sued seeking injunctive relief asserting that the state’s new policy violated federal law because it was more restrictive as prohibited by the MOE requirement.

The court denied a motion for temporary injunctive relief. It held that plaintiff had not made a showing of irreparable harm, particularly when weighed against the state’s interest in limiting long-term care under its Medical Assistance program to those genuinely unable to pay for their own care. Further, the court held that the new rule would not have any adverse impact on the plaintiff. Under existing law, as well as under the new rule, the uncompensated transfer must be determined by subtracting the amount already repaid from the original transferred amount. The original calculation of the penalty period would be the same under the existing state law as it would be under the new rule. The new rule only prohibited any subsequent recalculation of that period if further repayments were made after the initial calculation. That contingency would not occur because the son could not make further repayment.


Daughter Herman, individually and as personal representative of her mother’s estate, sued her father and sister. Herman alleged that the father had breached his fiduciary duty to the mother (his wife), as her attorney-in-fact under a power of attorney. Herman asserted that the father fraudulently conveyed his and the mother’s jointly owned marital residence, bank account, and certificates of deposit into his sole ownership and subsequently transferred those assets to the sister. As a result, they deprived the mother and her creditors (one of which was Herman) of their interests in those assets. Herman failed to establish that the initial transactions were unfair to the mother. The mother was in need of long-term care and had to be divested of assets in order to qualify for Medicaid. The father then transferred those assets to the sister despite the existence of a custodial claim by Herman for the care of the mother. The sister stated that the assets were to ensure a place to live and care by the sister for the rest of the parents’ lives, which was unfulfilled due to Herman being appointed guardian for the mother. The court found that the father made the transfer without receiving a reasonably equivalent value in exchange for the transfer. The transfers to Herman’s sister were fraudulent per the Uniform Fraudulent Transfers Act as to creditors, of which Herman was one.
VI. MEDICAID PLANNING AND THE UNAUTHORIZED PRACTICE OF LAW


This ethics opinion addresses whether a non-attorney, for a fee and in the course of a business enterprise, may provide advice and assistance to current and prospective nursing home patients and/or their families regarding qualification for Medicaid benefits. The court said that a non-attorney may review documents to identify an individual’s countable resources for purposes of applying for Medicaid nursing home benefits, prepare and file a Medicaid application for another, and attend state hearings with that individual or on his/her behalf to the extent that those activities are authorized by federal law. A non-attorney may not, however, engage in Medicaid planning if it requires specialized legal training, skill, and experience.

Such legal services consist of establishing a Medicaid planning strategy specific to an individual, including:

- Determination of the exact amount and nature of the resources the individual will be able to retain;
- Determination of the date of Medicaid eligibility; and
- A specific plan for reduction of the individual’s assets to qualify for Medicaid, including advice on how to “spend down,” gift resources, change title to resources, and convert one type of asset to another type of asset in order to maximize the assets transferred to others while qualifying for the maximum benefits at the earliest time.

VII. MEDICAID AND THE AFFORDABLE CARE ACT DECISION


From Scotusblog http://www.scotusblog.com/2012/06/court-holds-that-states-have-choice-whether-to-join-medicaid-expansion/

The Court’s decision on the constitutionality of the Medicaid expansion is divided and complicated. The bottom line is that: (1) Congress acted constitutionally in offering states funds to expand coverage to millions of new individuals; (2) So states can agree to expand coverage in exchange for those new funds; (3) If the state accepts the expansion funds, it must obey by the new rules and expand coverage; (4) but a state can refuse to participate in the expansion without losing all of its Medicaid funds; instead the state will have the option of continue the its current, unexpanded plan as is. [sic]
The votes for this outcome are divided among several opinions. Three Justices – the Chief, Justice Kagan, and Justice Breyer – took the position that depriving a state of all of its Medicaid funding for refusing to agree to the new expansion would exceed Congress's power under the Spending Clause. Although Congress may attach conditions to federal funds, they concluded, it may not coerce states into accepting those conditions. And in this case, taking away all the states' funds for the entirety of its Medicaid program just because it disagreed with a piece of the program would be coercive. But the remedy for that constitutional violation is not to declare the expansion unconstitutional – such that even states that want to participate would not have the option. Instead, the plurality held that the provision of the statute that authorized the Government to cut off all funds for non-compliance with the expansion was unconstitutional. The result is that states can choose to participate in the expansion, must comply with the conditions attached to the new expansion funds if they take that new money, but states can also choose to continue to participate only in the unexpanded version of the program if they want.

Justices Ginsburg and Sotomayor would have held the entire expansion program constitutional, even the provision threatening to cut off all funding unless states agreed to the expansion. Their votes created a majority for the proposition that the overall expansion was constitutional, and that states could choose to participate in the expansion and would have to comply with the expansion conditions if they did.

But there was still no majority about what to do about the states that do not want to participate in the expansion – the Chief Justice's 3-Justice plurality voted to strike down the provision allowing the Government to withhold all funds from states that reject the expansion; Justices Ginsburg and Sotomayor voted to uphold it.

The deadlock was broken by the dissenters. Justice Scalia – writing on behalf of himself, and Justices Kennedy, Thomas, and Alito – agreed with the Chief's plurality that the threat to withhold all funds was unconstitutionally coercive. But they would have held that the consequence is that the entire expansion program should be stricken. The result would have been that even states that wanted to participate in the program could not. The plurality's approach of simply striking down the provision that allowed withholding all funds if the state refused the expansion was, in the dissenters' view, tantamount to rewriting the statute.

At this point, that meant that there were 2 votes to uphold the expansion in its entirety, 4 votes to strike the entire expansion down, and 3 votes to strike down only the provision withholding all funds for non-compliance with the expansion mandate. So where does that leave things?
Fortunately (for the sake of clarity at least), Justices Ginsburg and Sotomayor resolved the ambiguity by voting with the plurality on the remedy question. That is, these Justices voted that if the statute was unconstitutionally coercive, then the remedy would be only to strike down the all-or-nothing sanction.

The consequence was a bottom line of 7 Justices – the Chief, Breyer, Kagan and the four dissenters – finding the expansion unconstitutional. But a different majority – the Chief, Ginsburg, Breyer, Sotomayor and Kagan – held that the remedy for the violation was to strike down only the provision allowing the federal government to withhold all Medicaid funds unless a state agrees to the expansion.

VIII. MEDICAID-ESTATE RECOVERY

In Re: Estate of Perry (Idaho Dist. Ct., 4th Dist., No. CV-IE-2009-05214, March 16, 2011). (State cannot recover assets that were transferred before Medicaid recipient died.)

An Idaho district court ruled that the state cannot recover assets from the estate of a Medicaid recipient's spouse that were transferred to the spouse before the Medicaid recipient died.

Martha and George Perry owned property together. Mrs. Perry entered a nursing home, and Mr. Perry transferred the property into his name. Mrs. Perry then began receiving Medicaid benefits. Mr. Perry died before Mrs. Perry, and the property was sold. After Mr. Perry's death, the state filed a claim against his estate seeking recovery of more than $100,000 in Medicaid benefits it had so far paid on Mrs. Perry's behalf.

The state asserted that, because Mrs. Perry previously had an interest in the property during the marriage, the state could recover an amount equal to her ownership interest. The estate's personal representative countered that the state was entitled only to recover an amount equal to Mrs. Perry's interest in the home at the time of her death. Because Mrs. Perry was still alive at the time of the transfer, the personal representative argued the state could not recover any amount. The magistrate division of Idaho's fourth judicial district ruled that the state's ability to recover costs was limited to assets that were transferred to the recipient's spouse at death, not to inter vivos transfers. The state appealed. (Mrs. Perry died while the appeal was pending.)

The Idaho District Court affirms, holding the definition of "estate" in federal Medicaid law does not permit the state to recover property interests the Medicaid recipient divested before death. The court determined that there is a conflict between state and federal law because state law would allow the state to recover from the spouse's estate so long as the property was once community property, but the court concluded that federal law preempts state law.
IX. TAX IMPLICATIONS OF CAREGIVER PAYMENTS


Lillian Baral suffered from dementia and her doctor recommended that she get twenty-four-hour-a-day care. Her brother hired caregivers to assist Ms. Baral with daily activities. On her tax return, Ms. Baral included a deduction for medical expenses for the payments to the caregivers. The IRS said the expenses were not deductible and asked for more money. Following Ms. Baral’s death, her estate appealed the matter to the U.S. Tax Court.

Under tax law, expenses for medical care may be claimed as an itemized deduction if they exceed 7.5 percent of adjusted gross income. (Note that this threshold will rise to 10 percent of adjusted gross income in 2012.) The definition of medical expenses includes the cost of long-term care if a doctor has determined you are chronically ill. “Chronically ill” means you need help with activities like eating, going to the bathroom, bathing, and dressing, or you require substantial supervision due to a severe cognitive impairment.

The Tax Court agreed with Ms. Baral that the payments to the caregivers for assisting and supervising Ms. Baral are deductible medical expenses. The expenses qualified as long-term care services even though the caregivers were not medical personnel because a doctor had found that the services provided to Ms. Baral were necessary due to her dementia.

X. SPECIAL NEEDS POOLED TRUSTS FOR THOSE OVER SIXTY-FIVE (PENNSYLVANIA COURT)


A U.S. District Court ruled that a Pennsylvania law limiting access to pooled trusts imposes Medicaid eligibility requirements that are more restrictive than federal law. The court struck down portions of the law that bar those over age sixty-five from using pooled trusts, that prohibit pooled trusts from retaining funds for deceased beneficiaries, and that require beneficiaries to have special needs that would not be met without such a trust. In 2005, the Commonwealth of Pennsylvania revised its Medicaid eligibility requirements to make it more difficult for elders and people with disabilities to qualify for benefits. Part of the new law, Section 1414 of Act 42 of 2005, imposed strict limits on pooled trusts, including barring the use of pooled trusts by individuals over the age of sixty-five, requiring that pooled trust beneficiaries have special needs that will not be met without the use of a pooled trust, capping the amount of funds that can be retained by a pooled trust after a beneficiary’s death at 50 percent, and disqualifying all members of a pooled trust from receiving a pooled trust resource exemption if one member of the pooled trust does not meet the requirements of Section 1414.

A group of Medicaid recipients who utilize pooled trusts filed suit against the Commonwealth, arguing that the new law was invalid because it imposed more stringent eligibility requirements than are required by federal law. The Commonwealth objected on numerous grounds, including standing and ripeness. The Commonwealth also claimed that the new trust law had nothing to do with
Medicaid eligibility, but was merely designed to regulate special needs trusts in general, and that, even if the law did pertain to Medicaid eligibility, federal law does not prohibit states from counting assets in special needs trusts when computing Medicaid eligibility.

The U.S. District Court for the Eastern District of Pennsylvania rules that portions of Section 1414 are invalid. The court found that the Commonwealth's objections are all inappropriate, and that the plaintiffs should be certified as a class. In regard to the age restriction, the court found that "Congress intended to permit disabled persons age sixty-five and older to form pooled special needs trust accounts," although the court noted that states may still impose a transfer penalty when the accounts are established. When discussing the "special needs" requirement, the court states that "[i]t is clear that the effect of Section 1414(b)(2) is to render ineligible disabled persons who would be eligible under federal law." The court also invalidates the portions of Section 1414 that force the trusts to only make expenditures that are reasonably related to the needs of the beneficiary and that force pooled trusts to use 50 percent of the funds remaining in the account of a deceased beneficiary to pay back the Commonwealth for Medicaid services provided.

XI. LEGISLATIVE UPDATE

A. Kentucky

1. HB 52 (2011).

AN ACT relating to elder and vulnerable adult abuse, neglect, and financial exploitation and making an appropriation therefor. Provides a civil remedy with treble damages for use against persons who are convicted of exploitation of an adult and who fail to return the victim's property within thirty days of an order by the sentencing court to do so. Includes the commission of a felony under KRS Chapter 209 among the offenses that trigger an offender’s forfeiture of the right to inherit property from the victim of the offense and directs that any escheated property be directed to the Elder and Vulnerable Victims Trust Fund. Establishes the Elder and Vulnerable Victims Trust Fund to provide funding for programs combating elder and vulnerable adult abuse, neglect, or financial exploitation. Creates a new section of KRS Chapter 209 to prohibit persons convicted of a felony under KRS Chapter 209 from serving in any capacity that has authority over the victim of the offense or the victim’s estate.

2. HB 164 (2011).

AN ACT relating to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Enacts the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, as recommended to the states by the National Conference of

1 Summaries prepared by the Kentucky Legislative Research Commission.
Commissioners on Uniform State Laws, to govern jurisdictional questions and disputes between states in regard to cases concerning guardians and conservators. Uses jurisdictional basis such as home state and emergency, similar to those used in interstate child custody cases.


AN ACT relating to the creation and administration of trusts and estates. Amends the Kentucky Principal and Income Act to permit a trustee to reallocate principal to income without court approval under named circumstances. Defines "unitrust," and explains duties of fiduciary. Establishes rules for conversion of a trust to a unitrust. Creates Kentucky "decanting" statutes that permit creation of a new trust. Requires that notice provided by the trustee to a beneficiary be delivered to the beneficiary by certified mail, restricted delivery, and with a return receipt. Permits the trustee to seek court approval to effectuate the purpose behind the notice if delivery cannot be made. Clarifies the effective date of the Kentucky Uniform Principal and Income Act. Permits a trustee to deal with Medicare surtax issues. Includes new provisions relating to spendthrift trusts to deal with federal income tax and related issues. Allows creation of a self-settled special needs "Pay Back" trust.

B. Federal

**S. 3270**

A BILL to amend title 38, United States Code, to require the Secretary of Veterans Affairs to consider the resources of individuals applying for pension that were recently disposed of by the individuals for less than fair market value when determining the eligibility of such individuals for such pension, and for other purposes.
Dear Attorney Bill: Thanks for all the help you have provided to our family all these years. I don’t know how you keep up with all those laws and things but I certainly am glad I have you to call on when I am faced with difficult life-changing questions. I know we are nearly the same age and you are facing the same questions about Social Security and IRA timing. So, I am thinking about retiring [aren’t we all?], and have a few questions about when I should take my Social Security and start my IRA. The HR folks have told me that our retirement fund has some decisions that must be made before I draw against it so I told them I would talk to you and get back with them. Do you have some time to spend on this with me?

Choose one:

______ Dear Client Phil: I really don’t know anything about retirement plans.

______ Dear Client Phil: How about Thursday at 1:30?

As attorneys we rarely have time to learn something new unless we are forced to by a client problem. ERISA is not an area of study for the general practitioner. However the issue can easily arise in divorce matters, estate planning and Medicaid planning. IRA distributions affect income tax on an estate and rights of beneficiaries and design for their new “income.” What types of funds require Minimum Required Distributions are important to understand. If for no other reason, we should know these issues affect our own retirement matters and the potential for use of retirement funds in our own businesses.

I. “RETIREMENT”

In the modern world, retirement is a qualitative term. Many things affect how we view this stage of our lives. Does it really mean we “quit” working? Do I want to “quit” now? Do I have to quit now? How is it funded? How much money do I have and will I “have” to continue working? Is Wal-Mart hiring? When should I start to draw my Social Security? Can my wife draw on my Social Security too? Should she? What kind of “retirement fund” does my employer have? How is it funded? Can I “roll it over?” Do I get benefits? How can they just close out the pension fund, I paid into it all these years.

* Thanks: In appreciation to Professor Robert Fleming, Esq. of Fleming and Curti, P.L.C., Tucson, AZ and the other class members of the Retirement Planning class in the Spring Semester of the Stetson University College of Law, LLM in Elder Law program for organizing and focusing on these issues. I have borrowed broadly from our class materials for this survey paper.
If we as lawyers want people to think we know something about these questions, here is a survey primer that can help focus us to answer (or find answers to) these questions.

II. SOCIAL SECURITY

We know what Social Security is (although most of us don't know its real name is Old Age, Survivors and Disability Insurance “OASDI”)

Social Security is the federal program that, although it was not designed that way, is depended on by nearly everyone in the program (and some not in the program) to fund their retirement years. When the program was designed in 1935, the life expectancy of the male was 58.1 years; in 1972 that age was 67.4 years. Today male workers are expected to live 76.2 years and females 81.1 years. Life expectancy is substantially longer and the numbers are not adding up the way we thought. As a result, in 1983 Congress began to tamper with when our benefits are to begin.

The following schedule applies as of today [but don't get too comfy, we all know how dependable this is now] for those planning to retire within the next (very) few years.

<table>
<thead>
<tr>
<th>Birth year:</th>
<th>“Full Retirement Age”</th>
</tr>
</thead>
<tbody>
<tr>
<td>1937 and prior</td>
<td>65</td>
</tr>
<tr>
<td>1938</td>
<td>65 and 2 months</td>
</tr>
<tr>
<td>1939</td>
<td>65 and 4 months</td>
</tr>
<tr>
<td>1940</td>
<td>65 and 6 months</td>
</tr>
<tr>
<td>1941</td>
<td>65 and 8 months</td>
</tr>
<tr>
<td>1942</td>
<td>65 and 10 months</td>
</tr>
<tr>
<td>1943 – 1954</td>
<td>66</td>
</tr>
<tr>
<td>1955</td>
<td>66 and 2 months</td>
</tr>
<tr>
<td>1956</td>
<td>66 and 4 months</td>
</tr>
<tr>
<td>1957</td>
<td>66 and 6 months</td>
</tr>
<tr>
<td>1958</td>
<td>66 and 8 months</td>
</tr>
<tr>
<td>1959</td>
<td>66 and 10 months</td>
</tr>
<tr>
<td>1960 and later</td>
<td>67</td>
</tr>
</tbody>
</table>

Choices can affect the actual time we begin our Social Security but here is a summary of some of the more important issues to consider:

1. 42 U.S.C.§401 et seq.
2. “In fact, nearly two out of three retirees receive at least half of their income from Social Security.” Social Security in a Nutshell, Chapter 11.
5. These issues presume that the client has not been disabled which brings in the disability consideration which allows a recipient to draw the Primary Insurance Amount (PIA) at the time of disability before their Full Retirement Age.
A. We have to have paid into the SS trust fund in “Covered Employment” at least “forty quarters” of value to be eligible. A “quarter” is not truly a quarter of a year but an amount that, if calculated over a year, would be considered “four quarters” on the SS scale. Currently one who earns $1,130 throughout one calendar year would qualify as having “four quarters.”

B. “Early” Social Security retirement benefits are available at age sixty-two (62) for those who are eligible but the monthly payment is reduced because our respective available retirement “fund” was calculated from full retirement age, i.e. sixty-six (66) years, and if not reduced, the numbers would not work. Therefore the calculation for the reduction is:

\[
\frac{5}{9} \times 1\% \text{ per month for the first 36 months} + \frac{5}{12} \times 1\% \text{ for each additional month thereafter.}
\]

If one takes their Social Security before Full Retirement Age, any reduction is PERMANENT thereafter, except for annual COLA.

C. Until last year, one could take early SS at sixty-two (62), then “buy back in” later by reimbursement at sixty-five (65) and basically use the payments as an interest free loan. Social Security got wise to this plan and ended it. However, another benefit that few understand is that once a wage earner reaches full retirement age, say sixty-six (66), a younger spouse can access the spousal share as early as age sixty-two (62), usually one half the Primary Insurance Amount of the wage earner. [A spouse is entitled to one half of the living wage earner’s Primary Insurance Amount.] It would be wise for the younger spouse, who has an employment record of his/her own, to take the spousal share at sixty-two (62) then drop the spousal share and elect his/her own at full retirement or later. Children under nineteen (19) who are still in school can also receive a benefit equal to half the Primary Insurance Amount of the parent. Surviving children (under nineteen (19) and a student unless disabled) are entitled to survivor’s benefits equal to 75 percent of the PIA. There is a Family Maximum, however.

D. On the other hand, I can wait to take my OASDI payments later than at my Full Retirement Age and the Primary Insurance Amount (PIA) will be adjusted higher about 8 percent each year I wait past my Full Retirement Age, until I am seventy-one years of age, when withdrawal is mandatory.

---

6 Some employment is not “covered.” Federal employees hired before 1984 are not covered. Babysitting is covered but some part-time college jobs, such as in the bookstore and fraternity houses, are not covered. A minor child who works in your law office is not covered.


9 Although this payment is divided among multiple children.
E. Medicare starts at sixty-five (65) regardless of when the worker starts her Social Security OASDI payments. We start signing up for Medicare about two months before our sixty-fifth birthday.

F. Medicare “Part A” is automatic and is basically “major medical,” while “Part B,” which pays doctor bills and diagnostics, must be elected. A premium (this year for the average person is $99.90\textsuperscript{10}) is deducted from the monthly SS check unless elected to be paid quarterly when billed. Medicare pays only about 80 percent so it is wise to purchase a “supplement” insurance policy which pays the co-pay and deductible that Medicare does not pay. Although there are enrollment periods, Medicare supplement insurance should be purchased at the time one enrolls in Medicare. If not, unlike the new Affordable Care Act provisions mandate, there may be underwriting issues. “Part C” is a managed care plan and can be elected in place of Part B and is often less expensive, but choice of physicians is limited.\textsuperscript{11} “Part D” is the pharmacy plan which, if not enrolled at the beginning, has a premium penalty increase of about 10 percent for each year one delays enrollment. It is better to enroll in the least expensive plan than to wait on enrollment.

G. Each person should receive an annual “Personal Earnings and Benefit Estimate Statement” which summarizes what the individual can expect from the Social Security system.\textsuperscript{12}

H. If the retired worker dies, the spouse is entitled to the full Primary Insurance Amount of the Deceased retired worker if the spouse’s own PIA is less than the decedent’s PIA. If the spouse remarries, unless he/she is over sixty (60) years of age, that prior spouse’s benefit is lost.

I. A “divorced spouse” can also share in the benefit if the marriage lasted at least ten (10) years, even if the worker has not retired. If the “worker spouse” remarries, the benefit is available. However, if the divorced spouse remarries, in most cases, she/he forfeits the right to claim on the ex-spouse.\textsuperscript{13} If more than one marriage, choose the larger amount.

J. Until recently, a client who had earnings after Full Retirement Age would have his/her check reduced. That rule has been limited to those who draw early retirement.\textsuperscript{14} Working after retirement and drawing Social Security Retirement funds is permitted within limits. Working after beginning one’s early retirement benefit can cost a reduction in the

\textsuperscript{10} http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1581/~/medicare-part-b-%28medical-insurance %29-monthly-premium-for-2012.

\textsuperscript{11} http://www.medicare.gov/Publications/Pubs/pdf/11219.pdf.

\textsuperscript{12} See, http://www.socialsecurity.gov/mystatement/ for an online copy.

\textsuperscript{13} A divorced spouse who is over sixty years of age can remarry and continue to collect from her ex-spouse.

\textsuperscript{14} 42 U.S.C. §403.
monthly check, depending on the amount of income earned. The check of a worker who worked until at least Full Retirement Age and began withdrawals is not reduced. The measure only considers “retirement earnings,” not annuities, interest, rental income and dividends. Once above the defined tiered income, SS benefits are taxed. Spousal income can cross the tier and cause taxation on SS benefits. However, only a maximum of one half of the benefit can be taxable.

K. To calculate your client’s Primary Insurance Amount here is the formula:

Calculate your Average Monthly Earnings for the highest 35 years of employment then...
(90% of the first $767) + (32% of the next $3,857) + (16% of everything above $4,624)

The total is the monthly check amount the first year at Full Retirement Age.

III. OTHER “GOVERNMENT RETIREMENT”

A. Railroad Retirement: Originated before SS because Congress anticipated the decline of the railroad system and the need to protect the economy from the loss of jobs. The benefits are similar but actually a little more lucrative monthly than SS. Medical benefits are unique and not on Medicare.

B. Federal Employees Retirement System: Not Social Security for those employed before 1983. This is an annuity plan that pays from federal funds. Those hired after 1983 will receive SS and Medicare along with having participated in a “Thrift Plan” through which the federal government and the employee jointly paid into a Qualified Fund, akin to a 401K in the private sector.

C. Civil Service Retirement System: This system is similar to the Federal Employees Retirement System.

D. Veteran’s Administration Military Retirement: After twenty (20) years of active military service, the payment is based on rank and length of service. Medical benefits are available through the VA medical facilities and CHAMP VA medical insurance for veterans and families of veterans.

15 An “early” retiree may earn $14,640 “provisional income” without affecting her check in 2012. However, earning beyond that amount will reduce $1.00 for each $2.00 earned.

16 Id.

17 [Link to SSA website]

E. **VA low income pension disability payments:** This is a “needs based” VA benefit to veterans who served at least one day during a defined period of war [not necessarily in the actual war zone] with at least ninety (90) consecutive days of active duty service period. Eligibility is because the individual is “disabled” (over sixty-five years of age meets that requirement), with low income and low resources.\(^{19}\)

IV. **“QUALIFIED” FUNDS AND “NON-QUALIFIED” FUNDS**

If money deposited into certain savings/retirement/annuity/IRA/investment account funds has not been taxed before being contributed into the fund, the funds may be “qualified” to be exempt from income tax until the money is released from the fund.\(^{20}\) “Non-Qualified” funds are taxed annually and the owner pays income tax on any income that is earned within the account. It is possible for a fund to hold qualified and non-qualified funds depending on who deposited the money into the fund. Some funds are exempt from taxation altogether.

The above paragraph is critically important when doing trust planning because a slip of the pen can cause a “taxable event” in the eyes of the IRS and cause a qualified fund to lose its exempt status in a single year causing all the deferred tax to become due. Know what kind of fund it is.\(^{21}\)

A. Qualified Plans

1. §401 and §403(b) and SEP plans.

   The IRS Code identifies what is required to defer income tax for deposits into employer retirement funds. A qualified plan is an employer sponsored plan that “qualifies” for tax deferral under §401(a) of the Internal Revenue Code. The goal of this Section is to encourage employers to provide an incentive for an employee to save for retirement. The contribution to a qualified plan made by an employer is tax deductible; the contribution of the employee is tax deferred. Typically, the contributions are designed as

---

\(^{19}\) Commonly referred to as “Aid and Attendance,” this is a “pension” fund for aged or disabled veterans and can also provide a monthly benefit for aging spouses of deceased veterans. Care should be taken when seeking this benefit through annuity agents because of the likelihood of creating an ineligibility for Medicaid nursing home benefits when an annuity is purchased to qualify the individual. The benefit can be as much as $11,830 for a veteran without dependents and $15,493 for a veteran with one dependent. For the spouse of a deceased veteran, the amount is $7,933 without dependents and $10,385 with one dependent. Benefits for Aid and Attendance and Homebound benefits are available to increase the amount. See, [http://www.veteranscareproviders.org/index.php?option=com_content&task=view&id=19&Itemid=41](http://www.veteranscareproviders.org/index.php?option=com_content&task=view&id=19&Itemid=41).

\(^{20}\) Funds meeting requirements of IRC §401(a).

\(^{21}\) These questions are foremost in Medicaid trust planning. IRAs and 401Ks and some annuities cannot be transferred into an irrevocable trust without risking their qualified status. Get your checkbook ready.
“matching” in some respect. These plans may be “Defined Benefit” or “Defined Contribution.”

a. Defined Benefit Plan: A Defined Benefit Plan is designed so that an employee can anticipate the amount of monthly retirement she/he will receive at the time they retire. These are historically the “retirement plans” of large employers or unions such as UMWA, General Motors and Studebaker.22 Qualified plans can be pension, profit sharing or stock bonus by design. The employer is obligated to fund the plan to adequately meet the distribution requirements. The problem is that a company that cannot meet the contribution due to a poor or changing economy may be unable to meet the mandatory contribution and the fund can be placed into bankruptcy. In such event the Pension Benefit Guaranty Corporation23 was created by Congress to insure at least a portion of the benefit payable to the participating retiree.

Four popular types of Defined Benefit Plans:

i. “Fixed benefit plans” entitle a retiree to a fixed monthly payment based on salary and longevity;

ii. “Flat benefit plans” determine the monthly payment based solely on salary;

iii. “Unit benefit plans” award a retiree based on longevity and salary;

iv. “Cash balance plans” which are hypothetical cash equivalents set aside although the actual distribution may not accurately be predicted;

v. “Pension plans” can be contracted for an employer to contribute based on the worker’s salary and longevity or position.

b. Defined Contribution Plan: Defined Contribution Plans are the current preferred method of providing employee benefit retirement funds. Rather than defining the amount that will be “paid out,” the fund defines the amount that is to be “paid in” by the employee, and typically matched by the employer, either fully or in part. The highest profiled of these are the 401K series accounts which can be created

---

22 I reference Studebaker because the failure of Studebaker’s pension fund gave rise to the Employer Retirement Income Security Act (ERISA) which regulates employer benefit packages through federal legislation/regulation.

(and administered) by an employer or by an institutional administrator. **403(b)** accounts are similar accounts restricted to use by educational and religious or charitable employers. Neither of these guarantees any amount of payout, but allows employers to contribute and deduct the contribution and allows employees to contribute and defer tax on the contributed income. These accounts may be “self-directed” but typically are not.

i. “Profit Sharing” plans are defined contribution plans which allow an employer to make discretionary contributions;

ii. “Stock Bonus” plans are also defined contribution plans but hold company stock as incentive investments. Commonly known as “Golden Handcuff” plans;

iii. “Pension” plans can also be defined contribution arrangements but employers are required to make minimum contributions.

2. **Types of “Qualified Plans.”**

   a. **401K:** Lots of flexibility, might be matching contribution, most common type for small businesses because owners can take advantage and shield income. All contributions are pre-tax. Contribution limits: Employer: 6 percent of pre-tax compensation; employee: $16,500. After-tax: $49,000.

   b. **403(b):** Available to employees of 501(c)(3) organizations and local school districts. Most Kentucky teachers participate in this type plan as a Kentucky Teacher’s retirement. Has a “thrift” and “savings” plan component. Contribution limits same as 401K: Employee: $16,500 plus employer’s contribution. Plus, employees who have worked more than fifteen years are allowed an additional $3,000.

   c. **Individual K:** Available to self-employed individuals. Permit self-employed to avoid administrative costs of managing a 401K while contributing the maximum contributions. A great benefit opportunity for the self-employed; one can borrow from a 401K but not from an IRA.

---

24 This list is accumulated from Natalie B. Choate’s *Life and Death Planning for Retirement Benefits*, 7th Edition, 2011, Ataxplan Publications, with summary assistance from Professor Robert Fleming’s Retirement Planning class materials during Spring Semester of the LLM program in Elder Law at Stetson University’s College of Law.
d. Keogh: Sometimes referred to as an “HR10” plan. Allows corporate contributions similar to a defined contribution plan but limits loans to owners and owners are limited in the amount of their contributions based on income paid to the owner.

e. Money Purchase Plan: Appears similar to a Defined Benefit Plan but is not. The employer is mandated to make annual contributions based on compensation. However, if the benefit performance lags, distributions are calculated and lowered rather than requiring the employer to add additional funding.

f. Profit Sharing Plan: Defined contribution plan which allows the employer to make variable contributions based on a year’s performance tied to profitability. Discrimination in favor to owners and executives is prohibited although the benefit may be age weighted toward older participants who may have worked in the early years of the corporation while growing the company.

g. SEP-IRA: “Simplified Employee Pension Plan” where each employee opens an IRA and the employer makes contributions based on a uniform percentage of salary to the account as an annual benefit. There is a 15 percent contribution limit. Employers must limit their own benefit to that of the employees. An attractive benefit offer for small firms. Once the contribution is made, the employer has no further obligation. Good start up plan. Best opened with an institutional administrator such as Vanguard. Compensation limit: $245,000 salary max with limit of 15 percent max contribution (all must be consistent)

h. Simple IRA: “Savings Incentive Match Plan for Employees” IRA. May be an IRA or 401K account. Similar to SEP-IRA where the employee opens an IRA and the employer makes an annual contribution. No active ERISA reporting requirements. Again, this is a good start up benefit plan. Contribution limit: $11,500.

i. “Thrift” or “Savings” Plan: Employers only contribute when the employee contributes from his after tax income. The employee’s contribution is not tax deductible but when it comes out, only the employer’s contribution is taxed. These plans are declining in popularity.
B. Non-Qualified Plans

1. The IRA: A “Non-Qualified Plan.”

   a. The important IRA issues.

   Individual Retirement Accounts are not “qualified plans.”\(^{25}\) Although most clients are depending on their Social Security check to carry them through, or their 401K, Congress originally intended retirement to be a “three legged stool” with Social Security, employer retirement and private savings to carry the load. Unfortunately the middle leg is faltering and a close look at the final leg indicates that we have not really held up our end of the bargain. Regardless, the Individual Retirement Account is the primary private source of support for America since it was created by legislation. Understanding IRA distributions is very important to an attorney who will counsel a client on early SS retirement benefits or on spousal “roll-overs” upon the death of a spouse. The following are just a few of the more prominent issues that an attorney needs to be familiar with:

   i. A traditional IRA can be started before an individual reaches seventy and one-half (70½) years of age, the mandatory withdrawal time.\(^{26}\) Annual contributions now are limited to $5,000 per individual under age fifty (50) but $6,000 for those fifty (50) and over. Some employees may be prohibited from having an IRA if their employer offers other retirement fund options.

   ii. A spouse may have an IRA but contribution rules apply even though contribution can be based on the employed spouse’s income.

   iii. I cannot take a “loan” from my IRA.\(^{27}\) A loan will lead to the entire plan being disqualified from tax exemption.

   iv. I must be withdrawing from the traditional IRA once I reach seventy and one-half (70½).


\(^{26}\) Roth IRAs can be started at any age if the worker continues working, because they are funded with after tax dollars.

\(^{27}\) There are exceptions through “early withdrawals without penalty” exceptions such as for first-time home buyers.
b. Roll-overs:

i. A roll-over to an IRA can be unlimited in amount. One may “roll-over” a distribution from another IRA or from a corporate 401K upon retirement or from a deceased spouse’s IRA or 401K or 403(b) type account, without incurring a “taxable event.”

ii. An important point is that the roll-over must be from one custodian to another. There is a sixty-day window for the transfer.

c. Roth IRA: A “Roth” IRA holds “after tax” contributions that build within the fund tax free and the owner contributed funds and any gain or appreciation is not taxed upon distributions. Any funds contributed by an employer will be taxed upon distribution, just as a traditional IRA distribution. There is a five (5) year waiting period after contributions are made before withdrawals can begin. There are not Required Minimum Distributions at age seventy and one-half (70½) as in traditional IRAs. Contributions can continue to be made to a Roth IRA if the individual is still working.

d. Converting a Traditional IRA to a Roth: This question is really, can I afford to convert? The answer is… if you can afford to pay the applicable tax up front with funds from another source (keeping the fund in tact), then yes, convert. But it is only a good idea if the economy is in a growth mode and funds must stay in the Roth for at least five years thereafter.

2. Three other Non-Qualified Plans:

a. 457(b) “Top Hat” funds are available for government employees, some charities and contractors who work primarily with the government. Large contribution limits. These funds may be rolled into IRAs, 401K and 403(b) plans. These funds are to benefit highly paid individuals and avoid ERISA rules.

b. “Rabbi Trust” is set up as a trust and funded annually. This plan allows an employer to hire a highly paid employee, promise a benefit but in its design, avoid ERISA rules. Can be funded with start-up stock. Subject to the

---


29 Revenue Procedure 92-64.
employer's creditor claims because the owner is not yet vested.

c. “Secular Trusts” are similar to Rabbi Trusts but the employer's creditors cannot reach the fund. However, because the rights vest immediately, the fund is included in the participant’s income.

V. PLAN (INCLUDING IRA) DISTRIBUTION RULES SUMMARY

Most retirement plan distribution rules are similar if not identical unless amended by contract terms. The MRD rules apply to all employer sponsored retirement plans.\(^{30}\) Essentially, traditional IRAs and “Qualified” funds are designed to exempt deposits held under the plan from being taxed until withdrawn. Any withdrawal from a traditional IRA\(^{31}\) or Qualified fund, with limited exceptions for 401K accounts, prior to age fifty-nine and one-half (59½) are assessed not only tax but a 10 percent penalty.\(^{32}\) Roth IRA withdrawals are also penalized to the extent of the distribution portion that is “qualified.”\(^{33}\) But MRD rules do not apply to a Roth IRA while the Participant is living. However, a “post-death” distribution to a surviving beneficiary under age fifty-nine and one-half (59½) or from a decedent younger than fifty-nine and one-half (59½) whether a traditional or Roth IRA will bear no penalty.\(^{34}\)

On the other hand, the confusing Required Beginning Date (RBD) will be no later than April 1\(^{st}\) of the year after the owner is “six months past [her/his] seventieth (70\(^{th}\)) birthday.”\(^{35}\) Essentially if someone is seventy and one-half (70½) on November 22 of 2012, (the year of the first mandatory distribution) the RBD can be delayed to no later than April 1, 2013. But there is a twist that we need to understand and that is that if that owner waits until April 1, 2013, he must take out two (2) withdrawals in 2013 because the delay in the RBD does not postpone the next year’s [2013] withdrawal, it only delays the 2012 withdrawal that must

---

\(^{30}\) IRC §401(a).

\(^{31}\) IRA owners may withdraw up to $10,000 for first time home buyers within 120 days of closing. Some higher education expenses may be paid from the IRA but with limitations.

\(^{32}\) IRC §72(t), 401K accounts can be used early for medical expenses, purchase of a principal residence, tuition and related expenses, burial and funeral expenses or repairs to a principal residence.

\(^{33}\) Roth IRAs contain both “qualified” and “non-qualified” funds. The contribution has been taxed, the appreciation has not been taxed. Therefore, an early withdrawal will be pro-rated and the portion of the early withdrawal that is “qualified” will incur an additional 10 percent tax above the ordinary income tax.

\(^{34}\) IRC §72(t)(2)(A)(iii).

\(^{35}\) There are some retirement plans that will not require distributions at seventy and one-half (70½) if the Participant is still working, unless the individual is at least a 5 percent owner of the business sponsoring the plan.
come out in the year the individual turns seventy and one-half (70½). There will be no more delays in the distribution dates.

Each year, on December 31, the value of the fund is used to calculate the Minimum Required Distribution (MRD) [or Required Minimum Distribution (RMD) if one prefers]. The MRD is the minimum amount that must be taken each year in order to avoid being penalized with an additional 50 percent tax on the amount not taken. It is the responsibility of the owner to assure that her distribution meets the required amount to continue as a qualified fund.

Between the fifty-nine and one-half (59½) point and the seventy and one-half (70½) point, the distribution pattern is up to the owner. But once begun, the annual withdrawals must continue. Once distributions are begun, any amount up to the whole fund can be taken out in any given year. Be sure that after the RBD that the MRD is met to avoid the penalty.

A. Survivor Distributions, the Real Challenge....

Lifetime withdrawals by a plan participant are simple. Determine the client’s age and look at Tables published in Publication 590, Individual Retirement Arrangements (IRAs). See Appendix. For the Participant/owner, use Table III which is simply a life table. With the exception of a surviving spouse, the IRS wants to tax the deferred fund so surviving beneficiaries must be taking out the assigned distributions. To calculate the distributions due a survivor (excepting the surviving spouse who elects to roll the decedent’s IRA into her own or take under the spouse’s ADP), look at Table I. The “Single Life Expectancy Table” is used by a beneficiary. The “Uniform Lifetime Table” is used by an account owner. The middle table “Joint and Last Survivor Table” is rarely used but is for the sole beneficiary of an account whose spouse is more than ten (10) years younger.

There are four (4) possible post death distribution measures:

1. Life expectancy of the surviving spouse.
2. Life expectancy of a non-spouse beneficiary.
3. Life expectancy of the Participant.
4. Five-year rule.

Distributions must begin no later than December 31 of the year after the year of death. (If MRD is due during the year of death, the distribution must come out to the estate as IRD)
Some examples:

Example #1:

Pete is sixty-two (62) years of age on November 22 and at the current value, his IRA is $123,000 on December 31, 2011. There is no MRD prior to seventy and one-half (70 ½) so Table III does not apply. But if Pete is seventy and one-half (70½) on November 22, he must take out his MRD no later than April 1 of next year, although he may take that distribution anytime during the year he turns seventy and one-half (70½) and it will satisfy the RBD rule. But looking to April 1 of next year, Pete goes to Table III (Uniform Lifetime Table) and we see that his factor is 27.4 which he divides into 123,000 and his MRD is $4,489 for the year he turns seventy and one-half (70½). The following year, his factor lowers but not an entire year. The MRD will be the quotient of the Account value on December 31, 2012, the year he turned seventy and one-half (70½) divided by 26.5. Thereafter the calculation is based on the prior December 31 account balance divided by his age factor and must be withdrawn no later than December of that year.

Example #2:

Pete has died an untimely death at age sixty-two (62) in 2012. He leaves his wife, Carla, age sixty (60) and three children, Robin (33 yrs.), Mary (31 yrs.) and Will (one of life’s little surprises, 16 yrs.). Pete has named Carla as Designated Beneficiary with the children as contingent beneficiaries. Carla, as a surviving spouse can continue to take based on any distribution pattern Pete has established if annuitized. Alternatively, she can establish a pattern based on her own life expectancy or “roll over” the entire amount into a new IRA for herself or into her current IRA. This “roll over” is only available to a surviving spouse. Carla need not take distributions until her RBD but if distributions are being made by Pete, she can continue to withdraw.

Let’s say Carla is seventy-three (73) when Pete passes. She can still “roll over” the account but she now must withdraw distributions based on either her own life from the Uniform Lifetime table III (factor of 24.7) or, she can choose one of three distribution patterns from the existing account: 1) continue to receive distributions based on the deceased spouse’s life expectancy; 2) continue distributions at her age factor from the Single Life Table I. If she was seventy-three (73) when he passed, the distribution factor would be 14.8. (123,000 / 14.8 = $8,310). Thereafter, the factor will change by increasing one year and reduce the factor accordingly; or 3) use the five-year rule and accept the entire amount at some point within five years.

Note: “contingent” beneficiaries who take in the event the Designated Beneficiary is deceased or disclaims, are not the same as “successor” beneficiaries who take after the Designated Beneficiary passes away.
If Pete has named Carla for a portion and the children each for a portion, the fund can be divided accordingly, but the children can take at their life expectancies or shorter.

If only the three children are named without specific shares, if the Separate Accounts Rule does not apply, it is possible that the measuring life will be the eldest of the three children. The Separate Accounts Rule was recently put into place to allow identifiable beneficiaries to set their own Applicable Distribution Rates (ADR) based on their own life expectancies.

B. Interesting IRA Details

1. IRA distributions can be passed through a “See through Trust” to control how they are used, so long as there is a “Designated Beneficiary” who can be seen through the terms of the trust. In essence, the trust can be a “conduit” through which distributions are made to a spouse, special needs child or spendthrift. But the “Designated Beneficiary” needs to be specific in order to avoid the “five-year rule.” If “separate accounts” are set up for children, the trust may avoid the five-year rule.

2. “Five-year rule” effectively says that if there is no specific beneficiary such as a named person, the entire amount of the fund must be distributed [taxed] within five years.\(^{37}\)

3. A “Designated Beneficiary” is any “individual” designated by the plan who is “identifiable” although he/she need not be named, i.e. “my spouse”.

4. When a plan “Participant” dies, there is a “Beneficiary Finalization Date” of October 31 of the year after the year of the Participant’s death. At this point all the beneficiaries of the plan must be disclosed and documented to the administrator.

5. September 30 of the year after the Participant’s death is the last date a “see-through trust” must be delivered to the plan administrator.

6. “Applicable Distribution Period” is the length of time used to calculate the Minimum Required Distribution. Effectively it is the life expectancy of the Participant (or in the case of a Spousal IRA, the surviving spouse).

7. Distributions due in the year of a Participant’s death are considered Income with Respect of a Decedent and payable to the estate, not plan beneficiaries.

\(^{37}\) A typical example is making an IRA payable to a family trust without naming the beneficiary, or simply not naming any beneficiary and forcing the distribution into the owner’s “estate.”
8. Although MRD distributions were “suspended” in 2009, that did not affect the RBD or ADR for calculating withdrawal rates.

9. Taking a larger distribution than the MRD does not “carry over” to the next year, the MRD will be the same regardless and distributions prior to the first distribution year have no effect on subsequent MRD.

10. Tables are calculated based on the age at the end of the distribution year, not the “current” age.

11. With multiple IRAs one can calculate the MRD and take the total by partial withdrawals from each IRA or elect to take from any of them.

12. The “Separate Accounts Rule” allows multiple beneficiaries to set up their own accounts and withdraw at their own respective ADR.

13. The death beneficiaries must begin their distribution no later than December 31 of the year after the death of the Participant.

14. IRA corpus is exempt from bankruptcy creditors.\(^{38}\)

C. Important Dates

- April 1 of the year after seventy and one-half (70½) is the last day that the RBD withdrawal can be made w/o penalty
- Dec 31 of prior year is when the value of the account is locked to calculate MRD
- Dec 31 of year after death is when separate beneficiary accounts must be set
- Dec 31 five years past year of death is when all of five-year rule distributions must be out
- Dec 31 after year of death is the Required Commencement Date for beneficiaries
- Oct 31 after year of death, copy of beneficiary trust due to administrator
- Sept 30 after year of death, Beneficiary Finalization Date

---

D. **ERISA**

The **Employee Retirement Income Security Act of 1974**\(^{39}\) arose as a result of the failure of Studebaker-Packard Company of South Bend, Indiana Pension Fund. The pension fund was inadequately funded because of the reduced auto sales and failing business. The statute set standards for keeping employer sponsored funds (both “qualified” and “non-qualified”) funded and managed. The important issue to attorneys is whether **ERISA** rules apply to company “benefits,” even small employers, such that the employer must conform the benefit plan to **ERISA** standards. The issue is “preemption” by **ERISA** standards over what the employer’s benefit plan contract might require.

One painful example of **ERISA**’s local effect is when a divorce occurs and the beneficiary statement on a retirement plan remains in the name of the divorced spouse. State law may seem to void the beneficiary statement because of the divorce. However, **ERISA** will require the payment to the spouse.\(^{40}\)

**ERISA Title I** requires reporting and disclosure to the Department of Labor or the IRS. **Title I** includes the COBRA ’83 rules to extend medical insurance and HIPAA privacy rules. **Title II** is primarily IRS rules for favorable tax treatment of plans. **Title II** designates jurisdiction of control in the Department of Labor or IRS. **Title IV** created the important Pension Benefit Guaranty Corporation that provides coverage for failing retirement funds covered by **ERISA**.

**ERISA** does not apply to federal, state or local government plans; most church plans; business owner benefits and plans where the business simply “collects” payments for benefits such as dental insurance and does not assist in funding.

**ERISA** does apply if there are “intended benefits” and “intended beneficiaries” and if the fund is provided by the employer and there are “procedures” for applying for and collecting benefits.\(^{41}\) There must be an “ongoing administrative scheme” for administration.\(^{42}\) Typically there must be a written plan, an available summary for the employee which is distributed annually and there are annual reporting requirements to the Department of Labor. Small businesses can have national administrators without burdensome cost and the price is well worth it to avoid having to

---


\(^{42}\) See, **Fort Halifax Packing v. Coyne**, 482 U.S. 1 (1987).
respond to questions about lack of standards when being administered by
the employer.

**ERISA** is a course in and of itself but the “preemption”\(^{43}\) issue brings it
into an attorney’s practice when the employer breaches rules he was not
familiar with or the employee finds that his “retirement benefits” are not
going to be available and wants us to tell him why. These arise in
bankruptcy, underfunding and union negotiation strengths and
weaknesses.

VI. CONCLUSION

As we said in the beginning, as attorneys we rarely have time to learn something
new unless we are forced to by a client problem. **ERISA** is not an area of study
for the general practitioner. However the issue can easily arise in divorce
matters, traditional estate planning and Medicaid planning. IRA distributions
affect income tax on an estate and rights of beneficiaries and design for their new
“income.” What types of funds require Minimum Required Distributions are
important to understand. If for no other reason, we should know these issues
affect our own retirement matters and the potential for use of retirement funds in
our own businesses.

\(^{43}\) 29 U.S.C. §1144(a).
### Table I
(Single Life Expectancy)
(For Use by Beneficiaries)

<table>
<thead>
<tr>
<th>Age</th>
<th>Life Expectancy</th>
<th>Age</th>
<th>Life Expectancy</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>82.4</td>
<td>28</td>
<td>55.3</td>
</tr>
<tr>
<td>1</td>
<td>81.6</td>
<td>29</td>
<td>54.3</td>
</tr>
<tr>
<td>2</td>
<td>80.6</td>
<td>30</td>
<td>53.3</td>
</tr>
<tr>
<td>3</td>
<td>79.7</td>
<td>31</td>
<td>52.4</td>
</tr>
<tr>
<td>4</td>
<td>78.7</td>
<td>32</td>
<td>51.4</td>
</tr>
<tr>
<td>5</td>
<td>77.7</td>
<td>33</td>
<td>50.4</td>
</tr>
<tr>
<td>6</td>
<td>76.7</td>
<td>34</td>
<td>49.4</td>
</tr>
<tr>
<td>7</td>
<td>75.8</td>
<td>35</td>
<td>48.5</td>
</tr>
<tr>
<td>8</td>
<td>74.8</td>
<td>36</td>
<td>47.5</td>
</tr>
<tr>
<td>9</td>
<td>73.8</td>
<td>37</td>
<td>46.5</td>
</tr>
<tr>
<td>10</td>
<td>72.8</td>
<td>38</td>
<td>45.6</td>
</tr>
<tr>
<td>11</td>
<td>71.8</td>
<td>39</td>
<td>44.6</td>
</tr>
<tr>
<td>12</td>
<td>70.8</td>
<td>40</td>
<td>43.6</td>
</tr>
<tr>
<td>13</td>
<td>69.9</td>
<td>41</td>
<td>42.7</td>
</tr>
<tr>
<td>14</td>
<td>68.9</td>
<td>42</td>
<td>41.7</td>
</tr>
<tr>
<td>15</td>
<td>67.9</td>
<td>43</td>
<td>40.7</td>
</tr>
<tr>
<td>16</td>
<td>66.9</td>
<td>44</td>
<td>39.8</td>
</tr>
<tr>
<td>17</td>
<td>66.0</td>
<td>45</td>
<td>38.8</td>
</tr>
<tr>
<td>18</td>
<td>65.0</td>
<td>46</td>
<td>37.9</td>
</tr>
<tr>
<td>19</td>
<td>64.0</td>
<td>47</td>
<td>37.0</td>
</tr>
<tr>
<td>20</td>
<td>63.0</td>
<td>48</td>
<td>36.0</td>
</tr>
<tr>
<td>21</td>
<td>62.1</td>
<td>49</td>
<td>35.1</td>
</tr>
<tr>
<td>22</td>
<td>61.1</td>
<td>50</td>
<td>34.2</td>
</tr>
<tr>
<td>23</td>
<td>60.1</td>
<td>51</td>
<td>33.3</td>
</tr>
<tr>
<td>24</td>
<td>59.1</td>
<td>52</td>
<td>32.3</td>
</tr>
<tr>
<td>25</td>
<td>58.2</td>
<td>53</td>
<td>31.4</td>
</tr>
<tr>
<td>26</td>
<td>57.2</td>
<td>54</td>
<td>30.5</td>
</tr>
<tr>
<td>27</td>
<td>56.2</td>
<td>55</td>
<td>29.6</td>
</tr>
<tr>
<td>Age</td>
<td>Life Expectancy</td>
<td>Age</td>
<td>Life Expectancy</td>
</tr>
<tr>
<td>------</td>
<td>----------------</td>
<td>------</td>
<td>-----------------</td>
</tr>
<tr>
<td>56</td>
<td>28.7</td>
<td>84</td>
<td>8.1</td>
</tr>
<tr>
<td>57</td>
<td>27.9</td>
<td>85</td>
<td>7.6</td>
</tr>
<tr>
<td>58</td>
<td>27.0</td>
<td>86</td>
<td>7.1</td>
</tr>
<tr>
<td>59</td>
<td>26.1</td>
<td>87</td>
<td>6.7</td>
</tr>
<tr>
<td>60</td>
<td>25.2</td>
<td>88</td>
<td>6.3</td>
</tr>
<tr>
<td>61</td>
<td>24.4</td>
<td>89</td>
<td>5.9</td>
</tr>
<tr>
<td>62</td>
<td>23.5</td>
<td>90</td>
<td>5.5</td>
</tr>
<tr>
<td>63</td>
<td>22.7</td>
<td>91</td>
<td>5.2</td>
</tr>
<tr>
<td>64</td>
<td>21.8</td>
<td>92</td>
<td>4.9</td>
</tr>
<tr>
<td>65</td>
<td>21.0</td>
<td>93</td>
<td>4.6</td>
</tr>
<tr>
<td>66</td>
<td>20.2</td>
<td>94</td>
<td>4.3</td>
</tr>
<tr>
<td>67</td>
<td>19.4</td>
<td>95</td>
<td>4.1</td>
</tr>
<tr>
<td>68</td>
<td>18.6</td>
<td>96</td>
<td>3.8</td>
</tr>
<tr>
<td>69</td>
<td>17.8</td>
<td>97</td>
<td>3.6</td>
</tr>
<tr>
<td>70</td>
<td>17.0</td>
<td>98</td>
<td>3.4</td>
</tr>
<tr>
<td>71</td>
<td>16.3</td>
<td>99</td>
<td>3.1</td>
</tr>
<tr>
<td>72</td>
<td>15.5</td>
<td>100</td>
<td>2.9</td>
</tr>
<tr>
<td>73</td>
<td>14.8</td>
<td>101</td>
<td>2.7</td>
</tr>
<tr>
<td>74</td>
<td>14.1</td>
<td>102</td>
<td>2.5</td>
</tr>
<tr>
<td>75</td>
<td>13.4</td>
<td>103</td>
<td>2.3</td>
</tr>
<tr>
<td>76</td>
<td>12.7</td>
<td>104</td>
<td>2.1</td>
</tr>
<tr>
<td>77</td>
<td>12.1</td>
<td>105</td>
<td>1.9</td>
</tr>
<tr>
<td>78</td>
<td>11.4</td>
<td>106</td>
<td>1.7</td>
</tr>
<tr>
<td>79</td>
<td>10.8</td>
<td>107</td>
<td>1.5</td>
</tr>
<tr>
<td>80</td>
<td>10.2</td>
<td>108</td>
<td>1.4</td>
</tr>
<tr>
<td>81</td>
<td>9.7</td>
<td>109</td>
<td>1.2</td>
</tr>
<tr>
<td>82</td>
<td>9.1</td>
<td>110</td>
<td>1.1</td>
</tr>
<tr>
<td>83</td>
<td>8.6</td>
<td>111 and over</td>
<td>1.0</td>
</tr>
<tr>
<td>Ages</td>
<td>20</td>
<td>21</td>
<td>22</td>
</tr>
<tr>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td>20</td>
<td>70.1</td>
<td>69.6</td>
<td>69.1</td>
</tr>
<tr>
<td>21</td>
<td>69.6</td>
<td>69.1</td>
<td>68.6</td>
</tr>
<tr>
<td>22</td>
<td>69.1</td>
<td>68.6</td>
<td>68.1</td>
</tr>
<tr>
<td>23</td>
<td>68.7</td>
<td>68.2</td>
<td>67.6</td>
</tr>
<tr>
<td>24</td>
<td>68.3</td>
<td>67.7</td>
<td>67.2</td>
</tr>
<tr>
<td>25</td>
<td>67.9</td>
<td>67.3</td>
<td>66.7</td>
</tr>
<tr>
<td>26</td>
<td>67.5</td>
<td>66.9</td>
<td>66.3</td>
</tr>
<tr>
<td>27</td>
<td>67.2</td>
<td>66.6</td>
<td>65.9</td>
</tr>
<tr>
<td>28</td>
<td>66.9</td>
<td>66.2</td>
<td>65.6</td>
</tr>
<tr>
<td>29</td>
<td>66.6</td>
<td>65.9</td>
<td>65.2</td>
</tr>
<tr>
<td>30</td>
<td>66.3</td>
<td>65.6</td>
<td>64.9</td>
</tr>
<tr>
<td>31</td>
<td>66.1</td>
<td>65.3</td>
<td>64.6</td>
</tr>
<tr>
<td>32</td>
<td>65.8</td>
<td>65.1</td>
<td>64.3</td>
</tr>
<tr>
<td>33</td>
<td>65.6</td>
<td>64.8</td>
<td>64.1</td>
</tr>
<tr>
<td>34</td>
<td>65.4</td>
<td>64.6</td>
<td>63.8</td>
</tr>
<tr>
<td>35</td>
<td>65.2</td>
<td>64.4</td>
<td>63.6</td>
</tr>
<tr>
<td>36</td>
<td>65.0</td>
<td>64.2</td>
<td>63.4</td>
</tr>
<tr>
<td>37</td>
<td>64.9</td>
<td>64.0</td>
<td>63.2</td>
</tr>
<tr>
<td>38</td>
<td>64.7</td>
<td>63.9</td>
<td>63.0</td>
</tr>
<tr>
<td>39</td>
<td>64.6</td>
<td>63.7</td>
<td>62.9</td>
</tr>
<tr>
<td>40</td>
<td>64.4</td>
<td>63.6</td>
<td>62.7</td>
</tr>
<tr>
<td>41</td>
<td>64.3</td>
<td>63.5</td>
<td>62.6</td>
</tr>
<tr>
<td>42</td>
<td>64.2</td>
<td>63.3</td>
<td>62.5</td>
</tr>
<tr>
<td>43</td>
<td>64.1</td>
<td>63.2</td>
<td>62.4</td>
</tr>
<tr>
<td>44</td>
<td>64.0</td>
<td>63.1</td>
<td>62.2</td>
</tr>
<tr>
<td>45</td>
<td>64.0</td>
<td>63.0</td>
<td>62.2</td>
</tr>
<tr>
<td>46</td>
<td>63.9</td>
<td>63.0</td>
<td>62.1</td>
</tr>
<tr>
<td>47</td>
<td>63.8</td>
<td>62.9</td>
<td>62.0</td>
</tr>
<tr>
<td>48</td>
<td>63.7</td>
<td>62.8</td>
<td>61.9</td>
</tr>
<tr>
<td>49</td>
<td>63.7</td>
<td>62.8</td>
<td>61.8</td>
</tr>
<tr>
<td>50</td>
<td>63.6</td>
<td>62.7</td>
<td>61.8</td>
</tr>
<tr>
<td>51</td>
<td>63.6</td>
<td>62.6</td>
<td>61.7</td>
</tr>
<tr>
<td>52</td>
<td>63.5</td>
<td>62.6</td>
<td>61.7</td>
</tr>
<tr>
<td>53</td>
<td>63.5</td>
<td>62.5</td>
<td>61.6</td>
</tr>
<tr>
<td>54</td>
<td>63.5</td>
<td>62.5</td>
<td>61.6</td>
</tr>
<tr>
<td>55</td>
<td>63.4</td>
<td>62.5</td>
<td>61.5</td>
</tr>
<tr>
<td>56</td>
<td>63.4</td>
<td>62.4</td>
<td>61.5</td>
</tr>
<tr>
<td>57</td>
<td>63.4</td>
<td>62.4</td>
<td>61.5</td>
</tr>
<tr>
<td>58</td>
<td>63.3</td>
<td>62.4</td>
<td>61.4</td>
</tr>
<tr>
<td>59</td>
<td>63.3</td>
<td>62.3</td>
<td>61.4</td>
</tr>
</tbody>
</table>
Table II (continued)
(Joint Life and Last Survivor Expectancy)
(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Ages</th>
<th>20</th>
<th>21</th>
<th>22</th>
<th>23</th>
<th>24</th>
<th>25</th>
<th>26</th>
<th>27</th>
<th>28</th>
<th>29</th>
</tr>
</thead>
<tbody>
<tr>
<td>60</td>
<td>63.3</td>
<td>62.3</td>
<td>61.4</td>
<td>60.4</td>
<td>59.5</td>
<td>58.5</td>
<td>57.6</td>
<td>56.6</td>
<td>55.7</td>
<td>54.7</td>
</tr>
<tr>
<td>61</td>
<td>63.3</td>
<td>62.3</td>
<td>61.3</td>
<td>60.4</td>
<td>59.4</td>
<td>58.5</td>
<td>57.5</td>
<td>56.6</td>
<td>55.6</td>
<td>54.7</td>
</tr>
<tr>
<td>62</td>
<td>63.2</td>
<td>62.3</td>
<td>61.3</td>
<td>60.4</td>
<td>59.4</td>
<td>58.4</td>
<td>57.5</td>
<td>56.5</td>
<td>55.6</td>
<td>54.7</td>
</tr>
<tr>
<td>63</td>
<td>63.2</td>
<td>62.3</td>
<td>61.3</td>
<td>60.3</td>
<td>59.4</td>
<td>58.4</td>
<td>57.5</td>
<td>56.5</td>
<td>55.6</td>
<td>54.6</td>
</tr>
<tr>
<td>64</td>
<td>63.2</td>
<td>62.2</td>
<td>61.3</td>
<td>60.3</td>
<td>59.4</td>
<td>58.4</td>
<td>57.4</td>
<td>56.5</td>
<td>55.5</td>
<td>54.6</td>
</tr>
<tr>
<td>65</td>
<td>63.2</td>
<td>62.2</td>
<td>61.3</td>
<td>60.3</td>
<td>59.3</td>
<td>58.4</td>
<td>57.4</td>
<td>56.5</td>
<td>55.5</td>
<td>54.6</td>
</tr>
<tr>
<td>66</td>
<td>63.2</td>
<td>62.2</td>
<td>61.3</td>
<td>60.2</td>
<td>59.3</td>
<td>58.4</td>
<td>57.4</td>
<td>56.4</td>
<td>55.5</td>
<td>54.6</td>
</tr>
<tr>
<td>67</td>
<td>63.1</td>
<td>62.2</td>
<td>61.3</td>
<td>60.2</td>
<td>59.3</td>
<td>58.3</td>
<td>57.4</td>
<td>56.4</td>
<td>55.5</td>
<td>54.6</td>
</tr>
<tr>
<td>68</td>
<td>63.1</td>
<td>62.2</td>
<td>61.2</td>
<td>60.2</td>
<td>59.3</td>
<td>58.3</td>
<td>57.4</td>
<td>56.4</td>
<td>55.4</td>
<td>54.5</td>
</tr>
<tr>
<td>69</td>
<td>63.1</td>
<td>62.2</td>
<td>61.2</td>
<td>60.2</td>
<td>59.3</td>
<td>58.3</td>
<td>57.3</td>
<td>56.4</td>
<td>55.4</td>
<td>54.5</td>
</tr>
<tr>
<td>70</td>
<td>63.1</td>
<td>62.1</td>
<td>61.2</td>
<td>60.2</td>
<td>59.3</td>
<td>58.3</td>
<td>57.3</td>
<td>56.3</td>
<td>55.4</td>
<td>54.4</td>
</tr>
<tr>
<td>71</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.2</td>
<td>59.2</td>
<td>58.3</td>
<td>57.3</td>
<td>56.3</td>
<td>55.3</td>
<td>54.4</td>
</tr>
<tr>
<td>72</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.2</td>
<td>59.2</td>
<td>58.2</td>
<td>57.3</td>
<td>56.3</td>
<td>55.3</td>
<td>54.4</td>
</tr>
<tr>
<td>73</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.2</td>
<td>59.2</td>
<td>58.2</td>
<td>57.3</td>
<td>56.3</td>
<td>55.3</td>
<td>54.4</td>
</tr>
<tr>
<td>74</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.2</td>
<td>59.2</td>
<td>58.2</td>
<td>57.3</td>
<td>56.3</td>
<td>55.3</td>
<td>54.4</td>
</tr>
<tr>
<td>75</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.3</td>
<td>56.3</td>
<td>55.3</td>
<td>54.4</td>
</tr>
<tr>
<td>76</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.3</td>
<td>55.3</td>
<td>54.4</td>
</tr>
<tr>
<td>77</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.3</td>
<td>55.3</td>
<td>54.4</td>
</tr>
<tr>
<td>78</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.3</td>
<td>55.3</td>
<td>54.4</td>
</tr>
<tr>
<td>79</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.3</td>
<td>55.3</td>
<td>54.4</td>
</tr>
<tr>
<td>80</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.3</td>
<td>55.3</td>
<td>54.4</td>
</tr>
<tr>
<td>81</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.3</td>
<td>55.3</td>
<td>54.4</td>
</tr>
<tr>
<td>82</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.3</td>
<td>55.3</td>
<td>54.4</td>
</tr>
<tr>
<td>83</td>
<td>63.1</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.3</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>84</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.3</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>85</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.3</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>86</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.3</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>87</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>88</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.2</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>89</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>90</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>91</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>92</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>93</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>94</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>95</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>96</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>97</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>98</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>99</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
</tbody>
</table>
### Table II (continued)

(Joint Life and Last Survivor Expectancy)
(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Ages</th>
<th>20</th>
<th>21</th>
<th>22</th>
<th>23</th>
<th>24</th>
<th>25</th>
<th>26</th>
<th>27</th>
<th>28</th>
<th>29</th>
</tr>
</thead>
<tbody>
<tr>
<td>100</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>101</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>102</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>103</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>104</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>105</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>106</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>107</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>108</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>109</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>110</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>111</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>112</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>113</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>114</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
<tr>
<td>115+</td>
<td>63.0</td>
<td>62.1</td>
<td>61.1</td>
<td>60.1</td>
<td>59.1</td>
<td>58.2</td>
<td>57.2</td>
<td>56.2</td>
<td>55.3</td>
<td>54.3</td>
</tr>
</tbody>
</table>

### Table II (continued)

(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Ages</th>
<th>30</th>
<th>31</th>
<th>32</th>
<th>33</th>
<th>34</th>
<th>35</th>
<th>36</th>
<th>37</th>
<th>38</th>
<th>39</th>
</tr>
</thead>
<tbody>
<tr>
<td>30</td>
<td>60.2</td>
<td>59.7</td>
<td>59.2</td>
<td>58.8</td>
<td>58.4</td>
<td>58.0</td>
<td>57.6</td>
<td>57.3</td>
<td>57.0</td>
<td>56.7</td>
</tr>
<tr>
<td>31</td>
<td>59.7</td>
<td>59.2</td>
<td>58.7</td>
<td>58.2</td>
<td>57.8</td>
<td>57.4</td>
<td>57.0</td>
<td>56.6</td>
<td>56.3</td>
<td>56.0</td>
</tr>
<tr>
<td>32</td>
<td>59.2</td>
<td>58.7</td>
<td>58.2</td>
<td>57.7</td>
<td>57.2</td>
<td>56.8</td>
<td>56.4</td>
<td>56.0</td>
<td>55.6</td>
<td>55.3</td>
</tr>
<tr>
<td>33</td>
<td>58.8</td>
<td>58.2</td>
<td>57.7</td>
<td>57.2</td>
<td>56.7</td>
<td>56.2</td>
<td>55.8</td>
<td>55.4</td>
<td>55.0</td>
<td>54.7</td>
</tr>
<tr>
<td>34</td>
<td>58.4</td>
<td>57.8</td>
<td>57.2</td>
<td>56.7</td>
<td>56.2</td>
<td>55.7</td>
<td>55.3</td>
<td>54.8</td>
<td>54.4</td>
<td>54.0</td>
</tr>
<tr>
<td>35</td>
<td>58.0</td>
<td>57.4</td>
<td>56.8</td>
<td>56.2</td>
<td>55.7</td>
<td>55.2</td>
<td>54.7</td>
<td>54.3</td>
<td>53.8</td>
<td>53.4</td>
</tr>
<tr>
<td>36</td>
<td>57.6</td>
<td>57.0</td>
<td>56.4</td>
<td>55.8</td>
<td>55.3</td>
<td>54.7</td>
<td>54.2</td>
<td>53.7</td>
<td>53.3</td>
<td>52.8</td>
</tr>
<tr>
<td>37</td>
<td>57.3</td>
<td>56.6</td>
<td>56.0</td>
<td>55.4</td>
<td>54.8</td>
<td>54.3</td>
<td>53.7</td>
<td>53.2</td>
<td>52.7</td>
<td>52.3</td>
</tr>
<tr>
<td>38</td>
<td>57.0</td>
<td>56.3</td>
<td>55.6</td>
<td>55.0</td>
<td>54.4</td>
<td>53.8</td>
<td>53.3</td>
<td>52.7</td>
<td>52.2</td>
<td>51.7</td>
</tr>
<tr>
<td>39</td>
<td>56.7</td>
<td>56.0</td>
<td>55.3</td>
<td>54.7</td>
<td>54.0</td>
<td>53.4</td>
<td>52.8</td>
<td>52.3</td>
<td>51.7</td>
<td>51.2</td>
</tr>
<tr>
<td>40</td>
<td>56.4</td>
<td>55.7</td>
<td>55.0</td>
<td>54.3</td>
<td>53.7</td>
<td>53.0</td>
<td>52.4</td>
<td>51.8</td>
<td>51.3</td>
<td>50.8</td>
</tr>
<tr>
<td>41</td>
<td>56.1</td>
<td>55.4</td>
<td>54.7</td>
<td>54.0</td>
<td>53.3</td>
<td>52.7</td>
<td>52.0</td>
<td>51.4</td>
<td>50.9</td>
<td>50.3</td>
</tr>
<tr>
<td>42</td>
<td>55.9</td>
<td>55.2</td>
<td>54.4</td>
<td>53.7</td>
<td>53.0</td>
<td>52.3</td>
<td>51.7</td>
<td>51.1</td>
<td>50.4</td>
<td>49.9</td>
</tr>
<tr>
<td>43</td>
<td>55.7</td>
<td>54.9</td>
<td>54.2</td>
<td>53.4</td>
<td>52.7</td>
<td>52.0</td>
<td>51.3</td>
<td>50.7</td>
<td>50.1</td>
<td>49.5</td>
</tr>
<tr>
<td>44</td>
<td>55.5</td>
<td>54.7</td>
<td>53.9</td>
<td>53.2</td>
<td>52.4</td>
<td>51.7</td>
<td>51.0</td>
<td>50.4</td>
<td>49.7</td>
<td>49.1</td>
</tr>
<tr>
<td>45</td>
<td>55.3</td>
<td>54.5</td>
<td>53.7</td>
<td>52.9</td>
<td>52.2</td>
<td>51.5</td>
<td>50.7</td>
<td>50.0</td>
<td>49.4</td>
<td>48.7</td>
</tr>
<tr>
<td>46</td>
<td>55.1</td>
<td>54.3</td>
<td>53.5</td>
<td>52.7</td>
<td>52.0</td>
<td>51.2</td>
<td>50.5</td>
<td>49.8</td>
<td>49.1</td>
<td>48.4</td>
</tr>
<tr>
<td>47</td>
<td>55.0</td>
<td>54.1</td>
<td>53.3</td>
<td>52.5</td>
<td>51.7</td>
<td>51.0</td>
<td>50.2</td>
<td>49.5</td>
<td>48.8</td>
<td>48.1</td>
</tr>
<tr>
<td>48</td>
<td>54.8</td>
<td>54.0</td>
<td>53.2</td>
<td>52.3</td>
<td>51.5</td>
<td>50.8</td>
<td>50.0</td>
<td>49.2</td>
<td>48.5</td>
<td>47.8</td>
</tr>
</tbody>
</table>
## Table II (continued)
(Joint Life and Last Survivor Expectancy)
(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Ages</th>
<th>30</th>
<th>31</th>
<th>32</th>
<th>33</th>
<th>34</th>
<th>35</th>
<th>36</th>
<th>37</th>
<th>38</th>
<th>39</th>
</tr>
</thead>
<tbody>
<tr>
<td>49</td>
<td>54.7</td>
<td>53.8</td>
<td>53.0</td>
<td>52.2</td>
<td>51.4</td>
<td>50.6</td>
<td>49.8</td>
<td>49.0</td>
<td>48.2</td>
<td>47.5</td>
</tr>
<tr>
<td>50</td>
<td>54.6</td>
<td>53.7</td>
<td>52.9</td>
<td>52.0</td>
<td>51.2</td>
<td>50.4</td>
<td>49.6</td>
<td>48.8</td>
<td>48.0</td>
<td>47.3</td>
</tr>
<tr>
<td>51</td>
<td>54.5</td>
<td>53.6</td>
<td>52.7</td>
<td>51.9</td>
<td>51.0</td>
<td>50.2</td>
<td>49.4</td>
<td>48.6</td>
<td>47.8</td>
<td>47.0</td>
</tr>
<tr>
<td>52</td>
<td>54.4</td>
<td>53.5</td>
<td>52.6</td>
<td>51.7</td>
<td>50.9</td>
<td>50.0</td>
<td>49.2</td>
<td>48.4</td>
<td>47.6</td>
<td>46.8</td>
</tr>
<tr>
<td>53</td>
<td>54.3</td>
<td>53.4</td>
<td>52.5</td>
<td>51.6</td>
<td>50.8</td>
<td>49.9</td>
<td>49.1</td>
<td>48.2</td>
<td>47.4</td>
<td>46.6</td>
</tr>
<tr>
<td>54</td>
<td>54.2</td>
<td>53.3</td>
<td>52.4</td>
<td>51.5</td>
<td>50.6</td>
<td>49.8</td>
<td>48.9</td>
<td>48.1</td>
<td>47.2</td>
<td>46.4</td>
</tr>
<tr>
<td>55</td>
<td>54.1</td>
<td>53.2</td>
<td>52.3</td>
<td>51.4</td>
<td>50.5</td>
<td>49.7</td>
<td>48.8</td>
<td>47.9</td>
<td>47.1</td>
<td>46.3</td>
</tr>
<tr>
<td>56</td>
<td>54.0</td>
<td>53.1</td>
<td>52.2</td>
<td>51.3</td>
<td>50.4</td>
<td>49.5</td>
<td>48.7</td>
<td>47.8</td>
<td>47.0</td>
<td>46.1</td>
</tr>
<tr>
<td>57</td>
<td>54.0</td>
<td>53.0</td>
<td>52.1</td>
<td>51.2</td>
<td>50.3</td>
<td>49.4</td>
<td>48.6</td>
<td>47.7</td>
<td>46.8</td>
<td>46.0</td>
</tr>
<tr>
<td>58</td>
<td>53.9</td>
<td>52.9</td>
<td>51.9</td>
<td>51.0</td>
<td>50.1</td>
<td>49.2</td>
<td>48.3</td>
<td>47.4</td>
<td>46.5</td>
<td>45.6</td>
</tr>
<tr>
<td>59</td>
<td>53.8</td>
<td>52.8</td>
<td>51.8</td>
<td>50.9</td>
<td>50.0</td>
<td>49.1</td>
<td>48.2</td>
<td>47.2</td>
<td>46.3</td>
<td>45.4</td>
</tr>
<tr>
<td>60</td>
<td>53.8</td>
<td>52.9</td>
<td>51.9</td>
<td>51.0</td>
<td>50.1</td>
<td>49.2</td>
<td>48.3</td>
<td>47.4</td>
<td>46.5</td>
<td>45.6</td>
</tr>
<tr>
<td>61</td>
<td>53.8</td>
<td>52.8</td>
<td>51.9</td>
<td>51.0</td>
<td>50.0</td>
<td>49.1</td>
<td>48.2</td>
<td>47.3</td>
<td>46.4</td>
<td>45.5</td>
</tr>
<tr>
<td>62</td>
<td>53.7</td>
<td>52.8</td>
<td>51.8</td>
<td>50.9</td>
<td>50.0</td>
<td>49.1</td>
<td>48.2</td>
<td>47.2</td>
<td>46.3</td>
<td>45.4</td>
</tr>
<tr>
<td>63</td>
<td>53.7</td>
<td>52.7</td>
<td>51.8</td>
<td>50.9</td>
<td>50.0</td>
<td>49.1</td>
<td>48.2</td>
<td>47.2</td>
<td>46.3</td>
<td>45.3</td>
</tr>
<tr>
<td>64</td>
<td>53.6</td>
<td>52.7</td>
<td>51.8</td>
<td>50.9</td>
<td>50.0</td>
<td>49.1</td>
<td>48.2</td>
<td>47.2</td>
<td>46.3</td>
<td>45.3</td>
</tr>
<tr>
<td>65</td>
<td>53.6</td>
<td>52.7</td>
<td>51.7</td>
<td>50.8</td>
<td>50.8</td>
<td>49.9</td>
<td>48.9</td>
<td>48.0</td>
<td>47.1</td>
<td>46.2</td>
</tr>
<tr>
<td>66</td>
<td>53.6</td>
<td>52.6</td>
<td>51.7</td>
<td>50.7</td>
<td>50.7</td>
<td>49.8</td>
<td>48.9</td>
<td>48.0</td>
<td>47.0</td>
<td>46.1</td>
</tr>
<tr>
<td>67</td>
<td>53.6</td>
<td>52.6</td>
<td>51.7</td>
<td>50.7</td>
<td>50.7</td>
<td>49.8</td>
<td>48.9</td>
<td>48.0</td>
<td>47.0</td>
<td>46.1</td>
</tr>
<tr>
<td>68</td>
<td>53.5</td>
<td>52.6</td>
<td>51.6</td>
<td>50.7</td>
<td>50.6</td>
<td>49.7</td>
<td>48.7</td>
<td>48.0</td>
<td>47.0</td>
<td>46.0</td>
</tr>
<tr>
<td>69</td>
<td>53.5</td>
<td>52.6</td>
<td>51.6</td>
<td>50.6</td>
<td>50.6</td>
<td>49.7</td>
<td>48.7</td>
<td>48.0</td>
<td>47.0</td>
<td>45.9</td>
</tr>
<tr>
<td>70</td>
<td>53.5</td>
<td>52.5</td>
<td>51.6</td>
<td>50.6</td>
<td>50.6</td>
<td>49.7</td>
<td>48.7</td>
<td>48.0</td>
<td>47.0</td>
<td>45.9</td>
</tr>
<tr>
<td>71</td>
<td>53.5</td>
<td>52.5</td>
<td>51.6</td>
<td>50.6</td>
<td>50.6</td>
<td>49.7</td>
<td>48.7</td>
<td>48.0</td>
<td>47.0</td>
<td>45.9</td>
</tr>
<tr>
<td>72</td>
<td>53.5</td>
<td>52.5</td>
<td>51.5</td>
<td>50.6</td>
<td>50.6</td>
<td>49.6</td>
<td>48.7</td>
<td>48.0</td>
<td>47.0</td>
<td>45.8</td>
</tr>
<tr>
<td>73</td>
<td>53.4</td>
<td>52.5</td>
<td>51.5</td>
<td>50.6</td>
<td>50.6</td>
<td>49.6</td>
<td>48.7</td>
<td>48.0</td>
<td>47.0</td>
<td>45.8</td>
</tr>
<tr>
<td>74</td>
<td>53.4</td>
<td>52.5</td>
<td>51.5</td>
<td>50.5</td>
<td>50.5</td>
<td>49.6</td>
<td>48.6</td>
<td>48.0</td>
<td>47.0</td>
<td>45.8</td>
</tr>
<tr>
<td>75</td>
<td>53.4</td>
<td>52.5</td>
<td>51.5</td>
<td>50.5</td>
<td>50.5</td>
<td>49.6</td>
<td>48.6</td>
<td>48.0</td>
<td>47.0</td>
<td>45.8</td>
</tr>
<tr>
<td>76</td>
<td>53.4</td>
<td>52.4</td>
<td>51.5</td>
<td>50.5</td>
<td>50.5</td>
<td>49.5</td>
<td>48.6</td>
<td>48.0</td>
<td>47.0</td>
<td>45.7</td>
</tr>
<tr>
<td>77</td>
<td>53.4</td>
<td>52.4</td>
<td>51.5</td>
<td>50.5</td>
<td>50.5</td>
<td>49.5</td>
<td>48.6</td>
<td>48.0</td>
<td>47.0</td>
<td>45.7</td>
</tr>
<tr>
<td>78</td>
<td>53.4</td>
<td>52.4</td>
<td>51.5</td>
<td>50.5</td>
<td>50.5</td>
<td>49.5</td>
<td>48.6</td>
<td>48.0</td>
<td>47.0</td>
<td>45.7</td>
</tr>
<tr>
<td>79</td>
<td>53.4</td>
<td>52.4</td>
<td>51.5</td>
<td>50.5</td>
<td>50.5</td>
<td>49.5</td>
<td>48.6</td>
<td>48.0</td>
<td>47.0</td>
<td>45.7</td>
</tr>
<tr>
<td>80</td>
<td>53.4</td>
<td>52.4</td>
<td>51.4</td>
<td>50.5</td>
<td>50.5</td>
<td>49.5</td>
<td>48.5</td>
<td>48.0</td>
<td>47.0</td>
<td>45.7</td>
</tr>
<tr>
<td>81</td>
<td>53.4</td>
<td>52.4</td>
<td>51.4</td>
<td>50.5</td>
<td>50.5</td>
<td>49.5</td>
<td>48.5</td>
<td>48.0</td>
<td>47.0</td>
<td>45.7</td>
</tr>
<tr>
<td>82</td>
<td>53.4</td>
<td>52.4</td>
<td>51.4</td>
<td>50.5</td>
<td>50.5</td>
<td>49.5</td>
<td>48.5</td>
<td>48.0</td>
<td>47.0</td>
<td>45.6</td>
</tr>
<tr>
<td>83</td>
<td>53.4</td>
<td>52.4</td>
<td>51.4</td>
<td>50.5</td>
<td>50.5</td>
<td>49.5</td>
<td>48.5</td>
<td>48.0</td>
<td>47.0</td>
<td>45.6</td>
</tr>
<tr>
<td>84</td>
<td>53.4</td>
<td>52.4</td>
<td>51.4</td>
<td>50.5</td>
<td>50.5</td>
<td>49.5</td>
<td>48.5</td>
<td>48.0</td>
<td>47.0</td>
<td>45.6</td>
</tr>
<tr>
<td>85</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>48.0</td>
<td>47.0</td>
<td>45.6</td>
</tr>
<tr>
<td>86</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>48.0</td>
<td>47.0</td>
<td>45.6</td>
</tr>
<tr>
<td>87</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>48.0</td>
<td>47.0</td>
<td>45.6</td>
</tr>
<tr>
<td>88</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>48.0</td>
<td>47.0</td>
<td>45.6</td>
</tr>
</tbody>
</table>
Table II (continued)
(Joint Life and Last Survivor Expectancy)
(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Ages</th>
<th>30</th>
<th>31</th>
<th>32</th>
<th>33</th>
<th>34</th>
<th>35</th>
<th>36</th>
<th>37</th>
<th>38</th>
<th>39</th>
</tr>
</thead>
<tbody>
<tr>
<td>89</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>90</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>91</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>92</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>93</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>94</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>95</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>96</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>97</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>98</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>99</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>100</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>101</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>102</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>103</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>104</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.5</td>
<td>48.5</td>
<td>47.5</td>
<td>46.6</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>105</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.4</td>
<td>48.5</td>
<td>47.5</td>
<td>46.5</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>106</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.4</td>
<td>48.5</td>
<td>47.5</td>
<td>46.5</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>107</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.4</td>
<td>48.5</td>
<td>47.5</td>
<td>46.5</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>108</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.4</td>
<td>48.5</td>
<td>47.5</td>
<td>46.5</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>109</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.4</td>
<td>48.5</td>
<td>47.5</td>
<td>46.5</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>110</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.4</td>
<td>48.5</td>
<td>47.5</td>
<td>46.5</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>111</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.4</td>
<td>48.5</td>
<td>47.5</td>
<td>46.5</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>112</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.4</td>
<td>48.5</td>
<td>47.5</td>
<td>46.5</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>113</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.4</td>
<td>48.5</td>
<td>47.5</td>
<td>46.5</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>114</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.4</td>
<td>48.5</td>
<td>47.5</td>
<td>46.5</td>
<td>45.6</td>
<td>44.6</td>
</tr>
<tr>
<td>115+</td>
<td>53.3</td>
<td>52.4</td>
<td>51.4</td>
<td>50.4</td>
<td>49.4</td>
<td>48.5</td>
<td>47.5</td>
<td>46.5</td>
<td>45.6</td>
<td>44.6</td>
</tr>
</tbody>
</table>

Table II (continued)
(Joint Life and Last Survivor Expectancy)
(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Ages</th>
<th>40</th>
<th>41</th>
<th>42</th>
<th>43</th>
<th>44</th>
<th>45</th>
<th>46</th>
<th>47</th>
<th>48</th>
<th>49</th>
</tr>
</thead>
<tbody>
<tr>
<td>40</td>
<td>50.2</td>
<td>49.8</td>
<td>49.3</td>
<td>48.9</td>
<td>48.5</td>
<td>48.1</td>
<td>47.7</td>
<td>47.4</td>
<td>47.1</td>
<td>46.8</td>
</tr>
<tr>
<td>41</td>
<td>49.8</td>
<td>49.3</td>
<td>48.8</td>
<td>48.3</td>
<td>47.9</td>
<td>47.5</td>
<td>47.1</td>
<td>46.7</td>
<td>46.4</td>
<td>46.1</td>
</tr>
<tr>
<td>42</td>
<td>49.3</td>
<td>48.8</td>
<td>48.3</td>
<td>47.8</td>
<td>47.3</td>
<td>46.9</td>
<td>46.5</td>
<td>46.1</td>
<td>45.8</td>
<td>45.4</td>
</tr>
<tr>
<td>43</td>
<td>48.9</td>
<td>48.3</td>
<td>47.8</td>
<td>47.3</td>
<td>46.8</td>
<td>46.3</td>
<td>45.9</td>
<td>45.5</td>
<td>45.1</td>
<td>44.8</td>
</tr>
<tr>
<td>44</td>
<td>48.5</td>
<td>47.9</td>
<td>47.3</td>
<td>46.8</td>
<td>46.3</td>
<td>45.8</td>
<td>45.4</td>
<td>44.9</td>
<td>44.5</td>
<td>44.2</td>
</tr>
<tr>
<td>45</td>
<td>48.1</td>
<td>47.5</td>
<td>46.9</td>
<td>46.3</td>
<td>45.8</td>
<td>45.3</td>
<td>44.8</td>
<td>44.4</td>
<td>44.0</td>
<td>43.6</td>
</tr>
<tr>
<td>46</td>
<td>47.7</td>
<td>47.1</td>
<td>46.5</td>
<td>45.9</td>
<td>45.4</td>
<td>44.8</td>
<td>44.3</td>
<td>43.9</td>
<td>43.4</td>
<td>43.0</td>
</tr>
<tr>
<td>47</td>
<td>47.4</td>
<td>46.7</td>
<td>46.1</td>
<td>45.5</td>
<td>44.9</td>
<td>44.4</td>
<td>43.9</td>
<td>43.4</td>
<td>42.9</td>
<td>42.4</td>
</tr>
</tbody>
</table>

Publication 590 (2011)
Table II (continued)

(Joint Life and Last Survivor Expectancy)
(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Ages</th>
<th>40</th>
<th>41</th>
<th>42</th>
<th>43</th>
<th>44</th>
<th>45</th>
<th>46</th>
<th>47</th>
<th>48</th>
<th>49</th>
</tr>
</thead>
<tbody>
<tr>
<td>48</td>
<td>47.1</td>
<td>46.4</td>
<td>45.8</td>
<td>45.1</td>
<td>44.5</td>
<td>44.0</td>
<td>43.4</td>
<td>42.9</td>
<td>42.4</td>
<td>41.9</td>
</tr>
<tr>
<td>49</td>
<td>46.8</td>
<td>46.1</td>
<td>45.4</td>
<td>44.8</td>
<td>44.2</td>
<td>43.6</td>
<td>43.0</td>
<td>42.4</td>
<td>41.9</td>
<td>41.4</td>
</tr>
<tr>
<td>50</td>
<td>46.5</td>
<td>45.8</td>
<td>45.1</td>
<td>44.4</td>
<td>43.8</td>
<td>43.2</td>
<td>42.6</td>
<td>42.0</td>
<td>41.5</td>
<td>40.9</td>
</tr>
<tr>
<td>51</td>
<td>46.3</td>
<td>45.5</td>
<td>44.8</td>
<td>44.1</td>
<td>43.5</td>
<td>42.8</td>
<td>42.2</td>
<td>41.6</td>
<td>41.0</td>
<td>40.5</td>
</tr>
<tr>
<td>52</td>
<td>46.0</td>
<td>45.3</td>
<td>44.6</td>
<td>43.8</td>
<td>43.2</td>
<td>42.5</td>
<td>41.8</td>
<td>41.2</td>
<td>40.6</td>
<td>40.1</td>
</tr>
<tr>
<td>53</td>
<td>45.8</td>
<td>45.1</td>
<td>44.3</td>
<td>43.6</td>
<td>42.9</td>
<td>42.2</td>
<td>41.5</td>
<td>40.9</td>
<td>40.3</td>
<td>39.7</td>
</tr>
<tr>
<td>54</td>
<td>45.6</td>
<td>44.8</td>
<td>44.1</td>
<td>43.3</td>
<td>42.6</td>
<td>41.9</td>
<td>41.2</td>
<td>40.5</td>
<td>39.9</td>
<td>39.3</td>
</tr>
<tr>
<td>55</td>
<td>45.5</td>
<td>44.7</td>
<td>43.9</td>
<td>43.1</td>
<td>42.4</td>
<td>41.6</td>
<td>40.9</td>
<td>40.2</td>
<td>39.6</td>
<td>39.0</td>
</tr>
<tr>
<td>56</td>
<td>45.3</td>
<td>44.5</td>
<td>43.7</td>
<td>42.9</td>
<td>42.1</td>
<td>41.4</td>
<td>40.7</td>
<td>40.0</td>
<td>39.3</td>
<td>38.6</td>
</tr>
<tr>
<td>57</td>
<td>45.1</td>
<td>44.3</td>
<td>43.5</td>
<td>42.7</td>
<td>41.9</td>
<td>41.2</td>
<td>40.4</td>
<td>39.7</td>
<td>39.0</td>
<td>38.3</td>
</tr>
<tr>
<td>58</td>
<td>45.0</td>
<td>44.2</td>
<td>43.3</td>
<td>42.5</td>
<td>41.7</td>
<td>40.9</td>
<td>40.2</td>
<td>39.4</td>
<td>38.7</td>
<td>38.0</td>
</tr>
<tr>
<td>59</td>
<td>44.9</td>
<td>44.0</td>
<td>43.2</td>
<td>42.4</td>
<td>41.6</td>
<td>40.8</td>
<td>40.0</td>
<td>39.2</td>
<td>38.5</td>
<td>37.8</td>
</tr>
<tr>
<td>60</td>
<td>44.7</td>
<td>43.9</td>
<td>43.0</td>
<td>42.2</td>
<td>41.4</td>
<td>40.6</td>
<td>39.8</td>
<td>39.0</td>
<td>38.2</td>
<td>37.5</td>
</tr>
<tr>
<td>61</td>
<td>44.6</td>
<td>43.8</td>
<td>42.9</td>
<td>42.1</td>
<td>41.2</td>
<td>40.4</td>
<td>39.6</td>
<td>38.8</td>
<td>38.0</td>
<td>37.3</td>
</tr>
<tr>
<td>62</td>
<td>44.5</td>
<td>43.7</td>
<td>42.8</td>
<td>41.9</td>
<td>41.1</td>
<td>40.3</td>
<td>39.4</td>
<td>38.6</td>
<td>37.8</td>
<td>37.1</td>
</tr>
<tr>
<td>63</td>
<td>44.5</td>
<td>43.6</td>
<td>42.7</td>
<td>41.8</td>
<td>41.0</td>
<td>40.1</td>
<td>39.3</td>
<td>38.5</td>
<td>37.7</td>
<td>36.9</td>
</tr>
<tr>
<td>64</td>
<td>44.4</td>
<td>43.5</td>
<td>42.6</td>
<td>41.7</td>
<td>40.8</td>
<td>40.0</td>
<td>39.2</td>
<td>38.3</td>
<td>37.5</td>
<td>36.7</td>
</tr>
<tr>
<td>65</td>
<td>44.3</td>
<td>43.4</td>
<td>42.5</td>
<td>41.6</td>
<td>40.7</td>
<td>39.9</td>
<td>39.0</td>
<td>38.2</td>
<td>37.4</td>
<td>36.6</td>
</tr>
<tr>
<td>66</td>
<td>44.2</td>
<td>43.3</td>
<td>42.4</td>
<td>41.5</td>
<td>40.6</td>
<td>39.8</td>
<td>38.9</td>
<td>38.1</td>
<td>37.2</td>
<td>36.4</td>
</tr>
<tr>
<td>67</td>
<td>44.2</td>
<td>43.3</td>
<td>42.3</td>
<td>41.4</td>
<td>40.6</td>
<td>39.7</td>
<td>38.8</td>
<td>38.0</td>
<td>37.1</td>
<td>36.3</td>
</tr>
<tr>
<td>68</td>
<td>44.1</td>
<td>43.2</td>
<td>42.3</td>
<td>41.4</td>
<td>40.5</td>
<td>39.6</td>
<td>38.7</td>
<td>37.9</td>
<td>37.0</td>
<td>36.2</td>
</tr>
<tr>
<td>69</td>
<td>44.1</td>
<td>43.1</td>
<td>42.2</td>
<td>41.3</td>
<td>40.4</td>
<td>39.5</td>
<td>38.6</td>
<td>37.8</td>
<td>36.9</td>
<td>36.0</td>
</tr>
<tr>
<td>70</td>
<td>44.0</td>
<td>43.1</td>
<td>42.2</td>
<td>41.3</td>
<td>40.3</td>
<td>39.4</td>
<td>38.6</td>
<td>37.7</td>
<td>36.8</td>
<td>35.9</td>
</tr>
<tr>
<td>71</td>
<td>44.0</td>
<td>43.0</td>
<td>42.1</td>
<td>41.2</td>
<td>40.3</td>
<td>39.4</td>
<td>38.5</td>
<td>37.6</td>
<td>36.7</td>
<td>35.9</td>
</tr>
<tr>
<td>72</td>
<td>43.9</td>
<td>43.0</td>
<td>42.1</td>
<td>41.1</td>
<td>40.2</td>
<td>39.3</td>
<td>38.4</td>
<td>37.5</td>
<td>36.6</td>
<td>35.8</td>
</tr>
<tr>
<td>73</td>
<td>43.9</td>
<td>43.0</td>
<td>42.0</td>
<td>41.1</td>
<td>40.2</td>
<td>39.3</td>
<td>38.4</td>
<td>37.5</td>
<td>36.6</td>
<td>35.7</td>
</tr>
<tr>
<td>74</td>
<td>43.9</td>
<td>42.9</td>
<td>42.0</td>
<td>41.1</td>
<td>40.1</td>
<td>39.2</td>
<td>38.3</td>
<td>37.4</td>
<td>36.5</td>
<td>35.6</td>
</tr>
<tr>
<td>75</td>
<td>43.8</td>
<td>42.9</td>
<td>42.0</td>
<td>41.0</td>
<td>40.1</td>
<td>39.2</td>
<td>38.3</td>
<td>37.4</td>
<td>36.5</td>
<td>35.6</td>
</tr>
<tr>
<td>76</td>
<td>43.8</td>
<td>42.9</td>
<td>41.9</td>
<td>41.0</td>
<td>40.1</td>
<td>39.1</td>
<td>38.2</td>
<td>37.3</td>
<td>36.4</td>
<td>35.5</td>
</tr>
<tr>
<td>77</td>
<td>43.8</td>
<td>42.9</td>
<td>41.9</td>
<td>41.0</td>
<td>40.0</td>
<td>39.1</td>
<td>38.2</td>
<td>37.3</td>
<td>36.4</td>
<td>35.5</td>
</tr>
<tr>
<td>78</td>
<td>43.8</td>
<td>42.8</td>
<td>41.9</td>
<td>40.9</td>
<td>40.0</td>
<td>39.1</td>
<td>38.2</td>
<td>37.2</td>
<td>36.3</td>
<td>35.4</td>
</tr>
<tr>
<td>79</td>
<td>43.8</td>
<td>42.8</td>
<td>41.9</td>
<td>40.9</td>
<td>40.0</td>
<td>39.1</td>
<td>38.1</td>
<td>37.2</td>
<td>36.3</td>
<td>35.4</td>
</tr>
<tr>
<td>80</td>
<td>43.7</td>
<td>42.8</td>
<td>41.8</td>
<td>40.9</td>
<td>40.0</td>
<td>39.0</td>
<td>38.1</td>
<td>37.2</td>
<td>36.3</td>
<td>35.4</td>
</tr>
<tr>
<td>81</td>
<td>43.7</td>
<td>42.8</td>
<td>41.8</td>
<td>40.9</td>
<td>39.9</td>
<td>39.0</td>
<td>38.1</td>
<td>37.2</td>
<td>36.2</td>
<td>35.3</td>
</tr>
<tr>
<td>82</td>
<td>43.7</td>
<td>42.8</td>
<td>41.8</td>
<td>40.9</td>
<td>39.9</td>
<td>39.0</td>
<td>38.1</td>
<td>37.1</td>
<td>36.2</td>
<td>35.3</td>
</tr>
<tr>
<td>83</td>
<td>43.7</td>
<td>42.8</td>
<td>41.8</td>
<td>40.9</td>
<td>39.9</td>
<td>39.0</td>
<td>38.0</td>
<td>37.1</td>
<td>36.2</td>
<td>35.3</td>
</tr>
<tr>
<td>84</td>
<td>43.7</td>
<td>42.7</td>
<td>41.8</td>
<td>40.8</td>
<td>39.9</td>
<td>39.0</td>
<td>38.0</td>
<td>37.1</td>
<td>36.2</td>
<td>35.3</td>
</tr>
<tr>
<td>85</td>
<td>43.7</td>
<td>42.7</td>
<td>41.8</td>
<td>40.8</td>
<td>39.9</td>
<td>38.9</td>
<td>38.0</td>
<td>37.1</td>
<td>36.2</td>
<td>35.2</td>
</tr>
<tr>
<td>86</td>
<td>43.7</td>
<td>42.7</td>
<td>41.8</td>
<td>40.8</td>
<td>39.9</td>
<td>38.9</td>
<td>38.0</td>
<td>37.1</td>
<td>36.1</td>
<td>35.2</td>
</tr>
<tr>
<td>87</td>
<td>43.7</td>
<td>42.7</td>
<td>41.8</td>
<td>40.8</td>
<td>39.9</td>
<td>38.9</td>
<td>38.0</td>
<td>37.0</td>
<td>36.1</td>
<td>35.2</td>
</tr>
</tbody>
</table>
### Table II (continued)
(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Ages</th>
<th>40</th>
<th>41</th>
<th>42</th>
<th>43</th>
<th>44</th>
<th>45</th>
<th>46</th>
<th>47</th>
<th>48</th>
<th>49</th>
</tr>
</thead>
<tbody>
<tr>
<td>88</td>
<td>43.7</td>
<td>42.7</td>
<td>41.8</td>
<td>40.8</td>
<td>39.9</td>
<td>38.9</td>
<td>38.0</td>
<td>37.0</td>
<td>36.1</td>
<td>35.2</td>
</tr>
<tr>
<td>89</td>
<td>43.7</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>38.0</td>
<td>37.0</td>
<td>36.1</td>
<td>35.2</td>
</tr>
<tr>
<td>90</td>
<td>43.7</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>38.0</td>
<td>37.0</td>
<td>36.1</td>
<td>35.2</td>
</tr>
<tr>
<td>91</td>
<td>43.7</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.1</td>
<td>35.2</td>
</tr>
<tr>
<td>92</td>
<td>43.7</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.1</td>
<td>35.1</td>
</tr>
<tr>
<td>93</td>
<td>43.7</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.1</td>
<td>35.1</td>
</tr>
<tr>
<td>94</td>
<td>43.7</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.1</td>
<td>35.1</td>
</tr>
<tr>
<td>95</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.1</td>
<td>35.1</td>
</tr>
<tr>
<td>96</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.1</td>
<td>35.1</td>
</tr>
<tr>
<td>97</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.1</td>
<td>35.1</td>
</tr>
<tr>
<td>98</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.1</td>
<td>35.1</td>
</tr>
<tr>
<td>99</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.1</td>
<td>35.1</td>
</tr>
<tr>
<td>100</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>101</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>102</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>103</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>104</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.9</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>105</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.8</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>106</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.8</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>107</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.8</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>108</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.8</td>
<td>39.8</td>
<td>38.8</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>109</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.7</td>
<td>39.8</td>
<td>38.8</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>110</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.7</td>
<td>39.8</td>
<td>38.8</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>111</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.7</td>
<td>39.8</td>
<td>38.8</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>112</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.7</td>
<td>39.8</td>
<td>38.8</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>113</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.7</td>
<td>39.8</td>
<td>38.8</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>114</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.7</td>
<td>39.8</td>
<td>38.8</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
<tr>
<td>115+</td>
<td>43.6</td>
<td>42.7</td>
<td>41.7</td>
<td>40.7</td>
<td>39.8</td>
<td>38.8</td>
<td>37.9</td>
<td>37.0</td>
<td>36.0</td>
<td>35.1</td>
</tr>
</tbody>
</table>

### Table II (continued)
(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Ages</th>
<th>50</th>
<th>51</th>
<th>52</th>
<th>53</th>
<th>54</th>
<th>55</th>
<th>56</th>
<th>57</th>
<th>58</th>
<th>59</th>
</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td>40.4</td>
<td>40.0</td>
<td>39.5</td>
<td>39.1</td>
<td>38.7</td>
<td>38.3</td>
<td>38.0</td>
<td>37.6</td>
<td>37.3</td>
<td>37.1</td>
</tr>
<tr>
<td>51</td>
<td>40.0</td>
<td>39.5</td>
<td>39.0</td>
<td>38.5</td>
<td>38.1</td>
<td>37.7</td>
<td>37.4</td>
<td>37.0</td>
<td>36.7</td>
<td>36.4</td>
</tr>
<tr>
<td>52</td>
<td>39.5</td>
<td>39.0</td>
<td>38.5</td>
<td>38.0</td>
<td>37.6</td>
<td>37.2</td>
<td>36.8</td>
<td>36.4</td>
<td>36.0</td>
<td>35.7</td>
</tr>
<tr>
<td>53</td>
<td>39.1</td>
<td>38.5</td>
<td>38.0</td>
<td>37.5</td>
<td>37.1</td>
<td>36.6</td>
<td>36.2</td>
<td>35.8</td>
<td>35.4</td>
<td>35.1</td>
</tr>
<tr>
<td>54</td>
<td>38.7</td>
<td>38.1</td>
<td>37.6</td>
<td>37.1</td>
<td>36.6</td>
<td>36.1</td>
<td>35.7</td>
<td>35.2</td>
<td>34.8</td>
<td>34.5</td>
</tr>
<tr>
<td>55</td>
<td>38.3</td>
<td>37.7</td>
<td>37.2</td>
<td>36.6</td>
<td>36.1</td>
<td>35.6</td>
<td>35.1</td>
<td>34.7</td>
<td>34.3</td>
<td>33.9</td>
</tr>
<tr>
<td>56</td>
<td>38.0</td>
<td>37.4</td>
<td>36.8</td>
<td>36.2</td>
<td>35.7</td>
<td>35.1</td>
<td>34.7</td>
<td>34.2</td>
<td>33.7</td>
<td>33.3</td>
</tr>
</tbody>
</table>

Publication 590 (2011)
<table>
<thead>
<tr>
<th>Ages</th>
<th>50</th>
<th>51</th>
<th>52</th>
<th>53</th>
<th>54</th>
<th>55</th>
<th>56</th>
<th>57</th>
<th>58</th>
<th>59</th>
</tr>
</thead>
<tbody>
<tr>
<td>57</td>
<td>37.6</td>
<td>37.0</td>
<td>36.4</td>
<td>35.8</td>
<td>35.2</td>
<td>34.7</td>
<td>34.2</td>
<td>33.7</td>
<td>33.2</td>
<td>32.8</td>
</tr>
<tr>
<td>58</td>
<td>37.3</td>
<td>36.7</td>
<td>36.0</td>
<td>35.4</td>
<td>34.8</td>
<td>34.3</td>
<td>33.7</td>
<td>33.2</td>
<td>32.8</td>
<td>32.3</td>
</tr>
<tr>
<td>59</td>
<td>37.1</td>
<td>36.4</td>
<td>35.7</td>
<td>35.1</td>
<td>34.5</td>
<td>33.9</td>
<td>33.3</td>
<td>32.8</td>
<td>32.3</td>
<td>31.8</td>
</tr>
<tr>
<td>60</td>
<td>36.8</td>
<td>36.1</td>
<td>35.4</td>
<td>34.8</td>
<td>34.1</td>
<td>33.5</td>
<td>32.9</td>
<td>32.4</td>
<td>31.9</td>
<td>31.3</td>
</tr>
<tr>
<td>61</td>
<td>36.6</td>
<td>35.8</td>
<td>35.1</td>
<td>34.5</td>
<td>33.8</td>
<td>33.2</td>
<td>32.6</td>
<td>32.0</td>
<td>31.4</td>
<td>30.9</td>
</tr>
<tr>
<td>62</td>
<td>36.3</td>
<td>35.6</td>
<td>34.9</td>
<td>34.2</td>
<td>33.5</td>
<td>32.9</td>
<td>32.2</td>
<td>31.6</td>
<td>31.1</td>
<td>30.5</td>
</tr>
<tr>
<td>63</td>
<td>36.1</td>
<td>35.4</td>
<td>34.6</td>
<td>33.9</td>
<td>33.2</td>
<td>32.6</td>
<td>31.9</td>
<td>31.3</td>
<td>30.7</td>
<td>30.1</td>
</tr>
<tr>
<td>64</td>
<td>35.9</td>
<td>35.2</td>
<td>34.4</td>
<td>33.7</td>
<td>33.0</td>
<td>32.3</td>
<td>31.6</td>
<td>31.0</td>
<td>30.4</td>
<td>29.8</td>
</tr>
<tr>
<td>65</td>
<td>35.8</td>
<td>35.0</td>
<td>34.2</td>
<td>33.5</td>
<td>32.7</td>
<td>32.0</td>
<td>31.4</td>
<td>30.7</td>
<td>30.0</td>
<td>29.4</td>
</tr>
<tr>
<td>66</td>
<td>35.6</td>
<td>34.8</td>
<td>34.0</td>
<td>33.3</td>
<td>32.5</td>
<td>31.8</td>
<td>31.1</td>
<td>30.4</td>
<td>30.0</td>
<td>29.1</td>
</tr>
<tr>
<td>67</td>
<td>35.5</td>
<td>34.7</td>
<td>33.9</td>
<td>33.1</td>
<td>32.3</td>
<td>31.6</td>
<td>30.9</td>
<td>30.3</td>
<td>29.7</td>
<td>28.8</td>
</tr>
<tr>
<td>68</td>
<td>35.3</td>
<td>34.5</td>
<td>33.7</td>
<td>32.9</td>
<td>32.1</td>
<td>31.4</td>
<td>30.7</td>
<td>30.1</td>
<td>29.5</td>
<td>28.6</td>
</tr>
<tr>
<td>69</td>
<td>35.2</td>
<td>34.4</td>
<td>33.6</td>
<td>32.8</td>
<td>32.0</td>
<td>31.3</td>
<td>30.6</td>
<td>30.0</td>
<td>29.4</td>
<td>28.3</td>
</tr>
<tr>
<td>70</td>
<td>35.1</td>
<td>34.3</td>
<td>33.4</td>
<td>32.6</td>
<td>31.8</td>
<td>31.1</td>
<td>30.3</td>
<td>29.7</td>
<td>29.1</td>
<td>28.1</td>
</tr>
<tr>
<td>71</td>
<td>35.0</td>
<td>34.2</td>
<td>33.3</td>
<td>32.5</td>
<td>31.7</td>
<td>30.9</td>
<td>30.1</td>
<td>29.5</td>
<td>29.0</td>
<td>28.0</td>
</tr>
<tr>
<td>72</td>
<td>34.9</td>
<td>34.1</td>
<td>33.2</td>
<td>32.4</td>
<td>31.7</td>
<td>31.0</td>
<td>30.3</td>
<td>29.7</td>
<td>29.2</td>
<td>28.2</td>
</tr>
<tr>
<td>73</td>
<td>34.8</td>
<td>34.0</td>
<td>33.1</td>
<td>32.3</td>
<td>31.5</td>
<td>30.8</td>
<td>30.2</td>
<td>29.6</td>
<td>29.1</td>
<td>28.3</td>
</tr>
<tr>
<td>74</td>
<td>34.8</td>
<td>33.9</td>
<td>33.0</td>
<td>32.2</td>
<td>31.4</td>
<td>30.7</td>
<td>30.1</td>
<td>29.5</td>
<td>29.0</td>
<td>28.1</td>
</tr>
<tr>
<td>75</td>
<td>34.7</td>
<td>33.8</td>
<td>33.0</td>
<td>32.1</td>
<td>31.3</td>
<td>30.6</td>
<td>30.0</td>
<td>29.4</td>
<td>28.9</td>
<td>28.0</td>
</tr>
<tr>
<td>76</td>
<td>34.6</td>
<td>33.8</td>
<td>32.9</td>
<td>32.0</td>
<td>31.2</td>
<td>30.5</td>
<td>30.0</td>
<td>29.5</td>
<td>28.9</td>
<td>28.0</td>
</tr>
<tr>
<td>77</td>
<td>34.6</td>
<td>33.7</td>
<td>32.8</td>
<td>32.0</td>
<td>31.1</td>
<td>30.3</td>
<td>29.8</td>
<td>29.3</td>
<td>28.7</td>
<td>27.8</td>
</tr>
<tr>
<td>78</td>
<td>34.5</td>
<td>33.6</td>
<td>32.8</td>
<td>31.9</td>
<td>31.0</td>
<td>30.3</td>
<td>29.8</td>
<td>29.3</td>
<td>28.7</td>
<td>27.7</td>
</tr>
<tr>
<td>79</td>
<td>34.5</td>
<td>33.6</td>
<td>32.7</td>
<td>31.8</td>
<td>31.0</td>
<td>30.1</td>
<td>29.5</td>
<td>29.0</td>
<td>28.4</td>
<td>27.6</td>
</tr>
<tr>
<td>80</td>
<td>34.5</td>
<td>33.6</td>
<td>32.7</td>
<td>31.8</td>
<td>30.9</td>
<td>30.1</td>
<td>29.2</td>
<td>28.7</td>
<td>28.2</td>
<td>27.5</td>
</tr>
<tr>
<td>81</td>
<td>34.4</td>
<td>33.5</td>
<td>32.6</td>
<td>31.8</td>
<td>30.9</td>
<td>30.0</td>
<td>29.2</td>
<td>28.7</td>
<td>28.3</td>
<td>27.5</td>
</tr>
<tr>
<td>82</td>
<td>34.4</td>
<td>33.5</td>
<td>32.6</td>
<td>31.7</td>
<td>30.8</td>
<td>30.0</td>
<td>29.1</td>
<td>28.7</td>
<td>28.3</td>
<td>27.4</td>
</tr>
<tr>
<td>83</td>
<td>34.4</td>
<td>33.5</td>
<td>32.6</td>
<td>31.7</td>
<td>30.8</td>
<td>29.9</td>
<td>29.1</td>
<td>28.2</td>
<td>27.4</td>
<td>26.5</td>
</tr>
<tr>
<td>84</td>
<td>34.3</td>
<td>33.4</td>
<td>32.5</td>
<td>31.7</td>
<td>30.8</td>
<td>29.9</td>
<td>29.0</td>
<td>28.2</td>
<td>27.3</td>
<td>26.5</td>
</tr>
<tr>
<td>85</td>
<td>34.3</td>
<td>33.4</td>
<td>32.5</td>
<td>31.6</td>
<td>30.7</td>
<td>29.9</td>
<td>29.0</td>
<td>28.1</td>
<td>27.3</td>
<td>26.4</td>
</tr>
<tr>
<td>86</td>
<td>34.3</td>
<td>33.4</td>
<td>32.5</td>
<td>31.6</td>
<td>30.7</td>
<td>29.8</td>
<td>29.0</td>
<td>28.1</td>
<td>27.2</td>
<td>26.4</td>
</tr>
<tr>
<td>87</td>
<td>34.3</td>
<td>33.4</td>
<td>32.5</td>
<td>31.6</td>
<td>30.7</td>
<td>29.9</td>
<td>28.9</td>
<td>28.0</td>
<td>27.1</td>
<td>26.3</td>
</tr>
<tr>
<td>88</td>
<td>34.3</td>
<td>33.4</td>
<td>32.5</td>
<td>31.6</td>
<td>30.7</td>
<td>29.8</td>
<td>28.8</td>
<td>28.0</td>
<td>27.2</td>
<td>26.3</td>
</tr>
<tr>
<td>89</td>
<td>34.3</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.7</td>
<td>29.8</td>
<td>28.9</td>
<td>28.0</td>
<td>27.2</td>
<td>26.3</td>
</tr>
<tr>
<td>90</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.8</td>
<td>28.9</td>
<td>28.0</td>
<td>27.1</td>
<td>26.3</td>
</tr>
<tr>
<td>91</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.7</td>
<td>28.0</td>
<td>27.1</td>
<td>26.3</td>
</tr>
<tr>
<td>92</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>28.0</td>
<td>27.1</td>
<td>26.2</td>
</tr>
<tr>
<td>93</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>28.0</td>
<td>27.1</td>
<td>26.2</td>
</tr>
<tr>
<td>94</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>27.9</td>
<td>27.1</td>
<td>26.2</td>
</tr>
<tr>
<td>95</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>27.9</td>
<td>27.1</td>
<td>26.2</td>
</tr>
<tr>
<td>96</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.2</td>
</tr>
<tr>
<td>Ages</td>
<td>50</td>
<td>51</td>
<td>52</td>
<td>53</td>
<td>54</td>
<td>55</td>
<td>56</td>
<td>57</td>
<td>58</td>
<td>59</td>
</tr>
<tr>
<td>-------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
</tr>
<tr>
<td>97</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.2</td>
</tr>
<tr>
<td>98</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.2</td>
</tr>
<tr>
<td>99</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.2</td>
</tr>
<tr>
<td>100</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.2</td>
</tr>
<tr>
<td>101</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.2</td>
</tr>
<tr>
<td>102</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.2</td>
</tr>
<tr>
<td>103</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.2</td>
</tr>
<tr>
<td>104</td>
<td>34.2</td>
<td>33.3</td>
<td>32.4</td>
<td>31.5</td>
<td>30.6</td>
<td>29.7</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.2</td>
</tr>
<tr>
<td>105</td>
<td>34.2</td>
<td>33.3</td>
<td>32.3</td>
<td>31.4</td>
<td>30.5</td>
<td>29.6</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.1</td>
</tr>
<tr>
<td>106</td>
<td>34.2</td>
<td>33.3</td>
<td>32.3</td>
<td>31.4</td>
<td>30.5</td>
<td>29.6</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.1</td>
</tr>
<tr>
<td>107</td>
<td>34.2</td>
<td>33.3</td>
<td>32.3</td>
<td>31.4</td>
<td>30.5</td>
<td>29.6</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.1</td>
</tr>
<tr>
<td>108</td>
<td>34.2</td>
<td>33.3</td>
<td>32.3</td>
<td>31.4</td>
<td>30.5</td>
<td>29.6</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.1</td>
</tr>
<tr>
<td>109</td>
<td>34.2</td>
<td>33.3</td>
<td>32.3</td>
<td>31.4</td>
<td>30.5</td>
<td>29.6</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.1</td>
</tr>
<tr>
<td>110</td>
<td>34.2</td>
<td>33.3</td>
<td>32.3</td>
<td>31.4</td>
<td>30.5</td>
<td>29.6</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.1</td>
</tr>
<tr>
<td>111</td>
<td>34.2</td>
<td>33.3</td>
<td>32.3</td>
<td>31.4</td>
<td>30.5</td>
<td>29.6</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.1</td>
</tr>
<tr>
<td>112</td>
<td>34.2</td>
<td>33.3</td>
<td>32.3</td>
<td>31.4</td>
<td>30.5</td>
<td>29.6</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.1</td>
</tr>
<tr>
<td>113</td>
<td>34.2</td>
<td>33.3</td>
<td>32.3</td>
<td>31.4</td>
<td>30.5</td>
<td>29.6</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.1</td>
</tr>
<tr>
<td>114</td>
<td>34.2</td>
<td>33.3</td>
<td>32.3</td>
<td>31.4</td>
<td>30.5</td>
<td>29.6</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.1</td>
</tr>
<tr>
<td>115+</td>
<td>34.2</td>
<td>33.3</td>
<td>32.3</td>
<td>31.4</td>
<td>30.5</td>
<td>29.6</td>
<td>28.8</td>
<td>27.9</td>
<td>27.0</td>
<td>26.1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Ages</th>
<th>60</th>
<th>61</th>
<th>62</th>
<th>63</th>
<th>64</th>
<th>65</th>
<th>66</th>
<th>67</th>
<th>68</th>
<th>69</th>
</tr>
</thead>
<tbody>
<tr>
<td>60</td>
<td>30.9</td>
<td>30.4</td>
<td>30.0</td>
<td>29.6</td>
<td>29.2</td>
<td>28.8</td>
<td>28.5</td>
<td>28.2</td>
<td>27.9</td>
<td>27.6</td>
</tr>
<tr>
<td>61</td>
<td>30.4</td>
<td>29.9</td>
<td>29.5</td>
<td>29.0</td>
<td>28.6</td>
<td>28.3</td>
<td>27.9</td>
<td>27.6</td>
<td>27.3</td>
<td>27.0</td>
</tr>
<tr>
<td>62</td>
<td>30.0</td>
<td>29.5</td>
<td>29.0</td>
<td>28.5</td>
<td>28.1</td>
<td>27.7</td>
<td>27.3</td>
<td>27.0</td>
<td>26.7</td>
<td>26.4</td>
</tr>
<tr>
<td>63</td>
<td>29.6</td>
<td>29.0</td>
<td>28.5</td>
<td>28.1</td>
<td>27.6</td>
<td>27.2</td>
<td>26.8</td>
<td>26.4</td>
<td>26.1</td>
<td>25.7</td>
</tr>
<tr>
<td>64</td>
<td>29.2</td>
<td>28.6</td>
<td>28.1</td>
<td>27.6</td>
<td>27.1</td>
<td>26.7</td>
<td>26.3</td>
<td>25.9</td>
<td>25.5</td>
<td>25.2</td>
</tr>
<tr>
<td>65</td>
<td>28.8</td>
<td>28.3</td>
<td>27.7</td>
<td>27.2</td>
<td>26.7</td>
<td>26.2</td>
<td>25.8</td>
<td>25.4</td>
<td>25.0</td>
<td>24.6</td>
</tr>
<tr>
<td>66</td>
<td>28.5</td>
<td>27.9</td>
<td>27.3</td>
<td>26.8</td>
<td>26.3</td>
<td>25.8</td>
<td>25.3</td>
<td>24.9</td>
<td>24.5</td>
<td>24.1</td>
</tr>
<tr>
<td>67</td>
<td>28.2</td>
<td>27.6</td>
<td>27.0</td>
<td>26.4</td>
<td>25.9</td>
<td>25.4</td>
<td>24.9</td>
<td>24.4</td>
<td>24.0</td>
<td>23.6</td>
</tr>
<tr>
<td>68</td>
<td>27.9</td>
<td>27.3</td>
<td>26.7</td>
<td>26.1</td>
<td>25.5</td>
<td>25.0</td>
<td>24.5</td>
<td>24.0</td>
<td>23.5</td>
<td>23.1</td>
</tr>
<tr>
<td>69</td>
<td>27.6</td>
<td>27.0</td>
<td>26.4</td>
<td>25.7</td>
<td>25.2</td>
<td>24.6</td>
<td>24.1</td>
<td>23.6</td>
<td>23.1</td>
<td>22.6</td>
</tr>
<tr>
<td>70</td>
<td>27.4</td>
<td>26.7</td>
<td>26.1</td>
<td>25.4</td>
<td>24.8</td>
<td>24.3</td>
<td>23.7</td>
<td>23.2</td>
<td>22.7</td>
<td>22.2</td>
</tr>
<tr>
<td>71</td>
<td>27.2</td>
<td>26.5</td>
<td>25.8</td>
<td>25.2</td>
<td>24.5</td>
<td>23.9</td>
<td>23.4</td>
<td>22.8</td>
<td>22.3</td>
<td>21.8</td>
</tr>
<tr>
<td>72</td>
<td>27.0</td>
<td>26.3</td>
<td>25.6</td>
<td>24.9</td>
<td>24.3</td>
<td>23.7</td>
<td>23.1</td>
<td>22.5</td>
<td>22.0</td>
<td>21.4</td>
</tr>
<tr>
<td>73</td>
<td>26.8</td>
<td>26.1</td>
<td>25.4</td>
<td>24.7</td>
<td>24.0</td>
<td>23.4</td>
<td>22.8</td>
<td>22.2</td>
<td>21.6</td>
<td>21.1</td>
</tr>
<tr>
<td>74</td>
<td>26.6</td>
<td>25.9</td>
<td>25.2</td>
<td>24.5</td>
<td>23.8</td>
<td>23.1</td>
<td>22.5</td>
<td>21.9</td>
<td>21.3</td>
<td>20.8</td>
</tr>
<tr>
<td>75</td>
<td>26.5</td>
<td>25.7</td>
<td>25.0</td>
<td>24.3</td>
<td>23.6</td>
<td>22.9</td>
<td>22.3</td>
<td>21.6</td>
<td>21.0</td>
<td>20.5</td>
</tr>
<tr>
<td>Ages</td>
<td>60</td>
<td>61</td>
<td>62</td>
<td>63</td>
<td>64</td>
<td>65</td>
<td>66</td>
<td>67</td>
<td>68</td>
<td>69</td>
</tr>
<tr>
<td>------</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td>76</td>
<td>26.3</td>
<td>25.6</td>
<td>24.8</td>
<td>24.1</td>
<td>23.4</td>
<td>22.7</td>
<td>22.0</td>
<td>21.4</td>
<td>20.8</td>
<td>20.2</td>
</tr>
<tr>
<td>77</td>
<td>26.2</td>
<td>25.4</td>
<td>24.7</td>
<td>23.9</td>
<td>23.2</td>
<td>22.5</td>
<td>21.8</td>
<td>21.2</td>
<td>20.6</td>
<td>19.9</td>
</tr>
<tr>
<td>78</td>
<td>26.1</td>
<td>25.3</td>
<td>24.6</td>
<td>23.8</td>
<td>23.1</td>
<td>22.4</td>
<td>21.7</td>
<td>21.0</td>
<td>20.3</td>
<td>19.7</td>
</tr>
<tr>
<td>79</td>
<td>26.0</td>
<td>25.2</td>
<td>24.4</td>
<td>23.7</td>
<td>22.9</td>
<td>22.2</td>
<td>21.5</td>
<td>20.8</td>
<td>20.1</td>
<td>19.5</td>
</tr>
<tr>
<td>80</td>
<td>25.9</td>
<td>25.1</td>
<td>24.3</td>
<td>23.6</td>
<td>22.8</td>
<td>22.1</td>
<td>21.3</td>
<td>20.6</td>
<td>20.0</td>
<td>19.3</td>
</tr>
<tr>
<td>81</td>
<td>25.8</td>
<td>25.0</td>
<td>24.2</td>
<td>23.4</td>
<td>22.7</td>
<td>21.9</td>
<td>21.2</td>
<td>20.5</td>
<td>19.8</td>
<td>19.1</td>
</tr>
<tr>
<td>82</td>
<td>25.8</td>
<td>24.9</td>
<td>24.1</td>
<td>23.4</td>
<td>22.6</td>
<td>21.8</td>
<td>21.1</td>
<td>20.4</td>
<td>19.7</td>
<td>19.0</td>
</tr>
<tr>
<td>83</td>
<td>25.7</td>
<td>24.9</td>
<td>24.1</td>
<td>23.3</td>
<td>22.5</td>
<td>21.7</td>
<td>21.0</td>
<td>20.2</td>
<td>19.5</td>
<td>18.8</td>
</tr>
<tr>
<td>84</td>
<td>25.6</td>
<td>24.8</td>
<td>24.0</td>
<td>23.2</td>
<td>22.4</td>
<td>21.6</td>
<td>20.9</td>
<td>20.1</td>
<td>19.4</td>
<td>18.7</td>
</tr>
<tr>
<td>85</td>
<td>25.6</td>
<td>24.8</td>
<td>23.9</td>
<td>23.1</td>
<td>22.3</td>
<td>21.6</td>
<td>20.8</td>
<td>20.1</td>
<td>19.3</td>
<td>18.6</td>
</tr>
<tr>
<td>86</td>
<td>25.5</td>
<td>24.7</td>
<td>23.9</td>
<td>23.1</td>
<td>22.3</td>
<td>21.5</td>
<td>20.7</td>
<td>20.0</td>
<td>19.2</td>
<td>18.5</td>
</tr>
<tr>
<td>87</td>
<td>25.5</td>
<td>24.7</td>
<td>23.8</td>
<td>23.0</td>
<td>22.2</td>
<td>21.4</td>
<td>20.7</td>
<td>19.9</td>
<td>19.2</td>
<td>18.4</td>
</tr>
<tr>
<td>88</td>
<td>25.5</td>
<td>24.6</td>
<td>23.8</td>
<td>23.0</td>
<td>22.2</td>
<td>21.4</td>
<td>20.6</td>
<td>19.8</td>
<td>19.1</td>
<td>18.3</td>
</tr>
<tr>
<td>89</td>
<td>25.4</td>
<td>24.6</td>
<td>23.8</td>
<td>22.9</td>
<td>22.1</td>
<td>21.3</td>
<td>20.5</td>
<td>19.8</td>
<td>19.0</td>
<td>18.3</td>
</tr>
<tr>
<td>90</td>
<td>25.4</td>
<td>24.6</td>
<td>23.7</td>
<td>22.9</td>
<td>22.1</td>
<td>21.3</td>
<td>20.5</td>
<td>19.7</td>
<td>19.0</td>
<td>18.2</td>
</tr>
<tr>
<td>91</td>
<td>25.4</td>
<td>24.5</td>
<td>23.7</td>
<td>22.9</td>
<td>22.1</td>
<td>21.3</td>
<td>20.5</td>
<td>19.7</td>
<td>18.9</td>
<td>18.2</td>
</tr>
<tr>
<td>92</td>
<td>25.4</td>
<td>24.5</td>
<td>23.7</td>
<td>22.9</td>
<td>22.0</td>
<td>21.2</td>
<td>20.4</td>
<td>19.6</td>
<td>18.9</td>
<td>18.1</td>
</tr>
<tr>
<td>93</td>
<td>25.4</td>
<td>24.5</td>
<td>23.7</td>
<td>22.8</td>
<td>22.0</td>
<td>21.2</td>
<td>20.4</td>
<td>19.6</td>
<td>18.8</td>
<td>18.1</td>
</tr>
<tr>
<td>94</td>
<td>25.3</td>
<td>24.5</td>
<td>23.6</td>
<td>22.8</td>
<td>22.0</td>
<td>21.2</td>
<td>20.4</td>
<td>19.6</td>
<td>18.8</td>
<td>18.0</td>
</tr>
<tr>
<td>95</td>
<td>25.3</td>
<td>24.5</td>
<td>23.6</td>
<td>22.8</td>
<td>22.0</td>
<td>21.1</td>
<td>20.3</td>
<td>19.6</td>
<td>18.8</td>
<td>18.0</td>
</tr>
<tr>
<td>96</td>
<td>25.3</td>
<td>24.5</td>
<td>23.6</td>
<td>22.8</td>
<td>21.9</td>
<td>21.1</td>
<td>20.3</td>
<td>19.5</td>
<td>18.8</td>
<td>18.0</td>
</tr>
<tr>
<td>97</td>
<td>25.3</td>
<td>24.5</td>
<td>23.6</td>
<td>22.8</td>
<td>21.9</td>
<td>21.1</td>
<td>20.3</td>
<td>19.5</td>
<td>18.7</td>
<td>18.0</td>
</tr>
<tr>
<td>98</td>
<td>25.3</td>
<td>24.4</td>
<td>23.6</td>
<td>22.8</td>
<td>21.9</td>
<td>21.1</td>
<td>20.3</td>
<td>19.5</td>
<td>18.7</td>
<td>17.9</td>
</tr>
<tr>
<td>99</td>
<td>25.3</td>
<td>24.4</td>
<td>23.6</td>
<td>22.7</td>
<td>21.9</td>
<td>21.1</td>
<td>20.3</td>
<td>19.5</td>
<td>18.7</td>
<td>17.9</td>
</tr>
<tr>
<td>100</td>
<td>25.3</td>
<td>24.4</td>
<td>23.6</td>
<td>22.7</td>
<td>21.7</td>
<td>21.1</td>
<td>20.3</td>
<td>19.5</td>
<td>18.7</td>
<td>17.9</td>
</tr>
<tr>
<td>101</td>
<td>25.3</td>
<td>24.4</td>
<td>23.6</td>
<td>22.7</td>
<td>21.7</td>
<td>21.0</td>
<td>20.2</td>
<td>19.5</td>
<td>18.7</td>
<td>17.9</td>
</tr>
<tr>
<td>102</td>
<td>25.3</td>
<td>24.4</td>
<td>23.6</td>
<td>22.7</td>
<td>21.7</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.7</td>
<td>17.9</td>
</tr>
<tr>
<td>103</td>
<td>25.3</td>
<td>24.4</td>
<td>23.6</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.9</td>
</tr>
<tr>
<td>104</td>
<td>25.3</td>
<td>24.4</td>
<td>23.5</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.8</td>
</tr>
<tr>
<td>105</td>
<td>25.3</td>
<td>24.4</td>
<td>23.5</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.8</td>
</tr>
<tr>
<td>106</td>
<td>25.3</td>
<td>24.4</td>
<td>23.5</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.8</td>
</tr>
<tr>
<td>107</td>
<td>25.2</td>
<td>24.4</td>
<td>23.5</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.8</td>
</tr>
<tr>
<td>108</td>
<td>25.2</td>
<td>24.4</td>
<td>23.5</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.8</td>
</tr>
<tr>
<td>109</td>
<td>25.2</td>
<td>24.4</td>
<td>23.5</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.8</td>
</tr>
<tr>
<td>110</td>
<td>25.2</td>
<td>24.4</td>
<td>23.5</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.8</td>
</tr>
<tr>
<td>111</td>
<td>25.2</td>
<td>24.4</td>
<td>23.5</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.8</td>
</tr>
<tr>
<td>112</td>
<td>25.2</td>
<td>24.4</td>
<td>23.5</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.8</td>
</tr>
<tr>
<td>113</td>
<td>25.2</td>
<td>24.4</td>
<td>23.5</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.8</td>
</tr>
<tr>
<td>114</td>
<td>25.2</td>
<td>24.4</td>
<td>23.5</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.8</td>
</tr>
<tr>
<td>115+</td>
<td>25.2</td>
<td>24.4</td>
<td>23.5</td>
<td>22.7</td>
<td>21.6</td>
<td>21.0</td>
<td>20.2</td>
<td>19.4</td>
<td>18.6</td>
<td>17.8</td>
</tr>
</tbody>
</table>

Table II (continued)
(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)
Table II (continued)
(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Ages</th>
<th>70</th>
<th>71</th>
<th>72</th>
<th>73</th>
<th>74</th>
<th>75</th>
<th>76</th>
<th>77</th>
<th>78</th>
<th>79</th>
</tr>
</thead>
<tbody>
<tr>
<td>70</td>
<td>21.8</td>
<td>21.3</td>
<td>20.9</td>
<td>20.6</td>
<td>20.2</td>
<td>19.9</td>
<td>19.6</td>
<td>19.4</td>
<td>19.1</td>
<td>18.9</td>
</tr>
<tr>
<td>71</td>
<td>21.3</td>
<td>20.9</td>
<td>20.5</td>
<td>20.1</td>
<td>19.7</td>
<td>19.4</td>
<td>19.1</td>
<td>18.8</td>
<td>18.5</td>
<td>18.3</td>
</tr>
<tr>
<td>72</td>
<td>20.9</td>
<td>20.5</td>
<td>20.0</td>
<td>19.6</td>
<td>19.3</td>
<td>18.9</td>
<td>18.6</td>
<td>18.3</td>
<td>18.0</td>
<td>17.7</td>
</tr>
<tr>
<td>73</td>
<td>20.6</td>
<td>20.1</td>
<td>19.6</td>
<td>19.2</td>
<td>18.8</td>
<td>18.4</td>
<td>18.1</td>
<td>17.8</td>
<td>17.5</td>
<td>17.2</td>
</tr>
<tr>
<td>74</td>
<td>20.2</td>
<td>19.7</td>
<td>19.3</td>
<td>18.8</td>
<td>18.4</td>
<td>18.0</td>
<td>17.6</td>
<td>17.3</td>
<td>17.0</td>
<td>16.7</td>
</tr>
<tr>
<td>75</td>
<td>19.9</td>
<td>19.4</td>
<td>18.9</td>
<td>18.4</td>
<td>18.0</td>
<td>17.6</td>
<td>17.2</td>
<td>16.8</td>
<td>16.5</td>
<td>16.2</td>
</tr>
<tr>
<td>76</td>
<td>19.6</td>
<td>19.1</td>
<td>18.6</td>
<td>18.1</td>
<td>17.6</td>
<td>17.2</td>
<td>16.8</td>
<td>16.4</td>
<td>16.0</td>
<td>15.7</td>
</tr>
<tr>
<td>77</td>
<td>19.4</td>
<td>18.8</td>
<td>18.3</td>
<td>17.8</td>
<td>17.3</td>
<td>16.8</td>
<td>16.4</td>
<td>16.0</td>
<td>15.6</td>
<td>15.3</td>
</tr>
<tr>
<td>78</td>
<td>19.1</td>
<td>18.5</td>
<td>18.0</td>
<td>17.5</td>
<td>17.0</td>
<td>16.5</td>
<td>16.0</td>
<td>15.6</td>
<td>15.2</td>
<td>14.9</td>
</tr>
<tr>
<td>79</td>
<td>18.9</td>
<td>18.3</td>
<td>17.7</td>
<td>17.2</td>
<td>16.7</td>
<td>16.2</td>
<td>15.7</td>
<td>15.3</td>
<td>14.9</td>
<td>14.5</td>
</tr>
<tr>
<td>80</td>
<td>18.7</td>
<td>18.1</td>
<td>17.5</td>
<td>16.9</td>
<td>16.4</td>
<td>15.9</td>
<td>15.4</td>
<td>15.0</td>
<td>14.5</td>
<td>14.1</td>
</tr>
<tr>
<td>81</td>
<td>18.5</td>
<td>17.9</td>
<td>17.3</td>
<td>16.7</td>
<td>16.2</td>
<td>15.6</td>
<td>15.1</td>
<td>14.7</td>
<td>14.2</td>
<td>13.8</td>
</tr>
<tr>
<td>82</td>
<td>18.3</td>
<td>17.7</td>
<td>17.1</td>
<td>16.5</td>
<td>15.9</td>
<td>15.4</td>
<td>14.9</td>
<td>14.4</td>
<td>13.9</td>
<td>13.5</td>
</tr>
<tr>
<td>83</td>
<td>18.2</td>
<td>17.5</td>
<td>16.9</td>
<td>16.3</td>
<td>15.7</td>
<td>15.2</td>
<td>14.7</td>
<td>14.2</td>
<td>13.7</td>
<td>13.2</td>
</tr>
<tr>
<td>84</td>
<td>18.0</td>
<td>17.4</td>
<td>16.7</td>
<td>16.1</td>
<td>15.5</td>
<td>15.0</td>
<td>14.4</td>
<td>13.9</td>
<td>13.4</td>
<td>13.0</td>
</tr>
<tr>
<td>85</td>
<td>17.9</td>
<td>17.3</td>
<td>16.6</td>
<td>16.0</td>
<td>15.4</td>
<td>14.8</td>
<td>14.3</td>
<td>13.7</td>
<td>13.2</td>
<td>12.8</td>
</tr>
<tr>
<td>86</td>
<td>17.8</td>
<td>17.1</td>
<td>16.5</td>
<td>15.8</td>
<td>15.2</td>
<td>14.6</td>
<td>14.1</td>
<td>13.5</td>
<td>13.0</td>
<td>12.5</td>
</tr>
<tr>
<td>87</td>
<td>17.7</td>
<td>17.0</td>
<td>16.4</td>
<td>15.7</td>
<td>15.1</td>
<td>14.5</td>
<td>14.0</td>
<td>13.5</td>
<td>13.0</td>
<td>12.5</td>
</tr>
<tr>
<td>88</td>
<td>17.6</td>
<td>16.9</td>
<td>16.3</td>
<td>15.6</td>
<td>15.0</td>
<td>14.4</td>
<td>13.8</td>
<td>13.3</td>
<td>12.7</td>
<td>12.2</td>
</tr>
<tr>
<td>89</td>
<td>17.6</td>
<td>16.9</td>
<td>16.2</td>
<td>15.5</td>
<td>14.9</td>
<td>14.3</td>
<td>13.7</td>
<td>13.1</td>
<td>12.6</td>
<td>12.0</td>
</tr>
<tr>
<td>90</td>
<td>17.5</td>
<td>16.8</td>
<td>16.1</td>
<td>15.4</td>
<td>14.8</td>
<td>14.2</td>
<td>13.6</td>
<td>13.0</td>
<td>12.4</td>
<td>11.9</td>
</tr>
<tr>
<td>91</td>
<td>17.4</td>
<td>16.7</td>
<td>16.0</td>
<td>15.4</td>
<td>14.7</td>
<td>14.1</td>
<td>13.5</td>
<td>13.0</td>
<td>12.4</td>
<td>11.9</td>
</tr>
<tr>
<td>92</td>
<td>17.4</td>
<td>16.7</td>
<td>16.0</td>
<td>15.3</td>
<td>14.6</td>
<td>14.0</td>
<td>13.4</td>
<td>12.8</td>
<td>12.2</td>
<td>11.7</td>
</tr>
<tr>
<td>93</td>
<td>17.3</td>
<td>16.6</td>
<td>15.9</td>
<td>15.2</td>
<td>14.6</td>
<td>13.9</td>
<td>13.3</td>
<td>12.7</td>
<td>12.1</td>
<td>11.6</td>
</tr>
<tr>
<td>94</td>
<td>17.3</td>
<td>16.6</td>
<td>15.9</td>
<td>15.2</td>
<td>14.5</td>
<td>13.9</td>
<td>13.2</td>
<td>12.6</td>
<td>12.0</td>
<td>11.5</td>
</tr>
<tr>
<td>95</td>
<td>17.3</td>
<td>16.5</td>
<td>15.8</td>
<td>15.1</td>
<td>14.5</td>
<td>13.8</td>
<td>13.2</td>
<td>12.6</td>
<td>12.0</td>
<td>11.4</td>
</tr>
<tr>
<td>96</td>
<td>17.2</td>
<td>16.5</td>
<td>15.8</td>
<td>15.1</td>
<td>14.4</td>
<td>13.8</td>
<td>13.1</td>
<td>12.5</td>
<td>11.9</td>
<td>11.3</td>
</tr>
<tr>
<td>97</td>
<td>17.2</td>
<td>16.5</td>
<td>15.8</td>
<td>15.1</td>
<td>14.4</td>
<td>13.7</td>
<td>13.1</td>
<td>12.5</td>
<td>11.9</td>
<td>11.3</td>
</tr>
<tr>
<td>98</td>
<td>17.2</td>
<td>16.4</td>
<td>15.7</td>
<td>15.0</td>
<td>14.3</td>
<td>13.7</td>
<td>13.0</td>
<td>12.4</td>
<td>11.8</td>
<td>11.2</td>
</tr>
<tr>
<td>99</td>
<td>17.2</td>
<td>16.4</td>
<td>15.7</td>
<td>15.0</td>
<td>14.3</td>
<td>13.6</td>
<td>13.0</td>
<td>12.4</td>
<td>11.8</td>
<td>11.2</td>
</tr>
<tr>
<td>100</td>
<td>17.1</td>
<td>16.4</td>
<td>15.7</td>
<td>15.0</td>
<td>14.3</td>
<td>13.6</td>
<td>12.9</td>
<td>12.3</td>
<td>11.7</td>
<td>11.1</td>
</tr>
<tr>
<td>101</td>
<td>17.1</td>
<td>16.4</td>
<td>15.6</td>
<td>14.9</td>
<td>14.2</td>
<td>13.6</td>
<td>12.9</td>
<td>12.3</td>
<td>11.7</td>
<td>11.1</td>
</tr>
<tr>
<td>102</td>
<td>17.1</td>
<td>16.4</td>
<td>15.6</td>
<td>14.9</td>
<td>14.2</td>
<td>13.5</td>
<td>12.9</td>
<td>12.2</td>
<td>11.6</td>
<td>11.0</td>
</tr>
<tr>
<td>103</td>
<td>17.1</td>
<td>16.3</td>
<td>15.6</td>
<td>14.9</td>
<td>14.2</td>
<td>13.5</td>
<td>12.9</td>
<td>12.2</td>
<td>11.6</td>
<td>11.0</td>
</tr>
<tr>
<td>104</td>
<td>17.1</td>
<td>16.3</td>
<td>15.6</td>
<td>14.9</td>
<td>14.2</td>
<td>13.5</td>
<td>12.8</td>
<td>12.2</td>
<td>11.6</td>
<td>11.0</td>
</tr>
<tr>
<td>105</td>
<td>17.1</td>
<td>16.3</td>
<td>15.6</td>
<td>14.9</td>
<td>14.2</td>
<td>13.5</td>
<td>12.8</td>
<td>12.2</td>
<td>11.5</td>
<td>10.9</td>
</tr>
<tr>
<td>106</td>
<td>17.1</td>
<td>16.3</td>
<td>15.6</td>
<td>14.8</td>
<td>14.1</td>
<td>13.5</td>
<td>12.8</td>
<td>12.2</td>
<td>11.5</td>
<td>10.9</td>
</tr>
<tr>
<td>107</td>
<td>17.0</td>
<td>16.3</td>
<td>15.6</td>
<td>14.8</td>
<td>14.1</td>
<td>13.4</td>
<td>12.8</td>
<td>12.1</td>
<td>11.5</td>
<td>10.9</td>
</tr>
<tr>
<td>108</td>
<td>17.0</td>
<td>16.3</td>
<td>15.5</td>
<td>14.8</td>
<td>14.1</td>
<td>13.4</td>
<td>12.8</td>
<td>12.1</td>
<td>11.5</td>
<td>10.9</td>
</tr>
<tr>
<td>109</td>
<td>17.0</td>
<td>16.3</td>
<td>15.5</td>
<td>14.8</td>
<td>14.1</td>
<td>13.4</td>
<td>12.8</td>
<td>12.1</td>
<td>11.5</td>
<td>10.9</td>
</tr>
</tbody>
</table>
### Table II (continued)

**Joint Life and Last Survivor Expectancy**

(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Ages</th>
<th>70</th>
<th>71</th>
<th>72</th>
<th>73</th>
<th>74</th>
<th>75</th>
<th>76</th>
<th>77</th>
<th>78</th>
<th>79</th>
</tr>
</thead>
<tbody>
<tr>
<td>110</td>
<td>17.0</td>
<td>16.3</td>
<td>15.5</td>
<td>14.8</td>
<td>14.1</td>
<td>13.4</td>
<td>12.7</td>
<td>12.1</td>
<td>11.5</td>
<td>10.9</td>
</tr>
<tr>
<td>111</td>
<td>17.0</td>
<td>16.3</td>
<td>15.5</td>
<td>14.8</td>
<td>14.1</td>
<td>13.4</td>
<td>12.7</td>
<td>12.1</td>
<td>11.5</td>
<td>10.8</td>
</tr>
<tr>
<td>112</td>
<td>17.0</td>
<td>16.3</td>
<td>15.5</td>
<td>14.8</td>
<td>14.1</td>
<td>13.4</td>
<td>12.7</td>
<td>12.1</td>
<td>11.4</td>
<td>10.8</td>
</tr>
<tr>
<td>113</td>
<td>17.0</td>
<td>16.3</td>
<td>15.5</td>
<td>14.8</td>
<td>14.1</td>
<td>13.4</td>
<td>12.7</td>
<td>12.1</td>
<td>11.4</td>
<td>10.8</td>
</tr>
<tr>
<td>114</td>
<td>17.0</td>
<td>16.3</td>
<td>15.5</td>
<td>14.8</td>
<td>14.1</td>
<td>13.4</td>
<td>12.7</td>
<td>12.1</td>
<td>11.4</td>
<td>10.8</td>
</tr>
<tr>
<td>115+</td>
<td>17.0</td>
<td>16.3</td>
<td>15.5</td>
<td>14.8</td>
<td>14.1</td>
<td>13.4</td>
<td>12.7</td>
<td>12.1</td>
<td>11.4</td>
<td>10.8</td>
</tr>
</tbody>
</table>

### Table II (continued)

**Joint Life and Last Survivor Expectancy**

(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Ages</th>
<th>80</th>
<th>81</th>
<th>82</th>
<th>83</th>
<th>84</th>
<th>85</th>
<th>86</th>
<th>87</th>
<th>88</th>
<th>89</th>
</tr>
</thead>
<tbody>
<tr>
<td>80</td>
<td>13.8</td>
<td>13.4</td>
<td>13.1</td>
<td>12.8</td>
<td>12.6</td>
<td>12.3</td>
<td>12.1</td>
<td>11.9</td>
<td>11.7</td>
<td>11.5</td>
</tr>
<tr>
<td>81</td>
<td>13.4</td>
<td>13.1</td>
<td>12.7</td>
<td>12.4</td>
<td>12.2</td>
<td>11.9</td>
<td>11.7</td>
<td>11.4</td>
<td>11.3</td>
<td>11.1</td>
</tr>
<tr>
<td>82</td>
<td>13.1</td>
<td>12.7</td>
<td>12.4</td>
<td>12.1</td>
<td>11.8</td>
<td>11.5</td>
<td>11.2</td>
<td>11.0</td>
<td>10.8</td>
<td>10.6</td>
</tr>
<tr>
<td>83</td>
<td>12.8</td>
<td>12.4</td>
<td>12.1</td>
<td>11.7</td>
<td>11.4</td>
<td>11.1</td>
<td>10.9</td>
<td>10.6</td>
<td>10.4</td>
<td>10.2</td>
</tr>
<tr>
<td>84</td>
<td>12.6</td>
<td>12.2</td>
<td>11.8</td>
<td>11.4</td>
<td>11.1</td>
<td>10.8</td>
<td>10.5</td>
<td>10.3</td>
<td>10.1</td>
<td>9.9</td>
</tr>
<tr>
<td>85</td>
<td>12.3</td>
<td>11.9</td>
<td>11.5</td>
<td>11.1</td>
<td>10.8</td>
<td>10.5</td>
<td>10.2</td>
<td>9.9</td>
<td>9.7</td>
<td>9.5</td>
</tr>
<tr>
<td>86</td>
<td>12.1</td>
<td>11.7</td>
<td>11.3</td>
<td>10.9</td>
<td>10.5</td>
<td>10.2</td>
<td>9.9</td>
<td>9.6</td>
<td>9.4</td>
<td>9.2</td>
</tr>
<tr>
<td>87</td>
<td>11.9</td>
<td>11.4</td>
<td>11.0</td>
<td>10.6</td>
<td>10.3</td>
<td>9.9</td>
<td>9.6</td>
<td>9.4</td>
<td>9.1</td>
<td>8.9</td>
</tr>
<tr>
<td>88</td>
<td>11.7</td>
<td>11.3</td>
<td>10.8</td>
<td>10.4</td>
<td>10.1</td>
<td>9.7</td>
<td>9.4</td>
<td>9.1</td>
<td>8.8</td>
<td>8.6</td>
</tr>
<tr>
<td>89</td>
<td>11.5</td>
<td>11.1</td>
<td>10.6</td>
<td>10.2</td>
<td>9.9</td>
<td>9.5</td>
<td>9.2</td>
<td>8.9</td>
<td>8.6</td>
<td>8.3</td>
</tr>
<tr>
<td>90</td>
<td>11.4</td>
<td>10.9</td>
<td>10.5</td>
<td>10.1</td>
<td>9.7</td>
<td>9.3</td>
<td>9.0</td>
<td>8.6</td>
<td>8.3</td>
<td>8.1</td>
</tr>
<tr>
<td>91</td>
<td>11.3</td>
<td>10.8</td>
<td>10.3</td>
<td>9.9</td>
<td>9.5</td>
<td>9.1</td>
<td>8.8</td>
<td>8.4</td>
<td>8.1</td>
<td>7.9</td>
</tr>
<tr>
<td>92</td>
<td>11.2</td>
<td>10.7</td>
<td>10.2</td>
<td>9.8</td>
<td>9.3</td>
<td>9.0</td>
<td>8.6</td>
<td>8.3</td>
<td>8.0</td>
<td>7.7</td>
</tr>
<tr>
<td>93</td>
<td>11.1</td>
<td>10.6</td>
<td>10.1</td>
<td>9.6</td>
<td>9.2</td>
<td>8.8</td>
<td>8.5</td>
<td>8.1</td>
<td>7.8</td>
<td>7.5</td>
</tr>
<tr>
<td>94</td>
<td>11.0</td>
<td>10.5</td>
<td>10.0</td>
<td>9.5</td>
<td>9.1</td>
<td>8.7</td>
<td>8.3</td>
<td>8.0</td>
<td>7.6</td>
<td>7.3</td>
</tr>
<tr>
<td>95</td>
<td>10.9</td>
<td>10.4</td>
<td>9.9</td>
<td>9.4</td>
<td>9.0</td>
<td>8.6</td>
<td>8.2</td>
<td>7.8</td>
<td>7.5</td>
<td>7.2</td>
</tr>
<tr>
<td>96</td>
<td>10.8</td>
<td>10.3</td>
<td>9.8</td>
<td>9.3</td>
<td>8.9</td>
<td>8.5</td>
<td>8.1</td>
<td>7.7</td>
<td>7.4</td>
<td>7.1</td>
</tr>
<tr>
<td>97</td>
<td>10.7</td>
<td>10.2</td>
<td>9.7</td>
<td>9.2</td>
<td>8.8</td>
<td>8.4</td>
<td>8.0</td>
<td>7.6</td>
<td>7.3</td>
<td>6.9</td>
</tr>
<tr>
<td>98</td>
<td>10.7</td>
<td>10.1</td>
<td>9.6</td>
<td>9.2</td>
<td>8.7</td>
<td>8.3</td>
<td>7.9</td>
<td>7.5</td>
<td>7.1</td>
<td>6.8</td>
</tr>
<tr>
<td>99</td>
<td>10.6</td>
<td>10.1</td>
<td>9.6</td>
<td>9.1</td>
<td>8.6</td>
<td>8.2</td>
<td>7.8</td>
<td>7.4</td>
<td>7.0</td>
<td>6.7</td>
</tr>
<tr>
<td>100</td>
<td>10.6</td>
<td>10.0</td>
<td>9.5</td>
<td>9.0</td>
<td>8.5</td>
<td>8.1</td>
<td>7.7</td>
<td>7.3</td>
<td>6.9</td>
<td>6.6</td>
</tr>
<tr>
<td>101</td>
<td>10.5</td>
<td>10.0</td>
<td>9.4</td>
<td>9.0</td>
<td>8.5</td>
<td>8.0</td>
<td>7.6</td>
<td>7.2</td>
<td>6.9</td>
<td>6.5</td>
</tr>
<tr>
<td>102</td>
<td>10.5</td>
<td>9.9</td>
<td>9.4</td>
<td>8.9</td>
<td>8.4</td>
<td>8.0</td>
<td>7.5</td>
<td>7.1</td>
<td>6.8</td>
<td>6.4</td>
</tr>
<tr>
<td>103</td>
<td>10.4</td>
<td>9.9</td>
<td>9.4</td>
<td>8.8</td>
<td>8.4</td>
<td>7.9</td>
<td>7.5</td>
<td>7.1</td>
<td>6.7</td>
<td>6.3</td>
</tr>
<tr>
<td>104</td>
<td>10.4</td>
<td>9.8</td>
<td>9.3</td>
<td>8.8</td>
<td>8.3</td>
<td>7.9</td>
<td>7.4</td>
<td>7.0</td>
<td>6.6</td>
<td>6.3</td>
</tr>
<tr>
<td>105</td>
<td>10.4</td>
<td>9.8</td>
<td>9.3</td>
<td>8.8</td>
<td>8.3</td>
<td>7.8</td>
<td>7.4</td>
<td>7.0</td>
<td>6.6</td>
<td>6.2</td>
</tr>
<tr>
<td>106</td>
<td>10.3</td>
<td>9.8</td>
<td>9.2</td>
<td>8.7</td>
<td>8.2</td>
<td>7.8</td>
<td>7.3</td>
<td>6.9</td>
<td>6.5</td>
<td>6.2</td>
</tr>
<tr>
<td>107</td>
<td>10.3</td>
<td>9.8</td>
<td>9.2</td>
<td>8.7</td>
<td>8.2</td>
<td>7.7</td>
<td>7.3</td>
<td>6.9</td>
<td>6.5</td>
<td>6.1</td>
</tr>
<tr>
<td>108</td>
<td>10.3</td>
<td>9.7</td>
<td>9.2</td>
<td>8.7</td>
<td>8.2</td>
<td>7.7</td>
<td>7.3</td>
<td>6.8</td>
<td>6.4</td>
<td>6.1</td>
</tr>
<tr>
<td>109</td>
<td>10.3</td>
<td>9.7</td>
<td>9.2</td>
<td>8.7</td>
<td>8.2</td>
<td>7.7</td>
<td>7.2</td>
<td>6.8</td>
<td>6.4</td>
<td>6.0</td>
</tr>
<tr>
<td>110</td>
<td>10.3</td>
<td>9.7</td>
<td>9.2</td>
<td>8.6</td>
<td>8.1</td>
<td>7.7</td>
<td>7.2</td>
<td>6.8</td>
<td>6.4</td>
<td>6.0</td>
</tr>
<tr>
<td>111</td>
<td>10.3</td>
<td>9.7</td>
<td>9.1</td>
<td>8.6</td>
<td>8.1</td>
<td>7.6</td>
<td>7.2</td>
<td>6.8</td>
<td>6.3</td>
<td>6.0</td>
</tr>
<tr>
<td>112</td>
<td>10.2</td>
<td>9.7</td>
<td>9.1</td>
<td>8.6</td>
<td>8.1</td>
<td>7.6</td>
<td>7.2</td>
<td>6.7</td>
<td>6.3</td>
<td>5.9</td>
</tr>
<tr>
<td>113</td>
<td>10.2</td>
<td>9.7</td>
<td>9.1</td>
<td>8.6</td>
<td>8.1</td>
<td>7.6</td>
<td>7.2</td>
<td>6.7</td>
<td>6.3</td>
<td>5.9</td>
</tr>
<tr>
<td>114</td>
<td>10.2</td>
<td>9.7</td>
<td>9.1</td>
<td>8.6</td>
<td>8.1</td>
<td>7.6</td>
<td>7.1</td>
<td>6.7</td>
<td>6.3</td>
<td>5.9</td>
</tr>
<tr>
<td>115+</td>
<td>10.2</td>
<td>9.7</td>
<td>9.1</td>
<td>8.6</td>
<td>8.1</td>
<td>7.6</td>
<td>7.1</td>
<td>6.7</td>
<td>6.3</td>
<td>5.9</td>
</tr>
</tbody>
</table>

Publication 590 (2011)
Table II (continued)
(Joint Life and Last Survivor Expectancy)
(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>AGES</th>
<th>90</th>
<th>91</th>
<th>92</th>
<th>93</th>
<th>94</th>
<th>95</th>
<th>96</th>
<th>97</th>
<th>98</th>
<th>99</th>
</tr>
</thead>
<tbody>
<tr>
<td>90</td>
<td>7.8</td>
<td>7.6</td>
<td>7.4</td>
<td>7.2</td>
<td>7.1</td>
<td>6.9</td>
<td>6.8</td>
<td>6.6</td>
<td>6.5</td>
<td>6.4</td>
</tr>
<tr>
<td>91</td>
<td>7.6</td>
<td>7.4</td>
<td>7.2</td>
<td>7.0</td>
<td>6.8</td>
<td>6.6</td>
<td>6.4</td>
<td>6.3</td>
<td>6.1</td>
<td>6.0</td>
</tr>
<tr>
<td>92</td>
<td>7.4</td>
<td>7.2</td>
<td>7.0</td>
<td>6.8</td>
<td>6.6</td>
<td>6.4</td>
<td>6.2</td>
<td>6.1</td>
<td>5.9</td>
<td>5.8</td>
</tr>
<tr>
<td>93</td>
<td>7.2</td>
<td>7.0</td>
<td>6.8</td>
<td>6.6</td>
<td>6.4</td>
<td>6.2</td>
<td>6.0</td>
<td>5.9</td>
<td>5.7</td>
<td>5.6</td>
</tr>
<tr>
<td>94</td>
<td>7.1</td>
<td>6.8</td>
<td>6.6</td>
<td>6.4</td>
<td>6.2</td>
<td>6.0</td>
<td>5.9</td>
<td>5.7</td>
<td>5.6</td>
<td>5.4</td>
</tr>
<tr>
<td>95</td>
<td>6.9</td>
<td>6.7</td>
<td>6.4</td>
<td>6.2</td>
<td>6.0</td>
<td>5.8</td>
<td>5.7</td>
<td>5.5</td>
<td>5.4</td>
<td>5.2</td>
</tr>
<tr>
<td>96</td>
<td>6.8</td>
<td>6.5</td>
<td>6.3</td>
<td>6.1</td>
<td>5.9</td>
<td>5.7</td>
<td>5.5</td>
<td>5.3</td>
<td>5.2</td>
<td>5.0</td>
</tr>
<tr>
<td>97</td>
<td>6.6</td>
<td>6.4</td>
<td>6.1</td>
<td>5.9</td>
<td>5.7</td>
<td>5.5</td>
<td>5.3</td>
<td>5.2</td>
<td>5.0</td>
<td>4.9</td>
</tr>
<tr>
<td>98</td>
<td>6.5</td>
<td>6.3</td>
<td>6.0</td>
<td>5.8</td>
<td>5.6</td>
<td>5.4</td>
<td>5.2</td>
<td>5.0</td>
<td>4.8</td>
<td>4.7</td>
</tr>
<tr>
<td>99</td>
<td>6.4</td>
<td>6.1</td>
<td>5.9</td>
<td>5.6</td>
<td>5.4</td>
<td>5.2</td>
<td>5.0</td>
<td>4.9</td>
<td>4.7</td>
<td>4.5</td>
</tr>
<tr>
<td>100</td>
<td>6.3</td>
<td>6.0</td>
<td>5.8</td>
<td>5.5</td>
<td>5.3</td>
<td>5.1</td>
<td>4.9</td>
<td>4.7</td>
<td>4.5</td>
<td>4.4</td>
</tr>
<tr>
<td>101</td>
<td>6.2</td>
<td>5.9</td>
<td>5.6</td>
<td>5.4</td>
<td>5.2</td>
<td>5.0</td>
<td>4.8</td>
<td>4.6</td>
<td>4.4</td>
<td>4.3</td>
</tr>
<tr>
<td>102</td>
<td>6.1</td>
<td>5.8</td>
<td>5.5</td>
<td>5.3</td>
<td>5.1</td>
<td>4.8</td>
<td>4.6</td>
<td>4.4</td>
<td>4.3</td>
<td>4.1</td>
</tr>
<tr>
<td>103</td>
<td>6.0</td>
<td>5.7</td>
<td>5.4</td>
<td>5.2</td>
<td>5.0</td>
<td>4.7</td>
<td>4.5</td>
<td>4.3</td>
<td>4.1</td>
<td>4.0</td>
</tr>
<tr>
<td>104</td>
<td>5.9</td>
<td>5.6</td>
<td>5.4</td>
<td>5.1</td>
<td>4.9</td>
<td>4.6</td>
<td>4.4</td>
<td>4.2</td>
<td>4.0</td>
<td>3.8</td>
</tr>
<tr>
<td>105</td>
<td>5.9</td>
<td>5.6</td>
<td>5.3</td>
<td>5.0</td>
<td>4.8</td>
<td>4.5</td>
<td>4.3</td>
<td>4.1</td>
<td>3.9</td>
<td>3.7</td>
</tr>
<tr>
<td>106</td>
<td>5.8</td>
<td>5.5</td>
<td>5.2</td>
<td>4.9</td>
<td>4.7</td>
<td>4.5</td>
<td>4.2</td>
<td>4.0</td>
<td>3.8</td>
<td>3.6</td>
</tr>
<tr>
<td>107</td>
<td>5.8</td>
<td>5.4</td>
<td>5.1</td>
<td>4.9</td>
<td>4.6</td>
<td>4.4</td>
<td>4.2</td>
<td>3.9</td>
<td>3.7</td>
<td>3.5</td>
</tr>
<tr>
<td>108</td>
<td>5.7</td>
<td>5.4</td>
<td>5.1</td>
<td>4.8</td>
<td>4.6</td>
<td>4.3</td>
<td>4.1</td>
<td>3.9</td>
<td>3.7</td>
<td>3.5</td>
</tr>
<tr>
<td>109</td>
<td>5.7</td>
<td>5.3</td>
<td>5.0</td>
<td>4.8</td>
<td>4.5</td>
<td>4.3</td>
<td>4.0</td>
<td>3.8</td>
<td>3.6</td>
<td>3.4</td>
</tr>
<tr>
<td>110</td>
<td>5.6</td>
<td>5.3</td>
<td>5.0</td>
<td>4.7</td>
<td>4.5</td>
<td>4.0</td>
<td>3.8</td>
<td>3.5</td>
<td>3.3</td>
<td>3.1</td>
</tr>
<tr>
<td>111</td>
<td>5.6</td>
<td>5.3</td>
<td>5.0</td>
<td>4.7</td>
<td>4.4</td>
<td>4.2</td>
<td>3.9</td>
<td>3.7</td>
<td>3.5</td>
<td>3.3</td>
</tr>
<tr>
<td>112</td>
<td>5.6</td>
<td>5.3</td>
<td>4.9</td>
<td>4.7</td>
<td>4.4</td>
<td>4.1</td>
<td>3.9</td>
<td>3.7</td>
<td>3.5</td>
<td>3.2</td>
</tr>
<tr>
<td>113</td>
<td>5.6</td>
<td>5.2</td>
<td>4.9</td>
<td>4.6</td>
<td>4.4</td>
<td>4.1</td>
<td>3.9</td>
<td>3.6</td>
<td>3.4</td>
<td>3.2</td>
</tr>
<tr>
<td>114</td>
<td>5.6</td>
<td>5.2</td>
<td>4.9</td>
<td>4.6</td>
<td>4.3</td>
<td>4.1</td>
<td>3.9</td>
<td>3.6</td>
<td>3.4</td>
<td>3.2</td>
</tr>
<tr>
<td>115+</td>
<td>5.5</td>
<td>5.2</td>
<td>4.9</td>
<td>4.6</td>
<td>4.3</td>
<td>4.1</td>
<td>3.8</td>
<td>3.6</td>
<td>3.4</td>
<td>3.1</td>
</tr>
</tbody>
</table>

Publication 590 (2011)
### Table II (continued)

(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>AGES</th>
<th>100</th>
<th>101</th>
<th>102</th>
<th>103</th>
<th>104</th>
<th>105</th>
<th>106</th>
<th>107</th>
<th>108</th>
<th>109</th>
</tr>
</thead>
<tbody>
<tr>
<td>100</td>
<td>4.2</td>
<td>4.1</td>
<td>3.9</td>
<td>3.8</td>
<td>3.7</td>
<td>3.5</td>
<td>3.4</td>
<td>3.3</td>
<td>3.3</td>
<td>3.2</td>
</tr>
<tr>
<td>101</td>
<td>4.1</td>
<td>3.9</td>
<td>3.7</td>
<td>3.6</td>
<td>3.5</td>
<td>3.4</td>
<td>3.4</td>
<td>3.1</td>
<td>3.1</td>
<td>3.0</td>
</tr>
<tr>
<td>102</td>
<td>3.9</td>
<td>3.7</td>
<td>3.6</td>
<td>3.4</td>
<td>3.3</td>
<td>3.2</td>
<td>3.1</td>
<td>3.0</td>
<td>2.9</td>
<td>2.8</td>
</tr>
<tr>
<td>103</td>
<td>3.8</td>
<td>3.6</td>
<td>3.4</td>
<td>3.3</td>
<td>3.2</td>
<td>3.0</td>
<td>2.9</td>
<td>2.8</td>
<td>2.7</td>
<td>2.6</td>
</tr>
<tr>
<td>104</td>
<td>3.7</td>
<td>3.5</td>
<td>3.3</td>
<td>3.2</td>
<td>3.0</td>
<td>2.9</td>
<td>2.7</td>
<td>2.6</td>
<td>2.5</td>
<td>2.4</td>
</tr>
<tr>
<td>105</td>
<td>3.5</td>
<td>3.4</td>
<td>3.2</td>
<td>3.0</td>
<td>2.9</td>
<td>2.7</td>
<td>2.6</td>
<td>2.5</td>
<td>2.4</td>
<td>2.3</td>
</tr>
<tr>
<td>106</td>
<td>3.4</td>
<td>3.2</td>
<td>3.1</td>
<td>2.9</td>
<td>2.7</td>
<td>2.6</td>
<td>2.4</td>
<td>2.3</td>
<td>2.2</td>
<td>2.1</td>
</tr>
<tr>
<td>107</td>
<td>3.3</td>
<td>3.1</td>
<td>3.0</td>
<td>2.8</td>
<td>2.6</td>
<td>2.5</td>
<td>2.3</td>
<td>2.2</td>
<td>2.1</td>
<td>2.0</td>
</tr>
<tr>
<td>108</td>
<td>3.3</td>
<td>3.1</td>
<td>2.9</td>
<td>2.7</td>
<td>2.5</td>
<td>2.4</td>
<td>2.2</td>
<td>2.1</td>
<td>1.9</td>
<td>1.8</td>
</tr>
<tr>
<td>109</td>
<td>3.2</td>
<td>3.0</td>
<td>2.8</td>
<td>2.6</td>
<td>2.4</td>
<td>2.3</td>
<td>2.1</td>
<td>2.0</td>
<td>1.8</td>
<td>1.7</td>
</tr>
<tr>
<td>110</td>
<td>3.1</td>
<td>2.9</td>
<td>2.7</td>
<td>2.5</td>
<td>2.3</td>
<td>2.2</td>
<td>2.0</td>
<td>1.9</td>
<td>1.7</td>
<td>1.6</td>
</tr>
<tr>
<td>111</td>
<td>3.1</td>
<td>2.9</td>
<td>2.7</td>
<td>2.5</td>
<td>2.3</td>
<td>2.1</td>
<td>1.9</td>
<td>1.8</td>
<td>1.6</td>
<td>1.5</td>
</tr>
<tr>
<td>112</td>
<td>3.0</td>
<td>2.8</td>
<td>2.6</td>
<td>2.4</td>
<td>2.2</td>
<td>2.0</td>
<td>1.9</td>
<td>1.7</td>
<td>1.5</td>
<td>1.4</td>
</tr>
<tr>
<td>113</td>
<td>3.0</td>
<td>2.8</td>
<td>2.6</td>
<td>2.4</td>
<td>2.2</td>
<td>2.0</td>
<td>1.8</td>
<td>1.6</td>
<td>1.5</td>
<td>1.3</td>
</tr>
<tr>
<td>114</td>
<td>3.0</td>
<td>2.7</td>
<td>2.5</td>
<td>2.3</td>
<td>2.1</td>
<td>1.9</td>
<td>1.8</td>
<td>1.6</td>
<td>1.4</td>
<td>1.3</td>
</tr>
<tr>
<td>115+</td>
<td>2.9</td>
<td>2.7</td>
<td>2.5</td>
<td>2.3</td>
<td>2.1</td>
<td>1.9</td>
<td>1.7</td>
<td>1.5</td>
<td>1.4</td>
<td>1.2</td>
</tr>
</tbody>
</table>

---

### Table II (continued)

(For Use by Owners Whose Spouses Are More Than 10 Years Younger and Are the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>AGES</th>
<th>110</th>
<th>111</th>
<th>112</th>
<th>113</th>
<th>114</th>
<th>115+</th>
</tr>
</thead>
<tbody>
<tr>
<td>110</td>
<td>1.5</td>
<td>1.4</td>
<td>1.3</td>
<td>1.2</td>
<td>1.1</td>
<td>1.1</td>
</tr>
<tr>
<td>111</td>
<td>1.4</td>
<td>1.2</td>
<td>1.1</td>
<td>1.0</td>
<td>1.0</td>
<td>1.0</td>
</tr>
<tr>
<td>112</td>
<td>1.3</td>
<td>1.1</td>
<td>1.0</td>
<td>1.0</td>
<td>1.0</td>
<td>1.0</td>
</tr>
<tr>
<td>113</td>
<td>1.2</td>
<td>1.1</td>
<td>1.0</td>
<td>1.0</td>
<td>1.0</td>
<td>1.0</td>
</tr>
<tr>
<td>114</td>
<td>1.1</td>
<td>1.0</td>
<td>1.0</td>
<td>1.0</td>
<td>1.0</td>
<td>1.0</td>
</tr>
<tr>
<td>115+</td>
<td>1.1</td>
<td>1.0</td>
<td>1.0</td>
<td>1.0</td>
<td>1.0</td>
<td>1.0</td>
</tr>
</tbody>
</table>

---

Publication 590 (2011)
### Table III
(Uniform Lifetime)

(For Use by:
- Unmarried Owners,
- Married Owners Whose Spouses Are Not More Than 10 Years Younger, and
- Married Owners Whose Spouses Are Not the Sole Beneficiaries of Their IRAs)

<table>
<thead>
<tr>
<th>Age</th>
<th>Distribution Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>70</td>
<td>27.4</td>
</tr>
<tr>
<td>71</td>
<td>26.5</td>
</tr>
<tr>
<td>72</td>
<td>25.6</td>
</tr>
<tr>
<td>73</td>
<td>24.7</td>
</tr>
<tr>
<td>74</td>
<td>23.8</td>
</tr>
<tr>
<td>75</td>
<td>22.9</td>
</tr>
<tr>
<td>76</td>
<td>22.0</td>
</tr>
<tr>
<td>77</td>
<td>21.2</td>
</tr>
<tr>
<td>78</td>
<td>20.3</td>
</tr>
<tr>
<td>79</td>
<td>19.5</td>
</tr>
<tr>
<td>80</td>
<td>18.7</td>
</tr>
<tr>
<td>81</td>
<td>17.9</td>
</tr>
<tr>
<td>82</td>
<td>17.1</td>
</tr>
<tr>
<td>83</td>
<td>16.3</td>
</tr>
<tr>
<td>84</td>
<td>15.5</td>
</tr>
<tr>
<td>85</td>
<td>14.8</td>
</tr>
<tr>
<td>86</td>
<td>14.1</td>
</tr>
<tr>
<td>87</td>
<td>13.4</td>
</tr>
<tr>
<td>88</td>
<td>12.7</td>
</tr>
<tr>
<td>89</td>
<td>12.0</td>
</tr>
<tr>
<td>90</td>
<td>11.4</td>
</tr>
<tr>
<td>91</td>
<td>10.8</td>
</tr>
<tr>
<td>92</td>
<td>10.2</td>
</tr>
<tr>
<td>93</td>
<td>9.6</td>
</tr>
<tr>
<td>94</td>
<td>9.1</td>
</tr>
<tr>
<td>95</td>
<td>8.6</td>
</tr>
<tr>
<td>96</td>
<td>8.1</td>
</tr>
<tr>
<td>97</td>
<td>7.6</td>
</tr>
<tr>
<td>98</td>
<td>7.1</td>
</tr>
<tr>
<td>99</td>
<td>6.7</td>
</tr>
<tr>
<td>100</td>
<td>6.3</td>
</tr>
<tr>
<td>101</td>
<td>5.9</td>
</tr>
<tr>
<td>102</td>
<td>5.5</td>
</tr>
<tr>
<td>103</td>
<td>5.2</td>
</tr>
<tr>
<td>104</td>
<td>4.9</td>
</tr>
<tr>
<td>105</td>
<td>4.5</td>
</tr>
<tr>
<td>106</td>
<td>4.2</td>
</tr>
<tr>
<td>107</td>
<td>3.9</td>
</tr>
<tr>
<td>108</td>
<td>3.7</td>
</tr>
<tr>
<td>109</td>
<td>3.4</td>
</tr>
<tr>
<td>110</td>
<td>3.1</td>
</tr>
<tr>
<td>111</td>
<td>2.9</td>
</tr>
<tr>
<td>112</td>
<td>2.6</td>
</tr>
<tr>
<td>113</td>
<td>2.4</td>
</tr>
<tr>
<td>114</td>
<td>2.1</td>
</tr>
<tr>
<td>115 and over</td>
<td>1.9</td>
</tr>
</tbody>
</table>
The Kentucky Bar Foundation
The Charitable Arm of the Bar

The Kentucky Bar Foundation (KBF) was created in 1958 to improve and facilitate the administration of justice, help those in need through law-related programs, and to educate the public about the role of the judicial system and the legal profession in Kentucky. With the financial support of Kentucky attorneys, the Foundation accomplishes this objective by providing grants for law-related programs and projects throughout the Commonwealth. The KBF has awarded grants for 2012 in the sum of $203,000, and has given over $2,000,000 in total grants since 1988. This has had a positive effect on the lives of many in our communities through the following types of programs:

- educating the public about law and the justice system
- helping at-risk children
- providing funding to assist abused women and children
- providing funding to educate parents and children about drug abuse
- providing funding to educate high school seniors about abuse of credit
- preserving legal history

The KBF’s Partners For Justice, Fellows, Patrons and Sustaining Members’ charitable contributions have helped to fund KBF grants to nonprofit groups that have developed the above programs and other projects to better serve our citizens. To participate in the bar’s charitable law-related efforts, contact the KBF at 1-800-874-6582.

IOLTA

One of the most visible programs of the Kentucky Bar Foundation is the Interest on Lawyers’ Trust Accounts Fund (IOLTA). IOLTA collects the interest generated from pooled client funds held in trust by lawyers. Routinely, a lawyer may receive money from clients that must be held in escrow for future use. Attorneys deposit small or short-term multiple client funds into an IOLTA interest-bearing account at a participating bank. The interest earned is remitted directly by the bank to the IOLTA Fund. Historically, through its interest revenues, IOLTA has made significant grants to the legal services programs and local bar pro bono programs throughout the Commonwealth.

Thanks to your participation, the IOLTA Fund has awarded over 13.8 million dollars in grants since 1988. For more information, call 1-800-874-6582.
Lawyers Mutual understands your business. Other companies just want your business.

Lawyers Mutual’s Features

- Immediate assistance in claims avoidance and claims repair
- Up to $10,000 for attorneys fees in defending a bar complaint (outside of policy limits) per policy period
- $500 loss of earnings, for each named insured, each day when attending a trial, arbitration, mediation, or deposition up to $10,000 (outside of policy limits) per policy period
- Coverage for acts, errors, and omissions anywhere in the world
- Mediator/arbitrator coverage
- Coverage for non-lawyers for services performed in the course and scope of employment with the insured firm
- Penalty-free reporting for incidents or potential claims
- Immediate coverage for new partners, associates, and employees during the term of the policy, with no additional premium due until policy renewal
- Free extended reporting period endorsement (“tail” coverage) provided upon death
- Free extended reporting period endorsement (“tail” coverage) for retiring or disabled attorneys who have been with Lawyers Mutual for five consecutive years
- CLE premium discounts
- New lawyer discount of 60% in the first year of practice (with graduated discounts through the fourth year of practice)
NIA, EXCELLENCE IN SERVICE.

With over $50,000,000 in group life and disability insurance plan benefits paid to KBA members and their families since 1957,

National Insurance Agency is proud to introduce New York Life Insurance Company as the new underwriter beginning July 1, 2012.

WWW.NIAI.COM • PHONE 502-425-3232 • WRL@NIAI.COM