

KENTUCKY BAR ASSOCIATION



BENCH & BAR MAGAZINE

SEPTEMBER/OCTOBER 2019

IN THIS ISSUE: **Evidence**



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# It is KLU Season

BY: J. STEPHEN SMITH  
KBA PRESIDENT



## IT'S GOING WELL SO FAR.

This second president's page will find KBA members sometime in the fall of 2020. We will be knee deep in fall sports, raking leaves, and generally gearing up for the holidays. The KBA will already have appeared in many cities with the Kentucky Law Update (KLU) events and CLE programming, and I will have enjoyed the privilege of seeing old friends and meeting other Kentucky attorneys for the first time. The KLU's go on into December, and over 5,000 of us take advantage. When we come to your location, please let us know how we're doing, and if you have any questions or concerns, find me during a break in the programming.

The year goes quickly, and we are already well underway with the planning for the 2020 KBA Annual Convention scheduled for June 24-26, in Covington. One of the amazing realizations of being president of your KBA is that people say 'yes.' David Davidson and Loren Wolff said yes to co-chairing the 2020 convention.

David Kramer and Claire Parsons said yes to co-chairing the 2020 convention CLE effort. Dedicated staff, including John Meyers, Mary Beth Cutter, Caroline Carter, Melissa Blackwell, Michele Pogrosky, Shannon Roberts, Jesi Ebelhar, and Guion Johnstone put in a good deal of hard work.

Moreover, it takes a committee to make this work. Justice Michelle Keller, Judge David Bunning, Judge Allison Jones, Judge James Schrand, Judge Karen Thomas, Judge Kathy Lape, Christine Stanley, David Sloan, Jackie Sue Wright, Jennifer Lawrence, Michael Nitardy, Mike O'Hara, Robert Craig, Sarah McKenna, Tom Kerrick, Tom Rouse, and Todd McMurtry all said yes to working toward a successful 2020 convention.

As a group, we will make every effort to bring you an engaging and entertaining several days in northern Kentucky. The Cincinnati Reds will be in town, playing both the Cubs and Nationals during convention week. We'll reserve an appropriate block of tickets, but you might want to go twice. FC Cincinnati will be in its second season in the top tier of the MLS and might also

be in town. The Cincinnati Zoo, Krohn Conservatory, Cincinnati Art Museum, the Broadway Series, many smaller playhouses, the Newport Aquarium, Kings Island, New Riff and Boone distilleries, the Hoffbrauhaus and Braxton breweries, and on and on. I'll spend the year around the Commonwealth promoting the events and the opportunities that Covington will offer. I hope you'll bring your families and extend your stay to enjoy the area.

## MEMBER BENEFITS

There are a couple of relatively new member benefits to tout. They were rolled out at the Louisville Convention, I believe, and are timely and needed. Cyber-security is a large concern for all attorneys. Every practicing attorney, without exception, possesses information that criminals want. Attorneys are also often seen as soft targets because too many rely on basic, off the shelf, or pre-installed defenses. These defenses are just candy for savvy attackers and horror stories abound. Small legal offices also often overlook the value of cyber-insurance because they think attackers are only after the big offices; a dangerous falsity to rely on. Ransomware, phishing scams, and nesting

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schemes, among others, all target bank account access, client information, etc., in law firms of all sizes. Even a relatively small firm can possess millions of dollars of exposure within their systems.

The KBA now has an agreement with Bar Association Cyber Insurance, administered by Houchens Insurance Group, offering cyber insurance to KBA members. Ask around, shop around, and give this provider a chance to win your business for a product we all need.

In addition, encryption services are, or soon will be, offered through Identillect. This service will allow you to send and receive secure emails, protecting client information and you. Remember that we all have a duty to be technologically competent, and this type of protection is becoming the standard, not the exception. Again, give Identillect the chance to win your business so that you can do business with some peace of mind.

For more information on the two programs, turn to page 30 of this issue, as Michael Losavio, a member of the KBA's Law Practice Task Force, provides a detailed description of what they have to offer our members.

If there is a Kentucky attorney unaware of LMICK, KBA's preferred malpractice insurance provider, I don't understand how that could be the case. LMICK is everywhere we have an event, always a sponsor and a participant, and has been so since day one of LMICK's existence. They even offer free (please tip well) shoe shines at every convention. What is somewhat mystifying is that there are still Kentucky attorneys who choose not to carry insurance coverage. Failing to cover yourself and protect your clients from mistakes with such a reasonable product seems a bad bet. The KBA now lists who does and does not carry insurance on the website, and we all must disclose that we do or do not have coverage. Client's certainly have the right to know. Call LMICK and protect yourself.

### PARTICIPATE FOR WELLNESS

My final points today are to promote participation and wellness. The KBA has many ways to become involved and enrich

your practice. There are many governance committees, practice sections, the Young Lawyers Division, the Bar Leadership Conference, the KLU's, Convention, the Diversity Summit, random social events, CLE galore, and on and on. The KBA is enriched through your participation, and you need the 18,945 KBA members to enrich and elevate your own practice. We learn from each other.

Participating in KBA offerings with other attorneys is also healthy, because we can discuss the benefits and challenges of the profession. We can vent and celebrate. It is good when an event can be educational,

and equally important that events bring us together to share stories and bond over our common interests. It is true that most of us already have friends who are attorneys; however, interacting with attorneys outside of our immediate work environment and social group enlarges and humanizes the effort we all bring daily. It lends perspective. Technology allows us to practice in increasingly isolated patterns and is a convenient but generally an unhealthy trend. Please attend the KLU near you, have lunch with others, and maybe even gather afterward for whatever suits you socially. You'll be glad that you did.



## Terms Expire on the KBA Board of Governors

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

Any such petition must be received by the KBA Executive Director at the Kentucky Bar Center in Frankfort prior to the close of business on the last business day in October. Please visit the KBA website at [www.kybar.org/petition](http://www.kybar.org/petition) to obtain a petition.

### The current terms of the following Board Members will expire on June 30, 2020:

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<i>7<sup>th</sup> District</i>	
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# *2020 Distinguished Service Awards* **CALL FOR NOMINATIONS**



The Kentucky Bar Association is accepting nominations for 2020 Distinguished Judge and Lawyer, Donated Legal Services and Bruce K. Davis Bar Service Awards. Nominations must be received by December 31, 2019. If you are aware of a Kentucky judge or lawyer who has provided exceptional service in these areas, please complete a nominating form.

## **DISTINGUISHED JUDGE AWARD** and **DISTINGUISHED LAWYER AWARD**

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

## **DONATED LEGAL SERVICES AWARD**

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

## **BRUCE K. DAVIS BAR SERVICE AWARD**

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



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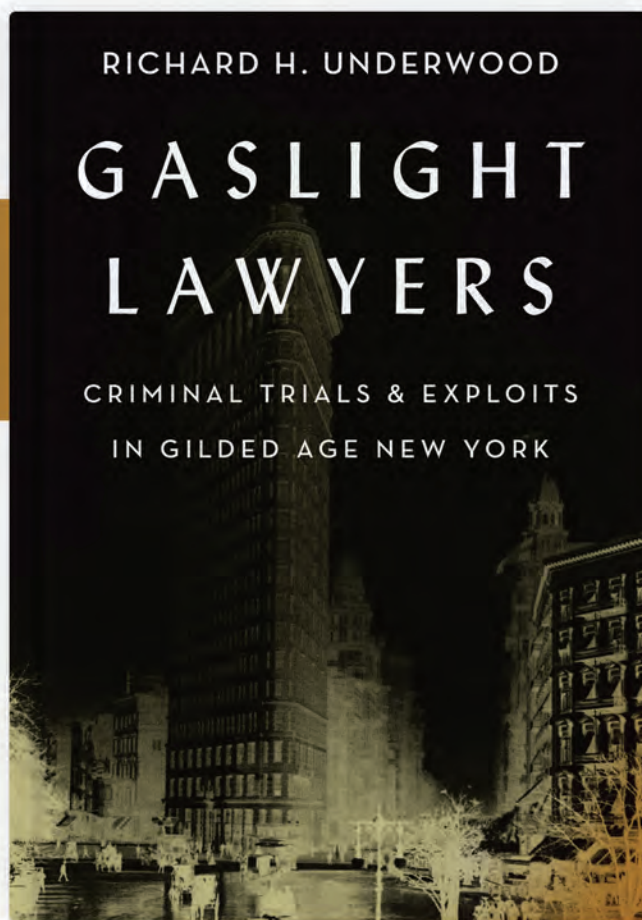
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## BOOK REVIEW BY JENNIFER L. BRINKLEY

**G**aslight Lawyers is an impressive read detailing the theatrics of criminal prosecution and defense in New York City during the last three decades of the 1800s, otherwise known as the Gaslight Era. And what an era in the legal profession this time period was. The word that comes to mind while reading this book is meticulous. Professor Richard Underwood, a self-described technician in the areas of ethics, trial advocacy, and evidence, has produced a body of work that is thoroughly researched and well sourced.

Professor Underwood examines the Gaslight Era by describing several larger-than-life lawyers of the New York bar and the important murder cases they prosecuted and defended. Their theatrics are documented in trial transcripts and media reports. Professor Underwood expertly interweaves trial transcripts with newspaper articles through the course of the book. Both criminal defense lawyers and prosecutors are featured. The reader is introduced to New York City during this era, not only to the way trials were conducted but also to the living geography of the city itself. The social conditions of the time are examined and the reader is transported back to candle-lit crime scenes, broken down tenement homes, and the thrum of the city. The role of media in criminal trials is also examined, and though journalistic ethics may have been different during the Gaslight Era, there is definitely a relatable sense of the impact media made on the outcome of jury trials. Additionally, some of the same biases in the criminal justice system highlighted in the book, including race, ethnicity, gender, and poverty, still impact the criminal justice system today.

The book starts with William “Big Bill” Howe, a popular criminal defense attorney known for his theatrics as well as his flamboyant attire, and his tense relationship with the Assistant District Attorney, Francis Wellman. Professor Underwood’s writing style puts the reader in the courtroom gallery. This first chapter details how formidable a force Howe was in the courtroom. Howe is described as an attorney who was tenacious, who could change his defense theory upon unfavorable testimony, and who could argue any point. The reader can easily imagine the disdain the prosecution would have had for Howe. In one example, Howe made sure to have the defendant’s young children in the courtroom following jury selection. This maneuver impacted the women in the courtroom, who



*Shadelandhouse Modern Press: Cover Design by Matt Tanner*

were quite sympathetic to the sight of the children clinging to the defendant. During the trial, one of the defendant’s children was sitting on the defendant’s knee during Howe’s summation to the jury. Howe decided on-the spot to incorporate the seven-year, who was playing with her father’s hair at the time, into his theory of the case. He dramatically claimed the child had committed some of the more sensational acts of the murder charge against her father, cutting off the victim’s head and mutilating the body. Instead of murder, the jury returned a verdict of manslaughter, much to the Judge’s disbelief.

My favorite section of the book details the trial of Maria Barbella. Barbella was charged with the murder of her lover and was ultimately convicted, becoming the first woman sentenced to die in the electric chair at Sing Sing. This section is fascinating because it examines not only the prosecution of this female defendant, but also the intersection of women’s rights and the law during this time.

Barbella had fallen in love with a man of somewhat ill repute. Domenico Cataldo had wooed Barbella with promises of marriage and possibly drugs and alcohol. When Cataldo was reluctant to actually commit to marriage on a date certain, Barbella became impatient. At one point, he stated he would not marry her unless

her mother gave him \$200, an exorbitant amount of money during this era. In response, Barbella wielded a razor and asked him once again to follow through with his promise of marriage. When he responded with taunts, Barbella slit his throat, fatally wounding him. She cleaned herself up and awaited her arrest.

Because Barbella was indigent, she was appointed an attorney by the name of Amos Evans. The famed attorney and author Henry Sedgwick even assisted Evans, and this would be Sedgwick's first case. They met with Barbella only one time before trial. Predictably, the defense did not go well. Among his many questionable rulings, Judge Goff made the following statement while delivering the jury instructions: "[a] jury has nothing to do with mercy. The law knows no distinction of persons. The law does not hold women less responsible than men. The female sex is sometimes used as a cloak for the most horrible crimes."

The jury took less than two hours to return a verdict of guilty. When she returned to court for sentencing, Barbella had new counsel. Frederick House had taken on her case and moved for a continuance. Judge Goff denied the request and imposed the penalty of death. News of the case spread like wildfire, igniting an outpouring of criticism and support. This case was exciting to members of the public as it involved ethnic division (Barbella was Italian and English was her second language), class division, sex discrimination, and, of course, murder. At the time, romantic paternalism was still alive and well and women were thought to be the inferior sex. Women would not be permitted to sit on New York juries until September 1937. Women did not have the right to vote. Women did not serve in the state legislature of New York until 1919.

A similar case from Kentucky was a topic of public interest, involving the killing of Archibald Brown, the son of Governor John Young Brown. Archibald had engaged in an affair with Mrs. Nellie Bush Gordon, the wife of Fulton Gordon. When Mr. Gordon discovered the affair, he shot and killed Archibald and Nellie. The trial judge dismissed the case at the close of the preliminary hearing, stating the action of the defendant was justified and could serve as a lesson for those engaging in adultery. Men could kill in the throes of domestic turbulence and come out unscathed. This was not the same for female defendants.

Suffragette Susan B. Anthony weighed in on the case to highlight the disparity in a death sentence imposed on a woman who could not speak fluent English (calling into question whether she could adequately assist in her own defense) and charged with a crime that, had it been committed by a man, death surely would not have been imposed. How would the verdict have been different if women could sit on the jury? Would the outcome be different if women had a hand in drafting the criminal statute and potential penalties?

House appealed Barbella's case to New York's high court. Judge Goff was found to have erred in various evidentiary rulings. The court was incredulous at the fact the jury convicted Barbella of premeditated murder in what seemed clearly to be the heat of

passion. Barbella was granted a new trial and presented a defense of "psychic epilepsy." Following this trial, the jury deliberated for less than an hour, returning a not guilty verdict.

There are other fascinating trials and arguments reconstructed in this book. It has a wide appeal to fans of historical non-fiction, criminology, trial procedure, and true crime, but it also involves humor and wit. There are individuals who make multiple appearances in this book and it is interesting to identify a lot of the players as direct relatives of known historical figures. It is also insightful to view trial work in an era that predated the public defender system, when *Miranda* warnings were not required, there was no established criminal forensic system, and no women served on juries or in the judiciary. Professor Underwood, through his meticulous research and his clever writing, creates an intricate work narrating the legal exploits of post-Civil War New York City. As the book cover sleeve states, it is an accounting of a time when "not every victim was quite so innocent, and not every defendant was as guilty as he (or she) looked." *Gaslight Lawyers* is a thought-provoking historical account of characters in the legal system whose exploits should not be lost through the passage of time.

#### ABOUT THE AUTHOR

**JENNIFER L. BRINKLEY** is an Assistant Professor of Legal Studies at University of West Florida in Pensacola. Her primary area of scholarship is women and the law. She has recently been published in the South Carolina Law Review and the Lincoln Memorial University Law Review. She has an article about Amanda's Law in Kentucky coming out in the Quinnipiac Law Review this fall.



Professor Underwood's books, *Gaslight Lawyers*, *Criminal Trials & Exploits in Gilded Age New York* and *CrimeSong: True Crime Stories from Southern Murder Ballads*, can be purchased at Joseph Beth Booksellers, Barnes & Noble, Amazon, and Shadelandhouse Modern Press. There is also a book tour scheduled for this fall with Professor Underwood, see below for dates and locations.

#### BOOK TOUR

**10.05 - Barnes & Noble** ELIZABETHTOWN, K.Y.  
*Gaslight Lawyers*

**10.08 - Mars Hill U.** ASHLAND, N.C.  
*With Artist Julyan Davis - CrimeSong*

**10.19 - Anderson County Public Library** LAWRENCEBURG, K.Y.  
*CrimeSong*

**11.08 - Appalshop** WHITESBURG, K.Y.  
*with artist Julyan Davis*



# Admissibility of Expert Opinion in Kentucky

## SUBSTANTIVE AND PROCEDURAL CONSIDERATIONS

BY DAVID V. KRAMER AND RYAN M. MCLANE

As science, technology, and medicine have become more advanced in recent decades, expert opinion evidence has understandably taken a more prominent role in civil and criminal litigation. During this time the legal system has developed heightened standards and procedures for scrutinizing proffered expert opinion to determine whether it is admissible. This article reviews the current state of Kentucky law on standards for admissibility of expert opinion evidence with a particular focus on substantive and procedural considerations for practitioners.

### A BRIEF HISTORY

In 1993, the United States Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals*<sup>1</sup> jettisoned the existing "Frye test"<sup>2</sup> for expert opinion evidence, under which the standard for admissibility

of expert opinion was whether it was generally accepted in the relevant discipline, and replaced it with what has come to be known as the *Daubert* test.

*Daubert* established four primary criteria that a trial court may use in assessing whether to admit expert opinion: "(1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community."<sup>3</sup>

This new test designated the trial court as "gatekeeper" of expert evidence and tasked trial courts with applying the foregoing factors to make a preliminary determination whether such evidence was sufficiently reliable and relevant to be admissible.<sup>4</sup> Notably, the *Daubert* criteria are not exclusive, and not all of them need to be applied in every case.<sup>5</sup>

In 1995, the Kentucky Supreme Court "followed the lead of the United States Supreme Court and adopted the rationale of the *Daubert* decision as the appropriate interpretation of the language of Rule 702."<sup>6</sup> The Kentucky Supreme Court reiterated its adoption of *Daubert* and its progeny in *Toyota Motor Corporation v. Gregory*,<sup>7</sup> and ultimately codified that approach in the 2007 amendments to KRE 702.<sup>8</sup>

## FEW BRIGHT-LINE RULES

A review of Kentucky *Daubert* case law leads to the realization that there are few bright-line rules with regard to the handling of expert opinion evidence in Kentucky. Perhaps that is the point. Indeed, the very nature of the *Daubert* criteria and Rule 702's requirements contemplate fact-specific inquiries into the reliability of expert opinion.

Examples of the disinclination toward broad or rigid expert evidence rules abound in Kentucky jurisprudence: Must the proponent of expert opinion produce the expert for cross-examination at a *Daubert* hearing? Not always.<sup>9</sup> Is the trial court required to hold a *Daubert* hearing? It depends on the circumstances.<sup>10</sup> Must the expert have practical experience in the subject field in order to qualify as an expert in it? It is helpful but not necessary.<sup>11</sup> Must an expert be licensed in a particular profession to opine within it? Preferably, but not in every case.<sup>12</sup>

A recent quote by Chief Justice Minton, writing for the Court in *Tigue v. Commonwealth*<sup>13</sup> on the subject of false-confession expert testimony illustrates this propensity against bright-line expert opinion rules: "Our conclusion is not a statement that false-confession expert testimony, is always admissible. The more accurate statement of our holding here is that false-confession expert testimony is not always inadmissible."

The Supreme Court's approach is clear. Admissibility of expert opinion evidence is to be determined on a case-by-case basis, and the trial court must apply Rule 702's requirements carefully to the given circumstances.

## IPSE DIXIT AND THE NEED FOR SUPPORTING AUTHORITY

In his treatise on classical Greek and Roman religions,<sup>14</sup> the Roman statesman Cicero recounted a story that factors heavily in *Daubert*-related case law. Cicero's dialogue reported that followers of the Greek philosopher Pythagoras would seek to win and end an argument by exclaiming "*autòs épha*," which in ancient Greek means "he himself said it." In other words, if Pythagoras said something, it must be so,

and the listener must accept it as true. In Latin, the phrase translates as "*ipse dixit*." It has come to signify the fallacy inherent in a speaker's asserting the truth of a statement based solely on the speaker's claim of authority.

The concept underlying the phrase *ipse dixit* has become an important consideration in assessing the admissibility of expert testimony. In this regard, trial courts must determine among other things whether an expert's opinions are reliable by considering the extent to which they are supported by valid scientific, technical, or other specialized knowledge, including peer-reviewed literature in the field.

Kentucky appellate courts have mentioned the *ipse dixit* principle in a number of cases in considering whether expert testimony was properly admitted or excluded. For instance, the Supreme Court upheld the trial court's exclusion, largely on the basis of *ipse dixit*, of the testimony of an engineer that a tire manufacturer could have made a safer tire since the testimony "was founded only on his bare assertion that this was so."<sup>15</sup> The Court of Appeals likewise upheld the trial court's exclusion of the testimony of an amusement park safety expert's *ipse dixit* opinions regarding the dangerousness of a roller coaster.<sup>16</sup> Even in a pre-*Daubert* case, Kentucky's highest court held that an expert's mere *ipse dixit* will not suffice to support a property valuation opinion when there was no evidence presented as a basis for it.<sup>17</sup> In short, an expert offering opinions primarily on the basis of *ipse dixit* (in other words, "because I say so") is properly subject to exclusion.

## THE BURDEN OF PROOF AND JUDICIAL NOTICE

The burden of proving whether the scientific theory underlying an expert's testimony is reliable under *Daubert* generally lies with the proffering party.<sup>18</sup> However, in rare circumstances, the burden can initially be shifted to the opponent if the underlying scientific method, technique, or theory "has been previously accepted as fact by the appropriate appellate court" and has been judicially noticed by the trial court.<sup>19</sup>

In *Johnson v. Commonwealth*, an expert offered opinions premised on microscopic comparisons of hair strands in the victim's hand to the defendant's hair.<sup>20</sup> Although the court judicially noticed the reliability of the challenged method, the opponent was still allowed to offer testimony rebutting the judicially noticed fact.<sup>21</sup> The Supreme Court accepted this practice, stating that "judicial notice relieves the proponent of the evidence from the obligation to prove in court that which has been previously accepted as fact by the appropriate appellate court."<sup>22</sup> Such notice "shifts to the opponent ... the burden to prove to the satisfaction of the trial judge that such evidence is no longer deemed scientifically reliable."<sup>23</sup> Even if a challenge to expert evidence is overruled based on judicial notice, the weight and credibility of the evidence can still be attacked at trial through cross-examination and rebuttal experts.<sup>24</sup>

Relying solely on judicial notice to support admission can be risky since such reliance may result in an inadequate record on appeal, for instance, in the event an appellate court rejects the trial court's taking of judicial notice. *Hamilton v. Commonwealth* provides a cautionary example. In that case, the trial court judicially noticed "Shaken Baby Syndrome" (SBS) because, it claimed, the scientific theory had been recognized as reliable by the Kentucky Supreme Court.<sup>25</sup> The Court of Appeals disagreed that the Supreme Court had previously recognized SBS as reliable.<sup>26</sup> The Court went on to state that "it was incumbent upon the [proponent] to demonstrate the reliability of the scientific method underpinning SBS, and it was [reversible] error for the trial court to judicially notice SBS and shift the burden to prove its unreliability onto [the opponent]."<sup>27</sup>

## WEIGHT OR ADMISSIBILITY?

Most litigators have heard a trial judge overrule a challenge to an expert witness on the premise that the challenge "goes to the weight and not the admissibility" of the testimony. The line between the trial court's performance of its gatekeeping function (i.e., determining admissibility of the expert opinion) versus invading the jury's role as fact-finder (i.e., ascribing the proper weight to give the expert opinion) is

not always clear. Indeed, this determination often presents a dilemma to the conscientious trial judge seeking to stay outside the jury's province while not shirking the duty to be the gatekeeper.

For example, in *Epperson v. Commonwealth*, the defendant challenged toxicology test results.<sup>28</sup> The Court concluded that the challenge went to the weight of the evidence and not the admissibility because the defendant did not attack "the scientific acceptability or reliability" of the blood test but attacked "the manner in which the single test of his blood was conducted."<sup>29</sup> Similarly, in *Garret v. Commonwealth*, the defendant challenged a ballistics analysis as having an unreliable subjective component.<sup>30</sup> The Supreme Court concluded that the test was reliable and that it was the jury's responsibility to evaluate any subjective components for credibility and reliability.<sup>31</sup> The defendant, therefore, should have directed his challenge to the weight of the expert's testimony "through cross-examination, as well as through the testimony of his own expert."<sup>32</sup>

### THE "DAUBERT HEARING" AND ESTABLISHING AN ADEQUATE RECORD

Whether an evidentiary hearing on the admissibility of expert testimony—a so-called *Daubert* hearing—is necessary continues to be an important question for trial courts and litigants. The answer to this question depends on the case-specific circumstances.

The Supreme Court has made clear there is no blanket requirement to hold a hearing on admissibility of expert testimony.<sup>33</sup> Rather, Kentucky law requires the trial court to make its determination on admissibility of expert testimony based on an "adequate record."<sup>34</sup> No formulaic test exists as to whether a given record is adequate. Rather, the record must be "complete enough to measure the proffered testimony against the proper standards of reliability and relevance ..."<sup>35</sup> If the record meets that standard, a *Daubert* hearing is not required.<sup>36</sup>

That "adequate record" standard is broad in nature and not always capable of clear

satisfaction. Perhaps for that reason, the Supreme Court has provided guidance on when a record is adequate in the absence of a *Daubert* hearing: "Usually, the record upon which a trial court can make an admissibility decision without a hearing will consist of the proposed expert's reports, affidavits, deposition testimony, existing precedent, and the like."<sup>37</sup>

Whether or not a *Daubert* hearing is held, the Supreme Court has expressly stated its preference that trial courts include findings of fact and conclusions of law in their *Daubert* rulings.<sup>38</sup> While a failure to include detailed findings is not automatic grounds for reversal,<sup>39</sup> the absence of such findings can require an appellate court to comb through the record and thereby needlessly subject the *Daubert* ruling to a higher level of appellate scrutiny and a greater risk of reversal. The prudent practitioner will thus request the trial court to make findings of fact in its order and will provide the trial court the evidence needed to do so.

If the trial court is not inclined to make findings of fact in its *Daubert* ruling, practitioners should consider, and request, what the Court of Appeals has called "the minimum." Specifically, "[w]hen the record is adequate, the minimum a court must do to fulfill the requirements of *Daubert* and its progeny is to make an affirmative

statement on the record that the court has reviewed the material submitted by the parties [relevant] to the testimony of the [expert witnesses] and [has] concluded that the testimony was reliable."<sup>40</sup> "[T]he court need not recite any of the *Daubert* factors, so long as the record is clear that the court effectively conducted a *Daubert* inquiry."<sup>41</sup>

### TRIAL COURT'S DISCRETION AND STANDARD OF REVIEW

The trial court's rulings on admissibility of expert testimony are evaluated in a two-step process under two deferential appellate review standards—clear error and abuse of discretion.<sup>42</sup> The trial court's preliminary findings of fact on reliability must first be reviewed for clear error,<sup>43</sup> under which the appellate court reviews "the record to see if there is substantial evidence to support the trial court's ruling."<sup>44</sup> Then, the trial court's determinations as to "whether the evidence will assist [the] trier of fact and the ultimate decision as to admissibility" must be reviewed for abuse of discretion,<sup>45</sup> under which the appellate court considers "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."<sup>46</sup>

### OVERVIEW

The limited number of bright-line rules and the discretionary nature of the gatekeeper's *Daubert* determination provide

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opportunities for lawyers to challenge an opponent's expert opinion evidence where a demonstrable question of the expert's qualifications or of the reliability of the expert's opinions exists. Moreover, a ruling on an expert challenge is likely to be upheld provided an adequate record has been made and the trial court has carefully fulfilled its gatekeeping function (preferably with written findings). On the other hand, the prudent practitioner should not file a *Daubert* challenge without the ability to prove serious deficiencies in the expert's qualifications or opinions. Otherwise, one risks a "weight not admissibility" ruling while simultaneously giving the opposition a roadmap to the challenger's cross-examination. **BB**

## ENDNOTES

1. 509 U.S. 579 (1993).
2. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
3. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 578-79 (Ky. 2000) (citations omitted).
4. KRE 702 Evidence Rules Review Commission Notes (2007); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
5. *Kumbo Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).
6. KRE 702 Evidence Rules Review Commission Notes (2007); *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995).
7. 136 S.W.3d 35 (Ky. 2004).
8. KRE 702 Evidence Rules Review Commission Notes (2007).
9. *Luna v. Commonwealth*, 460 S.W.3d 851 (Ky. 2015) (holding that, while unorthodox, the trial court did not abuse its discretion in declining to compel the Commonwealth to produce expert witnesses for examination at a *Daubert* hearing).
10. *Compare Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93 (Ky. 2008) (the record was adequate to make a *Daubert* ruling without an evidentiary hearing), with *Lukjan v. Commonwealth*, 358 S.W.3d 33 (Ky. App. 2012) (finding reversible error where the trial court neither held a *Daubert* hearing nor founded its ruling on an adequate record).
11. *Boon Edam, Inc. v. Saunders*, 324 S.W.3d 422 (Ky. App. 2010) (declining to establish a rule that practical experience in a given industry is necessary to qualify as an expert).
12. *Compare Elsea v. Day*, 448 S.W.3d 259 (Ky. App. 2014) (holding the trial court's determination that an expert was qualified to offer land boundary opinions, despite not being a licensed surveyor at the time of the events that were the subject of his testimony, was not an abuse of discretion), with *Brosnan v. Brosnan*, 359 S.W.3d 480 (Ky. App. 2012) (holding that an experienced social worker, who was not a

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- physician, psychiatrist, or psychologist, was not qualified to offer opinions on post-traumatic stress disorder).
13. --- S.W.3d ---, 2017-SC-000156-MR, \*17 (Ky. 2018).
14. *De Natura Deorum* ("On the Nature of the Gods").
15. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).
16. *West v. KKI, LLC*, 300 S.W.3d 184 (Ky. App. 2008).
17. *Commonwealth, Dept. of Highways v. Cecil*, 465 S.W.2d 250 (Ky. 1971).
18. *Commonwealth v. Martin*, 290 S.W.3d 59, 66 (Ky. App. 2008).
19. *Johnson v. Commonwealth*, 12 S.W.3d 258, 262 (Ky. 1999) (collecting cases discussing certain scientific methods, techniques, and theories that "have been recognized as reliable by [Kentucky] courts").
20. *Id.* at 260-61.
21. *Id.* at 261.
22. *Id.* at 262.
23. *Id.*
24. *See id.* n. 2 (citing *Crane v. Kentucky*, 476 U.S. 683 (1986)).
25. *Hamilton v. Commonwealth*, 293 S.W.3d 413, 417 (Ky. App. 2009).
26. *Id.* at 419.
27. *Id.* at 420.
28. *Epperson v. Commonwealth*, 437 S.W.3d 157 (Ky. App. 2014).
29. *Id.* at 165.
30. *Garrett v. Commonwealth*, 534 S.W.3d 217 (Ky. 2017).
31. *Id.* at 222.
32. *Id.* at 223.
33. *Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002).
34. *Id.* at 489.
35. *Hamilton v. Commonwealth*, 293 S.W.3d 413, 417 (Ky. App. 2009).

36. *Id.*
37. *Commonwealth v. Christie*, 98 S.W.3d at 488-89.
38. *See Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 101 (Ky. 2008) (holding that, absent a formal *Daubert* hearing, the trial "court had more than an adequate record before it to make its *Daubert* ruling" where the record at the pretrial hearing included voluminous discovery, depositions, reports and affidavits of experts, and extensive briefing by the parties).
39. *Id.*
40. *Lukjan v. Commonwealth*, 358 S.W.3d 33, 41 (Ky. App. 2012) (internal quotations omitted).
41. *Id.*
42. *Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004).
43. *Id.*
44. *Id.* at 917.
45. *Id.* at 915.
46. *Id.* at 914.

# Kentucky Rule of Evidence 807

BY: PROFESSOR CORTNEY E. LOLLAR,  
AARON W. MEEK AND MALLIE A. MYERS

The adjudication of child physical and sexual abuse claims poses difficult problems for courts across Kentucky and the nation. Often the crimes alleged are deeply troubling and involve children, an already vulnerable population, who have experienced additional heartbreaking circumstances and substantial harm. Yet the suggestibility of child witnesses and the circumstances surrounding their out-of-court statements raise significant concerns about inaccurate testimony and wrongful convictions. Child physical and sexual abuse cases regularly turn on the testimony of the child witness, making his or her testimony critical to the outcome of many criminal cases, dependency cases, and abuse and neglect cases, among others.

In response to this dilemma, Senator Whitney Westerfield, a former Christian County prosecutor, proposed an amendment to the Kentucky Rules of Evidence. The rule sought to create a new hearsay exception for certain out-of-court statements made by children under the age of 12 describing any sexual or physical abuse of the child. Under this proposal, in order to be considered exempt from the prohibition on hearsay, the court must first determine that the out-of-court statement has sufficient guarantees of trustworthiness using a totality of the circumstances test,<sup>1</sup> and then that the primary purpose of the statement is not “to create an out-of-court substitute for testimony.”<sup>2</sup> Assuming these two prongs are met, and proper notice is given to the opposing party, the child’s out-of-court statement could be admitted in two circumstances: (1) the child testifies, but the testimony on the stand does not include the information contained in the out-of-court statements or (2) the child’s testimony is not “reasonably obtainable” and corroborating evidence of the act exists.<sup>3</sup> Under the rule, testimony is not “reasonably obtainable” if, among other circumstances, the child claims a lack of memory of the subject matter of the statement or the child is unable to testify due to an “infirmity, including the child’s inability to communicate about the offense because of fear,” which would not improve if the trial were delayed.<sup>4</sup>

## THE PROCESS FOR AMENDING OR SUPPLEMENTING THE KENTUCKY RULES OF EVIDENCE

According to Kentucky statute, both the Supreme Court and the General Assembly have the power to amend or add to the Kentucky Rules of Evidence, with one substantial exception: consistent with the Kentucky Constitution, the Supreme Court maintains the sole authority to amend and enact evidentiary rules of “practice and procedure.”<sup>5</sup> Evidentiary rules other than those related to privilege are typically considered rules of practice and procedure.<sup>6</sup> Kentucky Rule of Evidence 1102 strongly encourages both the

Supreme Court and the General Assembly to rely on the Evidence Rules Review Commission before enacting a permanent change to the evidentiary rules.<sup>7</sup>

The Evidence Rules Review Commission is an advisory body convened by the Chief Justice of the Supreme Court and tasked with “reviewing proposals for amendment or addition to the Kentucky Rules of Evidence, as requested by the Supreme Court or General Assembly pursuant to KRE 1102.”<sup>8</sup> The Commission is comprised of the Chief Justice of the Kentucky Supreme Court, one additional member of the judiciary, the chairs of the House and Senate Judiciary Committee, a member of the KBA Board of Governors, and five members of the Bar appointed by the Chief Justice.<sup>9</sup> The Commission reviews proposed rules with an eye toward “secur[ing] fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”<sup>10</sup>

### PROPOSED KRE 807’S PATH

At the time he proposed adding Rule 807 to the existing evidentiary rules, Senator Westerfield was a member of the Evidence Rules Review Commission. Consequently, he first sought the Commission’s support before introducing the proposed rule to his colleagues in the legislature. After reviewing the proposal, on February 27, 2018, the Commission advised against adopting the hearsay exception.

The Commission rejected the proposal on three grounds: (1) the proposed rule failed to comport with the justifications underlying hearsay exceptions; (2) the proposed rule threatened the defendant’s Constitutional right of confrontation; and (3) other statutes and rules provide reasonable safeguards to alleged child victims in the context of trial testimony.<sup>11</sup>

First, the majority noted several key features of the established exceptions to the rule against hearsay. The Commission observed that the general prohibition against hearsay derives from the fact that the statements are made outside of the scrutiny of cross-examination. As a result, the trier of fact cannot judge the credibility of the declarant. The exceptions to the prohibition on hearsay, then, involve sources of information that are deemed trustworthy enough to overcome the lack of cross-examination.

Comparing the proposed rule to the existing hearsay exceptions, the Commission noted that most exceptions are not case- or subject-matter specific, and none are premised on the age or disability of the declarant.<sup>12</sup> In addition to noting other distinguishing features of existing hearsay exceptions, the Commission observed “the six exceptions, which tend to have application in the broadest range of cases, are based upon centuries of human experience that provide strong circumstantial guarantees of trustworthiness not found in out-of-court statements.”<sup>13</sup> By contrast, this proposed exception—which is based on the subject matter of the testimony and the age or disability of the declarant, and is not steeped in the “centuries of human experience that provide strong circumstantial

guarantees of trustworthiness”—does not resemble a traditional hearsay exception. According to the Commission, “instead of reliance upon long-recognized guarantees of trustworthiness that underpin traditional hearsay exceptions,” the proposed exception “places upon the trial court the responsibility for making pre-trial determinations of the trustworthiness of out-of-court statements as the avenue of admissibility.”<sup>14</sup>

Moreover, the Commission noted, the proposed rule would create a new form of declarant unavailability, related to fear or “the influence of other adults,” which is not present in any other exception. In the Commission’s view, “the process envisioned by this rule is presumably similar, albeit tailored to the specific type of conduct at issue, to that envisioned by the ‘residual hearsay rule,’” a rule the drafters of the initial Kentucky Rules of Evidence and the Kentucky Supreme Court specifically rejected when adopting the Rules of Evidence.<sup>15</sup> In summary, the Commission stated, “the Proposed Rule represents a significant departure from the established framework of the hearsay rule as embodied in the current rules of evidence.”<sup>16</sup>

In addition to these concerns, the Commission emphasized the potential Confrontation Clause<sup>17</sup> issues. Although the majority acknowledged that the rule specifically excludes testimonial statements from falling into the exception, these Commission members remained concerned that testimonial statements will be admitted due to a lack of clarity as to what constitutes a “testimonial” statement.

The proposed rule’s sponsors modeled the rule on a similar Ohio rule which survived a constitutional Confrontation Clause challenge in the landmark U.S. Supreme Court decision, *Ohio v. Clark*.<sup>18</sup> In *Clark*, a teacher reported to a child abuse hotline that one of her students possessed visible facial injuries and conveyed the child’s identification of her alleged abuser to the hotline. The Court determined that the child’s statements to the teacher were non-testimonial because they were spontaneously made in the context of an on-going emergency and were communicated to a person not principally charged with investigating criminal behavior. As such, the child’s statements did not violate the defendant’s Confrontation Clause rights and were properly admitted into evidence.

Notwithstanding the Court’s decision in *Clark*, the Commission noted that many of the scenarios the proposed rule was designed to address involved statements arising out of situations more closely resembling investigation and interrogation than the facts in *Clark*. The Commission highlighted another Ohio decision, *Ohio v. Arnold*, in which the state Supreme Court found that statements made to a child advocacy center social worker were testimonial.<sup>19</sup> The *Arnold* court emphasized that a social worker at a child advocacy center occupies a dual role: he or she is both a forensic investigator working with law enforcement and a medical interviewer obtaining information necessary for treatment.<sup>20</sup> As a result, child witness statements related to treatment are non-testimonial, but statements which are forensic or investigative in nature are testimonial and therefore inadmissible.

The interview process described in *Arnold* closely resembles the practice in Kentucky's child advocacy centers, the Commission observed, and thus it anticipated these interviews would be a primary source of the statements attorneys would seek to admit under the proposed rule. Consequently, the Commission expressed reservations about the proposed rule's impact on the Constitutional confrontation rights of criminal defendants, given that the interview process "may well be one that produces statements ultimately inadmissible under the Confrontation Clause of the Sixth Amendment."<sup>21</sup>

Finally, observing that this proposed rule "is not the first effort from the Kentucky General Assembly to address the admissibility of out-of-court statements made by children who are alleged to have been the victims of sexual abuse," the Commission emphasized that other Kentucky laws adequately protect the interests of alleged child victims.<sup>22</sup> One example is KRS § 421.350, which allows an alleged victim of child sexual abuse to testify outside of the courtroom via closed-circuit television or by video-recorded testimony in certain circumstances.<sup>23</sup> Similarly, KRS § 26A.140 allows for testifying children to be shielded from visual contact with the defendant in "appropriate cases," provided the court finds a compelling need for such screening.<sup>24</sup> In other words, the proposed rule offers no greater protection to vulnerable victims than those already provided under Kentucky law.

In light of the substantial concerns and the limited benefits offered by the proposed rule, the Commission recommended against adopting it: "[T]he Proposed Rule conflicts with the fundamental premise that the search for the truth is aided by the ability of an accused to confront and cross-examine the accuser in the presence of a jury of peers. In addition, the Proposed Rule represents a significant departure from the established framework of the hearsay rule as embodied in the current rules of evidence.... In the end, the balance of these concerns weighs against adoption of the Proposed Rule."<sup>25</sup>

Three members of the Commission dissented.<sup>26</sup> Their Minority Report emphasized that the out-of-court statements at issue often fall outside of the scope of other hearsay exceptions: the excited utterance exception rarely allows for their admissibility because often the out-of-court statements are made days or weeks after the exciting incident; the medical diagnosis exception denies the admission of statements a child makes to medical professionals identifying their assailant because such statements do not relate to their diagnosis.<sup>27</sup> The minority also disagreed with the majority's Confrontation Clause concerns, emphasizing that the proposed rule by its own terms excludes testimonial statements. Because there is "no mechanism" under Kentucky law for a child's "relevant, probative, reliable, and trustworthy" out-of-court statements to be admitted, the Minority Report asserted, a "thoughtful, careful departure from the 'established framework' of hearsay evidence is overdue."<sup>28</sup>

Subsequent to the Evidence Rules Review Commission's consideration of the rule, but a few weeks before it made its recommendation against adoption of the rule, Senator Westerfield introduced

proposed Kentucky Rule of Evidence 807 as Senate Bill 137 to the General Assembly.<sup>29</sup> Following a minor technical amendment, the bill passed both chambers of the state legislature without objection. Two months after the proposed rule's introduction, Governor Bevin signed the bill into law.<sup>30</sup> The new statute generated considerable conversation in the Kentucky legal community.

Ultimately, consistent with state law, the Kentucky Supreme Court had the final say on whether Kentucky proposed Rule 807 would become a new part of the Kentucky Rules of Evidence. After all, the hearsay rules and their exceptions are rules of practice and procedure, evidentiary rules that, according to the Constitution and state statute, only the Supreme Court may amend.<sup>31</sup> As KRE 1102 specifies,

The General Assembly may amend any proposal reported by the Supreme Court ... and may adopt amendments or additions to the Kentucky Rules of Evidence not reported to the General Assembly by the Supreme Court. However, the General Assembly may not amend any proposals reported by the Supreme Court and *may not adopt amendments or additions to the Kentucky Rules of Evidence that constitute rules of practice and procedure under Section 116 of the Constitution of Kentucky.*<sup>32</sup>

Thus, the decision on proposed Rule 807 belonged to the Kentucky Supreme Court.

In consideration of the proposal, the Court held a lengthy Supreme Court Rules Hearing at the Kentucky Bar Association's annual conference in 2018 to discuss the new law.<sup>33</sup> Notable scholars, policymakers, and practitioners testified both in favor of and against proposed KRE 807 during that hearing. Following several months of consideration and debate, on September 21, 2018, the Kentucky Supreme Court rejected the proposed amendment, relying on the majority opinion of the Commission in its order.<sup>34</sup>

In a short opinion, with all justices concurring, the Court reviewed the Commission's proceedings, and concluded, "The Supreme Court of Kentucky hereby adopts the recommendation of the Kentucky Evidence Rules Review Commission and thereby declines to adopt the proposed amendment. This Court recognizes the concern addressed in the proposed amendment and would consider alternate approaches upon presentation of future proposals."<sup>35</sup>

## WHAT HAPPENS NOW?

Despite its passage into law by the legislature and governor, proposed KRE 807 has been rejected by the Supreme Court in accordance with well-established procedures and constitutional law. As a result, attorneys seeking to admit out-of-court statements by child witnesses in cases with allegations of physical and sexual abuse cannot rely on KRE 807 as a vehicle for admissibility. The Supreme Court's opinion leaves open the possibility that a differently worded or conceptualized amendment to the Kentucky Rules of Evidence could be considered. However, in light of the proceedings leading up to the Supreme Court's opinion on this proposal, and its rejection of a similar statute enacted by the legislature in 1986,<sup>36</sup> any proposal

will have to convince the Evidence Rules Review Committee—and ultimately the Supreme Court—that the new evidentiary rule passes constitutional muster, is consistent with the overall objectives of the evidentiary rules, and adequately addresses the reliability concerns related to hearsay exceptions. **B&B**

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## ENDNOTES

1. Proposed KRE § 807(a)(1).
2. Proposed KRE § 807(a)(3).
3. Proposed KRE § 807(a)(2).
4. Proposed KRE § 807(b)(1)(A)-(C). Additionally, a child's testimony is not reasonably obtainable if the child is deceased, has a physical or mental illness, or the child is simply absent from the trial and her attendance or testimony cannot be obtained "by process or other reasonable means despite a good-faith effort to do so."

5. KRE § 1102; Ky. CONST. § 116. See also Robert G. Lawson, *Modifying the Kentucky Rules of Evidence – A Separation of Powers Issue*, 88 Ky. L.J. 525, 529-30 (2000).
6. Lawson, *supra* note 5, at 569 ("Most who have studied the substance/procedure dichotomy in the context of evidence law adhere to the view that 'the great bulk of what we presently know as the law of evidence is procedure.'"); *id.* at 572 ("It is safe to say, as we have so often been told, that the bulk of our evidence rules are indeed procedural."); *id.* at 576 ("Most of the case law predating adoption of the Federal Rules had classified the law of privileges as 'substantive' rather than 'procedural.'"); *id.* at 577 (discussing how Congress reached the conclusion, in relation to adopting the Federal Rules of Evidence, that privileges are substantive rather than procedural); *id.* at 580 (recognizing that the Kentucky General Assembly has "exercised authority over privilege rules for at least several decades" with no objection by the courts, and noting that preeminent scholars continue to recognize privilege as substantive law).
7. KRE § 1102(c) ("Neither the Supreme Court nor the General Assembly should undertake to amend or add to the Kentucky Rules of Evidence without first obtaining a review of proposed amendments or additions from the Evidence Rules Review Commission described in KRE 1103.")
8. KRE § 1103(b).
9. KRE § 1103(a).
10. KRE § 1103(b); KRE § 102.
11. Ky. Evid. Rules Rev. Comm'n Recommendation, at 1, 2, *available at* [https://kycourts.gov/courts/supreme/Rules\\_Procedures/201814.pdf](https://kycourts.gov/courts/supreme/Rules_Procedures/201814.pdf), Attachment 1 (Sept. 21, 2018).
12. *Id.*
13. *Id.*
14. *Id.*, at 2.
15. *Id.*
16. *Id.*, at 5.
17. U.S. CONST., amend. VI ("In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.")
18. Ky. Evid. Rules Rev. Comm'n Recommendation, at 2 (citing *Ohio v. Clark*, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015)); OHIO EVID. R. § 807.
19. *Ohio v. Arnold*, 933 N.E.2d 775 (Oh. 2010).
20. *Id.* at 777-78.
21. Ky. Evid. Rules Rev. Comm'n Recommendation, at 3.
22. *Id.*
23. KRS § 421.350. The Kentucky Supreme Court held that one section of the statute was unconstitutional in *Gaines v. Commonwealth*, 728 S.W.2d 525 (Ky. 1987), but the statute has otherwise remained in force since its enactment. Moreover, the Kentucky Supreme Court cited the statute favorably in later decisions. See, e.g., *Danner v. Commonwealth*, 963 S.W.2d 632 (Ky. 1998).
24. KRS § 26A.140; *J.E. v. Commonwealth*, 521 S.W.3d 210 (Ky. App. 2017) (holding that the District Court's failure to articulate a compelling need for visual screening violated the defendant's right of confrontation).
25. Ky. Evid. Rules Rev. Comm'n Recommendation, at 5.
26. Senator Westerfield, Representative Joe Fischer, and Commonwealth's Attorney Jackie Steele dissented.
27. See *Colvard v. Commonwealth*, 309 S.W.3d 239 (Ky. 2010).
28. Ky. Evid. Rules Rev. Comm'n Recommendation Minority Report, at 2, *available at* [https://kycourts.gov/courts/supreme/Rules\\_Procedures/201814.pdf](https://kycourts.gov/courts/supreme/Rules_Procedures/201814.pdf), Attachment 9.
29. Senator Westerfield introduced the bill to the Senate on February 2, 2018; the Commission began considering the bill in November 2017, and after several meetings, voted to reject it on February 27, 2018.
30. See 2018 Ky. Acts 116.
31. Lawson, *supra* note 5, at 529-30.
32. KRE § 1102 (EMPHASIS ADDED).
33. See Colin Crawford & Ariana Levinson, Univ. of Louisville: Dispatches from the Dean, *Will Kentucky adopt a new hearsay exception?*, *available at* <https://louisville.edu/law/about/deans-blog/will-kentucky-adopt-a-new-hearsay-exception> (last visited Aug. 3, 2019); conversation with Professor Robert Lawson (Aug. 2, 2019).
34. Order 2018-14, *IN RE: Proposed Amendment of the Kentucky Rules of Evidence*, (Ky. Sept. 21, 2018), *available at* [https://kycourts.gov/courts/supreme/Rules\\_Procedures/201814.pdf](https://kycourts.gov/courts/supreme/Rules_Procedures/201814.pdf).
35. *Id.* at 2.
36. See *Drumm v. Comm.*, 783 S.W.2d 380 (Ky. 1990) (*finding KRS § 421.355 unconstitutional*).



# You'd Better **Not** Delete That File: Spoliation and the Expanding Duty to Save Records

By: Joshua J. Leckrone and Lucas R. Harrison

Questions concerning the identification, preservation, and inadvertent destruction of potential evidence from the beginnings of a pre-trial matter through litigation of a filed claim can be daunting. Under a collection of case law and statutory schemes, the duty to preserve evidence is clear. However, in the majority of instances, especially in Kentucky, the duty to preserve information potentially relevant to litigation is a fact-based question which requires appropriate knowledge and preparation.

## THE DUTY TO PRESERVE

Under federal law, the rules governing the preservation of evidence have been discussed in detail and have developed rapidly with the use of electronically stored information. Kentucky has not created a bright-line rule for when the duty to preserve evidence arises, either through case law or statute. As a result, the best practice for Kentucky attorneys is to mirror federal requirements. To that end, it is advisable for a party to preserve evidence when the party receives notice the evidence is relevant to litigation or where the party should know the evidence may be relevant to future litigation.<sup>1</sup>

Once a party is put on notice of litigation, or reasonably anticipates it, the party should suspend operation of any existing policy for document destruction, and instead impose a litigation hold to assure preservation of the relevant documentation. Observing this obligation to preserve documents is legally mandatory.<sup>2</sup> Without a pre-litigation duty to preserve, a party could simply sabotage the discovery process of future, reasonably anticipated litigation by destroying any potentially relevant evidence.<sup>3</sup> However, where a party has no knowledge of any current or potential litigation, destruction of documents under a document retention policy—particularly one following industry standards—is nevertheless acceptable.<sup>4</sup>

The duty to preserve attaches immediately upon notice of a claim, of impending litigation, or of actual litigation. An impending suit, a demand letter, notice of a claim under an insurance policy, or service of process will commence the duty to preserve evidence in nearly all cases.<sup>5</sup> All four scenarios provide the necessary notice of potential litigation and the need to preserve any existing, potentially relevant evidence.

The most commonly used tool is the litigation hold letter. A litigation hold letter provides a party pre-suit notice that any existing evidence may be relevant to future litigation.<sup>6</sup> It enumerates the items of evidence believed to be relevant, and broad categories of evidence that may be relevant. Typically, the recipient is instructed to “preserve and not destroy” any and all evidence that may be relevant to the claim and anticipated suit.

Upon receipt of a litigation hold letter, the receiving party must take the necessary steps to preserve any existing, potentially relevant evidence.<sup>7</sup> The receiving party’s duties include conducting an investigation of whether any requested documents exist, identifying their location, and ensuring their preservation.<sup>8</sup> A party’s failure to undertake the necessary preservation steps after the duty to preserve arises, resulting in the loss or destruction of relevant information,

could result in unfavorable consequences once the suit is filed.<sup>9</sup>

## CONSEQUENCES OF VIOLATING THE DUTY TO PRESERVE

Once litigation has been filed, the presiding judge has broad discretion to resolve disputes over evidence that was not properly preserved pre-suit. Trial judges can take a wide variety of corrective actions, including sanctions such as exclusion of evidence and payment of fines, costs, and attorney’s fees.<sup>10</sup> Parties will sometimes seek outright dismissal or default judgment when they allege the loss of relevant evidence is particularly egregious.<sup>11</sup> Kentucky’s courts have rejected arguments that dispositive relief is a mandatory consequence of spoliation, though it has not ruled out the possibility that it could be appropriate under the right circumstances.<sup>12</sup>

Courts hold the discretion to decide what admonitions or instructions are to be given to the jury under the evidence and circumstances present.<sup>13</sup> Appellate review of a trial court’s decision concerning whether or not to provide a spoliation jury instruction fall under the abuse of discretion standard.<sup>14</sup> Perhaps the most commonly known sanction for failure to preserve evidence is the levying of a spoliation jury instruction against the non-preserving party. *University Medical Center, Inc. v. Beglin* is the leading Kentucky opinion concerning spoliation and addresses the requirements for obtaining a spoliation jury instruction.<sup>15</sup> The decision built upon precedent from over a decade before, where the instruction was recommended as a remedy to the potential intentional destruction of evidence, specifically in the criminal context.<sup>16</sup>

An acceptable missing evidence instruction acknowledges that the jury will engage in the requisite fact-finding before finding a party destroyed or lost relevant evidence without a valid explanation. One example, upheld by the Kentucky Court of Appeals, states:

During the trial you have heard reference to documents that were not retained by the railroad despite its knowledge of the claim of the plaintiff, Nita Bandy, administratrix of the estate of Russell D. Bandy. You may but are not required to infer that had these documents been retained by the railroad and produced here at trial that these documents would have been adverse evidence to the railroad and favorable to the plaintiff.<sup>17</sup>

Accordingly, if there is a factual dispute surrounding the lost evidence, the jury will address and resolve the dispute between the parties in their decision on the instruction.<sup>18</sup> Secondly, the adverse inference portion of the instruction does not *require* the jury to draw the adverse inference even where it believes evidence was intentionally destroyed, but leaves that decision up to the jury.<sup>19</sup>

Where evidence is missing “utterly without explanation” and where the party who lost the evidence had absolute care, custody, and control over the evidence, missing evidence is to be treated like any other evidentiary issue.<sup>20</sup> The Supreme Court of Kentucky has declined to place an enhanced burden upon the party seeking the instruction and refused to adopt any rule measuring the quantity or quality of the missing evidence to justify the sought-after

instruction.<sup>21</sup> When a document or other piece of evidence is relevant to the issue at hand, the jury can consider its nonproduction or destruction as evidence that the offending party destroyed the missing documentation out of fear its production would negatively impact the party's position.<sup>22</sup>

Significantly, neither a sanction nor an instruction is warranted unless there is proof the loss or destruction of the evidence was grossly negligent or intentional. When the proof presented shows that the evidence was lost due to mere negligence alone, a missing evidence instruction should not be given.<sup>23</sup> Mere negligence necessarily excludes bad faith, which is an element of the instruction.<sup>24</sup> In the same vein, other instances in which evidence is inadvertently lost through fire, weather, natural disasters, or destruction in the normal course of business under industry standards will not warrant the instruction.<sup>25</sup>

Kentucky has rejected an attempt to create a new cause of action in tort for spoliation of evidence.<sup>26</sup> In *Monsanto Co. v. Reed* the Court of Appeals initially issued an opinion attempting to create the tort to provide further recovery in excess of the potential sanctions levied for intentional or negligent destruction of relevant evidence.<sup>27</sup> Thereafter, the Supreme Court declined to create this new tort, finding jury instructions and civil penalties sufficient to counteract against the destruction of relevant evidence.<sup>28</sup>

However, the litigant's attorney is not free of potential consequences for destroying or failing to preserve relevant evidence. Ethical guidelines are clear that it is unlawful for an attorney to "obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."<sup>29</sup> Failure to preserve evidence can result in professional discipline.<sup>30</sup> Sanctions, reprimands, and potential bans from practice await intentional violations.

### OTHER SOURCES OF A DUTY TO PRESERVE

A duty to preserve evidence does not just arise from case law or statute; it can also be found in a contract, administrative regulation, an industry standard, or a party's own document retention policy.<sup>31</sup> One routinely litigated duty to preserve arises in the industry of interstate trucking. The Federal Motor Carrier Safety Regulations (FMCSR) requires that a multitude of records must be maintained in the ordinary course of business. For example, a driver's employment application must be kept for the duration of the employment, plus an additional three years.<sup>32</sup> A driver's electronic logging device, which records the driver's status log, must be retained by the company for six months.<sup>33</sup> Numerous other document retention requirements are found in the FMCSR, and these obligations apply even when the company has not been placed on notice of an accident or other loss.

Employers are not only required to maintain a litany of records relating to the driver, but also to provide the records to the

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Department of Transportation or any state or local officials with regulatory authority over the employer.<sup>34</sup> Failure to follow the statutory requirements can lead to serious consequences as the regulations provide for statutory penalties if the retention requirements are not followed. For example, civil penalties up to \$500 can be levied for each instance of an employer refusing or failing to provide the information required under 49 CFR § 382.405.<sup>35</sup> Further, criminal penalties may be imposed for any individual who “knowingly and willfully” violates the retention and access requirements for certain documents under the regulations.<sup>36</sup>

When a claim against a truck driver or trucking company results in a lawsuit, the opposing party will expect the company to have retained all records in accordance with the federal regulations. Failure to produce those records in response to routine discovery requests could be the basis of a spoliation instruction to the jury or other sanction. Savvy plaintiffs’ attorneys send detailed litigation hold letters to trucking companies immediately upon being retained to pursue a claim, even far in advance of litigation, thereby extending the company’s obligation to retain any potentially relevant records beyond the requirements of the FMCSR or the company’s record retention policy.

Due to the amount of data these companies must retain, and the various retention timeframes imposed by law, it is important for highly regulated industries, such as interstate trucking, to prepare for potential litigation following an accident. Accident response teams, including counsel and trucking experts, can be used at the scene of an accident to assure the relevant data from the tractor-trailer is not lost. In the aftermath of a significant trucking accident, there is a high risk of data destruction, which could be crucial to future litigation.

The duty to preserve evidence can be an invaluable tool to preserve potential evidence for future litigation, or an onerous and important burden to consider. Without the right preparation and appreciation of specific facts at hand, a case could be lost before it is filed. Conversely, thorough knowledge and understanding of the case law and applicable statutes and regulations can protect a client while also assuring no ethical or legal requirements are violated. **BB**

## ENDNOTES

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3. Margaret M. Koesel and Tracey L. Turnbull, Chapter 1: The Duty to Preserve Evidence, *Spoilation of Evidence* Ch. 1, American Bar Association (2013).
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5. *Id.*
6. *Id.*
7. ABA Civil Discovery Standard No. 10 (Aug. 2004).
8. *See Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796 (Ky. 2000).
9. *Pension Comm. of Univ. of Montreal PensionPlan v. Banc of Am. Sec.*, 685 F. Supp.2d 456, 470 (S.D.N.Y.2010)
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11. *Bandy v. Cincinnati*, New Orleans and Texas Pacific Ry. Co., 2001-CA-002121-MR, 2003 WL 22319202, at \*8 (Ky. App. Oct. 10, 2003).
12. *Id.*, (“However, Bandy has failed to cite a single case from any jurisdiction in which dismissal or default judgment was held to be required as a result of spoliation of evidence.”).
13. *Id.* at 791.
14. *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010).
15. *University Medical Center, Inc.*, 375 S.W.3d 783 (Ky. 2011).
16. *See Sanborn v. Com.*, 754 S.W.2d 534 (Ky. 1988).
17. *Bandy* at \*6.
18. *University Medical Center, Inc.*, 375 S.W.3d at 789.
19. *Id.*
20. *University Medical Center, Inc.*, 375 S.W.3d at 790.
21. *Id.*
22. *Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 217 (1st Cir.1982).
23. *University Medical Center, Inc.*, 375 S.W.3d at 791 (citing *Mann v. Taser Intern., Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009)).
24. *Id.*
25. *Id.*
26. *Santano Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997).
27. *Id.*
28. *Id.*
29. SCRT 3.130(3.4).
30. *See Andrews v. Kentucky Bar Ass’n*, 169 S.W.3d 862 (Ky. 2005).
31. Margaret M. Koesel and Tracey L. Turnbull, Chapter 1: The Duty to Preserve Evidence, *Spoilation of Evidence* Ch. 1, American Bar Association (2013).
32. 49 CFR § 391.21.
33. 49 CFR § 395.22.
34. 49 CFR § 382.405.
35. 49 USC § 521(b)(2)(A).
36. 49 USC § 521(b)(6).

## ABOUT THE AUTHORS



**JOSHUA J. LECKRONE** has been a litigation attorney at Walters Richardson, PLLC, since 2012. Leckrone graduated from the University of Cincinnati College of Law in 2005. Leckrone has litigated in the areas of automobile and commercial insurance law, coverage issues, bad faith claims and medical malpractice law.

**LUCAS R. HARRISON** joined Walters Meadows Richardson, PLLC, as a civil litigation attorney in 2018. He practiced as a Workers’ Compensation defense attorney prior to joining Walters Meadows Richardson. Harrison received his undergraduate degree from the University of Kentucky, *cum laude*, and his J.D. from the University of Kentucky College of Law.



# Being Mindful

**BY: ZACHARY A. HORN YLD CHAIR**

Mindfulness has become so ubiquitous that the word has ceased to have meaning.

Begin by sitting quietly in a comfortable chair. Then close your eyes and move your awareness to your breath. Now simply sit, watch, and wait for a thought to arise. Keeping your awareness gently on your breath, see how long it takes for a thought to bubble up into your awareness.

But even if you never achieve this level of Zen mastery, you will experience the benefits of mindfulness when you actively cultivate awareness and presence through a daily contemplative practice.<sup>4</sup> Over time you will become more peaceful and less reactive. Where once a certain person or situation may have triggered a series of thoughts and behaviors that sent you spiraling into fear, anger, or anxiety, you will

have a measure of spaciousness and objectivity around those feeling that allows you to behave more deliberately.

The purpose of this article was to introduce you to mindfulness and its benefits. In my next article I will discuss how to establish a daily contemplative practice in order to become a mindful rather than mindless lawyer. Until then, when you find yourself slipping into a mindless or reactive mode of thinking: stop, move your awareness to your breath, then watch and wait for a thought to arise.

#### ENDNOTES

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#### ABOUT THE AUTHOR

**ZACHARY A. HORN** is a managing partner of the law firm of Kirkland, Cain & Horn, PLLC, in Frankfort, Ky., where he practices in the areas of business law, civil litigation, banking, creditors' rights, and bankruptcy. Horn is a graduate of Transylvania University, where he graduated with honors, and of the University of Kentucky College of Law, where he served on both the Moot Court Board and Bankruptcy Moot Court Board.



He is the current chair of the Young Lawyers Division and has served on its Executive Committee since 2012. In addition to his service on the Executive Board of the Young Lawyers Division, Horn is the secretary/treasurer of Kentucky Capital Development Corporation, a member of the Frankfort Rotary Executive Committee, the Franklin County Democrats Executive Committee, the Church of the Ascension (Episcopalian) Vestry, the Episcopal Diocese of Lexington Executive Committee, and serves on the planning committee for the University of Kentucky/CLE Consumer Bankruptcy Law Conference.

Horn is also a frequent speaker and writer on issues ranging from attorney wellness and mindfulness in the law to more nuts and bolts issues relating to civil litigation and creditors' rights.

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At the 2019 commencement of the University of Louisville School of Law, we were fortunate to have former Kentucky Supreme Court Chief Justice Joseph E. Lambert—a 1974 graduate of Louisville Law—deliver remarks to the class.

I trust that I'm not alone in my belief that graduation speeches are often forgotten; I cannot remember the topic of the speech at my own law school graduation. But the remarks delivered by the former Chief Justice struck a chord with me—and I believe with the rest of the attendees as well. I was therefore delighted that Chief Justice Lambert agreed to reprint his remarks in *Bench & Bar*. They are edited slightly for space here. I hope you find his speech as thoughtful as I did when I heard it in person.

**- DEAN COLIN CRAWFORD**



**Joseph E. Lambert**

FORMER KENTUCKY SUPREME  
COURT CHIEF JUSTICE

**W**e are in the early years of a new century and there are many new ideas and tools available for improving justice in America. It's regrettable, but a lot of our new thinking about the role of a courts and the legal profession has been born out of crisis of confidence in our institutions.

Traditionally, lawyers and judges haven't been too concerned about issues of public trust and confidence. We merely assumed that our offices and our authority assured public acceptance. But a lot has changed in recent years. We live in a cynical nation and no longer do the trappings of our institutions guarantee acceptance of our work.

We must understand that we are in the public service business. While the adversarial system remains vital to the administration of justice, many across this nation now realize that our institutions can and should do more. Consider an example. The prosecutor may think the case is over when the conviction is obtained, and the defendant is sent off to jail. Of course, this ignores the fact that we don't have enough jails for housing; that the cost is extraordinary; that there is usually no treatment program to deal with the drug problems that cause many criminal episodes; and that the defendant will soon be released where he is likely to commit additional offenses. Likewise, when defense counsel wins on a motion to suppress or a not guilty jury verdict, he thinks he has won. But this, too, ignores the reality of drug addiction; family violence; poor education; language barriers; inadequate job skills; and the probability of a subsequent offense.

There is now a definite trend in the direction of therapeutic justice, a concept whereby courts and lawyers take a broader view of their responsibilities and undertake a role in problem-solving, not simply deciding short term winners and losers.

One of the prominent examples of this new thinking is Family Court, still relatively new in Kentucky, whereby judges pro-actively engage in problem-solving and extensively use helping professionals in an effort to prevent or minimize the myriad of problems that families encounter. In Kentucky, we have made a major commitment to Family Courts, and at present, most Kentucky counties have a Family Court. In November 2002, a constitutional amendment was adopted that firmly established family courts in Kentucky. I believe the success of family courts has been proven. Soon, I hope to see a family court in every judicial circuit and serving every Kentucky citizen.

Another innovation in widespread use is Drug Court. Drug Courts proceed from the idea that direct judicial involvement in the process of testing, supervising, counseling, and punishing drug offenders, with the promise of dismissal on the completion of a rigorous diversion program, may be a desirable alternative to incarceration. While Drug Courts recognize that some offenders should be incarcerated, they also recognize that

some should not. The Drug Court concept is undergoing constant refinement and adaptation and there are numerous adult and juvenile drug courts presently operating

In the American classic, *The Great Gatsby*, Fitzgerald opens with the following line, "Just remember that all the people in this world haven't had the advantages that

professional and personal lives in order, don't forget the big picture.

**You have been given the greatest of all gifts—the gift of time, and I trust that you have used it wisely.**

in Kentucky. Many believe the drug court model of direct judicial involvement may have broader application than just to drug offenses.

A persistent problem faced by legal institutions is the under-representation of minority citizens. This fact has created an atmosphere in which many minority citizens have a high level of distrust of our institutions. We cannot fail to address this challenge, for a failure to do so perpetuates division and distrust and undermines any success we may have in other areas of court improvement.

Simply stated, we need more minority lawyers and judges if our national goal of equal justice under law is to be achieved.

We must endeavor to see that access to justice is not denied because of cost. We must maintain legal professionalism; provide adequate funding for courts; and address the special needs of those who are mentally and physically disabled, elderly, homeless, and victims of domestic violence. We must see to it that children who are the collateral victims are provided for, and that they are not condemned to become dysfunctional adults.

In sum, we must discover ways to address the ills of our society, and to maintain the substantive foundations of our profession in a world that desperately needs innovative solutions.

The task before us is not easy and is not for the short-winded, but a lot of talented people are applying themselves to it. With each innovation and each experiment, courts are learning more about the power of an active, creative, problem-solving approach. It is now your time to make your contribution.

you've had." For most of you, recent years have been devoted to undergraduate school and law school.

During that time, you have had the opportunity to study at fine colleges and universities, under the guidance of teachers who were well-qualified and dedicated to your educational achievement. But most of all, you have had time to think, to study, and to learn.

Think about it. You have been given the greatest of all gifts—the gift of time, and I trust that you have used it wisely.

Now, another time has come. Your chosen profession is facing many challenges and your knowledge, intellect, and energy are needed in the quest for answers and solutions. You must also undertake the very real responsibility of self-support, debt repayment, and for many of you, the support of others. But in the process of getting your

You have now entered the profession of Adams, Jefferson, and Lincoln. You follow in the footsteps of Robert H. Jackson and Thurgood Marshall. From this nation's beginning, lawyers have authored and given meaning to our founding principle, the Rule of Law.

For more than two hundred years, this nation has engaged in dialogue, in a debate, and sometimes in a shouting match as to the application of the Rule of Law to cases with specific, real-life consequences. At this very moment a shouting match is going on. I am grateful to have had the opportunity to spend my professional life in the law and I now welcome you to our profession. I have no doubt that you will find the law to be an exciting and rewarding career.

Study the wisdom of the past. Search for the trail that has been blazed. Study the life of mankind for it is these lives that you must wisely order and study the precepts of justice which will prevail through you.

I am confident that your law school education has prepared you well for your chosen profession and for a life of service to your fellow man. You will find the law to be a rewarding, lifelong pursuit.

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**T**hink of it like a trailer for a movie: Anticipation. Challenge. Excitement.

It is the Kentucky Legal Education Opportunity Summer Institute that introduces selected entering first-year students at the three commonwealth law schools to the anticipation, challenge and excitement of law school. KLEO, as it is known as for short, is the colleges' shared program to expand access to legal education for students from underserved populations through a summer orientation and scholarships.

For some of the five KLEO students entering Chase College of Law fall semester, the trailer plays out like this:

### ANTICIPATION FOR CLASSES

**MARY MCKINLEY** of Cynthiana: "I am ready to learn and Chase seemed ready to open the doors and show me what it takes to become an attorney."

**AARON DORTON** of Irvine: "Chase fit my personality and lifestyle. I felt like I was more than a number and that I fit in. Chase felt like home."

**AURIELLE MARCH** of Louisville: "I attended Centre College for undergrad, and felt at home as soon as I walked on campus. Chase mirrored that feeling of comfort and excitement."

### CHALLENGE OF LAW SCHOOL

**MARY MCKINLEY**: "Attending KLEO helped me realize exactly what my classes require, and how to study more effectively. Thanks to KLEO, I have a group of friends who are supportive and great mentors I can call on."

**AARON DORTON**: "KLEO truly gives you a leg up on your 1L year and the rest of your law school career. The [KLEO] professors taught us how to read and brief cases, effective notetaking, outlining for exams, how to

find older exams and practice exam-taking skills on them, networking, and the importance of giving your best effort. These skills make the transition to law school seem much easier."

**AURIELLE MARCH**: "I was able to get past my first-day anxieties while attending KLEO. We experienced real class, reading assignments, briefing and exams. Now I know what professors are expecting from me, and I am prepared to be the best student I can be."

### EXCITEMENT FOR THE FUTURE

**MARY MCKINLEY**: "I am a forensic engineer, specializing in fire, arson and explosion investigations. I would like to continue to represent the industry and fight for the rights of every citizen and corporation. I hope to bring expert knowledge, along with my JD, to the courtroom."

**AARON DORTON**: "I'm not sure what type of attorney I'd like to be or what area I'd like to practice in, but I feel at home advocating

for people's rights. I'm trying to stay as open-minded as possible throughout law school, though, because your passions can come out of nowhere."

**AURIELLE MARCH**: "My purpose in life is to advocate for those who are disenfranchised, and I believe working as a lawyer will give me the best platform to do that."

As a voice of experience for the entering students, Chase 3L Haley P. Stahl served as their summer mentor. "I acted as an available aid, ready to answer any questions the students may have had as they learned new skills," she says. "In addition, KLEO provided opportunities to interact with leaders in the legal field from across Kentucky. We each spent a day shadowing a judge or attorney, attended panels with prominent speakers, and had lunch and conversation with the justices of the Kentucky Supreme Court." Among them: Chase alumnae Justice Michelle M. Keller, who regularly returns to Chase as a mentor for students for their future roles as lawyers.



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## UK LAW ALUMNI ASSOCIATION RECOGNIZES 2019 Hall of Fame Inductees and Alumni Award Recipients

**O**n June 12, 2019, alumni, family and friends gathered at the Galt House Hotel in Louisville to honor the 2019 UK Law Alumni Association Hall of Fame inductees and Alumni Award recipients.

The UK Law Alumni Association Hall of Fame was established to acknowledge graduates of the College whose extraordinary professional success and contributions, profound positive influence on the College of Law, and high degree of character and integrity are recognized by their peers.

Inclusion in the Hall of Fame is the highest honor bestowed by the Association.

The 2019 Hall of Fame inductees are The Honorable Mary C. Noble, Don S. Sturgill (posthumous), and Robert T. Yahng.

**The Honorable Mary C. Noble** received her B.S. in English in 1971 and M.A. in Psychology in 1974, both from Austin Peay State University in Clarksville, TN. She earned her Juris Doctor degree from the University of Kentucky College of Law in 1981.

Justice Noble began her legal career with Bryan and Fogle, in Mt. Sterling, Ky. Thereafter, she started her own firm in Lexington, Ky., practicing school law, personal injury, and criminal defense.

In 1989, Justice Noble was appointed Domestic Relations Commissioner for the Third Division of Fayette Circuit Court. She was then elected as Fayette Circuit Judge for the Fifth Division of Fayette Circuit Court until 2006, when she was elected to the Kentucky Supreme Court, Fifth District. She retired from her role in December 2016.

While a Fayette Circuit Judge, Justice Noble made history as the first two-term, female Chief Judge in Fayette Circuit Court, one of the state's original circuit courts. In her role as Chief Judge, she oversaw the construction of the Robert F. Stephens Courthouses and the subsequent move to the new Courthouses; and co-founded the Court of Justice Drug Court Program, which is now a statewide program. Justice Noble also served on the National Association of Drug Court Professionals and is a member of its Hall of Fame. She was appointed to and served on numerous committees and boards related to the Court of Justice during her tenure as Circuit Judge.

During her 10-year service on the Kentucky Supreme Court, she was the first woman to serve as Deputy Chief Justice and the first woman to preside over an oral argument before the Court. She also chaired the Family Court and Juvenile Court Rules Committees, which drafted Kentucky's first procedural rules for both Courts.

Justice Noble is the recipient of numerous awards for her judicial service.

Currently, Justice Noble is a partner at Noble Tate Neutrals, an alternative dispute resolution practice. She also consults on various legal matters.

**Don S. Sturgill** (1928-2002) attended Baylor Military Academy and graduated from Harvard University in 1950. After serving as a second lieutenant in the Air Force, he returned to Lexington to attend the University of Kentucky College of Law. In 1957, Don entered into private practice with Roy Moreland and Gardner Turner, forming the firm Sturgill, Moreland & Turner (now, Sturgill, Turner, Barker & Moloney).

Early in his career, Don was appointed as Kentucky's first Commissioner of Public Safety by Governor A.B. "Happy" Chandler. Among his accomplishments as Public Safety Commissioner, was the creation of the Kentucky Driver Point System to identify persons who may be habitually negligent drivers. His work has been cited as a major factor in the reduction of road fatalities throughout Kentucky.

Following his term as Public Safety Commissioner, he joined Senators John F. Kennedy's and Lyndon B. Johnson's presidential campaign staff in Washington, D.C., an opportunity made possible by the friendship he forged with Bobby Kennedy while he was at Harvard.

Don's background as a thoroughbred owner and breeder enabled him to become one of the nation's foremost equine attorneys. Don was involved in the syndication of about 75 thoroughbred stallions, including triple-crown winners Seattle Slew and Affirmed, and was a key figure in many significant racing law cases. Don was instrumental in getting simulcast revenues distributed to horsemen when few were familiar with the emerging technology.

In 2000, Don received the prestigious Fayette County Bar Association's Henry T. Duncan Award. He was a member of the Fayette County, Kentucky and American Bar Associations, Christ Church Cathedral, the Keeneland Club, the Thoroughbred Club of America, and the Harvard Club of Lexington. In 2015, Don was inducted into the American College of Equine Attorneys Hall of Fame.

**Robert T. Yahng** is a social science teacher at the Salesian College Preparatory High School, serving inner-city students in and near Richmond, Calif. His credentials also include teaching Honors/AP Economics and U.S. Government to high school seniors for over 18 years and co-authoring five U.S. History and U.S. Government

high school texts. In Spring 2019, Robert taught microeconomics at Berea College and has served on the Berea College Board of Trustees since 2002, currently serving as Chairman.

Born in China, and raised and educated in Kentucky, Robert graduated with a B.A. in History from Berea College in 1963 and a Juris Doctor degree from the University of Kentucky College of Law in 1967. After graduating, he served in the United States Air Force, receiving an honorable discharge with the rank of Captain in 1972. Robert joined Baker & McKenzie Law Firm as an associate in 1976, where he founded the Firm's Taipei office; and assisted with the start-up of their Shanghai office. He served several terms as managing partner of Baker & McKenzie Law Firm's San Francisco/Palo Alto offices and several terms on their Policy Committee. Robert is a former member of the Kentucky Bar Association and State Bar of California.

During his legal career, Robert authored articles, conducted seminars, and gave speeches for the AMA, AEA, and the Asia Society on international business legal practices. As public governor of the Pacific Stock Exchange from 1999-2002, Robert was involved in reorganizing the Pacific Stock Exchange business model, which was later adopted by the New York Stock Exchange.

Following his retirement from Baker & McKenzie Law Firm in 1998, Robert was the Chairman of American Bridge through 2013.

American Bridge is an industry leader known for its construction of complex steel structures, especially bridges such as the original Bay Bridge, built in 1936, and newly completed Bay Bridge in 2013.

The three Hall of Fame honorees join the esteemed group of 74 other inductees honored since the Hall of Fame was established in 1996. The inductees expressed gratitude for the honor bestowed upon them, the foundation provided by University of Kentucky College of Law, and for the people who have supported them during law school and throughout their careers.

The UK Law Alumni Association Board of Directors also established five awards to honor graduates who have distinguished themselves by contributions to the practice of law and service to communities. Five Alumni Awards were presented:

**Patrick Madden ('89), Professional Achievement**

**Dana Daughette Fohl ('10), Young Professional**

**William "Bill" Baird, III ('69), Community Service**

**The Honorable Pamela R. Goodwine ('94), Distinguished Jurist**

**Whayne C. Priest, Jr. ('62), Legacy Award**

The Professional Achievement Award recognizes a particularly noteworthy accomplishment in a given year but may be given to one who has achieved and sustained an extraordinary level of excellence

in a particular area of the law or one's chosen field. The Young Professional Award recognizes individuals who graduated within the past 10 years and have distinguished themselves professionally in the community, or in some other fashion. The Community Service Award is given to a graduate who has provided outstanding leadership in his or her local community, state or nation, to aid and benefit causes not necessarily related to the legal profession. The Distinguished Jurist Award is given to an individual who has distinguished himself or herself through a contribution of outstanding service to the legal profession. The Legacy Award is bestowed upon an individual who graduated 50 or more years ago and has demonstrated exceptional leadership in his or her profession and/or community and has made a positive impact on the wellbeing of the UK College of Law, the Commonwealth of Kentucky or elsewhere in the nation.

The UK Law Alumni Association provides programs and events to recognize the outstanding achievements of College of Law alumni, support initiatives at the College of Law, and foster engagement among alumni, faculty and students.

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# “WHO’S ON FIRST?”

## Pronoun Overuse and Misuse

BY: PROFESSOR JENNIFER JOLLY-RYAN

Pronoun overuse and misuse makes legal memoranda, briefs, and letters read like Abbot and Costello’s famous comedy routine, ‘Who’s on First?’<sup>1</sup> The famous skit casts Costello as a ballplayer promoted to the big league. Costello wants to learn his new teammates’ names. Abbot explains that the ballplayers all use nicknames rather than their real names, so he tries to teach Costello the players’ nick names and the position each ballplayer plays. Below is just a small portion of the famous comedy routine.

Bud Abbott: Well, let’s see, we have on the bags, Who’s on first, What’s on second, I Don’t Know is on third...

Lou Costello: That’s what I want to find out.

Bud Abbott: I say Who’s on first, What’s on second, I Don’t Know’s on third.

**“W**ho’s on First” comically converts pronouns into proper nouns and confuses Costello. Writers who use too many pronouns, or the wrong pronouns, also confuse their readers. Confusing pronouns in legal writing defeat the purposes of educating and persuading the writer’s audience, particularly when multiple parties or claims are involved. In legal writing, it is most important for the reader to know “Who’s on First.”

To avoid pronoun abuse and misuse, always keep in mind that pronouns have no meaning on their own. They simply are generic words that replace nouns. If a lawyer writes, “he ran across the street,” without first introducing the **antecedent**, the word that the pronoun replaces, the reader cannot tell whether a man, dog, or animal ran across the street. In determining “who’s on first,” that is, in determining who or what the pronoun references, first identify the antecedent. “Bob ran across the street and a truck hit him,” identifies Bob as the antecedent. The pronoun, “him,” obviously refers to Bob.

Pronouns must also agree with their antecedent in both number and person. For example, “it” cannot refer to a person, “she” cannot refer to a man and “those” cannot refer to a single item. Match the **antecedent** with a **pronoun** that is consistent in number. For example, if the **pronoun** is singular, the **antecedent** should also be singular. If the pronoun is plural, the antecedent should also be plural.

In using pronouns, follow these three rules:

**Rule 1: Each pronoun must refer to a single antecedent.**

- When either of two nouns can be a pronoun’s antecedent, the pronoun reference is ambiguous. To correct the problem, repeat the noun or rewrite the sentence.

**Incorrect:** The prosecutor held the sandwich in one hand and the telephone in the other, eating **it** while she talked.

**Corrected:** The prosecutor held the sandwich in one hand and the telephone in the other, eating **the sandwich** while she talked.

**Rule 2: Pronouns must refer to a stated antecedent and not to an implied one.**

- When the antecedent is not specifically stated, the reader must make an inference. The reader may make the wrong one. Avoid using words such as **this**, **which**, **that**, **these**, **those**, and **it** alone, to refer to a preceding idea or group of ideas. The reader will not know which noun the pronoun replaces.<sup>2</sup> An ambiguous pronoun is one that could be replacing more than one possible recent noun. If two males are mentioned in the same sentence, **he** could refer to either of them. In fact, a pronoun usually refers to the noun located closest to it. You never want your reader to have to decipher your meaning.<sup>3</sup>

**Incorrect:**

The judge’s **decision** reflected **his** judicial philosophy.

**Corrected:**

The judge’s decision reflected the **judge’s** judicial philosophy.<sup>4</sup>

**Rule 3: Pronouns and their antecedents must agree in person and in number (quantity).**

- Because pronouns derive their meanings from their antecedents, the pronoun must agree with the antecedent.

**Incorrect:**

An **employee** cannot be dismissed unless **they** have violated a company policy.

**Correct:**

An **employee** cannot be dismissed unless **he or she** has violated a company policy.

**Employees** cannot be dismissed unless **they** have violated a company policy<sup>5</sup>

- Lawyers often make the mistake of replacing the antecedent “the Court” with a plural pronoun. The **Court** is singular, not plural, so the pronoun that refers back to it must also be singular. A court is a singular entity, which always is referred to as an **it**, not a **they**. **Collective nouns**, such as “court,” “jury,” “committee,” “crowd,” “team,” or “corporation,” should take a singular pronoun when the writer is referring to the group as a unit.

**Incorrect:**

The **court** issued **their** decision.

**Correct:**

The **court** issued **its** decision.

**ABOUT THE AUTHOR**

**PROFESSOR JENNIFER JOLLY-RYAN**

teaches writing at Salmon P. Chase College of Law, Northern Kentucky University. She is a member of the Kentucky Bar Association, served as a commissioner and hearing officer for the Kentucky Commission on Human Rights, and graduated from Salmon P. Chase College of Law. She is a former law clerk for Judge S. Arthur Spiegel of the United States District Court, Southern District of Ohio and practiced law with the law firms of Dinsmore & Shohl and Jolly & Blau before joining the Chase College of Law faculty.



**ENDNOTES**

1. Bud Abbot and Lou Costello most famous comedy is likely “Who’s on First?” Including the script would not do the comedy justice. Readers can view the comedy routine at <https://www.youtube.com/watch?v=kT-cRRaXV-fg>. Abbot and Costello were inducted into the Baseball Hall of Fame, with the comedy skit called, “Who’s on First?” <https://baseballhall.org/discover/short-stops/whos-on-first>.
2. See Bryan Garner, *A Manual on Legal Writing Style*, § 10.11 (West, 2d ed. Revised 2006).
3. *Id.*
4. The rules and examples are from a Seattle University School of Law Summer Practice Academy handout, June 8-10, 2016.
5. *Id.*



# OUR Internet World AND Our Engagement IN THE System Of Justice

By: Michael Losavio

**T**he future is, of course, now our present. Much of what our colleagues and I have written over the years on technology in legal practice has been in the vanguard, practice technology and tips to help us do our work better. Do it more accurately. Do it more efficiently and cost-effectively for our clients. And it has helped some members of the bar, something we all try to do.

Our future-present is something different. That anticipated tech has become necessary tech. You need to go online for court dockets and filing. You need to use email, even if you don't let your clients use it to communicate with you. And, increasingly, this is defensive tech. That technology is needed whether for the ever more competitive business of the law or the ever more hostile online world we work in to stay competitive. As the courts provide more comprehensive approved forms for standard practice, we need to have systems that quickly and efficiently gather the needed information, complete and submit those forms, and let us prepare the roadmap for the litigation, whether uneventful or mine-laden. As the facts of the ever-more pervasive technologies we wrestle with become more novel and outré, we need to prepare our research methods and study skills to grapple with them. And resources that synthesize all of this would be really, really helpful.

And it pervades more than we might expect. The federal Sixth Circuit Court of Appeals, again leading the way in law and technology, released its opinion and analysis in *Caboo, et al v. SAS, et al*, arguably the first opinion to address accountability for flawed data analytics by a state entity. It is valuable reading to see how the fundamental legal obligations under our Constitution were impacted by computational procedures. In this case, a state unemployment compensation system “Robo-adjudicated” (the Court’s language) issues of fraud in unemployment compensation claims, resulting in denial of benefits and significant penalties. Unfortunately, this system was at one point producing “false-positives” at a rate of 93 percent, leading to many innocent people suffering financial injury. The defendants’ claims of qualified immunity as to the procedural due process violations were rejected by the Court. This is a harbinger of both the pervasiveness of the systems running our lives and how those who use those systems may be held accountable.

The Inspector General for the Los Angeles Police Department issued its report calling into question algorithmic based systems for crime control in Los Angeles. As a result, systems like PredPol (Predictive Policing) were withdrawn from service. Axon (formerly Taser International), a major technology vendor to law enforcement, released its internal advisory

report on the use of artificial intelligence and facial recognition technologies; that report recommended Axon not distribute such products at this time due to both error rates in the technology and the potential for misuse in deployment.

We can neither avoid the integration of technology in our representation of people in need nor can we accept that those technologies are purely benign and error-free. Just as much of the pursuit of justice has historically relied on lawyers and judges, so it will need to do so as the new facts of technology impact our lives in ways we just don't expect. It leads to the question of what are the things we need to do to get ready.

## Things to Do<sup>1</sup>

Our bar has done a very good job over the years in using its media and its continuing education programming to present and develop these issues. The task forces established to push this effort further are providing guidance on moving this in practical directions for the bar. But what is now needed is your direct input into the mix.

Yes, you. You deal with clients, courts, facts, investigators, opponents, opponents’ clients, and all of the sheer messy problems that find their way to the lawyer’s office. Those are problems others face across the state, across the country.

Perhaps the bar and the courts can do something about that.

But they need to know what might be needed. And you are best placed to say.

Should you wish to set out areas that might be appropriate for improved practice, think before you write. Our inherent frustrations with the many semi-controllable elements of legal practice should not inform your proposal. Or your life, as pervasive as they might be.

One approach—and it takes a bit more time—is to reflect on not just the problem but on how you feel it might be solved. This calms the mind and directs your concerns towards fixing things. It may not be the solution adopted, but it starts the process. It transforms a complaint into a challenge. And the challenge is more likely to be taken up and addressed.

To help, should you have the time, are a number of online discussions, templates and webinars on ordered solutions to problems. The old command model of a top-down solution has taken a lot of hits, giving way to collaborative frameworks that anticipate and resolve issues before they blow up.

Those collaborative frameworks have an advantage for legal practice: where you are cursed or blessed with a novel problem leading to the courts, these frameworks can help plan the strategy optimizing chances of success.

One such framework concisely set out is the Design Thinking model pushed by IBM into its development community. Open discussion and a training overview of this model is available at: <https://www.ibm.com/design/thinking/>.

A key part of this model is familiar to the bar: investigate before leaping in, keep investigating and adapt as new information comes in, especially from the human element.

Other design frameworks, especially those for software development, can help with case and practice development.

This extra effort can help make the problem you would like addressed more likely to be addressed, as you've pointed a way forward to making things better.

## Things to Do 2

The pervasive computing and ICT environment, with sensors collecting information from everywhere, has changed practice by widening the discovery space. And the exploitation space of our clients. How to keep track of all this is a challenge with the velocity of change. There is really no place to look except at online resources. Experts may not be expert on what we may precisely need; we may need to do *thorough* Rule 703 vetting before we retain them, just so we get the advice we need. Yet the perennial problem is how to know what we don't know.

So off we go to Google and Wikipedia – yes, I said it– to start the investigation. The subset site of [scholar.google.com](http://scholar.google.com) may help as it filters to scholarly, often peer reviewed discussions of the issues of concern. But sometimes it is precisely the open source general audience media online, though unvetted, that starts explaining really new technologies and the risks and benefits of them. The burden is on you to follow up on the validity of the discussions, but, nicely, Google's search selection algorithms tend to rank the best responses high in the listing of relevant documents.<sup>1</sup>

This directs to more and better resources.

Some resources are available to build knowledge to handle these new facts using tutorial-like services.

One large repository is Cybrary, a large and largely free collection of training materials of various lengths on information technology.

Another is the Kahn Academy. Though more limited in offerings, it has a reputation for quality in teaching fundamentals, such as programming, that may be of assistance. Other training resources are those offered by various vendors. Foremost among them is IBM, which offers its IBM Skills Academy to colleges to help build skills from

design management up through data science and cyber security. Perhaps this is an initiative the bar might seek to work with, to make these available to the bar to help us learn both what we need to protect our practices and to represent our clients in this technological age.

## Things to Do 3

We need to prepare for all the change around us with law and technology. Three core areas of legal ethics are in play, competence, communication and confidentiality, balanced against the brutal business necessity of working in an insecure online business world.

The bar has stepped in to offer support for this via two vendor-supported efforts.

The communication and confidentiality concerns in email are constantly evolving as IT and similar technologies are available via more and more venues, each of which may be subject to compromise. And each of which may be a pathway to compromise your office systems.

The rules on confidentiality electronic systems, particularly email, are not absolute in permitting use but rather require "reasonable efforts" to ensure confidentiality. What those efforts may require continues to change as the technology and the threats change. These may require the use of encrypted systems and regular training on safe practices and use of all law firm staff.

The KBA now has an email security provider for bar members, Identillect Technologies. See [www.identillect.com](http://www.identillect.com) The subscription-based services offered provide for secure encrypted emails, limitations on the printing or forwarding of those documents (we know how that can go wrong) controls over the download of data, the ability to set an expiration on a particular communication and secured responses from the recipients. Other features are available (at a price) that offer information security features related to authentication and message integrity to avoid "man-in-the-middle" attacks via your communications to your clients.

What about insurance? Again, you must weigh the cost versus the risk of loss. The KBA preferred cyber security insurance provider, Houchens Insurance Group, offers these protections and examples:

“This cyber insurance program is offered at a group rate that provides substantial savings from what is currently available in the marketplace. The application process has been streamlined and is based on company revenue and a one-page enrollment application. This cyber insurance program offers full limits for cyber incident response, cybercrime, system damage & business interruption, network security & privacy liability, media liability, and court attendance costs. This program also offers fund transfer fraud coverage, coverage for theft of escrow funds and potential coverage for theft of personal funds. The coverage includes access to

- cyber risk awareness training
- breach alerts
- cyber awareness videos
- incident response plan builders
- and the test system to see how your employees respond to phishing email.

**Ransomware/Cyber Extortion** – Law Firms files & data are held hostage unless a ransom is paid, frequently in the form of Bitcoin. Any firm using email is susceptible to a ransomware attack. Increasing email communication amongst law firms, clients and the courts make this an even greater threat. This cyber policy provides coverage for legal assistance, IT forensics, and extortion payments (even procuring Bitcoin) when a ransomware attack happens. If your data is lost in the process, this policy can provide the funds and expertise to help restore it.

**Social Engineering & Funds Transfer Fraud** – **Social Engineering** attacks occur when hackers purport to be clients, employees, or third parties deceive you or your employees via phone or electronic communication into sending money to a fraudulent account. If you send funds via telephone or electronically you are susceptible.

**Funds Transfer Fraud** is similar, except hackers gain access to your network and send instructions to the bank pretending to be you to wire money to fraudulent accounts, without your knowledge or consent.

### **Business Interruption & Dependent Business Interruption** – **Business Interruption:**

If your firm was unable to operate normally due to a cyber breach, how would you restore the income lost during that period? This policy provides coverage to reimburse a law firm for lost income during an extended outage, along with the costs to repair any damaged or destroyed data in the process.

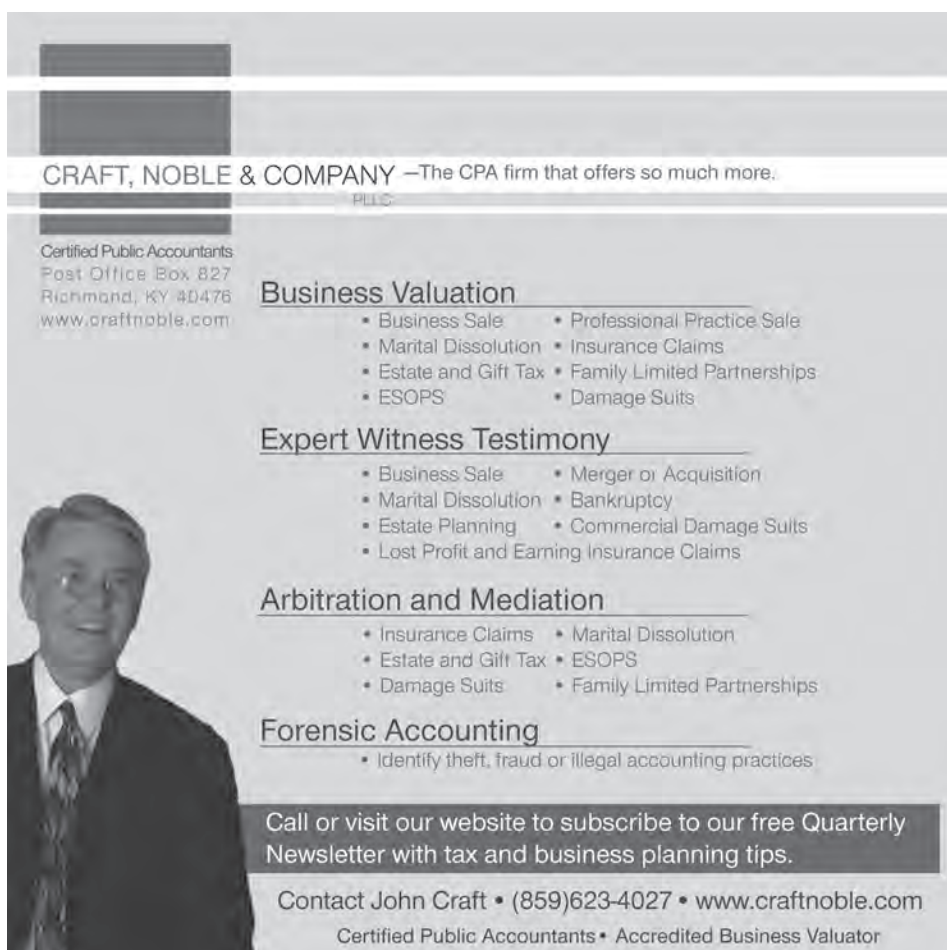
**Dependent Business Interruption:** Law firms are increasingly using cloud-based storage and platforms to help manage day to day operations. What happens when the platform suffers a breach, their system goes down, and you can't access any of your documents or management software for an extended period? Dependent Business

Interruption coverage can reimburse you for lost income if a third party you rely upon to operate your business is inoperable due to a network security intrusion.

This details the areas in which your firm may be attacked and damaged. This risk only increases as we engage in more and more electronic systems to make our services affordable in our practices competitive in this marketplace.”

## Things to Do 4

Lastly, although this is ending on a depressing note, I'm going to just provide a link or two and a cut and paste on a cyber security plague that is striking more and more small to medium-sized businesses, agencies and nonprofits, the ever popular Ransomware scourge. The Department of Homeland Security Cyber security and Infrastructure Security Agency (CISA), tasked to pass on knowledge of current and developing cyber threats, has released



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its advisory and resources for dealing with the spread of Ransomware. This includes what you should do now, how to recover if attacked and how to secure your operations for the future. Its summary of recommended actions, noted below, can be found at: [https://www.us-cert.gov/sites/default/files/2019-08/CISA\\_Insights-Ransomware\\_Outbreak\\_S508C.pdf](https://www.us-cert.gov/sites/default/files/2019-08/CISA_Insights-Ransomware_Outbreak_S508C.pdf) and its resource page for addressing Ransomware can be found at: <https://www.us-cert.gov/Ransomware>

CISA advises these basic actions to address Ransomware, which equally apply across a variety of other cyber threats that we will continue to face as we rely more and more on the systems:

### **"Actions for Today Make Sure You're Not Tomorrow's Headline:**

1. Backup your data, system images, and configurations and keep the backups offline
2. Update and patch systems
3. Make sure your security solutions are up to date
4. Review and exercise your incident response plan
5. Pay attention to ransomware events and apply lessons learned

### **Actions to Recover If Impacted Don't Let a Bad Day Get Worse:**

1. Ask for help! Contact CISA, the FBI, or the Secret Service
2. Work with an experienced advisor to help recover from a cyber attack
3. Isolate the infected systems and phase your return to operations
4. Review the connections of any business relationships (customers, partners, vendors) that touch your network
5. Apply business impact assessment findings to prioritize recovery

### **Actions to Secure Your Environment Going Forward Don't Let Yourself be an Easy Mark:**

1. Practice good cyber hygiene; backup,

update, whitelist apps, limit privilege, and use multifactor authentication

2. Segment your networks; make it hard for the bad guy to move around and infect multiple systems
3. Develop containment strategies; if bad guys get in, make it hard for them to get stuff out
4. Know your system's baseline for recovery
5. Review disaster recovery procedures and validate goals with executives"

There are two things to highlight that may have the greatest benefit for you, although they require constant diligence.

First, have a competent and experienced advisor on these issues should you have trouble. The problem is finding truly competent and experienced advisors, because how would we know? This may be an area in which the bar and its preferred providers can work together to provide resources for practitioners.

Second, "Practice good cyber hygiene." That we now use the term "hygiene" to reference safe computing is an interesting medical model of infection and injury. But just as washing our hands with soap and water can prevent most infections, basic cyber hygiene, like not clicking on that link can do a world of good. But that takes training, training, training. You have to reinforce with everyone what the basic practices are and to follow the matter how enticing.

This is one advantage small firms have in that when something slightly unclear pops up, the person should be able to go stand up and go ask if this is what is meant. This will avoid a whole host of phishing attacks.

And keep you and your client safe. Indeed, this might be something you want to emphasize with your clients so that they don't become the back door into infecting your systems and you are helping protect them from something that could easily destroy their businesses. That is the best kind of goodwill.



**ABOUT  
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### **ENDNOTES**

1. And, yes, there is an ongoing war between those trying to spoof higher rankings from Google and Google seeking to stop such gaming of their system. So it goes, and why you must still validate such results. Lawyers have been scorned for citing to online commentary without that validation.

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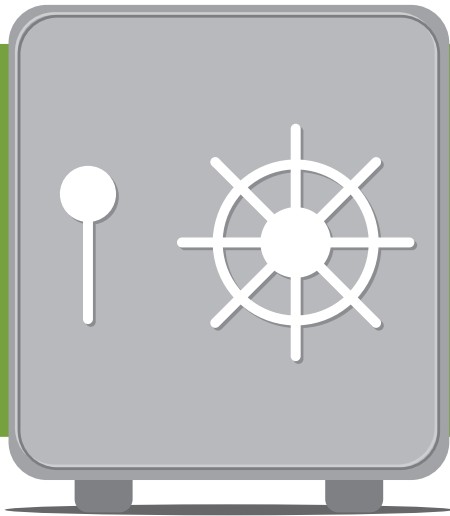
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### CSF Payments in Fiscal Year 2018-2019

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Niehaus, Daniel	\$8,800.00	1

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# ANITA ZIPFEL

## NAMED WINNING AUTHOR OF THE 2019 KBA STUDENT WRITING COMPETITION



**C**ongratulations to Anita Zipfel, the winning author of the 2019 Kentucky Bar Association Student Writing Competition. Her article, *"Courts v. Clinicians: The Civil Commitment Standard for Substance Use Disorder"* was selected as the first-place entry by members of the student writing competition judging panel.

Zipfel is a lifelong resident of Louisville and a 3L at the University of Louisville Brandeis School of Law. After spending a summer as a judicial intern observing drug court, Zipfel was inspired to write about involuntary commitment and the ethical and legal issues that surround it. At Brandeis she holds the position of articles selection editor for the University of Louisville Law Review. She currently works part-time as a clerk at the law firm Bishop Friend, P.S.C.

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Members are also required by rule SCR 3.035 to maintain with the Director a valid email address and shall upon change of that address notify the Director within 30 days of the new address. Members who are classified as a "Senior Retired Inactive" or "Disabled Inactive" member are not required to maintain a valid email address on file.

There are several ways to update your address and/or email for your convenience.

**Online:** Visit [www.kybar.org](http://www.kybar.org) to make changes online by logging into the website and editing your profile.

**Form:** Complete the **Address Changes/Updates** form found at [www.kybar.org](http://www.kybar.org), under the **For Members** tab, **Members Request, Address Changes/Updates**. Email completed form to [kcobb@kybar.org](mailto:kcobb@kybar.org)  
OR mail to :

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



In a 2015 peer-reviewed study, lawyers self-reported a major depressive episode in the past year at 28%. That's **4 times higher** than the general population.

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- Feelings of confusion, loneliness, isolation, and being overwhelmed
- Persistent sad, anxious, or “empty” mood
- Drug or alcohol use
- Feelings of hopelessness, helplessness, worthlessness, or low self-esteem
- Fatigue and decreased energy
- Insomnia or excessive sleeping
- Thoughts of suicide, suicide attempts

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All meetings are open to law students, lawyers and judges who are already involved or who are interested in a 12-step program of recovery, including but not limited to Alcoholics Anonymous, Narcotics Anonymous, Overeaters Anonymous and Al-Anon. Come meet other attorneys and network. All meetings and contacts are confidential. SCR 3.990.

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**this Fall**

KYLAP is excited to partner with the Diversity Equity, and Inclusion (DEI) Committee to present "Lawyer Well-being and Inclusion: It's Everybody's Bar," during the 2019 Kentucky Law Update. KYLAP Director, Yvette Hourigan, and DEI Committee Co-Chairs David Sloan and Allison Connelly will present along with a panel of representatives discussing diversity, equity, and inclusion (and why equity is such an important part of that equation), the impact of implicit bias (even when it's subconscious), and how to level the playing field.

# The Kentucky Bar Foundation Welcomes New Fellows



The Kentucky Bar Foundation (KBF) is proud to welcome 22 new Fellows from across the Commonwealth. The Fellows Program recognizes attorneys who have shown support for the KBF's mission through their success in the practice of law and their generosity in contributing to the KBF.

**RICK L. BARTLEY** of Pikeville is the former Pike County Commonwealth's Attorney. A graduate of Pikeville College and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1980. Mr. Bartley is a Life Fellow.

**DOUGLAS G. BENGE** of London practices law with the law firm of Cessna Benge. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1993. Mr. Benge currently serves on the Kentucky Bar Foundation Board of Directors. Mr. Benge is a Life Fellow.



**JOSHUA CRABTREE** of Covington is the Executive Director of Legal Aid of the Bluegrass. A graduate of Transylvania University and the University of Cincinnati College of Law, he was admitted to the Kentucky Bar in 2003.

**ANGELA LOGAN EDWARDS** of Louisville is the Chief Executive Officer of Lawyers Mutual of Kentucky. A graduate of Transylvania University and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 1994. Ms. Edwards is a Life Fellow.



**KELSEY E. FRIEND, JR.** of Pikeville is a retired judge from the 35<sup>th</sup> Judicial District. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1970. Judge Friend is a Life Fellow.

**ADAM FUTRELL** of Paducah practices law at The Law Office of Adam Futrell. A graduate of Murray State University and Vanderbilt University Law School, he was admitted to the Kentucky Bar in 2008. Mr. Futrell, also a member of the Illinois and Tennessee Bars, is a Life Fellow.

**ROBERT I. GALLENSTEIN** of Maysville is a retired district and circuit judge. A graduate of Georgetown University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1968. Judge Gallenstein is a Life Fellow.

**CLAYTON R. HUME** of Louisville practices law at Clayton R. Hume, PLLC. A graduate of the University of Kentucky and the University of Louisville Brandeis School of Law, he was admitted to the Kentucky Bar in 1995.

**ROBERT C. JOHNS** of Prestonsburg is the Executive Director of the Appalachian Research and Defense Fund of KY, Inc. (AppalReD). He is a graduate of the University of Notre Dame and George Washington University Law School. In addition to being a member of the Ohio and Pennsylvania Bars, he became a member of the Kentucky Bar in 2015.



**MEGAN P. KEANE** of Louisville practices law at Goldberg Simpson, LLC. She is a graduate of the University of Louisville and the University of Louisville Brandeis School of Law. Also a member of the Indiana Bar, she has been a member of the Kentucky Bar since 2011. Ms. Keane previously served as an ex-officio member of the Kentucky Bar Foundation Board of Directors as the Young Lawyers Division Representative.

**STEPHANIE MCGEHEE-SHACKLETTE** of Bowling Green practices law with Berry & McGehee Law Firm. A graduate of the University of Kentucky and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 2000. She currently serves on the Kentucky Bar Foundation Board of Directors. Ms. McGehee-Shacklette is a Life Fellow.





**JOSEPH H. MCKINLEY, JR.** is Senior United States District Judge of the United States District Court for the Western District of Kentucky. A graduate of the University of Kentucky and the University of Louisville Brandeis School of Law, he was admitted to the bar in 1979. Judge McKinley is a Life Fellow.

**CATHERINE MONZINGO** of Lexington practices law at Monzingo Law Office. A graduate of the University of Kentucky and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 1998. Ms. Monzingo is a Life Fellow.

**DARREL H. MULLINS** of Pikeville is a retired judge from the 35<sup>th</sup> Judicial District. A graduate of Pikeville College and Northern Kentucky University's Chase College of Law, he was admitted to the Kentucky Bar in 1989. Judge Friend is a Life Fellow.

**DARELL R. PIERCE** of Bowling Green practices law with the law firm of Pierce & Shadoan. A graduate of Western Kentucky University and Northern Kentucky University's Chase College of Law, he was admitted to the Kentucky Bar in 1983. Mr. Pierce is a Life Fellow.

**G. KENT PRICE** of Paducah practices law with the law firm of McMurry & Livingston, PLLC. A graduate of Georgetown College and Vanderbilt University Law School, he was admitted to the Kentucky Bar in 1986. He currently serves on the Kentucky Bar Foundation Board of Directors. Mr. Price is a Life Fellow.

**KELLY KIRBY RIDINGS** of London practices law with the law firm of Hamm, Milby & Ridings, PLLC. A graduate of the University of Kentucky and Northern Kentucky University's Chase College of Law, she was admitted to the Kentucky Bar in 2007. She currently serves on the Kentucky Bar Foundation Board of Directors.



**NEVA-MARIE POLLEY SCOTT** of Louisville is the Executive Director of the Legal Aid Society, Inc. A graduate of the University of Louisville and the University of Louisville Brandeis School of Law, she has been a member of the Kentucky Bar since 1999. Ms. Scott is a Life Fellow.

**REBECCA SIMPSON** of Bowling Green practices law with the law firm of English, Lucas, Priest & Owsley, LLP. A graduate of the Western Kentucky University and the University of Louisville Brandeis School of Law, she has been a member of the Kentucky Bar since 1999. She currently serves on the Kentucky IOLTA Fund Board of Trustees.



**J. STEPHEN SMITH** of Fort Mitchell practices law with the Graydon Firm in Northern Kentucky. He completed his undergraduate degree at Denison University, his Master's at the University of Kentucky's Patterson School of Diplomacy, and law school at the University of Cincinnati. Also a member of the Ohio and Indiana Bars, Mr. Smith has been a member of the Kentucky Bar since 1996. He currently serves as President of the Kentucky Bar Association. Mr. Smith is a Life Fellow.

**B. TODD WETZEL** of Princeton practices law at Wetzel Law Office. A graduate of the University of Virginia and the University of Kentucky College of Law, he has been a member of the Kentucky Bar since 1994. He previously served on the Kentucky Bar Foundation Board of Directors as one of the representatives of the First Supreme Court District. Mr. Wetzel is a Life Fellow.

**AMANDA A. YOUNG** of Bowling Green is the Executive Director of Kentucky Legal Aid. A graduate of Tennessee Technological University and the University of Kentucky College of Law, she has been a member of the Kentucky Bar since 1995.

**Thanks to the support and generosity of these and hundreds of other KBF Fellows, the Kentucky Bar Foundation is able to award significant annual grants to support law-related nonprofit programs and projects throughout the Commonwealth.**

**We are actively seeking new Fellows.**

**Please visit [www.kybarfoundation.org/donate/fellow](http://www.kybarfoundation.org/donate/fellow) or contact the Kentucky Bar Foundation at (800) 874-6582 to see how you can become a Fellow.**

# KENTUCKY LAW UPDATE 2019

By: Hampton Moore III



It is that time of the year. The tireless folks from the Kentucky Bar Association CLE Department are making their trip around the Commonwealth to provide the annual Kentucky Law Update to all members. I would like to thank the Kentucky Bar Association and all of the volunteers who are assisting with the production of the 2019 Kentucky Law Update. All members of the KBA should be proud of the Kentucky Law Update because we practice in the only mandatory CLE state in which its members can receive all required CLE at no additional cost.

The Kentucky Law Update will make stops in nine different locations throughout the Commonwealth this fall. The

program began right before Labor Day on August 29<sup>th</sup> and 30<sup>th</sup> in Owensboro and will conclude on December 5<sup>th</sup> and 6<sup>th</sup> in Lexington.

Have you already missed the location closest to you? No worries, as you can see there are plenty of other chances to attend in other locations.

The entire program has been approved in Kentucky for a total of 14.25 CLE credits, which includes 4.00 hours of ethics. The first day of the program addresses annual updates in Supreme Court decisions, Court of Appeals decisions, Kentucky legislation pertaining to legal issues, and federal law. The second day of the program is broken

into separate tracks so that members will have the option of choosing which courses to attend. The second day includes courses that are geared towards areas of the law that most practitioners will find beneficial like: family law, mediation, attorney well-being, criminal law, and law practice management. The second day will also focus on such hot topics as: hemp laws, veteran issues, immigration, and weapons in public places. All attendees will have opportunities on both days of the program to obtain the required 2.00 hours ethics.

For more information on the event and to register visit [www.kybar.org](http://www.kybar.org). See you at the Kentucky Law Update!

## 2019 KLU DATES & LOCATIONS

CITY	DATE	LOCATION
Owensboro	August 29-30	Owensboro Convention Center
Covington	September 12-13	Northern Kentucky Convention Center
Bowling Green	September 26-27	Sloan Convention Center
Paducah	October 2-3	Julian Carroll Convention Center
Pikeville	October 10-11	Eastern Kentucky Expo Center
Louisville	October 17-18	Kentucky International Convention Center
London	Oct. 31-Nov. 1	London Community Center
Ashland	November 21-22	Delta Marriott Ashland Downtown
Lexington	December 5-6	Lexington Convention Center

### HAMPTON MOORE III

is an attorney with Cole & Moore PSC in Bowling Green. He received his undergraduate degree from Transylvania University in 2005 and his J.D. from the Appalachian School of Law in 2009. He is a member of the Bowling Green/Warren County Bar Association.



Reporting and keeping track of your CLE is now even easier! You can quickly report your attendance and apply for CLE programs online.

**No more paper forms. No more checks. No more postage.**

**Just follow these simple steps!**

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1

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2

3

SIGN IN TO YOUR

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Submit New Credits

4

5

CLICK ON THE **Program** BOX AND TYPE IN THE **Activity Number**.  
**Wait** for the system to locate the program and for the field to populate. CLICK ON THE BOX TO SELECT THAT PROGRAM.

CLICK **Next**.

6

7

CLICK ON THE “**Total CLE**” SLIDE BAR AND USE YOUR MOUSE AND THE ARROW KEYS ON YOUR KEYBOARD TO SELECT THE AMOUNT OF CREDITS EARNED. REPEAT FOR THE “**Ethics**” SLIDE BAR.

TYPE YOUR **name as your certification** AND **signature**.

8

9

CLICK **Next**.

YOUR CREDIT HAS NOW BEEN ADDED AND WILL APPEAR ON YOUR TRANSCRIPT.

10

## 2019-2020 CLE COMMISSION MEMBERS

### **Jason F. Darnall, Chair**

*First District Representative*  
jason@bedlaw.com

### **Frank Hampton Moore III**

*Second District Representative*  
mooreiii@coleandmoore.com

### **Graham C. Trimble**

*Third District Representative*  
gtrimblelaw@gmail.com

### **Eric M. Weihe**

*Fourth District Representative*  
eric.weihe@skofirm.com

### **LaToi D. Mayo**

*Fifth District Representative*  
lmayo@littler.com

### **David B. Sloan**

*Sixth District Representative*  
dsloan@ortlaw.com

### **Leigh Gross Latherow**

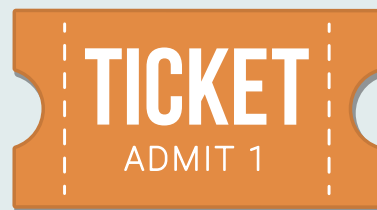
*Seventh District Representative*  
llatherow@vanattys.com

### **Justice Laurance B. VanMeter**

*Supreme Court Liaison*

**Interested in assisting with a CLE? Have ideas for a program?**

Contact **Mary Beth Cutter**, KBA Director for CLE at [mcutter@kybar.org](mailto:mcutter@kybar.org), or any member of the Continuing Legal Education Commission.



## LOOKING FOR UPCOMING KBA ACCREDITED CLE EVENTS?

LOOK NO FURTHER...CHECK OUT  
**[www.kybar.org/accreditedcleevents](http://www.kybar.org/accreditedcleevents)**

This easy to use search engine contains up to date information on CLE events that have been accredited by the Kentucky Bar Association Continuing Legal Education Commission.

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

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

### KENTUCKY LAW UPDATE



# 2019

ADVANCING THE PROFESSION THROUGH EDUCATION

## MARK YOUR CALENDARS!

The annual Kentucky Law Update (KLU) has just begun and it's not too late to sign up. The KLU program series is an exceptional benefit of KBA membership and Kentucky is the only mandatory CLE state that provides its members a way of meeting the annual CLE requirement at no additional cost. **Registration is available online at [www.kybar.org/page/KLUDatesandLocations](http://www.kybar.org/page/KLUDatesandLocations).**

### 2019 KENTUCKY LAW UPDATE DATES & LOCATIONS

**OWENSBORO**  
OWENSBORO CONVENTION CENTER  
August 29-30 (TH/F)

**COVINGTON**  
NORTHERN KENTUCKY CONVENTION CENTER  
September 12-13 (TH/F)

**BOWLING GREEN**  
SLOAN CONVENTION CENTER  
September 26-27 (TH/F)

**PADUCAH**  
JULIAN CARROLL CONVENTION CENTER  
October 2-3 (W/TH)

**PIKEVILLE**  
EASTERN KY EXPO CENTER  
October 10-11 (TH/F)

**LOUISVILLE**  
KY INTERNATIONAL CONVENTION CENTER  
October 17-18 (TH/F)

**LONDON**  
LONDON COMMUNITY CENTER  
October 31 – Nov. 1 (TH/F)

**ASHLAND**  
DELTA MARIOTT ASHLAND DOWNTOWN  
November 21-22 (TH/F)

**LEXINGTON**  
LEXINGTON CONVENTION CENTER  
December 5-6 (TH/F)

WE'LL SEE YOU IN

# Covington

FOR NEXT YEAR'S CONVENTION!

JUNE 24-26, 2020

NORTHERN KENTUCKY CONVENTION CENTER



# In Memoriam

**A**s a final tribute, the *Bench & Bar* publishes brief memorials recognizing KBA members in good standing as space permits and at the discretion of the editors. Please submit either written information or a copy of an obituary that has been published in a newspaper. Submissions may be edited for space. **Memorials should be sent to [sroberts@kybar.org](mailto:sroberts@kybar.org).**

NAME	CITY	STATE	DATE DECEASED
Kenneth John Allen	Thurmont	MD	May 18, 2019
Henry Miller Bugay	Palm City	FL	January 18, 2019
William Colvin	Greensburg	KY	April 27, 2019
Martin James Cunningham III	Nicholasville	KY	February 25, 2019
Temple Dickinson	Glasgow	KY	January 29, 2019
Marvin Jacob Feldman	Sugar Heights	OH	July 17, 2019
Donald L. Frailie II	Ashland	KY	October 31, 2018
Robert S. Frey	Louisville	KY	June 7, 2019
Harry L. Hargadon	Naples	FL	July 11, 2019
William Edward Hartlage	Louisville	KY	July 9, 2019
Samuel D. Hinkle IV	Louisville	KY	July 10, 2019
Rickie Allen Johnson	Symsonia	KY	June 25, 2019
Michael G. Karem	Ocala	FL	November 5, 2018
Clyde W. Middleton	Covington	KY	July 12, 2019
Laura Morrison	Frankfort	KY	January 17, 2019
John Lane Peck	Paducah	KY	December 19, 2016
Kathleen Kearney Schell	Jeffersonville	IN	June 28, 2019
Edwin E. Schottenstein	Columbus	OH	March 18, 2019
George D. Schrader	Huntsville	AL	August 18, 2017
Kenneth Walter Scott	Edgewood	KY	October 16, 2018
James Earl Shafer	Fishers	IN	June 26, 2017
Mary Lou Trautwein-Lamkin	Jeffersonville	IN	December 18, 2018
Rebecca Sue Ward	Shepherdsville	KY	February 17, 2019
James M. Warner	Louisville	KY	November 10, 2018
Douglas A. Wetzel	Owensboro	KY	July 19, 2019
Perry R. White Jr.	Paris	KY	July 20, 2019

**WILLIAM "BILL" HARTLAGE**, loving husband, father and grandfather passed away on July 9, 2019, at the age of 76 while on vacation, fly fishing in Alaska.

Bill was born on Sept. 17, 1942. He attended St. Thomas Seminary and Bellarmine College and studied law at University of Louisville Louis D. Brandeis School of Law. He was a machinist for almost 20 years working at Hartlage Machine Co. and Naval Ordinance before perusing a career as an attorney. He practiced at Fulton, Hubbard & Hubbard in Bardstown, Ky., and in private practice in Louisville.

He was an experienced fly fisher, tied his own flies and built several fly rods. Bill was a long time & loyal fan of Bellarmine basketball. He enjoyed many other activities including hunting and shooting skeet. He also enjoyed singing in his church choir, playing with his dogs, and camping with them and with his wife of 50 years, Doris. He was known for his sense of humor, wit, and ability to have a conversation with anyone.

Bill was preceded in death by his father Edward and his mother Alma. He is survived by his wife Doris (Allgeier) and his three children, Lynn Jagers (John), Tony Hartlage (Nancy) and Denise Beckovich (Daniel), his two grandchildren Cynthia Smith (Jarvis) and James Jagers, his sister Charlene and brothers Paul, David, and Tom (Maria).

*The preceding memoriam for William "Bill" Hartlage is based upon information obtained from the Courier-Journal, which published the obituary on July 21, 2019. To access the obituary in its entirety, visit: <https://www.legacy.com/obituaries/louisville/obituary.aspx?n=william-hartlage-bill&pid=193434749>.*

**SAMUEL D. HINKLE IV** passed away Wednesday, July 10, at his home. He was born on Sept. 23, 1947, in Lexington to the late Samuel D. Hinkle III and Jane C. Hinkle. He worked as an attorney in Louisville for Stoll Keenon Ogden. He was a founding partner of the firm's Louisville office and served on its board of directors. He was a committed advocate of public education and a member of the Shelby County and Kentucky State Boards of Education. Sam is survived by his wife Kate, and his four children, Duncan, Casey, John, and Rebecca Hinkle, and his sister Gay Rogers.

*The preceding memoriam for Samuel D. Hinkle IV is based upon information obtained from the Sentinel-News, which published the obituary from July 23–July 24, 2019. To access the obituary in its entirety, visit: <https://www.legacy.com/obituaries/sentinelnews/obituary.aspx?n=samuel-hinkle&pid=193461206>*



**CLYDE W. MIDDLETON**, an essential figure in the electoral dominance of the modern Republican party in northern Kentucky, died July 12, 2019, at Rosedale Green in Covington, from cancer. Mr. Middleton, who was admitted to the Kentucky bar in 1974, was 91.

Mr. Middleton represented Kenton and Boone counties in the Kentucky Senate from 1967 to 1986, and served as Kenton County judge-executive from 1990 to 1998.

He sponsored legislation to bring to life what is now Northern Kentucky University. He helped to engineer the relocation of Chase Law School, his alma mater, from a makeshift building and out of his district to the main NKU campus in Highland Heights, a rare act of political magnanimity. Mr. Middleton helped to create the Kenton County Public Library.

“Clyde Middleton was the rock upon which the foundation of today’s Kenton County GOP was established,” said the attorney, author, and long-time Congressional aide Rick Robinson.

Mr. Middleton was a native of the Cleveland area. He joined the Navy and was later admitted to the U.S. Naval Academy of which he was a graduate.

He was hired by Procter & Gamble, and he and his wife Mary decided to settle in northern Kentucky rather than in Ohio, because, he was heard to say, they could get substantially more house for the money in Kentucky.

As his roots and political notoriety grew, Mr. Middleton attended Chase, graduated, and passed the bar during his tenure as state senator.

Mr. Middleton was personable. He had a well-earned reputation for being able to work across party lines.

“Judge Middleton was always kind and patient with me and always treated me with respect,” said Kris Knochelman, one of his successors as Kenton judge-executive.

Mr. Middleton’s wife Mary, a popular and respected figure herself for decades, died in an accident in 2011. Mr. Middleton was preceded in death by two sisters. He is survived by his children Ann (Jack) Schmidt; his son David, a retired assistant U.S. attorney, his son John, an attorney and Kenton Circuit Clerk, and eight grandchildren.

Mr. Middleton’s funeral took place July 20, 2019, at Gloria Dei Lutheran Church in Crestview Hills. The family has requested donations be made to the Clyde and Mary Middleton Fund of the Greater Cincinnati Foundation, 200 W. Fourth Street, Cincinnati, Ohio, 45202.

—James P. Dady, from a remembrance in the River City News, an interview with John Middleton, and the author’s personal recollection.





Have an item for **Who, What, When & Where?** The *Bench & Bar* welcomes brief announcements about member placements, promotions, relocations and honors. Notices are printed at no cost and must be submitted in writing to: Managing Editor, *Bench & Bar*, 514 West Main Street, Frankfort, KY 40601 or by email to [sroberts@kybar.org](mailto:sroberts@kybar.org). Digital photos must be a minimum of 300 dpi and two (2) inches tall from top of head to shoulders. There is a \$10 fee per photograph appearing with announcements. Paid professional announcements are also available. Please make checks payable to the Kentucky Bar Association.



Kentucky Bar Association member **A.J. Ullman** recently debuted his fourth novel, “And The River Runs Deep: The Cold Case Murder Mystery Of Leah Marcus.” Someone murdered 17-year-old Leah Marcus, a piano-playing musical prodigy. Suspicion falls on her African American boyfriend and he is ultimately tried for her murder. Ten years later, the crime reporter for the Cincinnati Tribune who covered the crime and trial decided to re-investigate the murder and learn the truth behind the senseless killing. Her story is a tragedy in the tradition of Shakespeare. “And The River Runs Deep” drills into the lives of two families set amidst the turbulent times of racial strife and the impending doom of 9/11 with an emphasis on how race, sex and class affect the justice system.

University of Louisville’s Alumni Office has announced **Edwin S. Hopson** as the winner of the 2019 Brandeis School of Law Alumni Award. On October 24th, Hopson will be recognized at the annual University of Louisville Alumni Awards Ceremony. The awards ceremony recognizes one graduate from each school or college, based on their merit and contributions to the community. Hopson is currently senior counsel at **Wyatt** and serves as a member of Wyatt’s Labor and Employment Service Team, with a concentration in all areas of labor and employment law. His practice has been recognized with multiple honors over the years. He obtained his Bachelor of Science in Law and J.D. from the University of Louisville’s School of Law, and his Master of Laws in labor law from George Washington University Law School.



**Michele Henry** and **James Craig** are pleased to announce the relocation of their firm, **Craig Henry PLC**. Their new address is 401 West Main Street, Suite 1900, Louisville, KY 40202. They are also pleased to announce that **Tyler Larson** has joined the firm as

an associate. The firm practices employment, consumer, and class action litigation.



**Stites & Harbison, PLLC**, welcomes attorney **Cassandra Welch** to its Covington office. Welch is an attorney in the firm’s construction service group. Her practice focuses on advising clients throughout all phases of construction projects including planning, contract drafting and negotiation, project administration and disputes. She represents owners, contractors and subcontractors in construction disputes and litigation. Before joining the firm, she was a staff attorney to Judge Allison Jones of the Kentucky Court of Appeals. Welch earned her J.D., *summa cum laude*, from Northern Kentucky University, Salmon P. Chase College of Law. Welch is admitted to practice in Kentucky and Ohio.

**Sheehan, Barnett, Dean, Pennington, Dexter & Tucker, P.S.C.**, is proud to announce that

**Christopher J. Tucker** has been promoted to the position of partner with their law firm. Tucker has 13 years of experience and previously worked as an Assistant Commonwealth Attorney in both Adair County and Casey County before joining Sheehan Barnett in 2013. He also worked as an Assistant Casey County Attorney. His practice areas include personal injury, criminal law, bankruptcy, workers’ compensation, social security/disability and general civil litigation. In addition, Tucker handles family law matters, including adoption, divorce, child custody, dependency, neglect and abuse, and all other aspects of domestic litigation by providing a personalized approach.



**McBrayer PLLC** is excited to announce additions to their Louisville office, combining the talents of seven attorneys from the widely respected firm Reed Weitkamp Schell & Vice PLLC. Attorneys joining McBrayer in Louisville include **Alan D. Pauw**, **Ridley M. Sandidge**, **Ivan J. Schell**, **Maria C. Doyle**, **Trevor L.**



Alan Pauw



Ridley Sandidge



Ivan Schell



Maria Doyle



Trevor Earl



Maxine Bizer



Michael Oyler

**Earl, Jr., Maxine E. Bizer** and **Michael W. Oyler**.

All McBrayer Louisville office personnel moved to their new home in the former Reed Weitekamp office suite at 500 West Jefferson Street, Suite 2400, in downtown Louisville. **Pauw** has joined the firm as a member. Pauw has nearly 30 years of experience in the practice of law, focusing his practice on employee benefit plans, tax, corporate law and healthcare compliance. Pauw has a bachelor's degree from Calvin College, a master's degree from the University of Michigan, an M.B.A. in finance from the University of Southern California, and a J.D. from Boston College. **Sandidge** has joined the firm as a

member. Sandidge focuses his practice on business disputes, insurance defense and other defense work, and he has more than 40 years of legal practice experience. He has a bachelor's degree from Indiana University and a J.D. from Salmon P. Chase College of Law. **Schell** has joined the firm as a member. He concentrates his practice on estate planning, corporate law, and healthcare. Schell

has over 40 years of legal experience. He received his bachelor's degree from Butler University and his J.D. from the University of Michigan Law School. **Doyle** is now of counsel with McBrayer PLLC. Doyle is a former Certified Public Accountant, focusing her legal practice on corporate law in the areas of mergers and acquisitions, taxation, and securities. She earned a bachelor's degree in accounting at Bellarmine University and a J.D. from Georgetown University Law School. Doyle has over 25 years of legal experience. Earl has joined the firm as a member. **Earl** has more than 25 years of legal experience, focusing his practice in the areas of business and real estate litigation, creditors' rights and administrative law. He received his bachelor's degree from George Mason University and his J.D. from the College of William and Mary. He is licensed to practice law in Kentucky, Virginia and Indiana. **Bizer** is now of counsel with McBrayer. She has nearly 30 years of legal experience in estate planning and probate. She has a bachelor's degree from Indiana University and a J.D. from the University of Louisville, where she graduated *cum laude*. Oyler has joined the firm as a member. He concentrates his practice in the areas of commercial

and business litigation, intellectual property litigation, employment, and healthcare law. Oyler received his bachelor's degree from Purdue University and his J.D. from the University of Virginia.

**Sullivan Mountjoy, PSC**, announces that

**L. Christopher Hunt** has joined the firm as an associate. Hunt received his J.D. from the University of Kentucky College of Law in 2008. He also has a bachelor's degree in economics and political science, *magna cum laude*, from the University of Kentucky. He is completing a post-baccalaureate program in accounting from the University of Louisville. He recently served as general counsel, and as executive director of the Office of Technology and Special Audits, with Kentucky's Auditor of Public Accounts. Prior to that, he practiced law in Hartford and in Paducah, representing clients in civil litigation and business matters involving contracts, real property, estates, and torts.



**Christopher W.D. Jones**, an attorney with **Bingham Greenebaum Doll LLP**, has been named co-chair of the firm's business services department. **Jeffrey A. McKenzie** has been selected to chair Bingham Greenebaum Doll's Partnership Board.



**David S. Samford**, a member of the firm **Goss Samford, PLLC**, in Lexington, has been named as the general counsel for the Kentucky Guild of Brewers, the trade association of Kentucky's craft beer producers. Kentucky currently leads the nation in per capita growth of the number of craft breweries and has established an impressive track record of creating jobs and investment as the industry has grown from just five licensed breweries to 69 licensed breweries in the past decade.

**Stites & Harbison, PLLC**, welcomes attorney

**Andrew Noland** to its Louisville office. Noland is an attorney in the firm's real estate service group. His practice focuses on commercial real estate and business law. Before joining the firm, he was an attorney for five years at a firm in Louisville engaged in commercial real estate, business law and complex business litigation. Noland earned a J.D., *magna cum laude*, from the University of Louisville Brandeis School of Law in 2013. Noland is a member of Give 502, a giving circle for young professionals in the Louisville area.



**Sturgill, Turner, Barker & Moloney, PLLC**,

is proud to share that **Langdon Worley** has been accepted into the Leadership Lexington Class of 2019-2020. Leadership Lexington is an educational opportunity that broadens perspectives and allows participants to gain increased understanding of community dynamics and public issues. Langdon is an insurance defense attorney at Sturgill Turner

who gives back to the Lexington community by serving in leadership positions with Rotaract (president), the FCBA Women Lawyers Association (vice-president), Ronald McDonald House of the Bluegrass (fundraising committee) and the FCBA Foundation (board of directors).

**ELPO Law** Attorney **Rebecca Simpson** has been appointed by the Supreme Court of Kentucky to the IOLTA Board of Trustees. The IOLTA Fund is administered by the Kentucky Bar Foundation, the charitable arm of Kentucky's legal community. Simpson was recently recognized as a Kentucky Bar Foundation Fellow during the Fellows and Partners for Justice Luncheon. The Kentucky Bar Foundation, Inc., is a 501(c)(3) nonprofit organization founded in 1958 with assistance from a founding partner of ELPO Law, Attorney Charles E. English. It serves as the charitable arm of Kentucky's legal community, which has maintained a lengthy tradition of giving. Its mission is to further the public's understanding of the judicial system and the legal profession through programs and philanthropic partnerships that help those in need. Simpson is partner at English, Lucas, Priest & Owsley, LLP, practicing in the area of family law.



There were three commissioners of the KBA's Attorneys' Advertising Commission (AAC) whose terms ended June 30, 2019. These

commissioners are *John Simms* of Lexington, who served from 2013-2019, **Rhonda Hatfield-Jeffers** of Somerset, who served from 2014-2019, and **Steven D. Wilson** of Owensboro, who served from 2016-2019. At the AAC annual meeting on June 21, 2019, AAC Chair **Robert T. Watson** recognized these commissioners for their service to the AAC. Each of the outgoing commissioners also received a thank you letter and plaque recognizing their service. The AAC receives and reviews lawyer advertising submissions pursuant to the Kentucky Supreme Court Rules.



**Wyatt, Tarrant & Combs, LLP**, is pleased to welcome **Lindsay K. Scott** to its Louisville office. Scott concentrates her practice in transactional and regulatory health care law. Scott's areas of expertise include: advising hospitals, physician groups, Medicare Advantage Organizations, and Medicare Prescription Drug Plans on compliance with state and federal fraud, abuse, and privacy requirements, including the Anti-Kickback Statute, Stark Law, False Claims Act and HIPAA; as well as drafting and negotiating a variety of contracts and policies on behalf of those clients. Scott earned her J.D. from University of North Carolina Law School, and her B.A., *magna cum laude*, from Eastern University.



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Today, Chief Financial Officer (CFO) Jimmy Patronis announced the appointment of retired **Army Brigadier General T. Patterson Maney** to the Florida Veterans' Hall of Fame Council. He served nearly 30 years as an Okaloosa County Judge, received numerous awards and honors for his time of service in the United States Army, and retired as a Brigadier General in 2007. In December 2018, General Maney was inducted into Florida's Veterans' Hall of Fame. He retired as an Army Brigadier General with contingency operations in Panama, Haiti, Bosnia, and Afghanistan. He received numerous military awards including: Legion of Merit, Purple Heart, Bronze Star, and Combat Action Badge. General T. Patterson Maney's term begins immediately and expires on January 1, 2023.



**McBrayer** member and attorney **Anne-Tyler Morgan** has been appointed by Governor Matt Bevin to the Advisory Council for Medical Assistance (commonly referred to as the "MAC"). The Council participates in Medicaid policy development and program administration and advises the Kentucky Department for Medicaid Services regarding Medicaid health

and medical care. She will serve a four-year term as one of 19 Council members, joining the Secretary of the Cabinet for Health and Family Services, representatives of healthcare industry organizations, and healthcare consumer advocates.

**Steptoe & Johnson** is pleased to announce that **Chad M. Zimlich** has joined the firm's litigation department. He will practice in the firm's Louisville office. Zimlich joins Steptoe & Johnson from the law firm of Stoll Keenon Ogden PLLC where he practiced business litigation involving matters from breach of contract disputes to complex multi-party suits on behalf of both public and private companies. He previously served as prosecutor in the Jefferson County Attorney's Office and as a staff attorney for Chief Circuit Judge Phillip Shepherd of the Franklin County Circuit Court. Zimlich earned his law degree from Wake Forest University where he was an author and articles editor for the Wake Forest Law Review. He earned his bachelor's degree from The Catholic University of America.

The Leadership Louisville Center has selected **Stites & Harbison, PLLC**, attorney **Rebecca Weis** to participate in the Leadership Louisville Class of 2020. The 60-member class will spend 10 months of training and hands-on experiences with local leaders who currently tackle the community's biggest challenges. With the benefit of new perspectives and connections, Leadership Louisville graduates are prepared to become effective community leaders. Weis is a member (partner) of Stites & Harbison based in the Louisville office. As a member of the employment service group, she represents employers of all sizes in employment



and business-related disputes. Weis focuses primarily on traditional employment law counseling and litigation.

**J. Vincent Aprile II**, who practices with **Lynch, Cox, Gilman and Goodman P.S.C.**, in Louisville has been re-appointed to the editorial board of Criminal Justice magazine, the quarterly publication of the American Bar Association's Criminal Justice Section. Aprile has previously been a member of the magazine's editorial board (1989-2012, 2014-2019) and twice has served as its chair (2005-09, 1991-93). He continues as the author of his column, *Criminal Justice Matters*, a regular feature of the magazine for some 27 years (1992 to present).

**Karl G. Williams'** article "The Role of the Pharmacist in Addressing the Opioid Crisis," was published in the Albany Government Law Review. Williams served as the lead author with Shawn Fellows and Luke Sanna. Williams is a professor of pharmacy ethics and law at Wegmans School of Pharmacy at St. John Fisher College.

**Billy Upchurch**  
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**DBL Law** partners **Bill Brammell** and **Kelly Holden** were selected to present two breakout sessions at this year's KYSHRM Conference. Brammell and Holden presented, "EEOC, from A to Z," and "What To Do When Government Comes Knocking." Louisville-based attorney Brammell practices in the areas of civil and commercial litigation, including defending employment discrimination claims, administrative law, contract negotiation and white-collar criminal defense. Cincinnati-based attorney Holden heads DBL Law's Employment Law practice group, representing private and public employers in compliance matters related to employment laws and providing in-house training on such issues.



**Fulton, Devlin & Powers LLC** is pleased to announce that **Ann F. Batterton** has joined the firm. Batterton's practice will focus on workers' compensation defense and subrogation. She earned her B.A. from University of Kentucky in 1995 and her J.D. from the University of Louisville Brandeis School of Law in 1999.



Nashville attorney **Hal Hardin** was honored with this year's William M. Leech, Jr. Public Service Award by the Tennessee Bar Association Young Lawyers Division Fellows. Hardin was presented the award during the Tennessee Bar Association annual convention in Nashville on Friday, June 14. The Leech Award is presented each year to a Tennessee lawyer who has given outstanding service to the legal profession, the legal system, and the local community. Hardin is a member of the Kentucky Bar Association.



College of Law.

**Wyatt, Tarrant & Combs LLP** is pleased to announce that **Emily Daunhauer** has joined the Trusts, Estates and Personal Planning Team in the firm's Louisville office. Daunhauer concentrates her practice in the areas of estate and business planning, trust administration, probate and taxation. Daunhauer received her J.D., *magna cum laude*, from University of Kentucky

The Trump administration has selected **Dinsmore** partner **Justin Walker** for a federal judicial seat on the U.S. District Court for the Western District of Kentucky. At Dinsmore,



Walker practiced commercial litigation, with a focus on appellate law. In his role as assistant professor at the University of Louisville Brandeis School of Law, he conducted research in the areas of separation of powers, national security, and federal courts. Previously, Walker clerked for Justice Anthony Kennedy on the U.S. Supreme Court and for Justice Brett Kavanaugh on the U.S. Court of Appeals for the D.C. Circuit. He is a graduate of Harvard Law School and received a B.A. in political science from Duke University.

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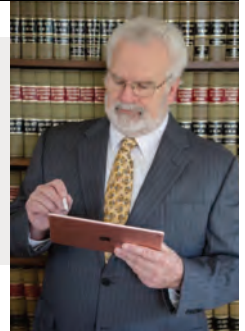
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