

Judicial Ethics Opinions

JE-102 REVISED

March 19, 2003

Question 1: Where a judge is sued in his official capacity and the Attorney General's office provides legal counsel, is the judge automatically disqualified from any case in which the Attorney General participates?

Answer 1: No. Where a judge is sued in his official capacity and the Attorney General represents him, he need not automatically disqualify himself. In addition, because the Committee did not believe that most parties and their attorneys would consider the information relevant, the judge is not required to provide notice on the record of the Attorney General's representation. Canon 3(E)(1).

Because of the nature of the lawsuits against judges represented by the Attorney General, a majority of the Judicial Ethics Committee voted to revise JE-102 to remove the requirement of notice on the record. The majority of these lawsuits are small, nuisance suits or lawsuits where the Commonwealth is the real party in interest; therefore, such a revision was considered consistent with the Commentary to Canon 3(E)(1) which requires a judge to give notice of a relationship when he believes that the parties and their attorneys would consider the information relevant even if the judge himself does not consider the information relevant. Disqualification is required only when a judge's impar-

tiality might reasonably be questioned. As the majority of the Committee did not consider that disqualification would be required in most of these cases or that most parties and their attorneys would have an objection, the burden was shifted to them to take notice of the relationship and raise the objection.

Hon. James L. Bowling,
Circuit Judge
*The Ethics Committee of the
Kentucky Judiciary*

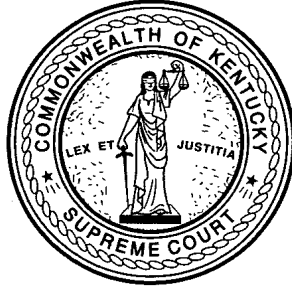
*Mr. Uhel Barrickman did not participate in this decision.

Advisory Ethics Opinions

Where to find them in the *Bench & Bar*

KBA E-336	Winter 1990	Volume 54, #1
KBA E-337	Winter 1991	Volume 55, #1
KBA E-338	Summer 1990	Volume 54, #3
KBA E-340	Fall 1990	Volume 54, #4
KBA E-341-343	Spring 1991	Volume 55, #2
KBA E-344-346	Summer 1991	Volume 55, #3
KBA E-347-348	Fall 1991	Volume 55, #4
KBA E-349	Spring 1992	Volume 56, #2
KBA E-350 & 351	Summer 1992	Volume 56, #3
KBA E-352-359	Summer 1993	Volume 57, #3
KBA E-360 & 361	Summer 1993	Volume 57, #3
KBA E-362 & 363	Spring 1994	Volume 58, #2
KBA E-364-367	Summer 1994	Volume 58, #3
KBA E-368 & 369	Fall 1994	Volume 58, #4
KBA E-370-373	Winter 1995	Volume 59, #1
KBA E-374	Spring 1996	Volume 60, #2
KBA E-375-379	Summer 1995	Volume 59, #3
KBA E-380-384	Fall 1995	Volume 59, #4
KBA E-385 & 386	Winter 1996	Volume 60, #1
KBA E-387	Spring 1996	Volume 60, #2
KBA E-388 & 389	Summer 1996	Volume 60, #3
KBA E-390 & 391	Fall 1996	Volume 60, #4
KBA E-392 & 393	Winter 1997	Volume 61, #1
KBA E-394	Spring 1997	Volume 61, #2
KBA E-395-399	November 1997	Volume 62, #5
KBA E-400	Summer 1997	Volume 61, #3
KBA E-401 & 402	Spring 1998	Volume 62, #2
KBA E-403	July 1998	Volume 62, #3
KBA E-404 & 405	September 1998	Volume 62, #4
KBA E-406	March 1999	Volume 63, #2
KBA E-407	July 1999	Volume 63, #4
KBA E-408	November 1999	Volume 63, #6
KBA E-409 & 410	January 2000	Volume 64, #1
KBA E-411	May 2000	Volume 64, #3
KBA E-412 - E-415	July 2000	Volume 64, #4
KBA E-416	July 2001	Volume 65, #4
KBA E-417	November 2001	Volume 65, #6
KBA E-418	March 2002	Volume 66, #2
KBA E-419	July 2002	Volume 66, #4
KBA E-420	March 2003	Volume 67, #2

Supreme Court of Kentucky



PROPOSED AMENDMENTS TO:

THE KENTUCKY RULES OF EVIDENCE

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THE RULES OF THE SUPREME COURT

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The following proposed amendments to Supreme Court Rules will be considered in an open session on Wednesday, June 11, at 9:30 a.m. The hearing will be held at the Kentucky International Convention Center in Louisville, in conjunction with the KBA Annual Convention.

PROPOSED AMENDMENT TO THE KENTUCKY RULES OF EVIDENCE

KRE 804 Hearsay Exceptions: Declarant Unavailable

Proposed addition of subsection (5) to KRE 804(b):

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(5) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

COMMENT

The law on relevance allows a party to introduce evidence showing that an opponent has done something with respect to potential evidence in a case that would support an inference contrary to the position the party is taking in the case (such as intimidation of a witness, destruction of documents, murder of a witness, etc.). Known as “spoliation” evidence, this allows a litigant injured by the actions of an opponent to benefit from adverse inferences based on misconduct. But it is easy to imagine situations in which this kind of benefit would not meet the needs of the injured litigant (because it could leave him/her/it without evidence that is needed to support a position).

The proposal is designed to provide a party injured by the wrongdoing of an opponent an opportunity to obtain a substitute for evidence lost as a result of such wrongdoing-out-of-court statements by a witness made unavailable for live testimony by actions of the opponent. It is identical to a provision that was added to the Federal Rules of Evidence in 1997. Drafters of the federal provision offered the following explanation:

... This recognizes the need for a prophylactic rule to deal with abhorrent behavior “which strikes at the heart of the justice system itself.” ... The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government. It applies to actions taken after the event to prevent a witness from testifying.

Before the adoption of this provision, federal courts had used the waiver concept to reach the same result, an outcome that could only be reached by ignoring the plain language of Rule 802 which requires exclusion of hearsay unless there is an explicit exception in the evidence rules or rules of the Supreme Court. If the result reached by use of waiver was proper (as it surely is), there is no reason to leave it unstated.

The exception would not come into play without a showing of “unavailability” of the declarant as a witness. Unavailability is fully defined in KRE 804(1) and should be suitable for this proposed exception; at least, it would cover the obvious situations (where opponent kills a witness, causes his absence by intimidation, and a marriage of a witness that triggers reliance on a privilege, etc.).

The proposal requires a showing that the opponent “engaged or acquiesced in wrongdoing.” The word “acquiesce” is designed to reach situations in which the opponent produces the unavailability without being directly involved in it (e.g., by failing to bring threatening activities to an end when able to do so, by failing to report to authorities known threats to witnesses that would benefit his/her position in litigation, etc.); its exact meaning would emerge from application over time.

The exception would come into play only when the wrongdoing produces the unavailability of a person who would qualify as “a witness.” In some instances, it would be easy to make the determination that a person is a “witness” (because there would be a pending proceeding in which it was obvious that the person would testify); in other instances, it might be difficult to make this determination (because there is only a potential proceeding and only the possibility that the person would testify). The provision must leave room for flexibility in this regard and would not achieve its objective if it required a showing that legal proceedings had been commenced and that the opponent was certain that the declarant would be a witness. This element of the exception, as well as the wrongdoing element, would present preliminary issues for the trial judge to resolve under KRE 104(a).

PROPOSED AMENDMENTS TO THE RULES OF THE SUPREME COURT

1. SCR 2.015

Proposed amendments to section (2) of SCR 2.015:

- (2) No person shall sit for the Bar Examinations administered under SCR 2.080, 3.500 or 3.510[8] unless he or she has first passed the Multi-State Professional Responsibility Examination administered by the National Conference of Bar Examiners by attaining a scaled score thereon of at least 75.

2. SCR 2.042

Proposed addition of section (4) to SCR 2.042:

- (4) Any member whose license is revoked by the Court for failure to comply with the terms of a conditional admission agreement shall be deemed to have been subject to a disciplinary action and restoration or reinstatement shall be subject to the rules set forth in SCR 3.510.

3. SCR 2.110

Proposed amendments to section (3) of SCR 2.110:

- (3) Admission under this Rule shall be conditioned on the applicant establishing that the district or state from which the applicant applies and in which the applicant performs the major portion of his or her professional activities has rules or other provisions providing for admission without examination and by reciprocity or comity which are no more restrictive than the rules of this Commonwealth. [at least equivalent to this Rule 2.110 and other pertinent rules of this jurisdiction.]

4. SCR 2.111

Proposed amendments to section (5) of SCR 2.111:

The performance of legal services in this Commonwealth solely for such attorney's employer, its parent, subsidiary, or affiliated entities, following admission to the Kentucky Bar on a limited certificate shall be con-

sidered to be the active engagement in the practice of law for all purposes. [The past performance by such applicant of legal services in this Commonwealth solely for his employer, its parent subsidiary, or affiliated entities, shall be deemed, for all purposes, to have been the authorized active engagement in the practice of law in this Commonwealth, if such attorney, at the time of the performance of such legal services met the requirements set forth in Sections 1(b)(i), 1(b)(ii), and 1(b)(iii) of this Rule.]

5. SCR 3.010 GENERAL DEFINITIONS

Proposed amendments to SCR 3.010:

As used throughout this Rule 3, the following definitions shall apply unless the context clearly requires a different meaning:

["Accredited sponsor" is the sponsor of a continuing legal education program that is accredited by the commission.

"Approved activity" is a continuing legal education activity that has been approved for credit by the Commission.]

"Association" is the Kentucky Bar Association.

"Attorney" is a person licensed or authorized to practice law.

["Award" is the Continuing Legal Education Award.]

"Board" is the board of governors of the association.

"Bylaws" means the bylaws of the association.

"Chairman" means the chairman of the house of delegates.

"Chairman-elect" means the chairman-elect of the house of delegates.

"Charge" means the pleading by which the association charges an attorney with unprofessional conduct.

"Circuit clerk" is the clerk of the court of respondent's present or last known residence.

"Clerk" is the clerk of the Supreme Court of Kentucky.

["Commission" is the continuing legal education commission.]

“Committee” means the committee on character and fitness defined in Rule 2.040.

“Complainant” means the party who causes to be initiated an investigation of an attorney, or who causes to be initiated a proceeding under Rule 3.160. The complainant may be a person or entity.

[“Continuing Legal Education” is any legal or other educational activity or program which is designed to maintain and improve the professional competency of practicing attorneys and is accredited by the Commission.]

“Court” is the Supreme Court of Kentucky.

[“Credit” is a unit for measuring continuing legal education activity.]

“Delegate” is a member of the house of delegates of the association.

“Director” is the director of the association.

“District” means a prescribed geographical and political area of the state.

[“Educational year” is the reporting period for mandatory continuing legal education and runs from July 1st each year through June 30th of the successive year.]

“Governor” is an elected member of the board.

“House” means the house of delegates of the association.

[“In-house activity” is an activity sponsored by a single law firm, single corporate law department, or single governmental office for lawyers who are members or employees of the firm, department or office.]

“Law student” means any person enrolled in an approved law school who has successfully completed the first year therein.

[“Legal writing” is a publication that contributes to the legal competency of the applicant or other attorneys or judges and is approved by the Commission. Writing for which the author is paid shall not be approved.]

“Member” means an attorney in good standing as required by the rules of the court.

[“Non-compliance” means not meeting continuing legal education requirements set forth in Rule 3.661 and includes both lack of certification and lack of completion of activities prior to established time requirements.]

“Officer” means a member elected or appointed pursuant to the rules.

“President” is the president of the association.

“President-elect” is the president-elect of the association.

“Registrar” is the registrar of the association.

“Respondent” is an attorney against whom a charge is filed.

“Rules” are the rules of the court.

“Section” means a body of members actively interested in and promoting improvements in a particular branch of law.

“Time” is computed as under the Rules of Civil Procedure.

“Treasurer” is the treasurer of the association.

“Trial commissioner” means the commissioner appointed pursuant to the provisions of Rule 3.230 and other rules governing disciplinary procedures.

[“Tribunal” means the inquiry tribunal appointed by the chief justice to determine whether probable cause exists for filing a charge.]

“Vice-chairman” is the vice-chairman of the house of delegates.

“Vice-president” is the vice-president of the association.

6. SCR 3.050 COLLECTION OF DUES; SUSPENSION FOR NONPAYMENT

Proposed amendments to SCR 3.050:

As soon as practicable after August 20th of each year, the Treasurer shall notify a member in writing of his or her delinquency. If such member remains delinquent on the 10th day of the following September, a late payment fee of fifty dollars shall be assessed and the Treasurer shall, forthwith, in writing, certify the member’s name to the Court. The Clerk shall docket the matter and the Court shall issue to such member a rule returnable twenty days thereafter, requiring the respondent to show cause why he/she should not be suspended from the practice of law. The response shall be in writing to the Supreme Court, filed with the Clerk, with a copy served to the Director and, in addition to payment of the delinquent dues and late payment fee, shall be accompanied by a fee paid to the Association in an amount to be set forth in the Court’s order. The Association shall be permitted to file a reply within ten days after the filing of a response by the member. Unless good cause be shown by the return day of the rule or within such additional time as may be allowed by the Court, an order shall be entered suspending respondent from the practice of law. An attested copy of the order shall forthwith be delivered by the Clerk to the member, the Director, and the circuit clerk of the member’s residential district for recording and indexing as required by Rule 3.480. The suspended member may apply for reinstatement to membership under the provisions of Rule 3.500.

7. SCR 3.165(1)(e) TEMPORARY SUSPENSION
BY THE SUPREME COURT

Proposed addition of subsection (e) to section (1) of SCR 3.165:

- (1) On petition of the Inquiry Commission, authorized by its Chair, and supported by an affidavit, an attorney may be temporarily suspended from the practice of law by order of the Court provided:

(e) Any lawyer who fails to respond to any charge filed by the Inquiry Commission shall be automatically suspended from the practice of law for an indefinite period until such response is made to the Inquiry Commission or until a subsequent order supersedes the temporary suspension.

8. SCR 3.166(1) AUTOMATIC SUSPENSION
AFTER CONVICTION OF A
FELONY

Proposed amendments to section (1) of SCR 3.166:

- (1) Any member of the Kentucky Bar Association who pleads guilty to or is convicted by a judge or jury of a felony in this State or in any other jurisdiction [as defined in KRS 500.080] shall be automatically suspended from the practice of law in this Commonwealth. “Felony” means an offense for which a sentence to a term of imprisonment of at least one (1) year was imposed. The imposition of probation or parole or any other type of discharge prior to the service of sentence, if one is imposed, shall not affect the automatic suspension. The suspension shall take effect automatically beginning on the day following the plea of guilty or finding of guilt by a judge or jury or upon the entry of judgment whichever occurs first. The suspension under this rule shall remain in effect until dissolved or superseded by order of the Court. Within thirty (30) days of the plea of guilty or finding of guilt by a judge or jury or entry of judgment whichever occurs first, the suspended attorney may file a motion with the Clerk of the Supreme Court of Kentucky setting forth any grounds which the attorney believes justify dissolution or modification of the suspension.

9. SCR 3.175 EFFICIENT ENFORCEMENT;
NOTICE OF ATTORNEY’S ADDRESS

Proposed amendments to SCR 3.175:

- (1) In order to facilitate the efficient enforcement of the Kentucky Rules of Professional Conduct, the rules of the Continuing Legal Education Commission, the dues obligations of attorneys, and such other communications of importance to the profession as the Supreme Court may consider appropriate, each attorney licensed by the Supreme Court to practice law in this Commonwealth shall:
- (a) maintain with the Director of the Association a current address at which he or she may be communicated with by mail, the said address to be known as the member’s Bar Roster address, and shall upon a change of that address notify the Director within thirty (30) days of the new address; and
- (b) include his or her five (5) digit member identification number in all communications to the Association including, but not limited to, any and all communications relating to his or her membership status, membership record, dues obligations, compliance with continuing legal education requirements or disciplinary proceedings in which he or she is a respondent.
- (2) After July 1, 2004, every member of the Association shall be deemed to have appointed the Disciplinary Clerk as that member’s agent for service of any document that is required to be served upon that member by any provision of Supreme Court Rule 2 or 3, provided that service of a document upon the Disciplinary Clerk shall constitute constructive service of that document upon the member only upon proof that all of the following requirements have been satisfied:
- (a) Reasonable efforts have been made to achieve actual service of the document upon the member;
- (b) Two (2) true copies of the document have been provided to the Disciplinary Clerk, accompanied by a written request that the Disciplinary Clerk serve the document upon the member at the member’s current Bar Roster address;

(c) Within seven (7) days after receipt of such request, the Disciplinary Clerk mailed one (1) copy of the document to the member at the aforesaid address, posted by certified mail, return receipt requested, restricted delivery - addressee only, in an envelope bearing the return address of the Disciplinary Clerk and marked on the outside as "OFFICIAL COMMUNICATION – IMMEDIATE ATTENTION REQUIRED"; and

(d) No less than thirty (30) days after mailing the document pursuant to subparagraph (c), the Disciplinary Clerk has entered a Return of Service which attests:

(i) that the Disciplinary Clerk mailed one of the copies of the document mentioned in subparagraph (b) to the member's Bar Roster address in accordance with the requirements of subparagraph (c);

(ii) that the Disciplinary Clerk has attached to the Return of Service all communications received in response to the service or attempted service of the document, including any certified mail receipt or other postal notice or return receipt relating to the delivery or attempted delivery of the document and any communication from the member of the Association or other person acting on behalf of such member; and

(iii) that the Disciplinary Clerk has provided a true copy of the Return of Service, with copies of all attachments, to the person or entity who requested service of the document up on the member of the Association.

(3) After July 1, 2004, the Association may reject any communication to the Association which fails to comply with paragraph (1) (b) of this Rule 3.175, provided that a member's failure to include his or her member identification number in a document shall not result in a default in any disciplinary proceeding.

[If an attorney cannot be served at his or her Bar Roster address, then that attorney shall be deemed to have designated the Secretary of State as his or

her agent for service of process and service shall be made pursuant to KRS 454.210.]

10. SCR 3.370(6) PROCEDURE BEFORE THE BOARD AND THE COURT

Proposed amendments to section (6) of SCR 3.370:

(6) The Board shall decide, by a roll call vote, whether the decision of the Trial Commissioner as to the finding of a violation and degree of discipline imposed is supported by substantial evidence or is clearly erroneous as a matter of law. The Board, in its discretion, may conduct a review *de novo* of the evidence presented to the Trial Commissioner. Both the findings and any disciplinary action must be agreed upon by eleven (11) or three-fourths (3/4) of the members of the Board present and voting on the proceedings, whichever is less. The result of each of the two (2) votes shall be recorded in the Board's minutes and in a written decision of the Board setting forth the reasons therefore as stated in paragraph seven (7) of [to]this rule. The President shall sign and file with the Disciplinary Clerk an order setting forth the action and decision of the Board. [, and t]The Disciplinary Clerk shall mail copies of such order and decision, together with a copy of the Trial Commissioner's report, to the Respondent and his/her counsel, [and] to each member of the Inquiry Commission, and shall place ten (10) copies in the file. The Board by a vote of a majority of the Board present and voting, may remand the case to the Inquiry Commission for reconsideration of the form of the charge, remand the case to the Trial Commissioner for clarification of the Trial Commissioner's report, or for an evidentiary hearing on points specified in the order of remand. The Board may order the parties to file additional briefs on specific issues.

11. SCR 3.500

Proposed amendments to section (3) of SCR 3.500:

(3) If the Committee recommends approval of the application and the Board concurs, then the application shall be referred to the Board of Bar Examiners, which Board shall administer a written examination which shall cover the subject of ethics and five (5) of the subjects listed in SCR 2.08[9]0(1). Each of these subjects must be passed by the Applicant, and not averaged or com-

bined with each other, or with the score obtained on the examination required by Rule 2.015[80]. The fees required by Rules 2.022 and 2.023[0] shall be paid prior to taking the examination.

If an Applicant passes an examination, such fact shall be certified to the Court together with a recommendation that the Applicant be readmitted to membership. If the Applicant fails to pass an examination, the Board of Bar Examiners shall certify the fact of failure to the Association and the Court for entry of an order denying the Applicant for reinstatement.

The provisions of Rules 2.015 and 2.08[9]0 shall apply where not inconsistent.

12. SCR 3.505

Proposed amendments to section (3) of SCR 3.505:

- (3) The Applicant or Bar Counsel shall have the right to a hearing before the Character and Fitness Committee prior to the issuance of its decision. The hearing shall be held within sixty (60) days from the request. The report of the Committee shall be filed within sixty (60) [thirty (30)] days of receipt of the transcript of hearing.

13. SCR 3.510

Proposed amendments to section (5) of SCR 3.510:

- (5) A suspended member of the Association who desires to resume practice as quickly as possible following [at the end of] a period of suspension may file an application to do so at any time during the last ninety (90) days [quarter] of the period of suspension[, but such application must be filed a sufficient length of time in advance of the end of the suspension to permit investigation of the Applicant].

14. SCR 3.600 CONTINUING LEGAL EDUCATION DEFINITIONS

Proposed addition of new rule SCR 3.600:

As used in SCR 3.610-3.690, the following definitions shall apply unless the context clearly requires a different meaning:

“Approved activity” is a continuing legal education activity that has been approved for credit by the CLE Commission.

“Attorney Identification Number” is the five (5) digit number assigned to each member of the association upon admission and is required to appear on all certifications for CLE activity, applications, responses or other correspondence to the Director or Commission.

“Award” is the Continuing Legal Education Award.

“Commission” is the continuing legal education commission.”

“Continuing Legal Education” is any legal [or other] educational activity or program which is designed to maintain or improve the professional competency of the practicing attorneys and is accredited by the Commission.

“Credit” is a unit for measuring continuing legal education activity.

“Educational year” is the reporting period for mandatory continuing legal education and runs from July 1st each year through June 30th of the successive year.

“In-house activity” is an activity sponsored by a single law firm, single corporate law department, or single governmental office for lawyers who are members or employees of the firm, department or office.

“Legal writing” is a publication which contributes to the legal competency of the applicant or other attorneys or judges and is approved by the Commission. Writing for which the author is paid shall not be approved.

“Non-compliance” means not meeting continuing legal education requirements set forth in Rule 3.661 and Rule 3.652 and includes both lack of certification and lack of completion of activities prior to established time requirements.

“Technological transmission” is a CLE activity delivery method other than live seminars and

includes video tape, audio tape, live broadcast transmission, satellite simulcast, teleconference, video conference, CD-ROM, data conference, computer on-line services, or other appropriate technology as approved by the Commission.

15. SCR 3.652(7) NEW LAWYER SKILLS PROGRAM

Proposed amendments to section (7) of SCR 3.652:

- (7) Members required to complete the New Lawyer Skills Program pursuant to paragraph (5) of this Rule may, upon application to and approval by the Commission, be exempted from the requirement if the member is admitted to practice in another jurisdiction for a minimum of five years, and will certify such prior [practice] admission to the Commission, or if the member has attended a mandatory new lawyer training program of at least twelve and one-half (12.5) credits, including two (2) ethics credits, offered by the state bar association of another jurisdiction and approved by the director.

16. SCR 3.661 CONTINUING LEGAL EDUCATION REQUIREMENTS: COMPLIANCE AND CERTIFICATION

Proposed amendments to SCR 3.661:

- (1) Each educational year, every person licensed to practice law in this Commonwealth, not specifically exempted pursuant to the provisions of Rule 3.666, shall complete and certify a minimum of twelve and one-half (12.5) credit hours in continuing legal education activities approved by the Commission, including a minimum of two (2) credit hours devoted to continuing legal education specifically addressing the topics of legal ethics, professional responsibility or professionalism. An educational year shall begin on July 1 and end on the following June 30. All continuing legal education activities must be completed not later than June 30 of each educational year. All certifications shall include a member's attorney identification number.
- (2) Certification of completion of approved CLE activities must be received by the Director not later

than August 10th immediately following the educational year in which the activity is completed. Certification shall be submitted to the Director by the sponsor of the accredited activity or by individual attorneys. Sponsors submitting certifications to the Director shall comply with all requirements set forth in SCR 3.665(6).

- (3) At least two (2) of the twelve and one-half (12.5) credit hours required shall be devoted to continuing legal education specifically addressing the topics of legal ethics or professional responsibility. Programs or seminars or designated portions thereof devoted to legal ethics or professional responsibility include but are not limited to programs or seminars or designated portions thereof with instruction focusing on the Rules of Professional Conduct and/or the Rules of Professional Conduct as they are directly related to law firm management, malpractice avoidance, attorneys fees, legal ethics, and the duties of attorneys to the judicial system, public, clients and other attorneys.
- (4) Integration of legal ethics or professional responsibility issues into substantive law topics is encouraged, but shall not count toward the two (2) credit minimum annual requirement.
- (5) A member who accumulates an excess over the twelve and one-half (12.5) credit requirement may carry forward the excess credits into the two successive educational years for the purpose of satisfying the minimum requirement for those years. Carry forward is limited to a total of twenty-five (25) credits. All excess credits above a total of twenty-five (25) credits will remain on the member's records but may not be carried forward.
- (6) Carry-forward credits shall be allowed to satisfy the two (2) credit annual requirement for continuing legal education addressing the topics of legal ethics, professional responsibility and professionalism, and may be carried forward into the two years next succeeding the year in which the hours were earned. Carry forward for ethics, professional responsibility and professionalism is limited to a total of four (4) credits.

[(6) On or before July 1 of each year, every non-exempt member shall certify to the Director that he or she has completed a minimum of twelve and one-half (12.5) credit hours of continuing legal education, including a minimum of two (2) credit hours devoted to continuing legal education specifically addressing the topics of legal ethics, professional responsibility or professionalism.]

(7) Certification may be submitted by sponsors or by individuals on approved Association forms, or uniform certificates, or any other format adopted by the Association.

[(8) Certification shall be submitted to the Director upon completion of the Continuing Legal Education activity at any time during the educational year. Certification shall not be submitted later than the August 10th immediately following the educational year in which the activities were completed.]

(8[9]) Compliance and certification requirements concerning the New Lawyer Skills Program are set forth at SCR 3.652(5) and (6).

17. SCR 3.662 QUALIFYING CONTINUING LEGAL EDUCATION ACTIVITY AND STANDARDS

Proposed amendments to section (2) of SCR 3.662:

- (2) The following categories of activities shall not qualify as a continuing legal education activity.
- (a) Activities designed primarily for non-lawyers.
 - (b) In-house activity which has not been accredited at least thirty (30) days in advance.
 - (c) In-house activities for which less than half the instruction is provided by qualified persons outside the firm, department or agency, and which members of the Court, the Commission or Commission designee are prohibited from observing for compliance without charge of fees.
 - (d) Technological transmissions as set forth at SCR 3.662(1)(j) which do not meet the standards set forth in SCR 3.662 and which have not been submitted and accredited pursuant to SCR 3.665, or which are of such poor audio

and video quality that participants cannot see or hear the content under reasonable circumstances.

- (e) Home study or self-study which does not meet the standards set forth in SCR 3.662 and which has not been submitted and accredited pursuant to SCR 3.665.
- (f) Bar review courses taken in preparation for bar examinations[.] for admission to the highest court in a state or jurisdiction.
- (g) Correspondence classes.
- (h) Any activity competed prior to admission to practice in Kentucky except the program required pursuant to SCR 3.661(9) and 3.652(5).
- (i) Undergraduate law or law-related classes.
- (j) Programs taken in preparation for licensure exams for non-lawyer professionals.
- (k) Business meetings or committee meetings of legal and law-related associations.

18. SCR 3.665(6)(f) PROCEDURE FOR ACCREDITATION OF CONTINUING LEGAL EDUCATION ACTIVITIES AND OBLIGATIONS OF SPONSORS

Proposed new subsection (f) of section (6) of SCR 3.665:

- (f) Sponsors may submit member activity certifications to the Director as required by SCR 3.661(2), via electronic means so long as the sponsor maintains the member's original certification, or copy thereof, of the completion of the activity on file for two (2) subsequent educational years following the year in which the activity was completed.

19. SCR 3.675(3) CONTINUING LEGAL EDUCATION REQUIREMENTS FOR RESTORATION OR REINSTATEMENT TO MEMBERSHIP; PROCEDURES

Proposed amendments to section (3) of SCR 3.675:

- (3) [A former member may receive credit for any timely certification of an approved activity. No credits shall be awarded for attendance at any program unless application is submitted to the Director during the educational year in which the program was attended or the two succeeding educational years.] The requirements for completion

of continuing legal education as a condition to restoration or reinstatement as set forth above may only be satisfied with credits earned in the current educational year during which the application is submitted and the preceding two educational years. Credits so earned shall be applicable to requirements imposed by the Commission upon application or other actions undertaken in pursuit of restoration or rein-statement.

KENTUCKY LAWYER ASSISTANCE PROGRAM (KYLAP)

20. SCR 3.900 DEFINITIONS

Proposed new rule SCR 3.900:

As used in SCR 3.900 through SCR 3.980:

- (1) “Impairment” means and includes any mental, psychological or emotional condition that impairs or may foreseeably impair a person’s ability to practice law or serve on the bench. Impairment may result from addiction to intoxicants or drugs, chemical dependency, substance abuse, mental disease, mental disorder or defect, or psychological or emotional illness.
- (2) “The Kentucky legal community” means and includes (a) all members of the Kentucky Bar Association, including judges; (b) all applicants for admission to the practice of law in Kentucky; (c) all students enrolled at law schools in the Commonwealth; and (d) all members of the Association who have been suspended from the practice of law pursuant to the Rules of the Supreme Court.

21. SCR 3.910 KENTUCKY LAWYER ASSISTANCE PROGRAM (KYLAP)

Proposed new rule SCR 3.910:

- (1) There is hereby established a state-wide program to be called the Kentucky Lawyer Assistance Program (or “KYLAP”), which shall be operated by the Association in accordance with these Rules. It shall be the mission and purpose of KYLAP to address impairment issues within the Kentucky legal community in a manner that serves and promotes the general mission and purpose of the Association as set forth in SCR 3.025.

- (2) KYLAP shall offer certain types of assistance as described in this Rule to members of the Kentucky legal community who suffer from actual or potential impairment, and may proceed to provide such assistance to any member of the said community as requested or authorized. The types of assistance offered and provided by KYLAP in a particular case may include lay counseling and encouragement; assisting, planning and execution of interventions; providing information about treatment alternatives; monitoring progress of recovery from impairment, which may include assistance in arranging, scheduling and tracking attendance at recovery programs, appointments with counselors, therapists and medical care providers and compliance with alcohol or drug screens; monitoring compliance with voluntary or involuntary treatment or recovery programs, which may include documentation and reports concerning compliance or non-compliance; obtaining authorizations in conformity with federal and state law; and other related tasks that may assist a member of the said community in addressing an actual or potential impairment; provided, however, that KYLAP shall perform the aforesaid types of assistance in such a manner that KYLAP’s staff does not render legal or medical advice and does not engage in any activity which constitutes the practice of law or medicine.
- (3) KYLAP shall develop and present educational programs for the Kentucky legal community regarding issues of impairment and shall pursue other appropriate opportunities to increase awareness and understanding of such matters and cultivate an environment in which issues of impairment are properly addressed.
- (4) KYLAP shall serve as a resource within the Association with respect to matters of impairment, so that all functions and activities of the Association may benefit from KYLAP’s information and expertise in matters of impairment.
- (5) KYLAP may engage in other activities consistent with these Rules and as authorized by the operating policies and procedures adopted by the KYLAP Commission.

(6) KYLAP shall perform all of the aforementioned duties in a manner consistent with the confidentiality provisions of Rule 3.970.

(7) KYLAP shall be funded from the annual dues collected by the Association pursuant to these Rules. KYLAP may also charge reasonable and appropriate fees for services rendered and accept monetary gifts in support of its activities, to the extent authorized by the KYLAP Commission and approved by the Board.

22. SCR 3.920 KENTUCKY LAWYER ASSISTANCE PROGRAM COMMISSION (KYLAP COMMISSION)

Proposed new rule SCR 3.920:

(1) The Board of Governors shall appoint a Commission to be called the Kentucky Lawyer Assistance Program Commission or "KYLAP Commission", which shall have general responsibility for the administration of KYLAP in accordance with these Rules.

(2) The Commission shall consist of fifteen (15) persons, as follows: (a) two members of the Board of Governors; (b) an active member of the Association (either a lawyer or judge) from each of the seven Supreme Court Districts; (c) two other active members of the Association (either lawyers or judges); and (d) four (4) citizens of the Commonwealth who are not members of the Kentucky legal community. The Board shall appoint persons who have a demonstrated interest in issues of impairment and shall also endeavor to make appointments which create a diversity of knowledge and life experience within the Commission's membership.

(3) Each member of the Commission shall be appointed for a period of four (4) years. However, in order to achieve staggered terms, the initial members of the Commission shall be appointed as follows:

(a) Five of the Commission members who are lawyers or judges shall be appointed for two-year terms;

(b) Four of the Commission members who are lawyers or judges shall be appointed for three-year terms;

(c) Two of the Commission members who are lawyers or judges shall be appointed for four-year terms;

(d) Two of the Commission members who are not members of the Kentucky legal community shall be appointed for three-year terms; and

(e) Two of the Commission members who are not members of the Kentucky legal community shall be appointed for four-year terms.

Thereafter, when any vacancy occurs in the membership of the Commission, that vacancy shall be filled by appointment by the Board of Governors. When a vacancy occurs prior to the expiration of a member's term, the new member shall be appointed for the remainder of the unexpired term. When a vacancy occurs because of the expiration of a term, the new member shall be appointed for a four-year term.

(4) The Commission shall have a Chair and a Vice-Chair. The Chair shall be appointed annually by the Board of Governors with input from the Commission and the KYLAP Director. The Vice-Chair shall be elected annually by the members of the Commission.

(5) The Commission shall meet quarterly or upon call of the Chair or upon the request of five (5) or more members. A member's failure to attend three (3) consecutive meetings will automatically result in the vacancy of that member's position on the Commission.

(6) The Commission shall have general responsibility for the administration of KYLAP in accordance with these Rules. In discharging its responsibility KYLAP shall have the authority to:

(a) Adopt operating policies and procedures as necessary and appropriate to implement these Rules and administer KYLAP, provided that such policies and procedures shall receive

prior approval of the Board; and

- (b) Make reports to the Board and Court annually or as otherwise required, provided that such reports shall be of a statistical and summary nature and shall not compromise the confidentiality of any referral under SCR 3.950 or any assignment under SCR 3.960.

23. SCR 3.930 KYLAP PROGRAM DIRECTOR AND STAFF

Proposed new rule SCR 3.930:

The Board of Governors, through the Executive Director of the Association, shall appoint a KYLAP Program Director and sufficient staff to provide administrative support for the KYLAP Commission and the KYLAP program. The Program Director shall be responsible for the administration of KYLAP.

24. SCR 3.940 KYLAP VOLUNTEER COUNSELORS

Proposed new rule SCR 3.940:

KYLAP may enlist volunteer counselors to assist KYLAP in discharging KYLAP's duties under these Rules. Such volunteer counselors shall be subject to all provisions of these Rules including the provisions of SCR 3.910(2) limiting the types of assistance provided by KYLAP and the confidentiality requirements of SCR 3.990.

25. SCR 3.950 SELF-REFERRALS

Proposed new rule SCR 3.950:

Any member of the Kentucky legal community may contact KYLAP to obtain information about KYLAP's services or to request assistance from KYLAP regarding an actual or potential impairment. Any such communication with KYLAP shall be confidential in nature and shall be held in strict confidence by KYLAP's staff and by all other persons involved in the implementation and delivery of KYLAP's services. Upon receiving any such inquiry, KYLAP may offer assistance of the nature described in Rule 3.910(2) as appropriate to the person's situation and circumstances, and may proceed to provide such assistance as authorized by that person.

26. SCR 3.960 THIRD PARTY REFERRALS

Proposed new rule SCR 3.960:

- (1) Any person may contact KYLAP and request or suggest that KYLAP offer assistance to a member of the Kentucky legal community who is suffering or may be suffering from an actual or potential impairment.
- (2) When a person contacts KYLAP pursuant to this Rule, his or her communication with KYLAP shall be confidential in nature and shall be held in strict confidence by KYLAP's staff and by all other persons involved in the implementation and delivery of KYLAP's services. Further, if KYLAP proceeds to communicate with the member of the Kentucky legal community who is the subject matter of the contact, KYLAP shall not disclose any information about its communications with the person who made the third-party referral, except as authorized by that person.
- (3) Any person who contacts KYLAP pursuant to this provision shall be immune from any liability to the person who is the subject matter of the contact, or to any other person, by reason of contacting KYLAP pursuant to this Rule.

27. SCR 3.970 AGENCY REFERRALS

Proposed new rule SCR 3.970:

- (1) A member of the Kentucky legal community who is the subject of a pending admission or disciplinary proceeding before an agency of the Supreme Court of Kentucky may authorize that agency to make a confidential request for assistance from KYLAP in evaluating or addressing any actual or potential impairment that may be relevant to the issues which the agency is charged with considering in the proceeding. In particular:
- (a) A member of the Kentucky legal community who is the subject of an application for admission, restoration or reinstatement to the practice of law in the Commonwealth may authorize the Office of Bar Admissions to communicate in confidence with KYLAP for the pur-

pose of requesting assistance from KYLAP in evaluating and addressing any actual or potential impairment that may be relevant to the OBA's consideration or disposition of the application for admission, restoration or reinstatement.

(b) A member or former member of the Association who is the subject of a disciplinary complaint or investigation pending before the Inquiry Commission may authorize that Commission to communicate in confidence with KYLAP for the purpose of requesting assistance from KYLAP in evaluating and addressing any actual or potential impairment that may be relevant to that Commission's consideration or disposition of that complaint or investigation.

(c) A member or former member of the Association who is the subject of an investigation or prosecution by the Office of Bar Counsel may authorize OBC to communicate in confidence with KYLAP for the purpose of requesting assistance from KYLAP in evaluating and addressing any actual or potential impairment that may be relevant to OBC's recommended disposition of that investigation or prosecution.

(2) Before an agency of the Court makes any contact with KYLAP pursuant to paragraph (1) of this Rule, it shall obtain a written authorization from the person who is the subject of the proposed assistance clearly evidencing the fact that such person has authorized the agency to communicate with KYLAP for one or more purposes set forth in paragraph (1).

(3) Upon receiving any request for assistance from an agency of the Court pursuant to paragraph (1) of this Rule, KYLAP shall satisfy itself: (a) that the person who is the subject of the proposed assistance has authorized the agency to communicate with KYLAP, in accordance with paragraphs (1) and (2) of this Rule; and (b) that the requested assistance falls within the scope of KYLAP's mission and services as set forth in Rule 3.910. KYLAP shall not take any other steps in response to the request until it has satisfied itself of these two threshold matters.

(4) After satisfying itself of the threshold matters set forth in paragraph (3), KYLAP shall determine whether it is able to provide any assistance to the requesting agency and respond appropriately to that agency. KYLAP is not obligated by these Rules to accept any request for assistance or become involved in any proceeding before any agency of the Court, and shall do so only when it determines that it is able to provide assistance in accordance with these Rules.

(5) Before providing any assistance pursuant to a request from an agency of the Court, KYLAP shall obtain a written authorization, waiver and release from the person who is the subject of the proposed assistance, in which that person authorizes KYLAP to:

(a) provide appropriate status reports to the requesting agency, and to any other appropriate agencies of the Court, regarding any aspect of the assistance provided by KYLAP after the date KYLAP has accepted the request for assistance, including, without limitation, (i) any assessment or diagnosis of the person's condition rendered after the date KYLAP has accepted the request for assistance, (ii) the person's progress in addressing the actual or potential impairment after the date KYLAP has accepted the request for assistance, and (iii) the person's compliance or non-compliance with any terms or conditions imposed by the Court, any agency of the Court, or KYLAP, after the date KYLAP has accepted the request for assistance;

(b) disclose to the requesting agency, and to any other appropriate agencies of the Court, any information gathered or received by KYLAP after the date KYLAP has accepted the request for assistance, for use as evidence in any admission, disciplinary, restoration or reinstatement proceeding, subject to the rules of evidence and procedure in that proceeding; and

(c) provide testimony in any admission, disciplinary, restoration or reinstatement proceeding regarding assistance provided by KYLAP after the date KYLAP has accepted the request

for assistance, subject to the rules of evidence and procedure in that proceeding.

28. SCR 3.980 SUPREME COURT ASSIGNMENTS TO KYLAP

Proposed new rule SCR 3.980:

- (1) The Supreme Court may assign appropriate tasks and responsibilities to KYLAP relating to the evaluation of an impairment or the monitoring of a person's progress toward recovery from impairment as part of the Court's final disposition of any application for admission to the bar, petition for temporary suspension, charge of professional misconduct or application for restoration or reinstatement, where an issue of impairment has been raised in the proceeding, provided that in no event shall KYLAP become involved in any proceeding prior to the final disposition of that proceeding without the consent of the lawyer.
- (2) The Board of Governors may recommend that the Court assign appropriate tasks and responsibilities to KYLAP as described in paragraph (1) of this Rule as part of the Board's recommendation to the Court in any disciplinary, restoration or reinstatement proceeding, where an issue of impairment has been raised in the proceeding before the Board.
- (3) When KYLAP receives a matter by assignment from the Court pursuant to paragraph (1) of this Rule:
 - (a) KYLAP shall proceed to provide assistance of the nature described in Rule 3.910(2) in accordance with the terms of the Court's order, and may impose additional requirements on the person who is the subject of the assignment as necessary to perform the assignment;
 - (b) KYLAP may provide reports to the Court, and to one or more agencies of the Court, as authorized or required by the terms of the Court's order;
 - (c) Any information gathered or received by KYLAP after the date of the Court's order

and in the course of discharging the tasks and responsibilities assigned by the Court as part of a final disposition under paragraph (1) of this Rule may be used as evidence in any admission, disciplinary, restoration or reinstatement proceeding regarding the person who is the subject of the assignment, subject to the rules of evidence and procedure in that proceeding; and

- (d) One or more representatives of KYLAP may be called as witnesses in any admission, disciplinary, restoration or reinstatement proceeding for the purpose of testifying about information gathered or received by KYLAP after the date of the Court's order and in the course of discharging the tasks and responsibilities assigned by the Court as part of a final disposition under paragraph (1) of this Rule, subject to the rules of evidence and procedure in that proceeding.

29. SCR 3.990 CONFIDENTIALITY.

Proposed new rule SCR 3.990:

- (1) All communications to KYLAP and all information gathered, records maintained and actions taken by KYLAP shall be confidential, shall be kept in strict confidence by KYLAP's staff and volunteers, shall not be disclosed by KYLAP to any person or entity, including any agency of the Court and any department of the Association, and shall be excluded as evidence in any civil, criminal or administrative proceeding and in any proceeding before the Court, the Board of Governors or the Office of Bar Admissions, except that:
 - (a) if the person who is the subject of KYLAP's assistance has provided a written release authorizing disclosure of communications to KYLAP or information gathered, records maintained or actions taken by KYLAP, KYLAP may disclose such information in strict accordance with the terms and conditions of that written release;
 - (b) if the matter was assigned to KYLAP by the Court pursuant to paragraph SCR 3.980,

KYLAP may issue reports, disclose information and provide testimony as set forth in paragraph (3) of that Rule, and this Rule 3.990 shall not be construed as a basis for excluding otherwise admissible evidence from any admission, disciplinary, restoration or reinstatement proceeding; and

(c) if KYLAP provided assistance pursuant to an agency referral under SCR 3.970, KYLAP may issue reports, disclose information and provide testimony as set forth in paragraph (5) of that Rule, and this Rule 3.990 shall not be construed as a basis for excluding otherwise admissible evidence from any admission, disciplinary, restoration or reinstatement proceeding.

(2) The foregoing requirement of confidentiality shall apply to all members of the KYLAP Commission, all KYLAP staff members and volunteers, all employees of the Association, all volunteer counselors, all persons who provide information or other assistance to KYLAP in connection with any referral or assignment, and all other persons who participate in the performance or delivery of KYLAP's services.

30. SCR 3.995 IMMUNITY.

Proposed new rule SCR 3.995:

The duties imposed by these Rules are duties owed to the Supreme Court, not to any other person or entity. Nothing in these Rules shall be construed as creating any cause of action or right of suit against any person or entity. The Kentucky Bar Association, the Board of Governors, the KYLAP Commission, the Inquiry Commission, the Office of Bar Admissions, the Executive Director of the Association, the KYLAP Program Director, the Office of Bar Counsel, all of their officers, members, employees or agents, and all volunteer counselors enlisted to assist KYLAP pursuant to SCR 3.940 shall be immune from liability for the performance or non-performance of the activities authorized by these Rules.

31. SCR 4.310(2), (3), (4) JUDICIAL ETHICS COMMITTEE AND OPINIONS.

Proposed amendments to sections (2), (3), and (4) of SCR 4.310:

- (2) Opinions as to the propriety of any act or conduct and the construction or application of any canon shall be provided by the committee upon request from any justice, judge, trial commissioner or by any judicial candidate. If the committee finds the question of limited significance, it shall provide an informal opinion to the questioner. If, however, it finds the question of sufficient general interest and importance, it shall render a formal opinion, in which event it shall cause the opinion to be published in complete or synopsis form. Likewise, the committee may issue formal opinions on its own motion under such circumstances as it finds appropriate.
- (3) Both formal and informal opinions shall be advisory only; however, the commission and the Supreme Court shall consider reliance by a justice, judge, trial commissioner or by any judicial candidate upon the ethics committee opinion.
- (4) Any person affected by a formal opinion of the ethics committee may obtain a review thereof by the Supreme Court by filing with the clerk of that court within 30 days after the end of the month in which it was published a motion for review stating the grounds upon which the movant is dissatisfied with the opinion. The motion shall be accompanied by a copy of the opinion or synopsis as published and shall be served upon the ethics committee and, if the movant is someone other than the party who initiated the request for the opinion, upon the initiating justice, judge or commissioner. The filing fee for docketing such motion shall be as provided by Civil Rule 76.42(1) for original actions in the Supreme Court. Notwithstanding the provisions of this subsection of the rule, the Supreme Court on its own initiative may review a judicial ethics opinion at any time.

YOUNG LAWYERS

SECTION OF KENTUCKY

Dear Kentucky Young Lawyer,

This letter is intended to constitute notice under relevant provisions of the By-Laws of the Kentucky Bar Association Young Lawyers Section of the Annual Meeting of the Section, and of proposed changes to the By-Laws to be considered for adoption at the Annual Meeting.

The Annual Meeting of the KBA Young Lawyers Section will take

place during the Kentucky Bar Association Annual Convention. Specifically, the Section's Annual Meeting will be held Thursday, June 12, 2003, at 11:30 a.m. at the Hyatt Regency in Louisville, Kentucky. In addition to the conduct of Section business, including election of officers and representatives, the luncheon meeting will feature Hon. John M. Rogers,



*Michael J. Cox,
Chair, KBA Young
Lawyers Section*

Judge of the United States Court of Appeals for the

Sixth Circuit, speaking on an issue relevant to young lawyers in Kentucky. You are cordially invited to join us for this meeting.

Presented for debate and adoption at that meeting will be a series of changes to the Section's By-Laws. Many of these changes are non-substantive, and may be generally described as accomplishing a re-organization of certain provisions for purposes of efficiency and editing. Substantive changes include a realignment of the duties and responsibilities of the office of Vice Chair of the Section, and the creation of a Standing Committee on Membership to enhance the Section's efforts to recruit, retain, and serve its membership. Qualifications for membership or leadership in the Section are unaffected.

If you have further questions concerning the Section's Annual Meeting, or desire to review in detail the proposed changes to the By-Laws described herein, please contact any Section officer at the address and/or phone number listed for that officer on the Young Lawyers Section area of the website of the Kentucky Bar Association, www.kybar.org.

LEGALLY INSANE

BY JIM HERRICK



"And also, we might want to consider a liquidated damages provision, instead of this 'skinning alive' business."

Michael Losavio

Computer Forensics for Bench and Bar

Intended Records of E-mail and Web Browsing

E-mail and web browsing are used by billions of people. E-mail messaging seamlessly creates a record for later review, a popular target for those seeking evidence; its facial intimacy and immediacy may invite words you or I might not normally put in writing. So, too, do web browsers store records of your web site visits to manage and speed access to web information; that information can also be of evidentiary interest in litigation.

E-mail and web browsing involve both your local computer and the vast machinery of computer networks. Network engineering itself records information about e-mail or web visits not otherwise available with postal mail or a library visit. Computer forensics studies of e-mail and web browsing seek all such information. Once found, you use it; if you know where others might find it, you can protect your e-mail and web browsing.

To find this or any electronic information, you look in what I call "intended" and "unintended" storage or filing of a record of an electronic document. By "intended" I mean what you meant to record *and* what the software designers of a particular electronic document program intended for regular storage, whether you know about that stored record or not. "Intended" storage can usually be retrieved by you with little trouble, if you know where to look, but special care is needed not to destroy or damage those records.

"Unintended" storage is where electronic records may be stored as an unintended or ignored result of the way computer and Internet systems are engineered. One example is the continued existence of an electronic file, like a word processing document, even after it's been "deleted;" it stays there until another file is saved over it. Finding those records may require special software and techniques. Even more than with "intended" storage, recovery of records in "unintended" storage carries a significant risk of damaging or destroying information in or

about a record, especially information crucial to authenticating those records for use as evidence in litigation.

The Permanent Record, Whether You Meant to Make It or Not

E-mail is a work tool. As with copy procedures in many information-generating offices, e-mail programs may preserve e-mail records for later use and reference. It depends on what is offered by your e-mail program, but many offer the same document preservation features.

Consider MS Outlook. When you send an e-mail, a copy is kept in the "Sent Items" folder. If you delete an e-mail from "Sent Items" or from your "Inbox," a copy is stored in your "Deleted Items" folder. You may also have a copy in the "Drafts" folder if you have been working on an e-mail and saved it as a draft, or simply worked on it for more than three minutes; this draft-saving feature is set by default by Outlook and may save drafts of messages you changed or decided not to send.

Over time, your collections of sent, deleted or draft messages can become huge, storing e-mails you've long forgotten about.

Review of these items is mini-forensic analysis in and of itself. You can eyeball the list of records in these folders, looking at recipient, time and date sent, subject, the first lines of a message (auto-preview), the message (preview) and if an attachment is included.

Search features cull for key words in parts of an email. The "Find" feature will search the address, subject line and message, or a combination thereof, for key words of interest, greatly speeding the analysis of stored records. Computer forensic tools perform much the same thing when analyzing a storage medium for records of interest.

To clean out those old messages, you'll need to delete them, and then delete the "Deleted Items" folder items. This may be required by the system administra-

Continued



Michael Losavio

tor, who doesn't want storage space taken up by old, unused records; automated nagging may assure you'll do something. You can also modify or turn off this default record-saving feature if you feel it appropriate. (This information may still reside in "unintended" storage in your system.)

But, these records may *still* reside in some intended storage. System backups protect your work in the event of a system failure, a blessing when you do have a massive system failure. (And you will have a massive system failure.) They also keep copies of your records.

The Auto-Archive feature of Outlook stores old e-mail. If turned on, it moves files of a set age from the Inbox and Sent Items folders to archive folders, and deletes records in the Deleted Items folder. These archived files may be later retrieved, but otherwise do not appear in your Inbox or Sent Items folders.

Replying to e-mail may also create records of which you are unaware. When you reply to an email, one e-mail feature appends a copy of the original message after your reply. If there is a reply back to your reply, then your reply and their initial message are appended to their reply, and so forth, and so on. Eventually a whole thread of discussions is preserved in the most recent response. You might not know that as the appended text may appear far below your viewing window. Sometimes, to send a message to someone I forgot to add to my address book, I'll find a past message from that person and "reply" to it with my new message. That may also send a copy the earlier message thread unrelated to the most recent message. This may also happen when you forward a reply to a third person, unaware that an entire electronic conversation of many messages is included.

All these useful features offer plentiful opportunities to find information, or inadvertently give it away. Many of these features can be modified or cancelled from the Options selection of the Tools menu of MS Outlook.

And Our Web Excursions?

Your web browser keeps track of your web excursions. Intended tracking includes the caching, or storage, of "cookie" files and copies of web pages you visited, and a running list of the addresses of the recent web pages you've visited. In MS Explorer, for example, these features are called, respectively, Temporary Internet Files and History.

The History feature is a navigation tool. By tracking your web research, it lets you easily go back to a site earlier visited. Your web-viewing History can be accessed from the Explorer Bar selection off the View menu; it displays a list of web sites visited that can be ordered by date, site visited, frequency of visits and time of today's visits. You may have also seen that the down arrow to the far right of the address box pulls down a list of web site addresses.

The Temporary Internet Files feature helps manage and speed access to web information. By storing copies of web pages visited, it lets Explorer call up a web page directly from your computer's storage rather than waiting to download the file from the Internet.

Your system also stores "cookies" from web sites you visit. "Cookies" are text files that store information sent from web sites you visit. They are later sent back to those web sites if you visit them again. These "cookies" are meant to speed up a web site's response to your needs by recording what you may have done with that web site before, like entering your password on a password-protected web site.

The Temporary Internet Files feature, accessed from the Internet Options selection off the Tools menu (Tools -> Internet Options -> General tab) will let you delete stored web pages and cookies; by clicking on Settings, it will also let you view the web pages stored on your system. This General tab will also let you delete the History listings and change the length of time Explorer tracks the history of your web visits.

As with deleting e-mails, this information still remains in "unintended" storage on your storage system until overwritten or wiped by special utility programs. Until then, it can still be retrieved using special data retrieval programs.

Unintended Storage?

We'll next look at forensic/security issues of unseen and "unintended" storage of electronic information. If you have thoughts on these issues, please send them to Michael.Losavio@louisville.edu for sharing with your colleagues in the Kentucky bar.

Michael Losavio is a Kentucky lawyer. He works with training and education for the Kentucky Administrative Office of the Courts. His son, Antonio Losavio, and the Hon. James Hoolihan, Judge, Minnesota Seventh District, assisted with this article, written in partial completion of the requirements of the Institute for Faculty Excellence in Judicial Education of the University of Memphis under funding provided by the State Justice Institute. Neither the Institute, the University of Memphis or SJI endorse any views expressed herein, which remain those of its authors.

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A Series

By Professor Rick Bales

Balance

Prose, like a symphony or a landscape painting, needs balance. This essay will discuss three types of balance that are essential to well-written prose: subject-verb agreement, noun-pronoun agreement, and parallel sentence construction.

1. Subject / verb agreement. Singular subjects should have a singular verb, and plural subjects should have plural verbs. When two singular nouns in the subject are joined by a conjunction, the verb should be plural, as in *The lawyer and the client were pleased with the contract negotiations*. However, prepositional phrases that come between the subject and the verb do not affect the verb, as in *The partnership of ten attorneys is unable to agree on anything*. (partnership . . . is). Similarly, subjects and verbs within dependent clauses should agree with each other, but do not affect the subject and verb in the main clause. An example is *One of the contracts the parties are signing requires arbitration of any future disputes*. (parties . . . are signing; one . . . requires).

Another common problem with subject / verb agreement arises with collective nouns. Examples of collective nouns include *jury*, *faculty*, *committee*, and *government*. Collective nouns are treated as singular subjects, and therefore get singular verbs. For example, *The jury is deliberating*. (jury . . . is), but *The jurors who parked in the garage are unhappy about the parking fee*. (jurors . . . are).

2. Noun / pronoun agreement. A pronoun is a word that stands for a noun. A pronoun usually has an antecedent, which is a noun that precedes the pronoun and that the pronoun refers to. A pronoun should have the same number, person, and gender as its antecedent. If multiple pronouns or antecedents exist, it should be clear which pronouns correspond to which antecedents.



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The most common noun / pronoun problem is disagreement in number. Two factors often contribute to this problem. The first is that the antecedent and the pronoun may be separated by a wide gulf of clauses. The second is the commendable desire to avoid sexist language. An example of both factors is: *A person who drives after drinking more than a few drinks should expect to have his / her / his or her [but not their] license revoked*. The pronoun, like the antecedent *person*, must be singular.

Just as pronouns must agree in number, they also must agree in person. An example is: *A lawyer should promptly return phone calls, or you will soon lose your clients*. This sentence is incorrect, because the antecedent is in the third person but the pronoun is in the second person. Re-cast it as *A lawyer should promptly return phone calls to avoid losing clients*.

Pronouns also must agree in gender. Judge Karen Thomas, ruling that Bob had violated the terms of his probation, exercised her authority to put him back in jail. If Bob is changed to Jill, or if the judge's name is changed from Nancy to Leonard, the sentence becomes confusing.

Finally, a pronoun should clearly refer to a particular antecedent. An example is the sentence *Because he was screaming loudly, the judge ordered the bailiff to remove the defendant from the courtroom*. To help make it clear who is screaming, make sure the antecedent precedes the pronoun, and don't separate the pronoun and antecedent with other similar nouns.

3. Parallel sentence construction. Keep likes alike. Similarity of form helps the reader recognize similarity of content and function.¹ The Beatitudes, for example, would be much less effective rhetorically if written:

Blessed are the poor in spirit . . .

Continued on page 60

The Sarbanes-Oxley Act

Continued from page 33

Endnotes

1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).
2. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 1998).
3. MODEL BUS. CORP. ACT §8.30 cmt. 2 (1999).
4. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §906, 116 Stat. 745, 806 (2002).
5. *Id.*
6. Certification of Disclosure in Companies' Quarterly and Annual Reports, 67 Fed. Reg. 57,275, 57,277 (September 9, 2002) (to be codified at 17 CFR pts. 228, 229 et. al.).
7. *Id.* at 57,277-8.
8. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §301, 116 Stat. 745, 776-777 (2002).
9. *Id.*
10. Certification of Management Investment Company Shareholder Reports and Designation of Certified Shareholder Reports as Exchange Act Periodic Reporting Forms; Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 68 Fed. Reg. 5348, 5354 (February 3, 2003) (to be codified at 17 CFR pts 240, 249 et. al.).
11. *Id.*
12. Section 101 of the Act establishes the Public Accounting Oversight Board to "oversee the audit of public companies that are subject to securities laws...in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §101, 116 Stat. 745, 750-3 (2002).
13. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §201, 116 Stat. 745, 771-2 (2002).
14. *Id.*
15. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §203, 116 Stat. 745, 773 (2002).
16. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §204, 116 Stat. 745, 773 (2002).
17. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §206, 116 Stat. 745, 774-5 (2002).
18. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §402, 116 Stat. 745, 787 (2002).
19. *Id.*
20. *Id.*
21. *Id.*
22. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §406, 116 Stat. 745, 789-90 (2002).
23. *Id.*



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Keeping the Corporation Clean

Continued from page 28

- government. The Guidelines mandate a formulaic approach to sentencing, setting out factors for the court to consider in reaching a criminal offense level, reflecting the severity of the crime. Other rules in the Guidelines assign a score to a defendant's criminal history. The two scores are then plotted on a grid, and the intersection gives a range of prison time which the court should ordinarily impose.
9. Act, Section 805.
 10. Notice of Proposed Temporary, Emergency Amendments to Sentencing Guidelines, Policy Statements and Commentary. Fed. Regis. 1102.
 11. Act, Section 802.
 12. *Id.*
 13. Act, Sections 902 and 906.
 14. Act, Sections 1102 and 1107.
 15. Act, Section 806.
 16. More precisely, the Guidelines prescribe an "offense level" based on the type of crime. The offense level provides a "base fine range" for a corporation. The Guidelines also set out a formula for computing a "culpability score," based on the size of the organization, based on factors such as whether it tolerated criminal activity or took measures to prevent it.
 17. U.S. Sentencing Guidelines Section 8C4.9.

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Following is a list of applicants who have applied to take the July 29 & 30, 2003 Kentucky Bar Examination. If anyone has knowledge pertinent to determining the character and fitness of any of these applicants to become a member of the Kentucky Bar, please provide that information to:

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J. Frank Burnette

What Lawyers “Do”

In an average month, the Client Assistance Program receives roughly 350 calls from the clients of Kentucky lawyers. These callers express various concerns about things their lawyers do, or don't do. On occasion I hear callers say, “You lawyers do this” or “You lawyers don't do that.” It appears that many have an opinion about what lawyers “do.”

Considering the events transpiring in the world now, it is a good time to consider one thing that some lawyers do—serve in the Armed Forces. Each branch of the Armed Forces has within it a Judge Advocate General's Corps (JAG). The JAG Corps are comprised of attorneys from all over the country. Some serve for a few years in the active forces and then continue in the reserve components, while others make a full time career of the military. The Dean of Salmon P. Chase College of Law and the US Attorney for the Western District of Kentucky are two Kentucky lawyers who have served with distinction as a JAG.



Frank Burnette is the Director of the KBA Client Assistance Program

JAGs perform a wide variety of functions, many of which are very similar to those of their civilian counterparts. They serve as prosecutors and defense counsel at the trial and appellate levels. They counsel individuals on domestic and personal financial matters. They process claims against the government when a service member's personal property has been damaged in the scope of his/her service.

JAGs also advise military Commanders at all levels on the legal requirements and ramifications of activities only conducted in the Armed Forces. Before a single service member was transported to the Middle East in the most recent crisis, JAGs were involved in preparing stationing or status of forces agreements with host nations. These

international agreements define the rights and privileges of our citizen soldiers in a foreign country; an extremely important protection when the culture, customs and taboos are dramatically different from what Americans are accustomed to at home.

Before a shot is fired in a combat environment, JAGs have been involved in the preparation of Rules of Engagement. These consider not only the political, but also the pragmatic concerns implicated in the use of deadly force and permit service members to know acceptable guidelines in advance so they can ensure their individual conduct is in conformity with the strategic objectives of the mission.

JAGs are also involved in what would appear to be purely military decisions such as targeting. The proper application of the law of war to targeting decisions is imperative. Whether a particular structure or location can legally be targeted requires extensive knowledge of the law of war and the fast moving facts of the combat environment. Innocent lives are often in the balance of these decisions, which must be made with far too little time for reflection. A Commander is likely to consult a JAG regarding the type of weapon selected for a particular target. From this it is apparent that military Commanders expect JAGs to have more than legal expertise.

When American and friendly forces are likely to capture enemy forces as prisoners, Commanders expect their JAGs to advise them on the required treatment conditions in conformity with the Geneva and Hague Conventions as well as other applicable international agreements. Even more complex issues require legal evaluation in the context of an occupational force.

The individual and political consequences of “bad advice” could be devastating. In the 1991 Gulf conflict, Iraq secreted combat aircraft in residential areas. Combat aircraft were obviously worthwhile targets for de-

Continued

What Lawyers "Do"

continued

struction. However, a reasoned analysis considered American superiority in the air and the likelihood of collateral damage to innocent Iraqi citizens. The aircraft were not targeted. Innocent people were not endangered and combat resources were utilized on other proper targets.

Those who serve in the Armed Forces as a JAG receive little notoriety. They are paid at the same rate as other service members of their rank and years of service. There is no specialty pay for JAGs. They serve the military in a unique capacity.

Like the JAG, the lawyers of Kentucky also serve their communities in a unique capacity. They volunteer their time for community projects and public service and are invariably in the front lines of most important decisions in a community. There are probably few practicing lawyers in Kentucky who have not provided their services *pro bono* to individuals. Most never seek any sort of credit or acknowledgment for the many hours they give to clients and the community. They go about their business on a day-to-day basis in the trenches, representing individuals and corporations in matters that impact on the lives of many. Few ever get their "fifteen minutes of fame."

Kentucky lawyers, like their military counterparts, have much of which they can be proud. While it is easy to generalize in the negative about lawyers — or any group — based on actual or suspected examples, the lawyers of Kentucky certainly have many ways to respond to such negativism. For example, they could give those who criticize the profession a few real-life examples of what lawyers do. ■

Effective Legal Writing

continued from page 53

People who mourn will be happy in the long run . . .

Meek people are blessed too . . .

Also, if you are hungry and thirsty for righteousness . . .

Keep syntactically equal items parallel.² For example: *The lawyer's job includes writing briefs, arguing motions, and to draft contracts.* *Writing* and *arguing* are participles; *to draft* is a gerund. Changing *to draft* to *drafting* emphasizes the similarities among the three duties.

Similarly, numbered lists and headings should be parallel. For example: *Plaintiff argued that (1) she had been wrongfully discharged, (2) defamation, and (3) that her former employer had violated the KCRA.* Here, not only are the con-

tents of each list syntactically different, but the signal "that" is used inconsistently: *Plaintiff argued that her former employer (1) wrongfully discharged her, (2) defamed her, and (3) discriminated against her in violation of the KCRA.*

Conclusion

Unbalanced prose is difficult to understand. When proofing your prose, pay particularly close attention to complex sentences and numbered lists. Match subjects to verbs, nouns to pronouns, and like phrases to like phrases. This will make your prose easier to read and more persuasive. ■

Footnotes

1. William Strunk Jr. & E.B. White, *The Elements of Style* 26 (4th ed. 2000).
2. Terri LeClercq, *Legal Writing Style* 41 (2d ed. 2000).

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When Clients Do Bad Things

Continued from page 11

Endnotes

1. See opening statements before the House Energy and Commerce Subcommittee on Oversight and Investigations hearing on March 14, 2002 concerning the corporate governance structure at Enron Corporation and the role of lawyers in Enron's financial collapse and bankruptcy. *The Financial Collapse of Enron Corporation, with Focus on Enron's Inside and Outside Counsel, Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce of the House of Representatives, 107th Cong., March 14, 2002.* The hearing transcript, including prepared statements of committee members and witness testimony, is available on the internet at <http://energycommerce.house.gov/107/action/107-90.pdf>.
2. In remarks to the ABA Business Law Section in August 2002, then-SEC Chairman Harvey L. Pitt admonished his audience: "Lawyers for public companies represent the company as a whole and its shareholder-owners, not the managers who hire and fire them. This should be self-evident, but recent events indicate some corporate lawyers have lost sight of this axiom, a form of professional blindness that isn't new. . . . To avoid this, and more modern, pictures of greed and duplicity, lawyers who represent public companies must use their legal acumen to pursue only those goals whose sole purpose is to further legitimate corporate interests, not the interests of individual managers – even if management's individual goals are supportable by a literal reading of the law."
3. See also Restatement (Third) of the Law Governing Lawyers §96(1)(a) (2000) ("the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to the organization's decision-making procedures").
4. Kentucky continues to follow an earlier version of Model Rule 1.6(b) which authorizes disclosure in the case of "imminent" death. SCR. 3.130 (1.6).
5. 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* §9.27 (3rd ed., 2003 Supp.).
6. Preliminary Report of the American Bar Association Task Force on Corporate Responsibility at 32. Of these states, only two limit disclosure to situations in which the client has used or is using the lawyer's services to further the crime or fraud. Eighteen states permit or require disclosure to rectify substantial financial loss resulting from a client's prior commission of a crime or fraud in which the client used the lawyer's services. *Id.*
7. Restatement (Third) of the Law Governing Lawyers §67 (2000).
8. See Ky. Rule 1.6, Comment [16], and ABA Model Rule 1.2, Comment [10].
9. 969 F.2d 744 (9th Cir. 1992).
10. The Task Force Report is available on the internet at <http://www.abanet.org/buslaw/corporateresponsibility/preliminaryreport.pdf>.
11. Pub. Law No. 107-204 (2002).
12. SEC Release No. 33-8185 (Jan. 29, 2003). The adopting release is available on the SEC's web site at <http://www.sec.gov/rules/final/33-8185.htm>.
13. See SEC Release No. 33-8186 (Jan. 29, 2003). The release soliciting additional comments on the original noisy withdrawal proposal and proposing an alternative approach is available on the SEC's web site at <http://www.sec.gov/rules/proposed/33-8186.htm>.
14. *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 268 (6th Cir. 1998).
15. Civil Action No. H-01-3624 (S.D. Tex. Dec. 20, 2002).
16. 511 U.S. 164 (1994).



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Poor Seminar
Cincinnati Bar Association

7 Appellate Half Day
Louisville Bar Association

8 Domestic Relations Institute
Cincinnati Bar Association

8-9 Sixth Annual Family Law
Seminar (AAML)
Louisville Bar Association

13 Kentucky School Law-
KERA
Louisville Bar Association

14 The Boone Conservancy-
Real Estate Committee
Seminar
*Northern Kentucky Bar
Association*

14 Representing Closely Held
Businesses, Their Owners &
Employees: A Study of
Conflicts (Ethics)
Louisville Bar Association

15 Bankruptcy Half Day
Louisville Bar Association

15-16 Annual Convention &
Seminar
*Kentucky Academy of Trial
Attorneys*

16 "Would You Like Fries with
That?" and Other Sentences
to Keep Out of Your
Professional Vocabulary
Louisville Bar Association

16 Social Security Seminar
Cincinnati Bar Association

16-17 11th Biennial Joe Lee
Bankruptcy Law Institute
UK-CLE

17 Professional Responsibility
Revisited
*Northern Kentucky Bar
Association*

20 Intellectual Property
Day Long
Louisville Bar Association

20 Ethics CLE
*Fayette County Bar
Association*

DON'T FORGET!

The educational year ends
June 30th, 2003, and you are
required by SCR 3.661
to have completed
a minimum of 12.5 CLE credits,
including 2.0 ethics credits
by this deadline.
For information about your CLE
record or for upcoming CLE
opportunities visit the
KBA web site at www.kybar.org.

- 20 Video: Professionalism, Ethics & Substance Abuse
Cincinnati Bar Association
- 21 CLE at Churchill Downs
Louisville Bar Association
- 22 Jury Instructions
Fayette County Bar Association
- 22 Health Law Half Day
Louisville Bar Association
- 23 Internet/e-Commerce and Computer Law Seminar
Cincinnati Bar Association
- 28 ADR/Mediation Half Day
Louisville Bar Association
- 29 Solo/Small Firm Half Day
Louisville Bar Association
- 30 Litigation Half Day
Louisville Bar Association
- 30 Auto Litigation Seminar-Owensboro
Kentucky Academy of Trial Attorneys

- 30 Labor & Employment Law Seminar
Cincinnati Bar Association
- 30 Ethics I-Ethics for the Ethical-A Positive Prospective
Northern Kentucky Bar Association

JUNE 2003

- 3 Environmental Day Long
Louisville Bar Association
- 4 Social Security Brown Bag
Louisville Bar Association
- 4 Ethics II-Prevention of Formal Bar Complaints
Northern Kentucky Bar Association
- 5 Breakfast CLE
Louisville Bar Association
- 5 In-House Counsel Brown Bag
Louisville Bar Association
- 6 Criminal Law Half Day
Louisville Bar Association

- 6 Auto Litigation Seminar-Live Repeat - Louisville
Kentucky Academy of Trial Attorneys
- 8-13 Trial Advocacy Institute
Cincinnati Bar Association
- 10-12 DPA Annual Conference
Department of Public Advocacy
- 11-13 **KBA Annual Convention**
Kentucky Bar Association
- 13 Auto Litigation Seminar - Live Repeat - Corbin
Kentucky Academy of Trial Attorneys
- 17 Young Lawyers Half Day
Louisville Bar Association
- 18 Breakfast CLE
Louisville Bar Association
- 18 Real Estate Brown Bag
Louisville Bar Association
- 19 Business Law Half Day
Louisville Bar Association
- 19 Closing Arguments
Fayette County Bar Association

NEW LAWYERS' PROGRAM REQUIREMENT

New admittees of the Kentucky Bar Association are **required** to complete the New Lawyer program ***within twelve months*** of the date of admission unless they have practiced in another jurisdiction for a minimum of five years. For answers to questions about the New Lawyers' Program or your completion deadline, please contact Sherry Hayden at 502-564-3795 or register online at www.kybar.org.



Upcoming programs are as follows:

OCTOBER 2-3, 2003
Northern Kentucky
Convention Center
Covington, Kentucky

- 19-20 Employee Benefits Conference
Cincinnati Bar Association
- 20 All Stars and Litigation Support Staff Seminar
Kentucky Academy of Trial Attorneys
- 20 Family Law Day Long
Louisville Bar Association
- 20 Family Law Seminar
Northern Kentucky Bar Association
- 23-30 Ethics Express Seminar and Golf Outing
Kentucky Academy of Trial Attorneys

- 25 Tax Half Day
Louisville Bar Association
- 25 Ethics Express Video
Repeat - Paducah
Kentucky Academy of Trial Attorneys
- 25-26 Bench and Bar
Fayette County Bar Association
- 26 Labor & Employment Half Day
Louisville Bar Association
- 26 CLE at Louisville Slugger Field
Louisville Bar Association
- 26 Ethics Express Video
Repeat-Bowling Green
Kentucky Academy of Trial Attorneys
- 26-28 Last Chance Video
UK-CLE
- 27 Ethics III-Ethics in Perspective
Northern Kentucky Bar Association
- 27 Proving Damages
Kentucky Academy of Trial Attorneys
- 27 Tax Ethics Brown Bag
Louisville Bar Association
- 30 Ethics Express Video
Repeat-Louisville
Kentucky Academy of Trial Attorneys
- 30 LBA Brown Bag
Louisville Bar Association

Update 2003

KENTUCKY LAW UPDATE 2003

Dates and Locations

September 4-5	Somerset Center for Rural Development
September 15-16	Owensboro Executive Inn Rivermont
September 24-25	Louisville Kentucky International Convention Center
October 16-17	Lexington Lexington Civic Center
October 23-24	Prestonsburg Jenny Wiley State Resort Park
October 28-29	Paducah Executive Inn Riverview
December 3-4	Covington Northern Kentucky Convention Center

CLE Non-Compliance Suspensions

Please Take Notice: The following members have been suspended from the practice of law by the Supreme Court of Kentucky as a result of their non-compliance with the minimum annual continuing legal education requirements of SCR 3.661 for the 2001-2002 educational year. The suspension Orders were entered on February 4, 2003.

Joseph Edward Newlin
John Edward Netti, Jr.
Caroline L. Griffith

Clement Leo Bezold, Jr.
Donald C. Buring
Christopher R. Fitzpatrick

Robert Ray Schindler
Jan R. Waddell
Christie Lynn Wright

Kentucky Bar Foundation Welcomes New Fellows

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



Glenn Acree practices law in Lexington. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1985.

Bobby Amburgey practices law in Mount Vernon with the law firm of Clontz & Cox. A graduate of Alice Lloyd College and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1998.

Leonard H. Brashear of Hyden practices law with the law firm of Morgan, Madden, Brashear & Collins. A graduate of Centre College and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1982. Mr. Brashear is a Life Fellow.

Robert J. Brown practices law in Lexington with the law firm of Wyatt, Tarrant & Combs. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1977. Mr. Brown is a Life Fellow.

W. Rodes Brown practices law in Lexington with the law firm of Jackson & Kelly. A graduate of the University of Kentucky and the University of Louisville Brandeis School of Law, he was admitted to the Kentucky Bar in 1978.

Thomas H. Burnett practices law in Lexington. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1963. Mr. Burnett is a Life Fellow.

Robert E. Cato practices law in London. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1966. Mr. Cato is a Life Fellow.

Stanton L. Cave practices law in Lexington and served in the Kentucky House of Representatives for eight years. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1988.

Gary I. Conley currently serves as General Counsel for Kentucky River Properties in Hindman. A graduate of

Northern Kentucky University and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1979.

Jeffrey D. Damron practices law in Pikeville with the law firm of Baird & Baird. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1987. Mr. Damron is a Life Fellow.

Robert F. Duncan practices law in Lexington with the law firm of Jackson & Kelly. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1983.

R. W. Dyche III of London currently serves as a Judge on the Kentucky Court of Appeals, Dist. 3, Div. 1. A graduate of Centre College and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1975.

James D. Elam practices law in Lexington with the law firm of Elam & Miller. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1967. Mr. Elam is a Life Fellow.

Gordon B. Finley, Jr. of O'Fallon, Illinois currently practices as a civil service attorney at Scott Air Force Base after serving 27 years as an Air Force Judge Advocate. A graduate of DePauw University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1968. Mr. Finley is a Life Fellow.

Jon L. Fleischaker practices law in Louisville with the law firm of Dinsmore & Shohl. A graduate of Swarthmore College and the University of Pennsylvania Law School, he was admitted to the Kentucky Bar in 1970. Mr. Fleischaker is a Life Fellow.

Virginia Baird Gannon practices law in Pikeville with the law firm of Baird & Baird. A graduate of Hanover College and Thomas M. Cooley Law School, she was admitted to the Kentucky Bar in 1995. Ms. Gannon is a Life Fellow.

Julie Muth Goodman practices law in Lexington with the law firm of Dinsmore & Shohl. A graduate of Transylvania

University and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 1980 and is also admitted to the New York Bar. Ms. Goodman is a Life Fellow.

John T. Hamilton practices law in Lexington with the law firm of Gess, Mattingly & Atchison. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1978.

G. Edward Henry II practices law in Lexington with the law firm of Henry, Watz, Gardner, Sellars & Gardner. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1979.

Kevin G. Henry practices law in Lexington with the law firm of Sturgill, Turner, Barker & Moloney. A graduate of Centre College and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1978. Mr. Henry is a Past President of the Fayette County Bar Association.

Christy Fiori Hornung of Louisville currently serves as CLE Program & Publications Attorney/Section Liaison at the Kentucky Bar Association in Frankfort. A graduate of the University of Louisville and the University of Louisville Brandeis School of Law, she was admitted to the Kentucky Bar in 1999.

Martin J. Huelsmann practices law in Fort Mitchell. A graduate of the University of Cincinnati and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1970 and is also admitted to the Ohio Bar. Mr. Huelsmann is a Life Fellow.

Elizabeth McConahy Jenkins practices law in Louisville with the law firm of Steinfeld, Boldt, Zaino & Jenkins. A graduate of Colgate University and the University of Virginia Law School, she was admitted to the Kentucky Bar in 1995 and is also admitted to the Virginia Bar and the District of Columbia Bar. Ms. Jenkins currently serves as Co-Chair of the Louisville Bar Association's Family Law Section. Ms. Jenkins is a Life Fellow.

Louis Kawaja is an attorney in the Eminent Domain Division of the Kentucky Transportation Cabinet in Lexington. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1969.

James Scott Kreutzer practices law in Pikeville with the law firm of Baird & Baird. A graduate of Transylvania University and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1997. Mr. Kreutzer is a Life Fellow.

Scott D. McMurray practices law in Newport with the law firm of McMurray, Monfort & Luersen. A graduate of Indiana University and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1978.

McKinnley Morgan of Hyden practices law with the law firm of Morgan, Madden, Brashear & Collins. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1972. Mr. Morgan is a Life Fellow.

Eileen M. O'Brien practices law in Lexington with the law firm of Stoll, Keenon & Park. A graduate of Transylvania University and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 1981. Ms. O'Brien is a Life Fellow.

Michael J. O'Connell practices law in Louisville with the law firm of Parker & O'Connell. A graduate of Xavier University and the University of Notre Dame Law School, he was admitted to the Kentucky Bar in 1974. A former Jefferson County District and Circuit Court Judge, Mr. O'Connell currently serves as a member of the Kentucky Bar Association Board of Governors and also as an Ex-Officio Director of the Kentucky Bar Foundation.

L. Edwin Paulson, Jr. practices law in Lexington. A graduate of the University of Virginia and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 1978 and is also admitted to the Florida Bar.

William D. Reynolds practices law in Mount Vernon with the Law Offices of

Jeffrey Thomas Burdette. A graduate of Eastern Kentucky University and the Salmon P. Chase College of Law, he was admitted to the Kentucky Bar in 2001.

John M. Rogers of Lexington currently serves as a Judge on the United States Court of Appeals, Sixth Circuit. A graduate of Stanford University and the University of Michigan Law School, he was admitted to the Kentucky Bar in 1980 and is also admitted to the District of Columbia Bar.

Wilfrid A. Schroder of Crestview Hills currently serves as a Judge on the Kentucky Court of Appeals, Dist. 6, Div. 2. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1970 and is also admitted to the Missouri Bar.

John E. Selent practices law in Louisville with the law firm of Dinsmore & Shohl. A graduate of Bellarmine University and the University of Notre Dame Law School, he was admitted to the Kentucky Bar in 1981.

W. Kennedy Simpson practices law in Louisville with the law firm of Thompson, Miller & Simpson. A graduate of Washington & Lee University and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1978 and is also admitted to the Virginia Bar.

Bruce W. Singleton practices law in Somerset. A graduate of the University of Kentucky and the University of Kentucky College of Law, he was admitted to the Kentucky Bar in 1978.

Neal Smith practices law in Pikeville with the law firm of Smith, Atkins & Thompson. A graduate of Vanderbilt University and the University of Louisville Brandeis School of Law, he was admitted to the Kentucky Bar in 1974.

Kathryn Warnecke practices law in Lexington with the law firm of Wise, Warnecke & Wise. A graduate of the University of Kentucky and the University of Kentucky College of Law, she was admitted to the Kentucky Bar in 1985. Ms. Warnecke is a Life Fellow.

Prospective Clients

Neither Fish Nor Fowl

The Ethics and Risk Management of Casual Contacts, Cold Calls and Preliminary Consultations

One of the anomalies of law practice is that prospective clients don't owe you a dime, but you owe them quite a bit – specifically confidentiality and competence. A new ABA Model Rule of Professional Conduct defines a prospective client as a person who discusses with a lawyer the possibility of forming an attorney-client relationship with respect to a matter. More than one lawyer has faced a conflict of interest disqualification motion because of a long ago casual contact, a quick telephone call, or brief office consultation with a prospective client in which representation was declined. Others have paid large malpractice claims because of careless advice when discussing with prospective clients whether they had a viable claim.



Del O'Roark is the Loss Prevention Consultant for Lawyers Mutual Insurance Company of Kentucky

The purpose of this article is to provide an overview of the professional responsibility and malpractice issues dealing with nonclients in that in-between category of not yet a client, but seeking legal advice. Talking to them could be a waste of time, or lead to the gold mine case we all dream about. How does a lawyer reasonably learn enough information to determine whether to enter an attorney-client relationship without risking allegations by former prospective clients of conflicts of interest or malpractice? In attempting to answer this question my goal is to leave you with a working lawyer's appreciation of the issues and some useful prospective client risk management guidelines.

The Status of Prospective Clients in Kentucky

Professional conduct rules do not cover the formation of the attorney-client relationship because it is a matter of substantive law. Probably for this reason the version of the ABA Model Rules of Professional Conduct on which Kentucky's rules are based did not include a rule on prospective clients. The only reference to prospective clients in the Model Rules then in effect was in the introductory Scope section which provided that prospective clients are owed certain duties including confidentiality. When the Kentucky Supreme Court implemented our version of the Model Rules in 1990, however, the Scope section was not included. Thus, Kentucky's Rules of Professional Conduct are silent on prospective clients.

What Kentucky does have in the way of ethics guidance is a 1987 KBA ethics opinion that adopted the majority view that prospective clients are owed professional duties. In KBA E-316 the Ethics Committee was asked whether a firm could represent the party adverse to a former prospective client if no confidences and secrets were obtained that could be used to the advantage of the adverse party. In answering yes to the inquiry the Committee cautioned:

"... a lawyer may be precluded from accepting employment adverse to a prospective client who did not retain the lawyer, if the prospective client revealed to the lawyer confidences and secrets about a matter in a good faith effort to secure legal counsel."

As early as 1931 Kentucky case law recognized that prospective client communications are protected by the attorney-client privilege.¹ In 1997 the Kentucky Supreme Court in *Lovell v. Winchester*² again considered the re-

sponsibilities of a lawyer dealing with a person seeking legal advice with a view to obtaining legal services. The case concerned a motion to disqualify an attorney for a conflict of interest. He had had an initial consultation with the moving party about the matter, but declined representation. He later accepted the other side of the matter. When a motion was made to disqualify him for a conflict of interest, he argued that he recalled nothing about the consultation. In rejecting this argument the Court relied on the Kentucky Rules of Evidence establishing when the attorney-client privilege applies. The Court held:

Having considered the arguments of both parties, we grant the writ of mandamus. KRE 503 (a)(1) defines a client as “a person ... who is rendered professional legal services by a lawyer, *or who consults a lawyer with a view to obtaining professional legal services from the lawyer.*” (emphasis added). This definition makes it clear that an individual who consults a lawyer is entitled to the privilege even though representation does not subsequently occur. In this case, it is uncontradicted that Appellants consulted King with the intention of employing him to represent them in their suit against Kidd.

Unquestionably, once the initial consultation transpired, Appellants became “clients” under the definition in KRE 503(a)(1) and the attorney-client privilege attached. After King retained the documents pertaining to the case for a month, the presumption arises that he became knowledgeable of their contents and that he learned confidential information relevant to the case. This gives rise to a conflict of interest³

The Court embellished its decision with these observations on how initial consultations can lead to the formation of attorney-client relationships:

Consultation with a lawyer may ripen into a lawyer/client relationship that precludes the lawyer from later undertaking a representation adverse to the individual who consulted him. The lawyer/client relationship can arise not only by contract but also from the conduct of the parties. Courts have found that the relationship is created as a result of the client’s reasonable belief or expectation that the lawyer is undertaking the representation. Such a belief is based on the conduct of the parties. The key element in making such a determination is whether confidential information has been disclosed to the lawyer.⁴

The Court then applied the principles of the former client conflict of interest rule⁵ to the case, added an appearance of impropriety test, and concluded the appearance of impropriety in this case warranted disqualification to protect the reasonable expectations of former clients and present clients.

Interestingly, the Court began its opinion by finding that the appellant qualified to claim the attorney-client privilege because the appellant had consulted the lawyer with a view to obtaining the lawyer’s legal services and to that extent was a client – never using the term prospective client.⁶ The case could have been decided on that holding alone, but the opinion went on to cover the formation of the attorney-client relationship, former client conflicts, and protecting former clients and present clients from the appearance of impropriety. I leave to your judgment what the essential holdings of the Court in *Lovell* were. What is clear for the purposes of this article is that the Court recognized that a lawyer has a duty of confidentiality when a person consults the lawyer with a view to obtaining legal services even though the lawyer is ultimately not retained to represent that person, *i.e.*, the person becomes a former prospective client. This duty of confidentiality can create a disqualifying conflict of interest when the lawyer represents other clients.

Neither *Lovell* nor KBA E-316 delineates the kind or amount of confidential information that reasonably can be obtained from prospective clients without creating a disqualifying conflict of interest. The most helpful guidance I found for this purpose was ABA Formal Ethics Opinion 90-358 (1990) in which the Ethics Committee suggested this four-step approach in avoiding conflicts of interest issues with prospective clients:

1. Identify conflicts of interest before undertaking representation in any matter.
2. Limit information from a would-be client to that which is necessary to check for conflicts.
3. When practicable get a waiver of confidentiality.
4. As soon as a conflict of interest is identified or the would-be client’s representation not undertaken for another reason, screen the lawyer with information relating to the representation from disclosing it within the firm.⁷

Recent Developments in Prospective Client Rules

Recognizing the gap in ethics guidance on prospective clients, the ABA in 2002 adopted Model Rule 1.18 Duties To Prospective Client. It neatly encapsulates the prin-

ciples evolving from case law on prospective client conflict disqualification motions⁸ and closely parallels §15, A Lawyer's Duties to a Prospective Client, of the American Law Institute's *Restatement of the Law Governing Lawyers* (2000). Model Rule 1.18 provides:

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
 - (1) both the affected client and prospective client have given informed consent, confirmed in writing, or
 - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

The key points to note are:

- No matter how brief the consultation, any information learned by the lawyer can only be revealed as Rule 1.9(c), Conflict of Interest: Former Client, allows.
- The trigger for a disqualifying conflict of interest is

- when the lawyer receives information that could be "significantly harmful" to the prospective client.
- Comment 5 to the rule permits, with the prospective client's informed consent, conditioning consultation with the understanding that information revealed to the lawyer will not preclude the lawyer from representing a different client in the matter.
- Waiver of a conflict of interest is permissible with the written informed consent of the affected client and the former prospective client.
- Prospective client conflicts of interest are imputed to other members of a firm, but screening is permissible to overcome the disqualification.

Model Rule 1.18 would work well in Kentucky, but it is academic unless and until the Supreme Court makes it part of our rules. Even so, I think it is useful as general guidance considering the ambiguous status of prospective clients under our current professional conduct rules. Particularly helpful is the "significantly harmful" standard for gauging when too much confidential information is obtained in a preliminary consultation. The Supreme Court proved prescient in *Lovell* by analyzing the case in part in terms of former client conflicts, because the real problem is with former prospective clients. This is some indication that the Court might be open to a prospective client rule of professional conduct.

Prospective Client Malpractice

The malpractice risk in a prospective client relationship is described succinctly in *Legal Malpractice* as follows:

The [*prospective client*] relationship arises when a person provides information to a lawyer in the reasonable belief that the information is confidential and will be used only for evaluating the legal merits of the person's claim, defense or needs. The attorney may also assume a duty of care. Thus, liability can be incurred for negligently advising a client not to proceed with the case or action or for the manner in which the [*prospective*] client is referred to another attorney. (footnotes omitted)⁹

The *Restatement of the Law Governing Lawyers* describes the duty of care owed to prospective clients more fully:

When a prospective client and a lawyer discuss the possibility of representation, the lawyer might comment on such matters as whether the person has a promising claim or defense, whether the law-

yer is appropriate for the matter in question, whether conflicts of interest exist and if so how they might be dealt with, the time within which action must be taken and, if the representation does not proceed, what other lawyer might represent the prospective client. Prospective clients might rely on such advice, and lawyers therefore must use reasonable care in rendering it. The lawyer must also not harm a prospective client through unreasonable delay after indicating that the lawyer might undertake the representation. What care is reasonable depends on the circumstances, including the lawyer's expertise and the time available for consideration

If a lawyer provides advice that is intended to be only tentative or preliminary, the lawyer should so inform the prospective clients. Depending on the circumstances, the burden of removing ambiguities rests with the lawyer, particularly as to disclaiming conclusions that the client reasonably assumed from their discussion, for example whether the client has a good claim.¹⁰

The key to appreciating the malpractice risk in any situation is to be clear about the status of the person with whom you are communicating. Are they a nonclient, prospective client, or client? The key to managing the risk is to know the duties owed to persons in each status. Because of the ambiguous position of prospective clients, it is important to keep foremost in mind that confidentiality and competence is owed them and to have a prospective client loss prevention strategy.

Managing the Risk

Casual Contacts

The bane of a lawyer's existence is the casual contact with a person looking for free legal advice — "I have this friend who..." or "Just one quick question." This can happen on a street corner, at a party, or in your front yard. I especially like the technique of the lawyer who told me at a CLE that he responds to legal questions at a party by saying, "I'd like to answer your question, but I'm drunk at the moment. Why don't you come into the office tomorrow?" He added, they never do.

Some lawyers have a just say no policy and refuse to discuss legal questions in public. Others as a matter of good public relations will answer by providing only generic legal information, e.g., "The clerk's office in the courthouse is where you can find out more about filing require-

ments for...." But they are careful not to say anything that could be construed as legal advice. Some lawyers take the risky approach of answering questions more specifically believing this is necessary to get new clients. In developing a risk management strategy in dealing with casual contacts consider:

- The more said to persons making casual contacts the greater the risk that it will be misconstrued as legal advice for their situation or that you are now their lawyer. A policy of not answering casual contact questions is bullet proof, but may cut off new business. In the interest of developing the situation one approach is to explain that legal questions are seldom simple and require a thorough analysis before specific answers can be given. Then suggest an office consultation. If that is declined, you have not been abrupt and know that in all likelihood this was not missed new business.
- The best practice is to document every casual contact made that involves any discussion of legal questions. It can be short, but should include the date, name of casual contact, gist of what was discussed, and any disclaimers communicated at the time. Many lawyers use a numbered consultation form for this purpose. In many cases it may be necessary to send a letter of nonengagement to make it clear that no attorney-client relationship was formed. This may seem laborious, but it is the proverbial ounce of prevention.
- Whatever you do – don't wing it. Have a strategy on how much you will say during casual contacts and stick to it. If you are consistent, you will have a much better chance of remembering what was said, and more important, what was not said.

Cold Telephone Calls"

A necessary, but often frustrating, aspect of providing legal service to the public is fielding numerous telephone calls throughout the day that can mean important new business or just someone looking for free legal advice. There is an art to risk managing telephone calls to be sure that new business is encouraged, time is not wasted, and unintended attorney-client relationships with malpractice exposure are avoided. Michael M. Bowden in "How To Handle Phone Inquiries From Potential Clients"¹² recommends office procedures that screen all incoming calls, get the caller's contact information, get the names of other parties involved in the matter, and establish when the in-

quiry becomes a consultation. Bowden makes these risk management points:

- A good screening technique is for a well trained secretary or paralegal to weed out calls concerning matters the lawyer does not want to take, provide the caller with information of the type of service the firm offers, explain typical fee arrangements, and ask the caller to make an office appointment or schedule a return call from the lawyer. If the caller is interested, contact information and names of other persons involved in the matter are then obtained. It should be made clear to callers that they are not yet clients of the lawyer – only the lawyer can accept the matter.
- Lawyers receiving calls directly should first get contact information and the names of other persons involved before discussing any facts. Since a complete conflict check cannot be done until after the call, limit the initial discussion to the essential information necessary to evaluate whether to pursue the retention. A good practice is to have a telephone consultation form pad on your desk to record this information during the call. Assign each call a consultation number and file the consultation sheet chronologically in a binder. Send a nonengagement letter if you choose not to take a matter and file it with the consultation sheet.
- The hardest part is controlling when a prospective client telephone call turns into an attorney-client relationship. Since the relationship may be implied from the circumstances without express lawyer acceptance of a matter, it must be made clear to a caller that a matter is not accepted simply because the lawyer takes the call. Some lawyers never give advice in response to a cold call. Others will if someone they know referred the caller or the caller is a current or former client. Sometimes you just have to go with your intuition, but complete the consultation sheet and get the contact information. Don't forget that advice given to a prospective client during a preliminary consultation exposes a lawyer to a malpractice claim even if it is later decided not to take the matter. Avoid giving statute of limitations advice. If it appears that some limitation period is about to expire, inform the caller of that possibility and urge consultation with another lawyer immediately. Keep advice to a minimum until you have accepted the matter.

Preliminary Office Consultations

Obviously, the best environment to conduct prospective client consultations is in your law office where routine client intake and conflict check procedures can be followed. Individuals making casual contacts and telephone inquiries with matters that have potential for developing into an attorney-client relationship should be encouraged to make an office appointment rather than discussing the matter in detail in public or over the telephone.

The risk management considerations for preliminary office consultations are in principle the same as for casual contacts and telephone inquiries. Be sure that client intake procedures obtain only the minimum amount of information necessary to conduct a conflict of interest check before discussing any details with a prospective client. Then only learn the minimum information you need to decide whether to accept the matter.

Some jurisdictions permit waiver agreements with prospective clients providing that any confidential information disclosed in a preliminary consultation will not preclude representation of another party in the same or related matter. These agreements typically are not used for routine client intake, but on a case-by-case basis. They should be used when there is concern that the prospective client is actually “taint shopping,” *i.e.*, attempting to disqualify the firm from representing another party in the matter.¹³ I am unable to locate any Kentucky authority that addresses use of preliminary consultation waiver agreements. Accordingly, proceed with caution, but with informed client consent to a waiver agreement, there is no apparent reason why this procedure should not be acceptable in Kentucky.¹⁴

Always use letters of nonengagement for declined representations that are best sent by certified mail, return receipt requested. I guarantee that a former prospective client with a complaint or claim never receives nonengagement letters sent by regular mail. A typical letter:

- Thanks the prospective client for making the personal contact, calling, or coming into the office.
- Includes the date and subject matter of the consultation.
- Provides clearly that representation will not be undertaken.
- Repeats any legal advice or information given — making sure that it complies with the applicable standard of care.
- Advises that there is always a potential for a

statute of limitations or notice requirement problem if the matter is not promptly pursued elsewhere. *Providing specific statute of limitations times should be avoided because of the limited information typically received in a preliminary consultation. If, however, it appears that a limitations period will expire in a short period of time, the declined prospective client should be informed of this concern and urged to seek another lawyer immediately.*

- Advises that other legal advice be sought.
- Avoids giving an exact reason for the declination, why the claim lacks merit, or why other parties are not liable.
- Encourages the person to call again.

Negligent Referral of Prospective Clients¹⁵

Many lawyers do not appreciate that declining a matter and referring a prospective client to another lawyer may result in malpractice liability. This is true even though the referring lawyer receives no fee and has no further participation in the representation. A preliminary consultation with a prospective client is sufficient to create a duty to exercise ordinary care and skill when referring that person to another lawyer. The applicable standard of care is based on the nature of the declined representation.

Often it will be enough to confirm that the recommended lawyer is licensed to practice law in Kentucky. Licensure gives rise to a presumption that the lawyer is competent and possesses the requisite character and fitness. If the declination is because the matter requires special skill or knowledge, the referring lawyer must be careful to ascertain that the suggested lawyer has the necessary competence. If the matter requires immediate action, the referring lawyer should advise that the new lawyer be consulted expeditiously. Recommending the right lawyer without cautioning that prompt action is necessary can also be a negligent referral.

Larry Bodine in "The Right Way To Refer A Case"¹⁶ advises that to limit your malpractice exposure:

- Keep no fee.
- Do not supervise the receiving attorney.
- Get proof that the receiving attorney is indeed a specialist in the legal matter, for example, by checking with the state bar association and other attorneys.
- Expressly advise your client [*or prospective client*] in writing that your role has ended.
- Ascertain that the receiving attorney has malpractice insurance in an adequate amount.

To avoid the problem altogether some lawyers will not make a referral recommendation or only provide a list of several lawyers. Others only refer declined prospective clients to lawyer referral services and legal aid offices. The point is to recognize the exposure and make well-considered referral recommendations.

Conclusion

I see more and more ethics opinions and case reports concerning prospective clients. For example, the West Virginia Supreme Court just overruled a disqualification order in a criminal case using much the same analysis as *Lovell*. The Oregon Supreme Court recently disciplined a lawyer for losing or inadvertently destroying papers obtained from a prospective client with whom the lawyer had never even spoken. The Court ruled that a lawyer owed the same duty to safeguard property to a prospective client that is owed to a client, comparing this extension of duty to that of extending confidentiality to prospective clients. Given the gap in guidance available to Kentucky lawyers to avoid prospective client problems such as these, perhaps it is time for our Bar to consider Model Rule 1.18 for adoption.

Endnotes

1. *Goode v. Commonwealth*, 44 S.W.2d 301 (1931).
2. 941 S.W.2d 466 (1997).
3. *Id.* at 467.
4. *Id.* at 468.
5. SCR 3.130 (1.9) Conflict of Interest: Former Client.
6. In *Jaggers v. Shake*, 37 S.W.3d 737 (2001) the Supreme Court cited *Lovell*, referring to the appellant as a "potential client."
7. The opinion includes a thorough analysis of prospective client issues and hypothetical illustrations of conflict situations.
8. For a good overview of case law on prospective clients see *Lawyer-Client Relationship: Prospective Clients*, ABA/BNA Lawyers' Manual on Professional Conduct at 31:151.
9. Mallen & Smith, *Legal Malpractice*, 5th ed. (2000), §14.3, Vol.2, p.544.
10. §15, Comment *e*, *A Lawyer's Duties to a Prospective Client*, *Restatement of the Law Governing Lawyers* (2000).
11. This section is a modification of the article "Fielding Telephone Inquiries" that appeared in the Summer 2000 Lawyers Mutual Insurance Company of Kentucky Newsletter.
12. Lawyers Weekly USA, 99 LWUSA 1046 (11/15/99).
13. Confidentiality waivers are often used in so called "beauty contest," when a major client interviews several firms to compete for representation. See Agran, *The Treacherous Path To The Diamond-Studded Tiara: The Ethical Dilemmas In Legal Beauty Contest*, 9 Georgetown Journal of Legal Ethics 1307 (1996).
14. To be entirely safe an inquiry to the KBA Ethics Hotline is recommended.
15. This section is a modification of the article "Negligent Referral To Other Lawyers" that appeared in the Spring 1996 Lawyers Mutual Insurance Company of Kentucky Newsletter.
16. Lawyers Weekly, USA 94 LWUSA 329 (4/11/94).



*Salmon
P. Chase
College of Law*



*Louis D. Brandeis
School of Law*

Chase College of Law Teams Excel in Competitions

Chase College of Law Moot Court teams have excelled in recent competitions. The Chase College of Law Moot Court Team of Angela Marcum and Nathan Blaske finished in second place in the Thurgood Marshall Constitutional Law Moot Court Competition in Washington D.C. The team defeated teams from Akron, Howard and Seton Hall. Additionally, Nathan Blaske was named Best Overall Oralist and Best Final Round Oralist. Chase student Scot Gonzales served as coach for the successful team. The competition was sponsored by the Federal Bar Association.

The Chase Moot Court Team of Laura Friecko and Poul Lemasters, finished 3rd at the Giles Sutherland Intellectual Property competition in Boston. In advancing to the semi-finals Chase's team beat schools including American University and George Washington.

The Chase National Trial Advocacy Team of Andre Campbell, Chuck Haselwood, Anna Schmaltz, and Emily Kirtley placed second at the ATLA Student Trial Advocacy Regional Competition. The ATLA

continued opposite column

Renovations at the Law School

The generosity of alums and friends of the law school has made possible some significant changes in the classroom wing at the law school. A number of gifts provided support for the newly created Student Commons area. Charles Moore (a 1973 graduate of the law school) and Brucie Moore provided a significant generous contribution to fund renovations of a seminar room. Charles Moore is an attorney from Owensboro, who said he made the gift because "the Brandeis School of Law provided me a sound foundation to practice an extraordinarily rewarding profession. Our gift expresses my profound gratitude by promoting the quality legal education envisioned by Justice Brandeis." A number of additional gifts to fund classroom renovations, which include adding technology and new furnishings, are expected within the next year.

Events

A record-breaking crowd of almost 700 attended the Brandeis Lecture delivered by Justice Ruth Bader Ginsburg on February 11. Her topic was "From Benjamin to Brandeis to Breyer – Is There a Jewish Seat?" Earlier in the day she spoke and took questions and answers in the packed Allen Courtroom at the law school. She included in her remarks comments about the memoirs of Malvina Shanklin Harlan, who was married to Justice John Marshall Harlan.

The day before the Brandeis Lecture, the law school celebrated a history of women at the law school, with a reception attended by a large crowd of alums, students, staff, and faculty. At the event stories from early and more recent alums were shared in a publication about the history of women at the Brandeis School of Law. The event was organized through the efforts of Associate Dean Linda Ewald and a number of alumnae from various eras.

On March 2, 2003, the Brandeis School of Law hosted its annual Awards Reception at which students receiving scholarships and awards and those who have competed in the eleven oral advocacy competitions were recognized. The event allowed for acknowledgement of the many donors who make these awards possible. Stephen Catron, President of the Kentucky Bar Association, opened the occasion with remarks about leadership and the importance of lawyers as leaders in society.

In carrying out the Brandeis vision of public service, our students engage in public service hours outside of the law school. But it is important to recognize the many hours of service that so many of our students give through their leadership. Through various activities, students enrich the law school experience by providing opportunities for intellectual challenge, learning through participation in competition, and opportunities for group work.

continued on page 76



The Admissions Process is a Credit to the College

As the admissions cycle for the Class of 2006 draws to a close, it may be a good time to write about our admissions program at the University of Kentucky College of Law. Although the process is inevitably the source of disappointment in some individual cases, the process overall is one that well serves the law school community.

As a starting point, it is more difficult to get into law school than it was when many of us applied. One reason it is more selective is that there are a much larger number of applicants for a limited number of seats in the entering class. The class size has remained constant of late, we aim for an entering class of about 140. But the number of applications has increased dramatically. Three years ago we had around 900 applications, this year we will have in excess of 1,500. While part of that is due to the economy, part is also due to the increasing reputation that UK enjoys.

Admissions are also more selective because the numerical profile of the applicant pool is getting better. Our median LSAT is in the 159-160 range, nationally the 80% among reported scores. Our median GPA is 3.56, which is much stronger than it was just a few years ago.

I don't by this mean to convey the impression that the admissions process is based entirely on numbers. It is not. But when the LSAT and GPA profile of the applicant pool is that high, there are many Kentucky applicants with interesting backgrounds, strong histories of public service, good indications of leadership potential and all the other non-numerical things we like to see, *and* who have excellent grades and scores. It becomes very difficult for an applicant with such strong non-numerical factors but mediocre grades and scores to gain admission.

I am pleased that we continue to do a full file review of applications. Unlike some other law schools, which simply take a candidate's GPA and LSAT and put them into a formula, we assign each admissions file to a member of the admissions committee. That committee member is responsible for presenting that candidate's file to the committee, for explaining to the committee what makes that person a desirable applicant beyond the numerical indices presented. While the large number of candidates who bring both good numerical indices and compelling additional characteristics to the table makes it a challenge to gain admission with a record below our medians, the full file review gives each candidate's file an opportunity to be fully explored and discussed.

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Chase Alumni continued

competition is one of the two top mock trial competitions in the nation, according to Professor Kathleen Gormley Hughes, who serves as faculty advisor to the team. Other teams competing in this region represented Akron, Howard, Cleveland Marshall, Toledo, Capital, University of Arkansas, Case Western Reserve, Thomas M. Cooley, and Ohio State University. This is the second consecutive year that a Chase team has earned 2nd place in this competition. The Chase team of Dana Luther, Colleen Kirkpatrick, Kim Sanders, and Nick Zingerelli placed 7th out of 16 teams.

Chase Alumnus Wende Morris Cross Named United States Magistrate Judge for the Southern District of Ohio

Wende Morris Cross, a 1992 Chase graduate, has been selected to be United States Magistrate Judge for the Southern District of Ohio. Ms. Cross will fill the position being vacated by the retirement of Judge Jack Sherman, a 1969 Chase graduate. Ms. Cross will be giving the Commencement Address for the 2003 Commencement Exercises on May 17.

The Student Bar Association hosted several social events and coordinated a class gift to the law school. They also worked on issues of parking, food service, the evening division program, and electronic exams. The SBA started a Student Bar Foundation, the first of its kind to be established by a student bar association, which will provide grants to programs that are in the public interest. This year the SBA Charity Auction raised \$8500, half of which will be used to fund the Student Bar Foundation program.

Members of the legal profession must set and maintain the highest standards of conduct. The Honor Council has one of the most important responsibilities at the law school – ensuring the honesty and integrity of students in the performance of their academic work. They do this by enforcing the Honor Code, and from time to time, making recommendations about changes in the Honor Code. The work of this organization is not highly publicized because of the obvious requirements of confidentiality that relate to their deliberations. They carefully and thoughtfully evaluate charges of Honor Code violations.

Eleven teams and 35 students participated in various oral advocacy competitions outside the law school this year. In addition to organizing these competitions, the Moot Court Board oversees intra-mural moot court competitions, including the Pirtle-Washer Competition and the spring first-year oral arguments.

The student members of leadership organizations at Brandeis can be proud of their exemplary

continued opposite column

SUMMARY OF MINUTES

KBA BOARD OF GOVERNORS MEETING

JANUARY 17, 2003

The Board of Governors met on January 17, 2003. Officers and Bar Governors in attendance were *President* S. Catron, *President-Elect* J. Stevenson, *Vice President* K. Westberry, *House of Delegates Chair-Elect* L. York, *Young Lawyers Section Chair* M. Cox, *Bar Governors 1st District* C. Woodall, M. Whitlow; *Bar Governors 2nd District* — C. English, Jr., C. Moore; *3rd District* — J. Dyche, R. Madden; *4th District* – J. White, M. O’Connell; *5th District* D. McSwain; *6th District* – B. Bonar, M. Grubbs and *7th District* – D. Combs, J. Rosenberg. Absent were: *Immediate Past President* B. Storm, *House of Delegates Chair* Forrest Cook and *Bar Governor* Shelby C. Kinkead, Jr.

In Executive Session, the Board considered two (2) discipline cases, involving one lawyer, one (1) reinstatement and one (1) restoration matter. Sheila Mann, Tomahawk and Roger Rolfes, Florence, non-lawyer members serving on the Board pursuant to SCR 3.375 participated in the deliberations.


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

- Heard status reports from the Client Assistance Program, Donated Legal Services Committee, Lawyers Assistance Program and Office of Bar Counsel.
- Contingent upon approval of the Lawyer Assistance Program (KYLAP) Rules, the Board abolished the Lawyers Helping Lawyers Committee and designated the committee members as Volunteer Counselors under the KYLAP program.
- Approved the adoption of a resolution to recognize March 18, 2003 as *Gideon Day* and to further communicate to the Governor and the members of the General Assembly the endorsement by the KBA for reasonable and adequate funding for indigent defense in Kentucky.
- Heard a report from representatives with the Kentucky Land Title Association, Kentucky Association of Realtors and Kentucky Homebuilders Association regarding House Bill 44 and Unauthorized Practice of Law Opinion U-58 in relation to real estate closings and the licensing of real estate settlement agents by the Department of Insurance.
- Approved the Fiscal Year 2003-2004 Budget to be submitted to the Supreme Court.
- Appointed David Sparks of Paducah to the Joint Local Federal Rules Commission for the Western District for a four (4) year term ending December 31, 2006.
- Heard a report from Young Lawyers Section Chair Michael J. Cox regarding the section’s activities during the Annual Convention.
- Approved the adoption of a resolution endorsing Wm. T. Robinson III in his candidacy for the Office of Treasurer of the American Bar Association.

- Heard a report from Director of CLE Jan Clark concerning the legislative issue with regard to KRS 6.711 and KRS 6.716 designed to give direction to the Legislative Ethics Commission for programming conducted for the legislators. The Board approved granting authority to the CLE Commission to communicate the endorsement of its own legislative position with regard to the proposed legislative proposal, said endorsement being made at the request of the Executive Director of the Legislative Ethics Commission.
- Heard a status report on the WING II construction from Executive Director Bruce Davis.

To KBA Members

Do you have a matter to discuss
with the KBA's Board of
Governors?



Board meetings are scheduled
on
June 10, 2003
July 18-19, 2003
To schedule a time on the
Board's agenda at one of these
meetings, please contact
Bruce Davis or Melissa Blackwell
at (502) 564-3795.

Kentucky Supreme Court approves Kentucky Lawyer Assistance Program (KYLAP) by Interim order.

On March 13, 2003, the Kentucky Supreme Court entered an Order temporarily amending the Rules of the Supreme Court. These amendments establish and implement the Kentucky Lawyer Assistance Program (KYLAP) and became effective March 17, 2003.

The temporary amendments are set out on page 44.

C. Houston (Hoot) Ebert is the current director of KYLAP and can be reached on his cell phone at 502-545-1801 or by calling the KYLAP hotline 502-875-1303. Pursuant to the rules, all calls are confidential.

Your comments and questions are welcome. The adoption of these rules will be discussed at the Supreme Court Rules Hearing on Wednesday, June 11, 2003, from 9:30 a.m. until 11:30 a.m. at the Annual Convention in Louisville.

Brandeis Alumni continued

leadership and service to the law school community.

The Brandeis School of Law is hosting a reception for our alumni at the KBA Annual Meeting. Please join us Wednesday, June 11, 2003, 5:00-6:30 p.m., in Medallion Ballroom D of the Seelbach Hotel.

RSVP to Simone Beach at sbeach@louisville.edu or 502-852-6366.

UK Alumni continued

How can a member of the bar help a promising applicant gain admission to the law school? You can counsel potential applicants when they first discuss going to law school that they must be conscientious in their undergraduate studies. You should counsel them to apply early in the cycle. If you know them beyond merely having known their parents for many years, you can write a letter of recommendation on their behalf, a letter which will identify accomplishments and traits of character which will help them in the full-file review process. And you can encourage them to come in and see us early in the process, to make sure that their file is as strongly presented as possible.

The admissions process can be the source of frustration. Any time there are as many qualified applicants and as few spaces, there will be situations which have a disappointing resolution. But if you have the opportunity, as I do, to get to know our students and to see them perform, you would be immensely pleased with our applications process. We are making these difficult decisions in a fair and responsible way, and the results are a credit to the College.

Supreme Court of Kentucky



IN RE: Order Amending Kentucky Rules of Evidence

2003 - 03

In accord with KRE 1102(a), and the Chief Justice having reported to the Kentucky General Assembly proposed changes to KRE 412 and KRE 608, and the General Assembly not having disapproved amendment to the Rules of Evidence by resolution during the 2003 Regular Session, the Kentucky Rules of Evidence are hereby amended, **effective July 1, 2003.**

The Rule Amendment
may be downloaded
from the Court's website
at
[www.kycourts.net/
Supreme/2003-
3ORDERAMENDING.pdf](http://www.kycourts.net/Supreme/2003-3ORDERAMENDING.pdf)

Kentucky Bar Foundation Provides Two Years of Funding for Kentucky High School Mock Trial Program

As the state championship season for the Kentucky High School Mock Trial Program got under way, the Kentucky Bar Foundation presented the Mock Trial Program with a check for \$24,240 — enough funding to operate the law-related education program for the next two years. The announcement preceded the news on March 21 that Richmond's Model Lab High School earned the 2003 state title for Kentucky and will advance to New Orleans for the National Mock Trial Tournament in mid-May.

"Several years ago the Administrative Office of the Courts entrusted the Kentucky Bar Foundation with investing some funds," said Dr. Deborah Williamson, general manager of the Division of Youth, Families and Community Services for the AOC, which operates the Mock Trial Program. "We learned recently from Kentucky Bar Foundation Executive Director Todd Horstmeyer that careful investing has grown that amount to nearly \$25,000. This will provide a great financial boost to the Mock Trial Program statewide."

"Over the years the Kentucky Bar Foundation has provided seed monies to start a variety of law-related education programs, including Mock Trial, that today serve thousands of students of all ages across Kentucky," added Williamson.



Kentucky Bar Foundation Executive Director Todd Horstmeyer, left, presented a check in March for \$24,240 to Dr. Deborah Williamson, general manager of the Division of Youth, Families and Community Services for the Administrative Office of the Courts, which oversees the Kentucky High School Mock Trial Program. The funding will operate the Mock Trial Program for the next two years.

"One of the most important missions of the Kentucky Bar Foundation is to provide information to Kentucky citizens so they can better understand the law and avail themselves of their rights under our judicial system," said Horstmeyer. "The Mock Trial Program is a wonderful way to begin this process with our high school students."

Williamson said the Kentucky High School Mock Trial Program is considered one of the best law-related education programs in the state. "The program demystifies the Kentucky judicial system by allowing students to prepare and try a

case under the supervision of teachers and attorney coaches. Since its inception in 1983, more than 10,500 students, 1,200 judges and 1,000 attorneys have taken part in the program. Currently there are 20 Kentucky high schools with active Mock Trial teams.”

The Kentucky High School Mock Trial Program is one of the many youth-related programs offered through the Division of Youth, Families and Community Services of the Administrative Office of the Courts. The AOC supports the activities of more than 3,500 Kentucky Court of Justice employees, including the elected offices of justices, judges and circuit court clerks. As the fiscal agent for the Court of Justice, the AOC executes the Judicial Branch budget.

REGISTRATION

Kentucky Bar Foundation Annual Golf Scramble

An event of the Kentucky Bar Association 2003 Convention

*Friday, June 13
Shotgun Start • 1:00 p.m.
Quail Chase Golf Club, Louisville, KY*

The 2003 Kentucky Bar Foundation Golf Scramble features a shotgun start for eighteen holes of play and is to be held at the Quail Chase Golf Club. Prize-winning contests are included, and refreshments will be available during the afternoon and at the awards presentation following the end of the rounds! All net proceeds from the scramble support KBF grants made annually each June. Cost to play is \$95 per player and law firm sponsorships for each tee or hole cost \$300. Players of all skill levels are welcome!

Please Print:

Name _____
Address _____
City _____ State _____ Zip _____
Tel. # _____ Fax # _____

- ☐ I wish to play golf. Enclosed is my check for \$95.
- ☐ I wish to be a hole or tee sponsor. Enclosed is my check for \$300.
- ☐ I wish to do both. Enclosed is my check for \$395.

Please pair me with _____ Handicap or Average Score _____

*Please make checks for Golf Scramble payable to the Kentucky Bar Foundation.
Detach this form and mail with check to:
Kentucky Bar Foundation, 514 W. Main St., Frankfort, KY 40601-1883*

In Memoriam

James R. Carr
Louisville

John S. Cary
Prospect

John H. Clarke, Jr.
Maysville

A. Scott Hamilton, Jr
Alva, FL

James W. Lambert
Mount Vernon

Herman E. Leick
Corbin

Mitzi S. Moyers
Florence, S.C.

Olga S. Peers
Louisville

William R. Redwine
Sandy Hook



KENTUCKY BAR
ASSOCIATION

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On the Move

Hectus & Strause, PLLC is pleased to announce **W. Anderson Woodford** has joined the firm. Woodford received his B.A. and his J.D. from University of Kentucky. He will concentrate his practice in the areas of business law, workers' compensation and real estate law.



Mark W. Leach

Stites & Harbison announces **Mark W. Leach** has joined the firm's Louisville office as an associate. He will concentrate his practice on business litigation. Leach received his J.D. from Tulane Law School, *cum laude*. He graduated, *magna cum laude*, from Bradley University with his B.A.



Kent Wicker

Steven S. Reed and **Kent Wicker** proudly announce the formation of **Reed Wicker PLLC** located at 1120 Waterfront Plaza, 325 West Main Street, Louisville, (502) 572-2500. Reed received his B.A., *magna cum laude*, from Western Kentucky University and his J.D. from University of Kentucky. Wicker received his B.A., *summa cum laude*, from Duke University with Distinction in Economics and graduated with honors from Harvard Law School. Reed and Wicker will focus their practice on business litigation, em-



Steven S. Reed

ployment litigation and corporate/white collar investigations defense.



Matthew Breetz



Jason Thomas

Bench & Bar apologizes for misstating the positions of several **Stites & Harbison** attorneys in the March 2003 issue. An amended announcement fol-

lows. **Stites & Harbison** is pleased to announce **Matthew Breetz**, **Marjorie Farris**, **Jason Thomas** and **Amanda Thompson** have been elected Members in the firm.

Mauritia Kamer has been elected Counsel with the firm. Breetz focuses his practice on the defense of complex professional liability claims, products liability and premises liability and is active in commercial business litigation and securities broker/dealer arbitration. He earned his J.D. from University of Kentucky. Farris is a trial lawyer who focuses her practice on the defense of products liability claims, complex business litigation matters and class action defense. She earned her J.D., *cum laude*, from University of Louisville. Thomas earned his J.D. from Indiana



Marjorie Farris



Amanda Thompson



Mauritia Kamer

University School of Law and focuses his practice on complex business litigation claims, construction law and administrative law matters for major corporate and institutional clients. Thompson is a member of the firm's Liability Defense Service Group and earned her J.D. from University of Kentucky. Kamer is a member of the Employment Service Group and earned her J.D. from University of Kentucky.

Greenebaum Doll & McDonald PLLC is proud to announce **Mark F. Sommer** and **Raymond J. Stewart** have been elected as Practice Group Managers within the firm. **David A. French** and **Thomas E. Powell** have been admitted as Members of the firm. Sommer, Member and resident in the firm's Louisville office, was elected as Chair of the firm's Tax and Employee Benefits practice group. He concentrates his practice in the areas of state, local and federal taxation, civil and criminal tax controversy/litigation and business law, economic developments/incentives, governmental affairs and bankruptcy taxation. He received his undergraduate degree from Xavier University's Williams College of Business and his law degree from University of Cincinnati. Stewart, Member and resident in the firm's Greater Cincinnati offices and head of the Washington, D.C. office, was elected as Chair of the firm's Corporate and Securities practice group. He concentrates his practice in the areas of corporate law, international law, taxation capital formation and business transactions. He received his undergraduate degree from Thomas More College and his law degree from University of Kentucky. He also received a Master of Laws in Taxation from Georgetown University College of Law and is a Certified Public Accountant. French is resident in the



Mark F. Sommer



R. J. Stewart



David A. French



Thomas E. Powell

firm's Lexington office and concentrates his practice in the areas of commercial litigation, civil rights and constitutional law. French received his undergraduate degree from David Lipscomb University, *summa cum laude*, and his law degree from Harvard University, *cum laude*. He is a member of the Litigation and Dispute Resolution practice group. Powell is resident in the firm's Louisville office and concentrates his practice in the areas of administrative and insurance litigation and occupational safety and health law. Powell received his undergraduate degree from Western Kentucky University and his law degree from the University of Nebraska with highest distinction. He is a member of the Health Care and Insurance practice group.

LG&E is pleased to announce **Cheryl E. Bruner** and **Tim Dowdy** have recently joined LG&E Energy's corporate legal staff. Bruner joined LG&E Energy's Law Department as a Senior Corporate Attorney and Dowdy joined LG&E Energy as a Senior Corporate Attorney

Stephen B. Pence, United States Attorney for the Western District of Kentucky, announces **Amy M. Sullivan** has been appointed as an Assistant United States Attorney. Sullivan, a 1995 graduate of Brandeis School of Law, has been assigned to the Office's Appellate Section. She will also prosecute a wide range of criminal cases including general crimes, fraud and drugs.

Eugene L. Mosley, Jeffrey C. Sauer and W. Waverley Townes are pleased to announce the formation of **Mosley, Sauer & Townes, PLLC**. Their offices are located at 1900 One Riverfront Plaza, 401 West Main Street, Louisville, Kentucky 40202, (502) 589-4404. Practice areas include commercial litigation, family law, corporate and transactional law, employment law, adoptions and probate.

Stacey A. Blankenship of **Denton & Keuler** has been named a partner in the firm. Blankenship graduated,

cum laude, from Murray State University and received her law degree, *magna cum laude*, from Southern Illinois University Law School.



S. A. Blankenship



J. A. Moore

Woodward, Hobson & Fulton, L.L.P. announces **Jennifer A. Moore** has joined the firm as an associate in its Louisville office. Moore will be practicing in the firm's General Litigation and Specialized Advocacy, Professional Liability and Business Advocacy practice groups. Moore received her B.A., *magna cum laude*, from Transylvania University in 1995. She received her J.D., *cum laude*, from University of Kentucky in 1998.

McMurry & Livingston is pleased to announce **Natalie Moore White** as a new Associate. White is a 2000 graduate of Widener University School Of Law. Her primary practice areas include Domestic Relations and General Litigation.



Natalie M. White

Stites & Harbison is pleased to announce **Sarah G. Cronan** has joined the firm. She is a member of the firm's Business Litigation and



S. G. Cronan

Have an item for Who, What, When & Where?

The *Bench & Bar* welcomes brief announcements about member placements, promotions, relocations and honors. Notices are printed at no cost and must be submitted in writing to:

Managing Editor, Kentucky *Bench & Bar*, 514 West Main St., Frankfort, KY 40601-1883. There is a \$10 fee per photograph appearing with announcements. Paid professional announcements are also available. Please make checks payable to the Kentucky Bar Association.

The deadline for announcements appearing in the July edition of *Who, What, When & Where* is June 1, 2003

WHO, WHAT, WHEN & WHERE

Torts and Insurance Service Groups. Cronan received her J.D. from Vanderbilt University School of Law. She earned her B.A., *cum laude*, from Tulane University, Newcomb College, New Orleans and also attended American University's Washington Semester Program/Public Administration and Miami University, Ohio.

Dana B. Quesinberry is proud to announce the opening of her law office at 214 East Main St., Morehead. Quesinberry serves as Rowan County Assistant Attorney in addition to having a private practice in civil litigation, real estate and mediation. She received her undergraduate degree from Thomas More College and her J.D. from Chase College of Law.

Robert H. Eardley has joined the **John L. Stinziano Law Office** in Naples, FL. Eardley holds an LL.M. in estate planning and will continue to practice primarily in the areas of estate planning and estate administration.

Amy Glenn Wallace has joined **Barnes & Thornburg** as an associate. She practices in the labor and employment department. Wallace received her undergraduate and law degree from University of Kentucky.



Amy G. Wallace

Kerrick, Grise, Stivers & Coyle, P.L.C. is pleased to announce **Thomas P. Shreve** and **Thomas B. Russell** have joined the firm as associates in their Elizabethtown and Bowling Green office, respectively. Shreve received his B.B.A. in Management from the University of Kentucky, graduating with honors, *magna*

cum laude, and received his J.D. from the University of Kentucky. He will practice in the areas of business law and civil litigation. Russell received his bachelor's degree from DePauw University and his J.D. from Salmon P. Chase College of Law, with honors, including the Charles S. Bell Memorial Award for the highest Constitutional Law grade. He will practice in the areas of medical malpractice and insurance litigation.

Spurgeon & Tinker, PSC is pleased to announce the opening of a Lexington Office at 120 Prosperous Place, Ste. 202, Lexington, (859) 263-1860. The firm also announces **James G. Womack** has joined the Lexington office. Womack earned his J.D. from Salmon P. Chase College of Law and his practice areas include civil litigation, insurance defense, medical malpractice and products liability.

Stoll, Keenon & Park, LLP announces **Donald Smith** has recently become associated with the firm's Lexington office. **Jeff Barnett, Jeff Chapuran, John Henderson** and **Amy Johnson** were named partners in the firm.

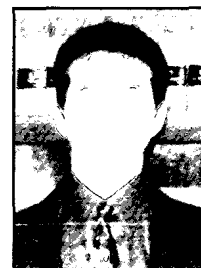
Wallingford Law, P.S.C. is pleased to announce **David D. Wolfe** has joined the firm as an associate. Wolfe, a 1980 graduate of Salmon P. Chase College of Law, will concentrate his practice in the areas of estate planning, probate, wills, trusts and elder law.



David D. Wolfe

Kemp, Ison, Harton, Tilley & Holland, LLP announces **Duncan Cavanah** has joined the firm as an associate. He will be engaged in the

general practice area, concentrating on real estate and litigation. Cavanah received his J.D. degree from the University of Kentucky and his undergraduate from Transylvania University.



Duncan Cavanah



Edwin H. Clark

Edwin H. Clark is pleased to announce the opening of his law office, located at 1030 Monarch St., Ste. 350, Lexington, (859) 219-1280. He will concentrate his practice in civil litigation, real estate transactions, and estate and probate matters. Clark earned his B.A. from Wake Forest, his Master's Degree from University of Iowa and his J.D. from University of Kentucky.

Weltman, Weinberg & Reis Co., L.P.A. welcomes new associate **Cynthia R. Clausen**. Clausen will be working in the legal action recovery department of the Cincinnati office. Clausen has a B.A. from Kentucky Wesleyan College and a J.D. from Salmon P. Chase College of Law.

The North Carolina law office of **Booth Harrington & Johns, L.L.P.** is pleased to announce **Andrew D. Atherton** has joined the firm as an associate.

Sturgill, Turner, Barker & Maloney, PLLC announces **Patricia T. Bausch** has become a partner in the firm and **Sarah Charles Wright, Charles D. Cole, Joshua M. Salsburey** and **Andrew D. DeSimone** have become associates

with the firm. Bausch focuses on employment law, education law, public sector defense and civil rights defense. Wright, Cole, Salsburey and DeSimone practice in the areas of civil litigation, employment law, education law, insurance defense, health care law and administrative law.

Lori M. Hayden is pleased to announce the opening of her law firm, located at 150 East Main St., Hazard, (606) 436-3630. Hayden earned her B.S. from University of Louisville and received her J.D. from Rutgers Law School.

Stephanie D. Ritchie is pleased to announce the opening of her law office, located at 105 North Main St., Ste. 3, Greenville, (270) 338-5134. Ritchie is a graduate of the University of Kentucky College of Law. Her practice areas include criminal defense, civil litigation, social security and domestic and family law.

In the News

Bruce A. Brightwell received the President's Award from the American College of Legal Medicine. Brightwell received the award



Bruce Brightwell

in recognition of his volunteer effort of co-authoring the College's *amicus* brief to the U.S. Supreme Court in the case of *Kentucky Association of Health Plans, Inc. v. Miller*.

Thomas E. Rutledge, member of **Ogden Newell & Welch, PLLC**, served as co-chair of the subcommittee that drafted the *Prototype Partnership Agreement for a Limited Liability Partnership Formed Under*

the Uniform Partnership Act (1997), which appears in the February 2003 issue of *The Business Lawyer*. Rutledge has also been appointed as an ABA Section of Business Law Advisor to the National Conference of Commission of uniform State Law project to update the Uniform Limited Liability Company Act.

Dinsmore & Shohl partner **Mary J. Healy** has been named to the Board of Regents of the American College of Trust and Estate Counsel as a Fellow of the College. Healy focuses her practice on estate tax planning; preparation of wills, trusts, and complex techniques for tax savings; and family dispositive plans, protection of fiduciaries and beneficiaries with interests in estates, trusts and guardianships. She received her J.D. from Salmon P. Chase College of Law at Northern Kentucky University (1978) and her B.A. from University of Cincinnati (1974).

Stites & Harbison is pleased to announce **Elizabeth Lee Thompson**, Member in the Lexington office, has been certified in business bankruptcy law by the American Board of Certification. Certification signifies Thompson has met rigorous, objective standards and has demonstrated knowledge in bankruptcy law.



E. L. Thompson

Watz Gardner Sellars & Gardner, PLLC, is pleased to announce that **Jane E. Graham** has joined the firm in an Of Counsel capacity. Graham recently retired as Chief of the Civil Division of the United States Attorney's Office for the Eastern District of Kentucky, following a 23 year career with that office. She

served four terms representing the 5th Supreme Court District on the KBA Board of Governors and is a past president of the Kentucky Chapter of the Federal Bar Association. Graham will concentrate her practice in the fields of mediation and civil litigation.



Jane E. Graham

Patrick R. Hughes, Partner in **Deters, Benzinger & LaVelle**, has been selected as a member of Leadership Kentucky for 2003. Leadership Kentucky is a non-profit educational organization bringing together of people who possess a broad variety of leadership abilities, career accomplishments and volunteer activities, to gain insight into complex issues facing the state.



Patrick R. Hughes

Woodward, Hobson & Fulton, L.L.P. is pleased to announce six of the Firm's attorneys were named among *The Best Lawyers in America 2003-2004*: **Glen S. Bagby**, Trusts and Estates, **Richard H. C. Clay**, Business Litigation, Personal Injury and Civil Litigation, **William D. Grubbs**, Business Litigation, Personal Injury and Civil Litigation, **Robert L. Hallenberg**, Trusts and Estates, **Thomas A. Hoy**, Health Law, **David R. Monohan**, Personal Injury and Civil Litigation.

Stites & Harbison announces **Charles J. "Mike" Cronan IV** has been named in a national survey to the Client Service All-Star Team for Law Firms 2002. Cronan concentrates his practice on business and



C. J. Cronan IV

civil litigation with emphasis on commercial litigation, defense of product liability, health care law and alternative dispute resolution.

Hall, Render, Killian, Heath & Lyman, P.S.C. was ranked in *Modern Healthcare Magazine* as one of the Top 5 Healthcare Legal Heavyweights. The firm's American Health Lawyers Association members include **Rene Remek Savarise**, **Sharon K. Hager** and **Edward L. Schoenbaechler**.

Glenn D. Denton, of **Denton & Keuler Law Firm**, has been named 2003 Chair of the Board of the Paducah Area Chamber of Commerce.

The Federal Trade Commission (FTC) Chairman has appointed **Stephen J. McGuire** to serve as Chief Administrative Law Judge at the FTC. McGuire earned his undergraduate degree from University of Kentucky and his J.D. from South Texas College of Law.

Relocations

The law firm of **Pedley, Zeike & Gordinier, PLLC** announces the relocation of its offices. The firm's new address is 2000 Meidinger Tower, 462 South Fourth Ave., Louisville, (502) 589-4600.

A. Page Beetem is pleased to announce the relocation of her law practice to 258 Main St., Florence, (859) 594-4529. Beetem will continue to practice in the areas of Workers' Compensation, Social Security Disability and Personal Injury.

Bench & Bar

Call for Articles

Dear KBA Member:

The KBA Publications Committee is dedicated to serving the needs of the KBA membership, and your participation is vital and appreciated. Through your input, we have identified potential topics for future issues of the *Bench & Bar*:

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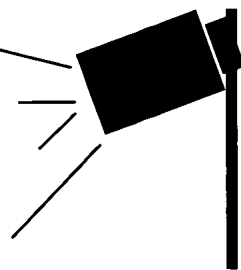
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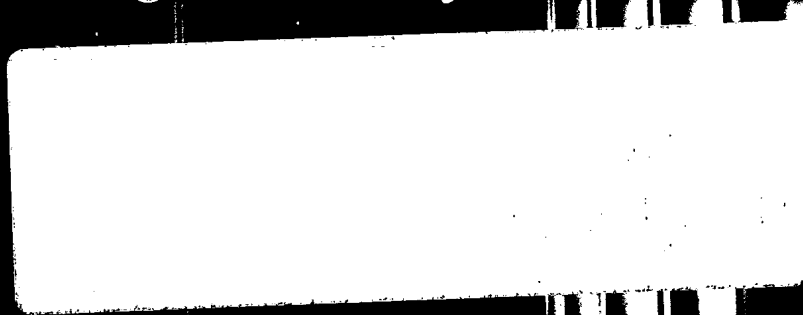
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