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There are many challenges that will command my attention in the coming year. I have attempted to highlight several of those in my interview with Jim Dady, which also appears in this issue of Bench & Bar. But there are several other points that I want to highlight here.

First is a renewed emphasis on how to manage a law office, with a special emphasis on technology. This past year we established a Task Force on Law Office Management. The charge of the task force goes well beyond merely law office management, relating to such things as how to start a law firm, how to market a law firm, how to enhance client development and how to finance a law firm. While all of these points are of importance, one of the primary jobs is to assist our members to embrace the use of technology. The American Bar Association rules provide that a lawyer not only be competent to practice law but also be competent in the use of technology. We have appointed Bob Young, from Bowling Green, to head this task force. He has served as chair of the Law Practice Division of the American Bar Association and he is very enthusiastic about moving the task force forward to provide assistance to all of our lawyers on the use of technology in their law practice.

Another important goal for the coming year is to ensure that we do everything we can to assist the state Supreme Court in securing adequate funding from the legislature and the Governor’s office for our entire judicial system. Chief Justice Minton has shouldered this mission for the past several years, but as members of the Kentucky Bar Association we must double our efforts to ensure adequate funding for the judicial system.

As many know, the judicial system is under ferocious attack in many areas, including the area of funding. The Legal Services Corporation, which has been in effect since 1974, is being threatened by a bill which will totally cancel its funding. This will leave some of our nation’s most vulnerable citizens with no legal assistance when facing threats to their security and well-being. As members of the Kentucky Bar Association we should be at the fore of the battle to prevent that from happening and do that in recognition that many of the citizens of the Commonwealth of Kentucky have been aided by the Legal Services Corporation.

We have failed to provide support for our judicial system. Currently in Kentucky there are 1,682 of the 3,386 employees of our State Court system that qualify for food stamp assistance. There are 324 employees of our State Court system that have salaries below the poverty guidelines for a family of four.

The judges in our Courts have not had a salary increase since 2011. In the four years prior to that year, they had a one percent salary increase and two $400 salary increases. This is unacceptable in a society that is bottomed on the Rule of Law.

As we continue to work on all of these efforts, we also need to recognize what it is that we do as lawyers. We need to go back to the basics to realize that our job is the basic job of a democratic society. Our job is to provide justice. The rule of law has always been under attack since the beginning days of America. But, as a student of history I would suggest that this is one of the times when the rule of law is been under the most rigorous of attacks.

The rule of law depends on adherence, not only to the particular dictates of the law, but also to the ideas of integrity, morality and fairness. It also depends on a decent and deep respect for the legal system and the judges charged with the responsibility of making decisions within the legal system. As members of the Bar, we need to ensure that we return to and cultivate an atmosphere of respect for the law and for the judiciary.

That adherence requires that our public officials pay homage to the respect that they have for the legal system.

We must not allow ad hominem attacks on judges and the judicial system, by public officials, in general to go unchallenged. We must do this with the understanding that the United States is a country of laws, first and foremost, and if there is no respect for the law, then there is no respect for the Country. In so doing, we will be joining the American Bar Association and the American College of Trial Lawyers in speaking out and recently challenging those who would foster disrespect for the law and judicial opinions.

Finally, I would say that in May, I had the honor of giving a commencement address to the 2017 graduates of the University of Kentucky College of Law. I asked the graduates, as they stood on the brink of completing their legal education, to reflect on when they made the decision that they wanted to be a lawyer, and more importantly why they wanted to be a lawyer. Rather than wait for their answer, I suggested the answer because I knew the answer from one of these law school graduates would be the same answer that every single one of us would give. That answer is: That we are lawyers because we want to be of service.

I think it is true and we should always remember that truth as we go about our law practice each and every day. The essence of being a lawyer is providing service to people. I would implore you to never forget that fact.

Thank you for electing me as your president for 2017-2018. I will try as hard as I know how to fulfill the responsibility you have given to me.
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By Kentucky Lawyers. For Kentucky Lawyers.
Under our convention theme of “OUR EVOLVING PROFESSION AND THE KENTUCKY LAWYER,” this year’s event offered more than 50 top-notch CLE programs. On **WEDNESDAY, JUNE 21**, **JERRY BUTING**, one of the defense attorneys for Steven Avery, who appeared in the Netflix documentary series “MAKING A MURDERER,” held “A Conversation on Justice.” **RABIA CHAUDRY** appeared thereafter. She is a public advocate for Adnan Syed, the wrongfully convicted man at the center of the most popular podcasts in history, “SERIAL” and “UNDISCLOSED.” On **THURSDAY, JUNE 22**, **MARK WHITACRE**, who was the subject of the book and major motion picture (starring Matt Damon) “THE INFORMANT,” spoke. He was the whistleblower in the mid-1990’s Archer Daniels Midland price fixing conspiracy, wore a wire for the FBI for almost three years and spent time in federal prison. On **FRIDAY, JUNE 23**, the programming was packed with entertaining and interesting sessions, such as “Better NOT Call Saul: Professional Ethics Lessons from ‘Breaking Bad,’” “Hamilton, Not the Musical,” and “Fantasy Sports: The Challenging Legal Landscape.” Also in the lineup was **MATT JONES**, Kentucky attorney and host of “HEY KENTUCKY!” and “KENTUCKY SPORTS RADIO,” who joined us to discuss compliance and legal issues in collegiate sports. Topping off Friday’s schedule was the featured presentation by **AMANDA KNOX** who shared her story alongside Professor Gregory Gordon. She is the American exchange student who spent almost four years in an Italian prison, following her conviction for the 2007 murder of Meredith Kercher, a fellow exchange student who shared her apartment. In 2015, Knox was definitively acquitted.
**KBA ANNUAL BANQUET**

During the convention’s Annual Banquet held at the Owensboro Convention Center on Thursday, June 22, outgoing KBA President R. Michael Sullivan presented the **2017 DISTINGUISHED LAWYER AWARD** to Lexington attorney **PIERCE W. HAMBLIN** and the **DISTINGUISHED JUDGE AWARD** to **JUDGE THOMAS B. RUSSELL**, a Federal Court Judge from Paducah. President Sullivan also presented the **PRESIDENT’S SPECIAL SERVICE AWARD** to **W. DOUGLAS MYERS**, posthumously. Myers’ wife, **JAN**, was present to accept the honor. Myers was a former KBA President from Hopkinsville. Chief Justice John D. Minton Jr. presented the **CHIEF JUSTICE’S SPECIAL SERVICE AWARD** to **JOYCE JENNINGS** and **DIANE LOGSDON**, both retired lay members of the Judicial Conduct Commission, having served a combined total of 44 years on the Commission.

Following the awards, the **KBA’S NEW OFFICERS** and **BAR GOVERNORS FOR 2017-2018** were sworn into office by Chief Justice Minton. The new officers include **WILLIAM R. GARMER**, Lexington as **PRESIDENT**; **DOUGLAS C. BALLANTINE**, Louisville; **J. STEPHEN SMITH**, Ft. Mitchell; **R. MICHAEL SULLIVAN** as **IMMEDIATE PAST PRESIDENT**; and **ERIC M. WEIHE**, Louisville.

**BAR GOVERNORS** receiving the oath of office were **VAN F. SIMS**, Paducah, 1st Supreme Court District (SCD); **JOHN DAVID MEYER**, Owensboro, 2nd SCD; **HOWARD O. MANN**, Corbin, 3rd SCD; **AMY D. CUBBAGE**, Louisville, 4th SCD; **MINDY BARFIELD**, Lexington, 5th SCD; **TODD V. MCMURTRY**, Ft. Mitchell, 6th SCD; and **RHONDA J. BLACKBURN**, Pikeville, 7th SCD.

Other Kentucky Bar Governors who were recognized for their continuing service were **W. FLETCHER SCHROCK**, Paducah, 1st Supreme Court District (SCD); **THOMAS N. KERRICK**, Bowling Green, 2nd SCD; **MELINDA GILLUM DALTON**, Somerset, 3rd SCD; **BOBBY SIMPSON**, Louisville, 4th SCD; **EILEEN M. O’BRIEN**, Lexington, 5th SCD; and **GARY J. SERGENT**, Covington, 6th SCD; and **JOHN F. VINCENT** of Ashland, 7th SCD.

Also honored were retiring KBA President **SULLIVAN**, Immediate Past President **DOUGLAS FARNSLEY** and outgoing YLD Chair **REBECCA R. SCHAFER**, as well as **MICHAEL PITMAN** of Murray, the 1st SCD Representative on the KBA Board of Governors and the 7th SCD Representative **E. “MICKEY” MCGUIRE** of Prestonsburg.

**KBA MEMBERSHIP LUNCHEON**

The annual membership luncheon was held on Friday, June 23, at the Owensboro Convention Center. Prior to the luncheon President Sullivan and Chief Justice Minton honored the attorneys who achieved **SENIOR COUNSELOR STATUS**. Following their ceremony the senior counselors attended the membership luncheon and watched a touching tribute to recognize their years of service. This year 198 attorneys were recognized as senior counselors. President Sullivan presented the **BRUCE K. DAVIS BAR SERVICE AWARD** to the past and present **KBA ETHICS HOTLINE COMMITTEE MEMBERS**. Sullivan later presented the **2017 DONATED LEGAL SERVICES AWARD** to **NED PILLERSDORF**, with DeRossett & Lane of Prestonsburg. Former YLD Chair J. Tanner Watkins presented the **NATHANIEL A. HARPER DIVERSITY AWARD** to **ROULA ALLOUCH** of the Law Offices of Raymond Decker in Cincinnati. To conclude the luncheon, **2017 ANNUAL CONVENTION CHAIR J.D. MEYER** and **CLE PLANNING COMMITTEE CHAIR MATTHEW P. COOK**, were thanked for all of their hard work and dedication to the 2017 KBA Annual Convention.
Louisville attorney **Tanner Watkins** receives the 2017 **Outstanding Young Lawyer Award** from Richard H.C. Clay of Louisville.

**Former KBA President WM. T. (Bill) Robinson III** was awarded the **Service to Young Lawyers Award**, posthumously. John Crockett of Louisville presented the award to Joan Robinson during the YLD Luncheon.

**Sarah McKenna** of Louisville receives the **Outstanding YLD Executive Committee Member Award** from Young Lawyers Division Chair Rebecca Schafer.

**Stephanie Wurdock** of Lexington receives the **Outstanding YLD District Representative** from YLD Chair Rebecca Schafer.

**Acena Beck** of Covington receives the **Young Lawyer Service to the Community Award** from Aaron Beck.

**YLD Chair Rebecca Schafer** presents **Lee Metzger** of Covington with a plaque recognizing him as **Outstanding Committee Chair**.

**W. Douglas Myers**, former KBA President, was presented the **President’s Special Service Award**, posthumously, from KBA President R. Michael Sullivan. Doug’s wife, Jan, was there to accept the award.

**Pierce W. Hamblin** of Lexington receives the 2017 **Distinguished Lawyer Award** from KBA President R. Michael Sullivan during the Annual Banquet.

**Federal Court Judge Thomas B. Russell** of Paducah receives the 2017 **Distinguished Judge Award** from KBA President R. Michael Sullivan during the Annual Banquet.

Members of the **2017-18 KBA Board of Governors**.
Chief Justice John D. Minton Jr. presents Joyce Jennings and Diane Logsdon, both of Elizabethtown, with the Chief Justice’s Special Service Award during the Annual Banquet for their service on the Judicial Conduct Commission.

KBA President R. Michael Sullivan presents Immediate Past President Douglass Farnsley of Louisville with a plaque honoring his 10 Years of Service on the KBA Board of Governors. Farnsley has served on the Board from July 1, 2007-June 30, 2017.

KBA President R. Michael Sullivan presents 1st District Bar Governor Michael Pitman with a plaque recognizing his four years of service on the KBA Board of Governors from July 1, 2013-June 30, 2017.

KBA President R. Michael Sullivan presents 7th District Bar Governor Earl “Mickey” McGuire with a plaque recognizing his six years of service on the KBA Board of Governors from July 1, 2011-June 30, 2017.

KBA President R. Michael Sullivan presents Immediate Past President Douglass Farnsley of Louisville with a plaque honoring his 10 Years of Service on the KBA Board of Governors. Farnsley has served on the Board from July 1, 2007-June 30, 2017.

R. Michael Sullivan was presented with this plaque for his Service as President during 2016-2017 by incoming KBA President Bill Garmer.

Ned Pillersdorf with Pillersdorf, DeRossett & Lane in Prestonsburg receives the 2017 Donated Legal Services Award from KBA President R. Michael Sullivan during the KBA Membership Luncheon.

Tanner Watkins of Louisville presents the Young Lawyer Division’s 2017 Nathaniel R. Harper Award to Roula Allouch of Cincinnati.

INCOMING KBA PRESIDENT BILL GARMER addresses the attendees during the 2017 Annual Banquet held on June 22.

The Thomas B. Spain Award was presented by Continuing Legal Education Commission Chair W. Mitchell Hall, Jr., to B. Scott West with the Department of Public Advocacy.

Members of the Kentucky Bar Association’s Ethics Hotline Committee receive the 2017 Bruce K. Davis Bar Service Award from KBA President R. Michael Sullivan during the KBA Membership Luncheon.

Seventeen of the KBA’s past presidents attended the annual Membership Luncheon held June 23 at the Owensboro Convention Center.
2017 LAW DAY AWARDS

The winner of the Kentucky Bar Association’s annual Law Day Competition received their award during the Membership Awards Luncheon held Friday, June 23, at the Owensboro Convention Center as a part of the 2017 Annual Convention. Law Day Committee Chairman Gailen W. Bridges, Jr., presented the award during the luncheon.

The BOWLING GREEN-WARREN COUNTY BAR ASSOCIATION was the recipient of the award for the Large Bar Category. The Bowling Green-Warren County Bar Association focused their celebration around this year’s theme, “The 14th Amendment: Transforming American Democracy.”

The Bowling Green-Warren County Bar Association celebrated Law Day with a public ceremony held at the Capitol Arts Center, where roughly 250 people attended. They continued their tradition and held a poster contest for the schools in their areas. They also participated in the KBA Young Lawyers Division’s Legal Food Frenzy collecting canned food goods and hosted a blood drive for the American Red Cross.

Brent Stinnett, president of the Bowling Green-Warren County Bar Association and Law Day Chair Katie Embry accept the plaque from Gailen W. Bridges, Jr., honoring the Bowling Green-Warren County Bar Association in the Large Bar Category.

THANK YOU TO ALL OF THOSE BAR ASSOCIATIONS WHO PARTICIPATED IN LAW DAY 2017.
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Kentucky Lawyer Assistance Program

Kentucky Secretary of State’s Office
You successfully litigated the landmark case of *Hilen v. Hays* (1984) to decision by the Kentucky Supreme Court. In that case, the Court abolished the common-law rule of contributory fault that barred recovery by a plaintiff as little as one percent at fault, a rule firmly in place for more than 90 years. The Court adopted the rule of comparative fault by which a recovery is reduced by the percentage of fault attributable to the plaintiff.

When you took on Margie Montgomery Hilen as a client, did you sense that hers was the case to cause this tectonic shift in the law of torts?

When I accepted Margie Montgomery Hilen as a client, I can’t say that I sensed this was the case that would cause a tectonic shift in the law of torts. But, there was a movement throughout the United States in the 1970s and 1980s to abandon the old ‘all-or-nothing’ law of contributory fault in favor of comparative fault. By 1984, 41 states had already adopted comparative fault as the rule to be applied where the fault of the respective parties was in question. Some states had adopted comparative fault by legislative enactment and nine states had adopted comparative fault by judicial decision. So, there clearly was a move at foot to adopt comparative fault throughout the country at the time that I tried *Hilen v. Hays*.

In retrospect, *Hilen v. Hays* was the perfect case to take to the Supreme Court because the defendant was clearly at fault and at the close of the proof, the Judge, James Keller, who later served on the Kentucky Supreme Court, entered a directed verdict against the defendant on fault. That left the only issue to be tried, was whether Margie should bear any fault for her actions. When that issue was submitted to the jury, the jury found Margie at fault, finding that she knew or should have known that the defendant was intoxicated to the extent his ability to safely operate a motor vehicle was impaired.

Before the case went to the jury, I had submitted a comparative fault jury instruction to the Court and Justice Keller, following the then precedent of the Supreme Court, refused to give that instruction. The case was submitted to the jury and the jury found Margie at fault. The stage was then set for the appeal.

The case was remanded to the trial court in Lexington. Can you tell us how it came out for her when it was resolved?

*Hilen v. Hays* was remanded from the Supreme Court to the trial court in Lexington before Justice James Keller for a new trial on the issue of comparative fault. Before the retrial, the case was settled. Margie Hilen was compensated for her serious injuries which included, among other injuries, a fractured neck.

The doctrine of contributory negligence had a long life. Can you describe some of the creative strategies resorted to by judges, lawyers, and juries to work around what otherwise would have been harsh results?

Before comparative fault was adopted in Kentucky, judges, lawyers and juries attempted to work around the harsh application of contributory negligence as a complete defense. They did this understanding that the finding of fault is basically a question of fact for a jury to decide after they have heard all of the evidence in the case. Many times, before the advent of comparative fault, juries would attempt to do what was apparently the right thing to do under the circumstances and, if the Plaintiff was not egregiously at fault, the jury would award the Plaintiff damages. Many times when they did this, the juries would reduce the total amount of damages from what would be a full and complete compensation of the injuries.

In fact, in his opinion in Hilen, Justice Leibson pointed that, at oral argument, counsel for the defendant argued to the court that while the doctrine of contributory negligence did create injustices and inequities, that those “inequities” were often cured by juries.
acting in disregard of the instructions of the trial Judge. The juries were making de facto findings of comparative fault even though that was not the law. Justice Leibson used this argument by defense counsel to underscore the unfairness of the contributory negligence doctrine being used as a complete ban to recovery by the plaintiff.

Did you have the sense as you were litigating the case that the dynamics of the Kentucky Supreme Court were moving in Ms. Hilen's direction?

I did sense that when we were litigating *Hilen v. Hays* that the Kentucky Supreme Court was probably amenable to changing the law. I thought that mainly on the basis of what other states had done up to the point in time. As said previously, when *Hilen v. Hays* reached the Kentucky Supreme Court, there were already 41 states that had adopted comparative fault as the doctrine to be applied in negligence cases. So there was definitely momentum at the time to abandon the doctrine of contributory negligence as a complete bar to plaintiff’s recovery and adopt the more equitable and fair doctrine of comparative fault.

At that time, Kentucky had two of the finest Justices ever to sit on the Kentucky Supreme Court. Justice Charles Leibson and Justice Robert F. Stephens were brilliant jurists. They recognized that the essence of good law is that it be fundamentally fair, not only in fact but in appearance. Justice Leibson and Justice Stevens were both very intelligent and capable Justices, and they both saw that the application of contributory fault was fundamentally unfair. They recognized the importance of the opportunity to make the law just and fair for all those who appeared before the Courts of Kentucky. Justice Leibson pointed out that the fundamental purpose of negligence law was to make a full, fair and unfettered analysis of the fault of every party. Only when that was done could it be said that “Justice was done.” Justice Leibson made this clear when he quoted Prosser in the opinion as saying,

“The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot-free. No one has ever succeeded in justifying that as a policy, and no one ever will.” Prosser, Comparative Negligence, 51 Mich.L.Rev. 465,469 (1953) *Hilen v. Hays*, Ky., 673 S.W.2d 713

With all of this in mind, it was clear that there was an opportunity in the 1980's to change the law of comparative fault in Kentucky and I happened to be the lucky lawyer with just the right case at just the right time that did just that.

When did you decide to stake your honor, your reputation, and your economic security on your own ability and diligence, and the value of your cause—when did you decide to become a contingent-fee personal-injury lawyer, in other words.

I decided to become a plaintiff’s lawyer shortly after I began to practice law. In my first 20 months of practicing law, I was a law clerk for the Honorable B.T. Moynahan, Jr., who was Chief Judge of the United States District Court for the Eastern District of Kentucky. Following that service, I was hired by Charlie Landrum, who was soon to become the president of the Kentucky Bar Association, to work for his law firm, which was basically an insurance defense firm. Charlie was a well-established lawyer in Kentucky and routinely represented such clients as L&N Railroad. Charlie was very kind to me and literally took me under his wing and let me be his “young lawyer” in almost all the cases that he tried during the period of time that I was there. One of those cases was a products liability case which is still cited as Kentucky law, the case was *Nichols v. Union Underwear Co*. Ricky Nichols was six-years-old and was on his back porch one summer day and was playing with matches when he caught his Union Underwear t-shirt on fire, the t-shirt burst into flames. Ricky was severely burned. His lawyer filed suit claiming that Union Underwear had produced a defective product in that it was not rendered flame retardant. This lack of fire retardant, thus led to the shirt bursting into flame.
We tried the case for over two weeks in Frankfort in the middle of the winter, and at the end of the trial, late on a cold January evening, the jury returned a verdict finding Union Underwear not responsible for Ricky’s burns. All of the people on our side of the case were celebrating our victory. But as we walked out of the courtroom, I saw young Ricky sitting by himself at the counsel table. It was at that moment that I determined that I would rather be on the side of the plaintiff than on the side of the defendant. Shortly after that, I left Charlie’s firm and took a job with Bob Turley a leading plaintiff’s lawyer in Lexington at the time. Since then, I have always represented the plaintiffs.

Did you have great mentors in the course of your legal education? If so, who were they, and what did you learn from them?

I did have great mentors in my legal education and the primary one was Judge B. T. Moynahan, Jr., the Chief Judge in the United States District Court for the Eastern District of Kentucky. Judge Moynahan was very close to me and took me to every case that he tried throughout the Eastern District of Kentucky. I had the opportunity to observe lawyers from all over the Commonwealth trying all manner of cases. Judge Moynahan routinely took me aside during the day and would comment on the various things that lawyers were doing in the courtroom, both good and bad, and why they were good and why they were bad. He taught me everything he knew about the law and trying cases. This was an invaluable learning experience. I also had the opportunity to practice with lawyers like Bob Turley, Bill Johnson, and Peter Perlman, all of who are great trial lawyers and, of course, Bill and Pete are still practicing at a high level, and are still two of the best trial lawyers in Kentucky.

Justice Venters reported in our May edition of the decline in civil cases being filed, in cases being tried to jury, in cases being appealed, and therefore less refinement and interpretation being made by appellate judges.

Justice Venters has reported that there is a decline in civil cases being filed and being tried to jury and statistics show this to be true. Throughout my career, year after year, I’ve seen a steady decline in the number of tort cases being filed. Of course, this is contrary to the claims of insurance companies, and tort reform advocates who claim that there are too many law suits, and too many frivolous law suits. The statistics just don’t support that claim, top side or bottom. Nevertheless, there are fewer cases being filed and being tried. And, this is not only because of the reduced number of cases being filed, but also because of alternative dispute resolution methods being employed. It is almost unheard of that a case will now go to trial before that case has been ordered to mediation by the trial judge. Over 90 percent of the cases filed are mediated before trial and reach a settlement.

In addition there are now mandatory arbitration clauses in many different contracts. Most consumers only realize they have signed such a contract after they have been injured.

All of these factors have reduced the number of trials not only in Kentucky but throughout the United States.

Has the Courthouse lost its primacy as the place where citizens go to settle their disputes?

Because of the actions mentioned above, the Courthouse has indeed lost its primacy in the place where citizens go to settle their disputes. And that, in my mind, is an unfortunate situation because the right to trial by jury in civil cases is embedded in the Seventh Amendment to the United States Constitution as a primary right of all of our citizens. There is no better way to achieve justice than by having a trial and having everyone have the opportunity to put on their evidence and then have a jury decide the case.

In addition to Hilen v. Hayes, you recently successfully argued a case before the Kentucky Supreme Court that dramatically changed the analysis of punitive damage awards and clarified how corporations ratify the acts of their agents acts, to become legally responsible for their agents actions. Would you elaborate on this case?

Just last year I was asked to argue a case before the Supreme Court that has great significance. Before I was asked to argue the case before the Kentucky Supreme court the case had been pending before the Courts for almost 15 years. It had been tried twice in the Fayette Circuit Court. Each time there was a verdict for the plaintiff and each time the defendant appealed the result to the Kentucky Court of Appeals. The first trial result resulted in a verdict for the plaintiff which included $1,500,000 in punitive damages. The Court of Appeals reversed on the punitive damage award and ordered a new trial on punitive damages with a different jury instruction to be submitted to the jury.

The second trial resulted in a verdict for the plaintiff with punitive damages of $1,450,000. This was appealed to the Court of Appeals, who affirmed the verdict. The defendant then filed a petition for discretionary review and the petition was granted.

It was only then that I was asked to be involved in the case. Until that point, the case had been handled by two excellent Kentucky lawyers: Darryl Lewis and Elizabeth Seif. Darryl is a graduate of the University of Kentucky College of Law and practices in Florida. Liz is also a graduate of the University of Kentucky College of Law. They worked together to try the case two times and handled the two appeals to the Court of Appeals.

In upholding the verdict on the second appeal, Justice Venters allowed the verdict to stand even though the punitive damage award was in a ratio of 386:1 compared to the compensatory damage award. Justice Venters stated that:

“Perhaps the most important violation of the indicia of a punitive damage award is the degree of reprehensibility of the defendants conduct.”

Here the Court found that the conduct of the defendant hospital was so reprehensible that it justified the ratio of 386:1.

This case involved the treatment of Milford Gray, an uninsured indigent paraplegic. He was “complaining of extreme abdominal pain.” In less than 18 hours, the hospital admitted then discharged Mr. Gray, and admitted him and discharged him again. A few hours after the second discharge Mr. Gray died at the home of a relative.
The autopsy revealed that his death resulted from the rupture of a duodenal ulcer.

One of the three expert witnesses who testified for the Plaintiff said this:

“I would say the hospital's conduct— I mean, the words horrific, egregious. I can't believe that in 1999 this would happen in the United States of America. But it did happen. That's why we're sitting here. The reason this law [EMTALA] was passed in 1988 was to try to help and prevent this from ever happening. But it happened. And it happened here. And this is just horrific. I mean, “873 this person died preventably and died a horrible death. And I'm just shocked.”

(The case is reported as Saint Joseph Healthcare, Inc v. Larry Thomas O'Neill, 487 SW 3d 864 (Ky 2016 )

This case stands for the proposition that the law in America is for the protection of everyone, no matter what their station in life.

Are you confident that a competent advocate representing an injured person can still obtain justice in our system a high percentage of the time, particularly the severely injured?

In spite of the case of Milford Gray referenced above, I think it is increasingly difficult for a competent advocate to obtain justice in our jury system, especially for severely injured people. There are many reasons for this, but one of the main reasons for my thoughts are the constant and unabated tort reform propositions that are constantly being proposed and passed into law. That, coupled with advertising lawyers on the television and radio, has made trial lawyers, lawyers representing the injured plaintiff, more unpopular than they have ever been. These ads on television and on the radio present the image that all that lawyers have to do is file a lawsuit and the defendants will come running with bags of money to pay them. Because that is the perception that is now widely accepted by the public, the opposite has become true. The public, because of all of this, has become cynical and it becomes less and less likely for a jury to return substantial damages for people who are severely injured. As Caesar so famously said “The fault, dear Brutus, lies not in our stars but in ourselves.”

Because of these factors, the right to trial by jury has been under a furious and relentless attack. These attacks have come from many sources, including insurance companies and many politicians.

Sometimes when I am arguing cases to a jury, I pull out my copy of the United States Constitution and remind the jurors of what is embodied in the Seventh Amendment. When I do this, I am struck by the look on many of the jurors faces. It is clear from their expressions that they have no idea that the right to trial by jury is a fundamental Constitutional right. We must as lawyers do everything we can to ensure that our citizens Seventh Amendment right to a jury trial is not destroyed.

You have long been involved in the political process, including some time as chairman of the Kentucky Democratic Party. Does politics still have a place for the hard-working, idealistic young lawyer? I have been involved in the political process, since receiving my law degree. I think it is necessary for lawyers to be deeply involved in the life of their communities. That means being deeply involved in the political arena. America is all about the clash of differing ideas. That is good, but we must never lose site of the fact that the purpose of the clash of ideas is to help develop a better life for all of our citizens.

It is important for us as lawyers to be involved in the political process because we enjoy a special vantage point as a result of our everyday activities to see how political decisions affect people. We must make sure that our legal system continues to protect the rights of people like Margie Hilen and Milford Gray.

The late Bill Robinson advised Kentucky students picking a law school that if they intended to practice in Kentucky that they ought to go to the UK College of Law. You have had a relationship with the institution for more than 40 years. Can you describe what that has meant to you, personally and professionally?

Bill Robinson, who as many of you know recently passed away, and was president of both the Kentucky Bar Association and the American Bar Association, felt strongly that to practice law in Kentucky, you should attend the University of Kentucky College of Law. I agree with him and often say the same thing to young law students. Obviously, that idea should also extend to both The Brandeis School of Law, as well as Salmon P. Chase School of Law. The rational is pretty simple. That is, that if you attend the University of Kentucky College of Law, or the other Kentucky law schools and then practice law in Kentucky, you will start your contacts with your colleagues there in law school and maintain those contacts throughout your career. That is an invaluable asset to a lawyer as they go through their years of practice and those contacts will benefit that lawyer both personally and professionally throughout their practice. So, I agree with Bill when he said that and I have said the same thing to many students, many times.

It is quite an involved process to become president of the Kentucky Bar Association. It takes years and a big commitment. Along the way have you thought about what themes and initiatives you would like to pursue in your year as president?

KBA board membership is an involved process and it does take a big commitment. I made that commitment and have been honored to be elected president and by that, to be of service to members of the Kentucky Bar. The themes and initiatives that I will honor through this year of being president involve a commitment to do everything in my power to keep the Kentucky Bar Association as one of the outstanding bar associations in America.

For years, the Kentucky Bar Association's Annual Convention has been the second largest attended Bar Convention in the country. It is important to maintain that standing, and to keep that tradition alive and well.

There are many other points of focus for the Kentucky Bar Association in this upcoming year. Many of those points of focus were highlighted by the work of the Strategic Planning Committee which was chaired in January 2016 by my dear friend, Doug Myers. With Doug’s guidance, the Planning Committee set about...
to establish a five year plan for the Kentucky Bar Association to continue to provide top level services for the members of the association. Former Presidents Doug Farnsley and Mike Sullivan began the implementation of these plans. They were not to be completed in one year and will require continued involvement in moving forward. In addition, we will build on the programs already in place that require our attention for their continued improvement.

The first of the programs, and among the most important, is Kentucky Lawyer Assistance Program (KYLAP). As most of you know that program has been established to assist lawyers who are battling depression, alcohol and substance abuse. With Yvette Hourigan’s leadership, the KYLAP program is one of the most effective programs of any bar association in the United States. Yvette is doing an outstanding job, and continues to work toward improvement of the funding of the KYLAP program to ensure that we can continue providing services for our members.

In addition, in April the KBA held a Diversity and Inclusion Summit in Lexington that was attended by over 200 people. It was sponsored by the KBA and it was the second such Summit held by the KBA. We intend to have another Summit in the 2018-2019 year and believe that is an important aspect of what we are doing as a bar association.

We will work to increase the collaboration between the KBA and the local bar associations throughout the state. We want to extend our services to the local bar associations and have a more connected working relationship. As president, my mission will be to visit the local bar associations as I can throughout the coming year, to increase that collaboration.

In doing that, we will communicate to the local bar associations how their members may move toward leadership involvement with the KBA. We want to emphasize that the KBA is an organization devoted to all its members and all of its members have an equal opportunity to become involved in leadership roles.

We will continue to address the image of lawyers in society in general, and particularly in Kentucky. It has always been easy to disrespect lawyers. But, we need to be aware of what we can do as individual members of the bar association to enhance the image of lawyers. We can do that by our participation, not only in our law practice, but in our communities in general. By being active members of social and civic organizations, we can enhance the respect that people in our community have for lawyers. I would encourage each and every lawyer to think about what you are doing in terms of involving yourself in community activities and whatever you are doing, try to expand your effort.

We need to support the KBA Continuing Legal Education (CLE) program recognized as one of the best in the country. We should emphasize that we are the only bar association in America that provides free continuing legal education in each of our Supreme Court districts every year. This allows our members to complete all of their CLE requirements in a free two day period each and every year.

The KBA has established a Task Force on Judicial Evaluation. That task force is working on a plan to have judicial evaluations in every judicial district, in place throughout the state in the coming year. We believe that such evaluations will enhance the administration of Justice throughout the state for not only lawyers but also for consumers.

In addition, we need to remember that one of the duties of the KBA is to ensure that we have an effective disciplinary process and that it fosters the trust of not only you as members but also as members of society. Once again, we have a disciplinary process which is always engaged and that work will continue. One of the primary duties of your Board of Governors is to effectuate the disciplinary process. The Board puts in countless hours in that process. The Board tries to ensure that the disciplinary process provides a fair result, for both the lawyers charged and the public.

After a deep study and substantial deliberation, the Kentucky Supreme Court determined that there should be reallocation of judicial resources around the Commonwealth. Will there eventually be legislation embodying the findings of the study? This is a major problem in today’s society. Justice and the appearance of justice is fundamental to a free society. Trial by jury is the best way for the system to work. No one has yet to find a better way. Having said that, we should evaluate how we use our judicial resources and reallocate them if necessary. But we need to be mindful of the fact that as we do this we must not dismantle our time honored court system, and increase efforts to support our judiciary.

We must emphasize to all, that one of the most noteworthy aspects of our form of government is that it is premised on the primacy of the rule of law. We must support our judiciary. We must make sure that the citizens of Kentucky and the United States recognize how important the adherence to the rule of law is to our functioning as a modern society.

In the president’s page of this Bench & Bar issue, I point out some of the challenges we are facing in helping our elected leaders provide for a vibrant and vital judicial system for all the citizens of the Commonwealth.

In addition, I would say that one of the most important things I will do as president is to maintain an open door to each and every member. In pursuit of that, I encourage the membership to contact me with any question or concern, with calls to my office or through the KBA Bar Center.

In closing, I thank each and every one of you for your support and know that I may call on you for your help as the year progresses.

ENDNOTES
1. 673 S.W.2d 713.
On June 30 of each year, terms expire for seven (7) of the fourteen (14) Bar Governors on the KBA Board of Governors. SCR 3.080 provides that notice of the expiration of the terms of the Bar Governors shall be carried in the *Bench & Bar*. SCR 3.080 also provides that a Board member may serve three consecutive two-year terms. Requirements for being nominated to run for the Board of Governors are contained in Section 4 of the KBA By-Laws and the requirements include filing a written petition signed by not less than twenty (20) KBA members in good standing who are residents of the candidate’s Supreme Court District. Board policy provides that “No member of the Board of Governors or Inquiry Commission, nor their respective firms, shall represent an attorney in a discipline matter.” In addition any member of the Bar who is considering seeking or plans to seek election to the Board of Governors or to a position as an Officer of the KBA will, if elected, be required to sign a limited waiver of confidentiality regarding any private discipline he or she may have received. Any such petition must be received by the KBA Executive Director at the Kentucky Bar Center in Frankfort prior to the close of business on the last business day in October.

The current terms of the following Board Members will expire on June 30, 2018:

1st – W. Fletcher Schrock, Paducah
2nd – Thomas N. Kerrick, Bowling Green
3rd – Melinda G. Dalton, Somerset
4th – Bobby Simpson, Louisville
5th – Eileen M. O’Brien, Lexington
6th – Gary J. Sergent, Covington
7th – John Vincent, Ashland
IN MEMORIAM

IN LOVING MEMORY OF
WM. T. (BILL) ROBINSON III

BY: JAMES P. DADY

William T. Robinson, III, a former president of both the Kentucky and American Bar associations, a legal practitioner of the highest distinction, and who carried a philanthropic portfolio of staggering dimension, died May 9, 2017, at St. Elizabeth Hospital's In Patient Hospice surrounded by his family, after a fierce battle with cancer. He was 72.

Mr. Robinson's achievements as a lawyer were singular. He routinely made the lists of best lawyers, in Kentucky and Ohio. He helped to lead three of Kentucky's most substantial law firms during 45 years of practice. He was always hyper-prepared and scrupulously ethical. His professional stature elevated every forum where he practiced. Mr. Robinson was a preternaturally talented rainmaker. A measure of his eminence in the bar was his 1997 appointment as a special justice of the Kentucky Supreme Court. He won the Themis Award in 2003, the highest distinction bestowed by the Cincinnati Bar Association. He won a distinguished lawyer award from the Northern Kentucky Bar Association and from the Kentucky Bar Association, and a host of other distinctions.

Mr. Robinson's dedication to bar service was peerless. He was involved for more than three decades in various capacities with the American Bar Association. His work for the ABA culminated in his election as president for 2011–12. The electorate for the ABA presidency is approximately 70. In typical Robinsonian fashion, he took a laptop and a cellphone to a place in Florida and for two weeks wooed the voters. When he obtained pledges of support of a majority, he called his opponent, who then congratulated Mr. Robinson and declared the contest over.

Mr. Robinson was an advocate for the cause of clients who could not afford market prices for legal services, and for competent representation for the criminally accused. In his later years, Mr. Robinson fought tirelessly—and in contemporary America it is a fight—for the independence and fair compensation of judges. As his strength waned in the final weeks of his life, he travelled to Nevada with his wife Joan to engage in interviews for the president of the National Judicial College, where he was serving as chairman.

Mr. Robinson engaged in the causes of legal education and professional development for decades. He was founding board chairman of the Kentucky IOLTA fund, president of the Kentucky Bar Foundation, and a charter board member of Lawyers Mutual Insurance Company of Kentucky.

Mr. Robinson was a proud graduate of the University of Kentucky College of Law, and was inducted into the school's Hall of Fame in 2004. What was remarkable was his attachment to schools he didn't attend. He was the first recipient of the honorary alumnus award of Salmon P. Chase Law School. He helped to found the Inns of Court chapter at Chase. In 2011 he was given an honorary doctor of laws degree from Chase and was commencement speaker that day. He was given honorary degrees from Samford University’s Campbell College of Law in Homewood, Ala., in 2012, and from California Western Law School in San Diego in 2011. He was commencement speaker at the University of Cincinnati College of Law in 2012, at the Columbus School of Law at The Catholic University of America, at the University of Montana School of Law, and was given an honorary doctorate and was commencement speaker at Xavier University in Cincinnati in 2012.

Mr. Robinson was an evangelist for lawyers and the cause of lawyering. There are not too many lawyers; there are too few, he would say, pointing to research on how often citizens attempt to solve complicated legal problems by themselves. He challenged detractors of the profession to identify a local board, a charitable cause, a civic organization that does not include a lawyer in its ranks, implying that but for the pro bono work of lawyers, communities would collapse.

Another facet of Mr. Robinson's legacy was his prodigious commitment to community service.

Northern Kentucky is the Commonwealth’s second most populous metropolitan area, but it has always lacked a central organizing principle. There are more than 40 cities in Boone, Campbell, and Kenton counties, another long list of schools, public and private, and another list of special districts and taxing authorities, and for generations, northern Kentucky had been held back from political, economic, and social advance by its balkanization.

In the mid-1980s, Mr. Robinson helped to found the Tri-County Economic Development Board, a collaboration of the three counties into a unified, professionalized initiative in industrial recruitment and economic development. With its capacity to speak and act for the region, Tri-Ed has led northern Kentucky to an era of unprecedented prosperity.

Mr. Robinson was long associated with the Kenton County Airport, which operates the Cincinnati/Northern Kentucky International Airport. The airport and ancillary
businesses have been a reliable source of jobs and economic development for the region for generations.

He was chairman of the Northern Kentucky Chamber of Commerce, was given the Walter Dunlevy Frontiersman award for community service by the organization, and had an award created in his name by the Chamber.

A devout Roman Catholic, Mr. Robinson was active in the cause of comity among those of different faiths.

Mr. Robinson’s dedication to Thomas More College, his alma mater, was so consuming, the school’s president said at his passing that Mr. Robinson was perhaps the school’s most prominent alumnus.

It is also likely that among all of his projects and passions the one nearest his heart besides his family was Redwood School in Fort Mitchell, an institution dedicated to improving the lives of children and adults with disabilities. Mr. and Mrs. Robinson were benefactors of the school for more than 50 years. The couple requested memorials to be given to Redwood in the announcement of his death.

It may have been immodest for it to have been suggested while he was alive, as if no one individual deserved the honor but as his prodigious life can now be seen in full, the nickname has been given to him: “Mr. Northern Kentucky”— and no one has come forward to offer another candidate.

Bill Robinson was born in Covington January 6, 1945, to William T. Robinson, Jr., and Hilda Ratermann Robinson. He grew up in Mt. Auburn, a hilltop neighborhood just north of downtown Cincinnati.

The elder Mr. Robinson was a postal clerk and did side work cleaning medical offices in the neighborhood. Mrs. Robinson was a full-time homemaker.

The couple had another son, John R. Robinson, who lives in Washington and is employed as a lobbyist, and a daughter Bettie Jo Robinson Laidlaw, a full-time homemaker.

The family’s circumstances were modest, but the younger Bill Robinson was heard to say in recent years that the animating principle of his parents was for their children to obtain the education they could not. He also credited his parents for instilling in him the religious values he carried all his life.

Mr. Robinson attended seminary for five years, including one year, which was the equivalent of the first year of college. He redirected his career path from the priesthood to a life in the law, and enrolled in what then was Villa Madonna College, since renamed Thomas More College.

There he met Joan Wernersbach, whom he married in 1969. The couple had two children William T. (Tay) Robinson, IV, who is now 47, and Todd Robinson, who died in 2015 at the age of 42. There are four grandchildren.

No account of the life of Bill Robinson would fairly represent him without at least mentioning his intense devotion to his Catholic faith. He sought to attend Mass every day, sometimes among Passionist nuns at a monastery in Erlanger. He said that he believed that God spoke to him through his intuition.

Mr. Robinson endured a series of orthopaedic surgeries in the last decade of his life, and an array of complicated and painful surgeries and treatment protocols in his last illness. He experienced perhaps the most debilitating blow a parent can endure in recent years, and he met the world with unfailing optimism and hopes for better prospects around the corner. With his departure in view, he expressed on Caring Bridge his enthusiasm for his prospects in the afterlife.

Mr. Robinson encouraged young people to read obituaries, and challenged them to find one that says ‘So and so owned three Mercedes or two houses, or this amount of jewelry … No one should ever be measured by the quality of our car or the size of our home, and if that is your goal, you are doomed to frustration,” he said.

Those blessed to have known Bill Robinson will not readily forget his vivid personal qualities. He was always immaculately clad, almost always in perfectly-tailored suits, his shoes gleaming, his French cuffs shot perfectly into the sleeves of his jackets, tie knotted perfectly. He was movie-star handsome. His appearance was so sleek, it was off-putting to those who hadn’t yet had the pleasure of knowing him. Among those who did, his appearance was an expression of his belief in the Catholic duty to honor his body as a temple of the Holy Ghost and to always put forth the best possible version of himself.

His attention to his appearance was a sign of respect to those he encountered, in practice, and in everyday life. It was part of a huge empathy. Like some from modest circumstances whose lives throw a steep arc across the sky, he never forgot his beginnings. His antennae were always on high alert for an acquaintance in need of good counsel, a nudge of the highest influence toward a school admission or a job, a kind word.

Mr. Robinson was an old-Church Catholic, but he would have embraced the Eastern spiritual concept that everyone is in the process of achieving their highest state of being. If you came into his orbit, he wanted to help you achieve yours.

Mr. Robinson’s Christmas-card list was so long that he dispensed with the convention of cards, and instead sent 6,000 Yule-themed emails. Six thousand!

It is not readily recollected that he was ever in anything less than a good mood, less than sunny about his prospects, or less than friendly toward everyone who came his way. He lit up every room he walked into.

Bill Robinson never met a stranger. Strangers were friends he hadn’t made yet.

The writer thanks Melanie Bragg; Judith Clabes, editor of The Northern Kentucky Tribune; The River City News; WCPO.com; Frost Brown Todd, and Joan Robinson for their reporting and recollections about Mr. Robinson.
Kentucky developers scored a major win in this year’s legislative session, and opponents of controversial local land-use decisions now face a significant hurdle that must be overcome when appealing such decisions in the form of a new bond requirement. House Bill 721 was adopted in the 2017 legislative session as emergency legislation, becoming immediately effective as the law of the Commonwealth. This legislation is likely to change the course of land-use litigation arising under KRS Chapter 100 dramatically. Section 2 of the law leaves no doubt as to its purpose: “...it is desirable to curb unnecessary appeals of land-use cases, which appeals burden the courts, cause loss of jobs and tax revenue, and many times render time-sensitive projects such as multi-family affordable housing projects undevelopable.”

House Bill 72 certainly has teeth in that appellants may be required to post appeal bonds of up to $250,000 to pursue their claims before the Court of Appeals. Thus, what at first might seem an arcane set of procedural requirements, is a game changer for land-use litigation in imposing real liability on appellants who are unsuccessful before the appellate courts when no practical risk of such liability existed prior to House Bill 72. Kentucky’s recognition of broad standing of persons claiming to be injured or aggrieved to bring land-use appeals4 has long provided an open door for such litigation. However, with House Bill 72, the first door of circuit court review is still wide open, but, down the hall, opening the door to the Court of Appeals becomes much more difficult.

On its face, the new legislation might be seen primarily to benefit developers. However, it should also be seen as empowering local governments, because it creates a financial hurdle to challenge fully their land-use decisions which have been upheld by circuit court. At the same time, the legislation exempts local government from the bond requirement in electing to challenge a circuit court judgment adverse to the local government.5 House Bill 72’s application is very broad in the land-use context in that it applies to “any challenge under this chapter” (i.e. KRS Chapter 100).4 It thus applies to KRS 100.347 statutory appeals arising from zoning map or text amendments, conditional use permits, development plans, variances, subdivision plats, non-conforming use determinations, planning commission cellular tower approvals, and any appeal from a final board of adjustment decision which is appealed to the Court of Appeals. It also likely applies to declaration of rights actions and challenges to validity of ordinances which require interpretation of KRS Chapter 100.

LAND-USE LITIGATION PRIOR TO HOUSE BILL 72

For many decades, if development opponents lost in circuit court and then appealed to the Court of Appeals, the successful applicant had to consider carefully the “build at risk” issue while the litigation proceeded through the appellate process. The then Court of Appeals explained the developer’s quandary in Hofgesang v. McMakin,7 a case involving a rock quarry:

“Appellants seek to avoid this consequence but, as the chancellor pointed out, the appellants “assumed the risk attendant to the operation and the results of this litigation, since they, of their own accord and of their own volition, continued their operations, they must now be content to face the consequences and fill the hole that they have dug with the same or similar substances to that which they removed from it.” Little need be added. They gambled and lost. To hold otherwise would bring discredit to the judicial process.” Id. at 951.

In contemplation of such a developer’s nightmare, innumerable real estate projects of every variety have been delayed while statutory appeals pursuant to KRS 100.347 have wound their way to finality in the courts with no real risk of financial liability for unsuccessful appellants.5 In addition, many settlements of one kind or another have been reached with neighborhood development opponents, whether monetary or in the form of development concessions, in order to resolve litigation without waiting for final outcome before Kentucky’s appellate courts.

Prior to the enactment of House Bill 72, the combination of an appeal to the Court of Appeals and subsequent motion for discretionary review would typically delay finality of the case for more than...
two years with the developer normally refraining from construction in such period to protect itself against a potential adverse appellate decision. Even if the developer ultimately prevailed in such a case and the appeal might be objectively found frivolous or brought in bad faith, it has been virtually unheard of that an appellate court would impose damages or single or double costs within its authority under Civil Rule 73.02(4).

To be clear, the Kentucky judiciary has not been hesitant to follow substantial evidence standards and apply the strict compliance doctrine to defeat land-use appeals on the facts and law applicable to particular cases. However, these results only become final after a long march through the appellate process. This oft-repeated pattern of delay in final resolution has led to great dissatisfaction among developers.

THE APPEAL BOND REQUIREMENTS OF HOUSE BILL 72

House Bill 72 upends the current land-use litigation dynamic as it has been practiced in Kentucky for decades and creates new liability under a bond requirement not previously part of land-use litigation and of a type not generally applied to appeals of other administrative or legislative governmental action. The key provision of the legislation allows an appellee to make a motion for a bond within 30 days after an appeal has been filed to the Court of Appeals. Thus, as a practical matter and for the first time, development opponents will have to consider that defeat in the appellate courts could make them liable for substantial costs far beyond their own attorney fees. House Bill 72 may be thought of as two step legislation which combines a new obligation as to responsibility for costs, plus the opposing party’s appellate attorney fees, and then sets a bond procedure to protect the appellee’s interest in recovering such newly imposed liability. Also, in establishing a bifurcated proceeding in which appeal on the merits proceeds to the Court of Appeals in connection with setting of a bond requirement by a circuit court, the traditional distinctions in the Civil Rules between interlocutory orders and final and appealable judgments of trial courts become somewhat clouded.

Developers’ concerns over the protracted appellate process under KRS Chapter 100 in general had long been simmering. However, it was last year’s failure of a potential new Walmart project in west Louisville, (perceived to be based at least in part on delays arising from a KRS 100.347 appeal pending before the Court of Appeals) that was a catalyst in building support for the legislation among members of both political parties and united a coalition of members having varying development philosophies. House Bill 72 was introduced by Representative Jerry T. Miller of House District 36, which includes parts of Jefferson and Oldham counties. The General Assembly heard testimony from all sides of the development equation. Opponents expressed their concerns, with persons representing citizens groups pulling no punches, arguing that House Bill 72 is unconstitutional and intended not simply to regulate appeals, but to eliminate them. Ultimately, House Bill 72 passed by a 51-39 vote in the House and 21-17 in the Senate. It was designated as emergency legislation and signed by Governor Matt Bevin on April 11, 2017, and therefore became effective immediately.

The legislation establishes that if an appeal of a circuit court’s “final decision” is made in accordance with a legal challenge under KRS Chapter 100, the circuit court “… shall, upon motion of an appellee” as set forth in House Bill 72, require the appellant to file an appeal bond. Significantly, “shall” is mandatory under Kentucky law and House Bill 72 provides the circuit judge with no discretion to fail to set a bond after a proper and timely motion.

The bond requirement is expected to be applied to circumstances where a developer has prevailed on a land-use application and opponents have appealed the local government approval. However, a close reading of the statute reveals some mutuality in that a developer who prevails before local government and loses before a circuit court could be subject to the bond requirement in connection with any appeal to the Court of Appeals. Of course, a bond requirement presumably would not stop a well-funded developer from seeking recourse in the Court of Appeals, in contrast to how the financial burden of the bond requirement may impact citizens groups.

Appellees have 30 days after a notice of appeal has been filed in circuit court to file a motion for the circuit court “... to order the appellant to post an appeal bond.” House Bill 72 provides that “if an appellee does not move the circuit court to require the appellant to post an appeal bond, the right to request an appeal bond is waived.” The legislation provides that “any party that appeals the Circuit Court’s final decision” shall upon proper appellee motion “be required to file an appeal bond.”

The legislation sets a deadline for the circuit court’s ruling on the bond motion, which is certainly in contrast to the normal absence of such deadlines under the Civil Rules. House Bill 72 provides “within thirty (30) days of an appellee filing a motion in Circuit Court for the appellant to post an appeal bond, the Circuit Court shall conduct a hearing to determine the amount of the appeal bond, issue findings of fact, and set the bond amount with good and sufficient surety.” Interestingly, the 30 day clock runs from the filing of the motion, which could present some timing issues in circuits in which motion hour is held once a month.

House Bill 72 goes on to require that “in determining the amount of the appeal bond, the Circuit Court shall determine if the appeal is presumptively frivolous…” The circuit court’s determination is only relevant to setting the appeal bond. An appellate court decision on the merits of the case is not impacted by a circuit court determination that an appeal is “presumptively frivolous.” Two issues the circuit court is to consider, although these issues are not exclusive, are: “1. whether the appeal is of a ministerial or discretionary decision” and “2. whether or not there exists a reasoned interpretation supporting the appellant’s position.” Of course, certain local government decisions under KRS Chapter 100 are considered “ministerial,” such as the approval of a subdivision plat. If the applicant meets the requirements of the regulations, then there generally is no discretion to deny approval of the plat. Other decisions under KRS Chapter 100 involve much broader discretion, such as decisions on a requested variance or zoning map amendment. Presumably, the intent of House Bill 72 is that appeals of ministerial decisions will be more suspect
of being presumptively frivolous if plain error by the agency is not readily apparent.

Determining the existence of a “reasoned interpretation supporting the appellant’s position”23 puts the same circuit judge who has just rejected the appellant’s argument in the position of evaluating whether it involved a “reasoned interpretation.” Finding a “reasoned interpretation” could be equated to identifying any good faith basis for the appellant’s claim on a more permissive construction, while a more restrictive approach might require a “reasoned interpretation” to be consistent with existing published precedent of Kentucky’s appellate courts or with a statute or ordinance. There are further issues as to whether a “reasoned interpretation” could be based on persuasive authority of other states, federal case law precedent, or an unpublished opinion of a Kentucky appellate court (assuming the criteria of CR 76.28(4)(c) is satisfied). Finally, could a well-developed argument for change in existing Kentucky law be a “reasoned interpretation” that would prevent an appeal from being considered “presumptively frivolous”? The Kentucky Court of Appeals has found such arguments sufficient to avoid CR 11 sanctions.24

House Bill 72 does not further define what constitutes a “presumptively frivolous” appeal. The best definition under Kentucky law might be the text of CR 73.02(4), which provides “[a]n appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.” Judicial interpretations under CR 1125 are also persuasive. Practitioners informally surveyed for this article expressed doubt as to the judiciary’s enthusiasm to categorize even poorly supported land-use appeals as “presumptively frivolous.” Experience has generally been that the courts are loath to impose CR 73.02(4) sanctions or other sanctions in land-use appeals arising from KRS Chapter 100. Thus, it appears likely the judiciary will normally decline to characterize appeals by local citizens as presumptively frivolous.

In the expected few cases in which a Circuit Court determines an appeal to be “presumptively frivolous,” House Bill 72 will require it to “…consider all costs, economic loss, and damages that the appellee may suffer or incur during the pendency of, or that will be caused by, the appeal, including attorney fees and court costs, up to a maximum bond amount of two hundred fifty thousand dollars ($250,000).”26 Alternatively, “if a Circuit Court determines that an appeal is not presumptively frivolous, the Circuit Court shall consider the costs that the appellee may incur during the pendency of the appeal, including, but not limited to attorney fees and court costs, plus interest payable on land acquisition or development loans, up to a maximum bond amount of one hundred thousand dollars ($100,000).”27 Curiously, the “interest” component mentioned in the $100,000 bond category is not expressly mentioned in the $250,000 category. However, the reference to “all costs” and “economic loss” in the $250,000 category could be argued to encompass interest as well. A key issue is whether the directive “to consider the costs” and the “up to a maximum” language in the legislation would allow a court to impose a much lower bond amount than has been proven by appellee, perhaps based on equitable principles. Counsel for both developers and citizens groups will argue across the Commonwealth over whether a circuit court has discretion as to the bond amount even if it is clear some bond amount must be imposed.

House Bill 72 provides that the “...appellee has the burden to present sufficient evidence establishing the appellee’s cost and damages.”28 As a practical matter, given the short time frame of the process from notice of appeal to bond hearing, appellee’s counsel should confer in advance with his or her client and any necessary fact and/or expert witnesses and have them available for the hearing. A written report as to costs and damages would provide an opportunity to make the issues clear for the Circuit Court.

While calculation of interest on construction loans during the pendency of an appeal would be straightforward, other issues are more complex and could ultimately lead to circuit courts evaluating expectations involving lost profits in the appeal period. Predictions as to time necessary to get all permits, time to construct the development, and factors such as anticipated lease out or residential lot sales time periods and initial business income could become germane to court’s setting of the bond amount. Precise calculation might not be easy, but developers would only need to offer proof sufficient to justify the $100,000 bond amount where an appeal is found to be based on a “reasoned interpretation.”

House Bill 72 includes attorney fees the appellee “may incur” in the calculus of the bond amount.29 Attorney fees anticipated to be incurred by an appellee during an appeal can depend on a variety of factors such as the extent of procedural maneuvering and whether oral argument is scheduled. On top of these factors is that uncertainty arising from whether a motion for discretionary review will be filed and granted. In the context of a bond hearing, an appellee’s attorney will be expected to offer proof of anticipated attorney fees. Zoning attorneys are not accustomed to stating actual (and, much less, anticipated) fees in public filings, in contrast to foreclosure or collection attorneys, for example, who routinely disclose actual fees for inclusion in judgments.

In localities not having “plan certain” or “development plan” requirements in connection with rezoning cases,30 an applicant could be placed in a position of having, at least to some degree, to show their hand as to projected development in the bond hearing. In such localities it is not uncommon for a developer to obtain a map amendment from an agricultural or residential classification to a commercial or industrial classification and then to later seek site plan approval when a specific development proposal is completed, perhaps many months or even years after the rezoning.

An appellant is required to post the circuit-ordered bond within 15 days of the circuit court’s determination of the bond amount.31 House Bill 72 requires the circuit court to have determined what is required as “good and sufficient surety” when setting the bond amount.32 Thus, as a practical matter, appellant will then need to move quickly to obtain and submit appropriate documentation. It is difficult to see much incentive for insurance companies to offer such bonds considering the liability involved as a result of the low percentage of success in appeals of land-use cases to the Court of
Appeals. Surety bonds are normally issued as to events very unlikely to take place. To oblige itself as a surety, an insurance company will have to be convinced that the appellant had sufficient credit to pay its obligation on the bond, if necessary. Recordable and enforceable pledges of unencumbered real property or certificates of deposit might be proposed as the quickest means of providing surety in the applicable time frame if an insurance company surety bond is not available.

After a bond is set and an appeal runs its course through the appellate courts to a final and unappealable result, either the appellant or appellee may make a motion in the Circuit Court requesting a hearing to determine the actual costs and damages to be paid to the appellee under the appeal bond if the appellant prevails on the merits.33 Interestingly, the appellee is referred to throughout House Bill 72 in the singular, which raises a question as to whether and how damages would be apportioned between multiple appellees (where, for example, one appellee is a developer with a purchase contract and the other appellee is the fee simple property owner) if both had joined in an initial motion for bond. As with the hearing initially setting the bond, the hearing to determine actual costs and damages is to be held within 30 days of the request.34

In circumstances in which the appellant prevails on the merits before the Court of Appeals or the Supreme Court, the appellant will be able to obtain release of the bond under House Bill 72. A circuit court judge who earlier ruled such an ultimately successful appeal to be “presumptively frivolous” might then regret having required local citizens to post a $250,000 bond prior to their ultimate vindication.

**POTENTIAL CHALLENGES TO THE CONSTITUTIONALITY OF HOUSE BILL 72**

Zoning practitioners and the courts will expend considerable effort sorting out the above interpretative issues where House Bill 72 is triggered by appellee motion in particular cases. However, looming over all such cases will be the “elephant in the room” of whether House Bill 72 is constitutional in whole or in part.35 Developers will want constitutionality resolved as soon as possible by published appellate precedent in their favor, while citizens group appellants benefit from either their outright success or by the issue remaining unresolved indefinitely.

Normally, land-use litigation in Kentucky focuses on the prohibition of arbitrary governmental action under Section 2 of the Kentucky Constitution or due process considerations. To paraphrase Star Trek, litigation under House Bill 72 will implicate provisions of the Kentucky Constitution where “no zoning attorney has gone before.”

Section 115 of the Kentucky Constitution, as adopted in 1978, provides in pertinent part: “[i]n all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court.”36 and that “[p]rocedural rules shall provide for expeditious and inexpensive appeals.”37 Strict adherence to procedural rules may be required.38 Proponents of House Bill 72 are likely to argue that it does not prevent or prohibit appeals, but only imposes bond requirements in connection with such appeals. Such proponents would further argue that the appeal itself is not expensive in that if the appellant prevails, House Bill 72 imposes no direct out-of-pocket costs on an appellant during the appeal beyond costs of obtaining a bond. The argument is founded on the “good and sufficient surety” for the bond being released after appellant’s success on final and non-appealable judgment. Real costs would fall upon the appellants only upon losing their appeal on the merits so that the taking of an appeal would not itself be expensive to the point of being in violation of Section 115 of the Kentucky Constitution.

Section 116 of the Kentucky Constitution provides “The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction....” Section 110(2)(b) of the Kentucky Constitution authorizes the Supreme Court to “exercise appellate jurisdiction as provided by its rules.” The Kentucky Supreme Court has held that under Sections 109 and 116 of the Kentucky Constitution, only the Supreme Court has the power to prescribe rules governing appellate procedure and jurisdiction.40

Sections 27 and 28 of the Kentucky Constitution establish the separation of powers between the legislature and the judiciary. For example, the Kentucky Supreme Court found a statute relating to bifurcated trials in felony cases to be an effort to invade its powers by legislatively establishing rules of practice and procedure in violation of the separation of powers doctrine in Section 28 of the Kentucky Constitution.41 In contrast, there is precedent in the land-use context recognizing that “an appeal from an administrative decision is a matter of legislative grace and not a right” and “... failure to follow the statutory guidelines for such an appeal is fatal.”42 Thus, sorting out the dividing line between legislative and judicial powers is more difficult in particular circumstances than it might initially seem.

The Kentucky Supreme Court has found a statute to encroach upon judicial powers to establish rules but elected, in its discretion and as a matter of comity, to uphold the statute in question as a “statutorily acceptable alternative.”43 The Supreme Court reserved “... the right to review in the future this procedure and present refinements or alterations to it.”44 Thus, opponents of House Bill 72 who choose to litigate the matter not only have to prevail on the black letter law, but might need to persuade the Supreme Court to decline to apply comity to the new statute as well.45

The “one appeal” of Section 115 has been interpreted as an appeal from a circuit court to an appellate court that is not satisfied by right of an appeal from an administrative agency or legislative body to a circuit court.46 Thus, defenders of the legislation may not merely argue that planning commission and legislative body decisions constitute levels of appeal. The Kentucky Supreme Court has found in interpreting Section 109 of the Kentucky Constitution that “... tribunals of review and for appeal are courts within the constitutional meaning of the word.”47 Moreover, the reference to “one appeal” in Section 151 of the Kentucky Constitution has been found in litigation arising under KRS Chapter 100 to be satisfied in circumstances of parties litigating a matter from circuit court to the appellate courts.48

In at least one decision involving an appeal in a bastardy proceeding
and interpretation of the interplay between a statute and Civil Rule imposing a bonding requirement, Kentucky's highest court recognized that “unless the conditions of such appeal are reasonable, the defendant is effectively denied this right.”56 The then Court of Appeals recognized bastardy proceedings were unique, that the judgment and therefore bond involved were substantial, and that bastardy proceedings have a “criminal aspect” and elected not to apply the Civil Rule bond requirement to the appeal at issue.50 Arguments as to the bond requirement being an effective denial might also be framed under the federal equal protection clause.51

More recently, Elk Horn Coal Corp. v. Cheyenne Res., Inc., 163 S.W.3d 408 (Ky. 2005), addressed the legislature’s attempt to impose a 10 percent penalty as additional damages on a civil judgment by statute. The Supreme Court described the goal of the statute as “...to prevent frivolous appeals,” which goal was described as a “legitimate state interest.”52 The version of KRS 26A.300 then in effect was nonetheless found unconstitutional as being in violation of the equal protection provisions of both the Kentucky and federal constitutions and the separation of powers provisions of the Kentucky Constitution. The Kentucky Supreme Court referenced CR 73.02(4) allowing an appellate court determining an appeal to be frivolous to “...award just damages and single or double costs to the appellee or respondent” and stated the rule allows the Supreme Court to “...adequately deter, and to punish if necessary, any appellant filing a frivolous appeal or discretionary review motion.”53 The Kentucky Supreme Court ultimately concluded KRS 26A.300 deterred discretionary review motions “...both frivolous and meritorious” and, as such, invaded the constitutional power assigned exclusively to such court to “exercise appellate jurisdiction provided by its rules.54

Any attempt to apply Elk Horn, supra, against House Bill 72 would need to overcome the fact that House Bill 72 treats “reasoned interpretation” appeals more favorably than “presumptively frivolous” appeals, while the statute under review in Elk Horn made no distinction. Furthermore, in Elk Horn only a very narrow class of motions for discretionary review were covered, while House Bill 72 applies broadly to appeals before the Court of Appeals per KRS Chapter 100, thus potentially avoiding the equal protection issue which was key to the Elk Horn decision.

There seems little doubt that opponents of development projects will seek to challenge the constitutionality of one or more aspects of House Bill 72. Obviously, they have ample incentive to do so in that House Bill 72, as a practical matter, may effectively halt many zoning controversies at the circuit court level as development opponents are unable or unwilling to meet the bond requirements to pursue review before the Court of Appeals. The only question from the perspective of such attorneys would seem to be in what form to make the challenge to the new legislation.

One approach might be a facial attack on the new statute in the form of a declaration of rights action by a plaintiff with sufficient standing to sue,55 with the Kentucky Attorney General being given the appropriate statutory opportunity to participate in defense of the legislation56 and perhaps with even an agreed facts case being submitted per KRS 418.020. KRS 418.045 provides that “any person ... whose rights are affected by statute” may seek a declaration of rights if an actual controversy exists. In some cases, appellate courts have recognized standing of associations to make such claims.57 There are appellate opinions in which related declaration of rights claims have been allowed to proceed independently from KRS 100.347 statutory appeals and other opinions in which such claims have been considered part of the statutory appeal.58 The existence of another adequate remedy, such as appeal of a particular bond decision on motion, if allowed, does not automatically preclude a judgment for declaratory relief.59 Where an “important public question” is involved, Kentucky’s appellate courts are more likely to proceed with declarations of rights.60

A second approach to challenge the legislation would be by raising the claim before the circuit court in any initial pleading and then advancing it again when the appellee makes the motion for bond pursuant to House Bill 72. Should the bond still be imposed by the circuit court, the appellant then might proceed with an appeal of the bond decision to the Court of Appeals on the theory such decision was final and appealable and separate from the underlying KRS 100.347 action originally filed. If no direct appeal of the bond decision is available, an appellant might try a writ of prohibition61 as an alternative. The specter of two appeals or one appeal and a writ of prohibition proceeding separately before perhaps different panels of the Court of Appeals is presented with perhaps one case or another stayed while the companion appeal proceeds. In Elk Horn, supra, the challenge to the constitutionality of KRS 26A.300 had arrived at the Court of Appeals for a second time due to the constitutional challenge of the penalty statute.62 Determined appellants are likely to try to follow a similar path to contest House Bill 72 in that delay is their ally.

Should all or part of House Bill 72 be declared unconstitutional as a result of any such challenge, it will be of substantial importance and interest whether the ruling in the appellate opinion would apply to void the new law ab initio or only prospectively.63

THE FUTURE OF LAND-USE LITIGATION

For better or for worse, House Bill 72 opens the door to a new world of land-use litigation. Prior to resolution of its constitutionality, attorneys for developers throughout the Commonwealth will anguish over when to advise clients to proceed with construction. If the legislation ultimately survives constitutional challenge, developers will, as a practical matter, have a powerful tool to discourage appeals of KRS Chapter 100 land-use cases to the Court of Appeals. At the same time, development opponents will have every incentive to re-focus their efforts at the agency, legislative body, and circuit court levels. Between the proverbial rock and a hard place will be the Circuit Judges who will have the duty to set and enforce the bonds against appellant local voters who look to them in hopes they will sustain their “not in my back yard” (i.e. “NIMBY”) and other claims.

Some years ago a television commercial ended with a child reading a treatise on zoning variances upon going to bed. Presumably, sleep soon followed. In contrast, House Bill 72 will keep zoning practitioners wide awake for the foreseeable future as they debate and litigate its substance, procedures, and constitutionality.
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ENDNOTES
1. 17 RS HB 72/EN. House Bill 72 was not codified in KRS Chapter 100 at the drafting of this article.
2. What is an "unnecessary appeal" may be in the eye of the beholder. Expect litigants challenging constitutionality of the legislation to test whether House Bill 72 may be sustained on its stated purpose.
3. House Bill 72, Section 2.
5. House Bill 72, Section 5.
6. House Bill 71, Section 1(1).
7. 457 S.W.2d 950 (Ky. 1969); 1969 Ky. LEXIS 3
8. For example, Kentucky's appellate courts disfavor Strategic Lawsuits Against Public Participation ("SLAPP") which have resulted in liability for citizens groups opposing development in some other states. Eastern Ky. Resources v. Arnett, 892 S.W.2d 617 (Ky. Ct. App. 1995).
10. Minton v. Fiscal Court of Jefferson County, 850 S.W.2d 52 (Ky. App. 1992); Warren County Citizens for Managed Growth, Inc. v. Board of Com‘rs of City of Bowling Green, 207 S.W.3d 7 (Ky. App. 2006).
11. KRS 13B.160 provides for appeal of certain state agency decisions from circuit court to the Court of Appeals pursuant to the Kentucky Rules of Civil Procedure with no special statutory bond requirement. See also similar KRS 278.450 applicable to appeals of Public Service Commission decisions.
12. House Bill 72, Section 2 provides in pertinent part, "... this Act takes effect upon its passage and approval by the Governor...."
13. If there is more than one appellant, parties will argue over whether each appellant has to post the full bond or whether it is an apportioned or joint and several obligation. The legislation does impose the bond obligation on "any party that appeals." See House Bill 72, Section 1(1).
14. KRS 446.010(30).
15. Section 2 of House Bill 72 provides the circuit court "shall impose" the bond.
16. House Bill 72, Section 1(2).
17. Id.
18. House Bill 72, Section 1(1).
19. House Bill 72, Section 1(3)(b).
20. Id.
21. Id.
23. House Bill 72, Section 1(3)(b)(2).
26. House Bill 72, Section 1(3)(c).
27. House Bill 72, Section 1(3)(d).
28. House Bill 72, Section 1(3)(e).
29. House Bill 72, Section 1(3)(c) and (d).
30. See, for example, the Ballitt County, Kentucky Zoning Ordinance.
31. House Bill 72, Section 1(3)(f).
32. House Bill 72, Section 1(3)(a).
33. House Bill 72, Section 1(4)(a).
34. House Bill 72, Section 1(4)(b).
35. KRS 446.090 provides standards for severability of statutes. House Bill 72 itself does not include a severability clause.
36. Vessels v. Brown-Forman Distillers Corp., 793 S.W.2d 795 (Ky. 1990) discusses how the Workers’ Compensation statutes constitutionally allow an agency decision to be appealed to the Court of Appeals and then the Supreme Court in a unique procedure. See also Louisville Metro Health-Dept. v. Highview Manor Ass’n, LLC, 319 S.W.3d 380 (Ky. 2010).
37. Since Section 115 was adopted in 1978, long after adoption of KRS Chapter 100 and, specifically, KRS 100.347, it would seem difficult to argue the right to appeal only applied to types of cases existing on adoption of Kentucky’s 1892 Constitution.
38. The Kentucky Legislature in adopting KRS 21A.050(2) has recognized this role of the Kentucky Supreme Court as to appeals.
41. Commonwealth v. Rencor, 734 S.W.2d 794, 796 (Ky. 1987).
43. Foster v. Overstreet, 905 S.W.2d 504 (Ky. 1995).
44. Id. at 506.
45. Comity may only be invoked at the Supreme Court level as an "institutional policy reserved for the Supreme Court." D’O Bryan v. Hedgepeth, 892 S.W.2d 571, 577 (Ky. 1995).
49. White v. Commonwealth ex rel. Fock, 299 S.W.2d 618, 619 (Ky. 1957).
50. Id. at 619.
51. Lindsey v. Normet, 405 U.S. 56 (1972)(An appeal right "cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.").
52. Id. at 421. It will likely be contested as to whether the purpose of preventing what are described as "unnecessary appeals" (House Bill 72, Section 2) is a legitimate state interest.
53. Id. at 421.
54. Id. at 424.
56. KRS 418.075.
58. Greater Cincinnati Marine Service, Inc. v. Ludlow, 802 S.W.2d 427, 429 (Ky. 1980) ("Complaint... is far more than an appeal..."). See also Warren County Citizens for Managed Growth, Inc., et al v. Board of Commissioners, et al, 207 S.W.3d 7 (Ky. App. 2006) (Finding purported declaratory judgment claims part of KRS 100.347 statutory appeal).
60. Board of Education v. Louisville, 157 S.W.2d 337 (Ky. 1941).
62. Elk Horn, supra, at 412.
Historic preservation, the conserving and curating of the remarkable in the built environment, has passed from a concept to an axiom of public policy since the enactment of the National Historic Preservation Act 51 years ago.

A sophisticated historic preservation plan is part of a strategy for economic and community development for almost any city of a certain vintage.

Historic buildings and other venerated places are among the most popular tourist destinations across the country and here in Kentucky.

What continues to implicate the law is when the popular impulse to save our treasures treads upon the property rights of the owners of those assets.

**HISTORIC PRESERVATION AS ECONOMIC DEVELOPMENT**

Historic preservation benefits communities large and small across the Commonwealth. Its economic benefits are apparent, preservation advocates say.

Eighty-six Kentucky communities participate in the Kentucky Renaissance Main Street program. Since Kentucky began the program in 1979, more than $2 billion has been invested in Kentucky downtowns.1

Rehabilitation of historic buildings creates more jobs than new construction, according to preservationists. Forty-three jobs are created for every $1 million invested in historic preservation. A Kentucky historic-preservation tax-credit has led to the creation of at least 2,200 new jobs. The Main Street program has led to 4,720 jobs. Heritage tourism employs 2,700 Kentuckians.2,3

Where historic preservation succeeds, property values soar. Historic preservation is the principal strategy for regeneration in and around downtowns across the commonwealth and across the country.

The case has been made that the rehabilitation of older homes is more necessity than choice for Kentucky cities. Nearly 20 percent of the housing units in Kentucky were built before World War II.4 Nearly the same percentage of Kentuckians live in structures built before 1950. Older housing is a port of entry to the middle class for many younger Kentuckians.5

Reinvestment in older structures is almost always more economical than new construction, preservationists contend. When the United States’ geopolitical interest depends upon how well energy is used, reinvesting in older buildings conserves energy and promotes environmental sustainability.

Older buildings preserve *embedded* energy; that is, the sum of energy needed to cut the trees for the lumber used in the building, to haul the lumber to the construction site, to manufacture the steel and bricks, to install the infrastructure to service the home: the streets and roads, gas and waterlines, sanitation connections, sidewalks.6 In Australia, a study found that embedded energy in existing buildings is equivalent to 10 years of the total energy consumption of the entire country.7

Whether a district carries an official imprimatur of “historic,” or is simply older, reinvesting in buildings is better energy policy than building new ones, according to preservationists.

There is an intangible, non-economic value to historic preservation. The look and feel of old buildings, streetscapes, and historic country landscapes provokes affection and civic pride.

A stroll in Old Louisville through St. James Court and Belgravia Court that intersects it is a memorable experience. The larger district of Old Louisville is an open-air museum of flamboyant Victorian architectural styles dating from the day when the Kentucky’s metropolis was making its mark as a substantial American city.8

Butchertown east of downtown Louisville recalls an era when residents lived near their factory jobs.9 A stroll along its Washington Avenue brings admiration for the shape and line of the homes, and for the energy and commitment of those bringing new life to them. Those efforts are echoed in a half-dozen other mature Louisville residential districts.

The promoters of Louisville’s Main Street extol its spectacular streetscape as an evolving project of historic preservation, economic development, and tourism promotion.

Covington’s Licking Riverside Historic District is an mélange of grand residences from the Victorian era. Newport’s East Row Historic District has heroically unslummed itself over the last four decades, and become a desired middle-class enclave from which many walk to work in downtown Cincinnati.

Blessed with the organizational aplomb of the influential Bluegrass Trust for Historic Preservation, the neighborhoods just north of downtown Lexington, especially the one surrounding Gratz Park, are urban treasures.
The horse country at the periphery of Lexington and beyond is so well loved it long ago was given protected status by government concerned about encroaching development.

Much of downtown Bardstown is an intact Federal historic district, and the town was named in recent years as the most beautiful small town in America by a national tourism promotion organization.10

Paducah’s restored downtown and its Lower Town Arts District have been fashioned into a flourishing cultural and commercial area near where the Tennessee River meets the Ohio.

Some residents and businesses in older neighborhoods clamor for an official “historic” designation across Kentucky.

“Preservation,” according to a noted critic, “is the savings of the essence and style of other eras through their architectural and urban forms, so that the meaning and flavor of other times and tastes are incorporated into the mainstream. The accumulation is called culture.”11

THE EVOLUTION OF PRESERVATION IN AMERICA

Historic preservation has been a cause in western civilization since the ancient Greeks and Romans. Some of their built artifacts remain standing to this day.

The preservation movement in America can be traced to 1816 when the room in Independence Hall in Philadelphia where the Declaration of Independence had been signed was stripped of its fixtures, and several local associations stepped in to halt further aesthetic vandalism.

In the 1850s, the Mount Vernon Ladies Association led the preservation of George Washington’s estate. Both the U.S. Congress and the Commonwealth of Virginia had declined the honor.12

Congress in 1889 appropriated $2,000 to spare from looters the 14th Century Casa Grande ruins in what was then the Arizona Territory.13

Five years later, President Grover Cleveland collaborated with Congress to block by eminent domain the plan of a railway company to build a line through the Gettysburg Civil War battlefield. A federal preservation plan led to the installation a memorial and other historical markers. The legislation for the plan was eventually upheld by the U.S. Supreme Court in United States v. Gettysburg Electric Railroad Co.14

In the Progressive era, Congress passed the Antiquities Act to protect historic sites on federal lands. In the 1930s, President Franklin Roosevelt’s Civil Works Administration developed the Historic American Buildings Survey, which was an inventory of structures on federal lands.

The fault line between the assertion of government authority for a common purpose such as zoning, and individual property rights, was marked by the U.S. Supreme Court in 1926 in Village of Euclid v. Ambler Realty.15

The zoning ordinance of a Cleveland suburb confined industrial activity to a designated area. Ambler Realty sued, arguing that the scheme deprived it of property rights guaranteed by the Fifth Amendment. The ordinance amounted to a taking for which Ambler must be compensated, the company argued.

The Supreme Court analogized the case to one in nuisance law. A nuisance “may merely be a right thing in the wrong place, like a pig in the parlor instead of the barnyard,” the majority said.16

The majority found the record undeveloped as to proof of whatever loss Ambler might have suffered because of the zoning scheme. Local authority is the better forum than an appellate court to evaluate the burdens and benefits of land-use law, the Ambler majority ruled.

Within a decade of Ambler, zoning regulation had become common, and with it provision for the preservation of historic assets.

In 1931, Charleston, S.C., became the first American city to safeguard historic structures within its zoning code.

In 1941, the Louisiana Supreme Court, which sits in on Royal Street in New Orleans’ French Quarter completed in 1910, decided a case brought by the operator of a gas station who wanted to erect a sign of a size wildly out of compliance with local code restrictions in the Quarter.17

The purpose of the ordinance was to preserve the architectural and historical worth of historic buildings. The Louisiana Supreme Court
The destruction of Penn Station so energized the preservation movement that it can be regarded with the clarity of hindsight as the Pearl Harbor of the movement.

New York City in 1965 enacted its Landmarks Preservation Law. The stated purpose of the act was to “[S]afeguard desirable features of the urban fabric, protect and embrace the city’s attractiveness to tourists and visitors, to support and stimulate business and industry, strengthen the economy of the city, and to promote the use of historic districts, landmarks, interior landmarks, and historic landmarks for the education, pleasure, and welfare of the city.”22

**THE NATIONAL HISTORIC PRESERVATION ACT**

Under the sponsorship of Sen. Henry M. Jackson, Congress passed the National Historic Preservation Act, and it was signed into law by President Lyndon B. Johnson in October, 1966.

The Act reinforced preservation as national policy. It authorized the Secretary of the Interior to expand and maintain a National Register of Historic Places. The secretary was to develop standards for this development of this inventory of historically significant districts, sites, buildings, and objects.

The Act encouraged state and local preservation programs by authorizing states to appoint preservation officers, which in the commonwealth has become the Kentucky Heritage Council.

The Act in Section 106 requires a sort of preservation impact statement to take account of the effect of development in or around a National Register asset before federal funds can be expended.

**PENN CENTRAL V. CITY OF NEW YORK**

Government at every level has pressed preservation strategies in the last half-century.

Preservation has been promoted by government taxing and spending policy. The preservation impulse has become a web of political, economic, legal, social, and cultural norms.

Courts have been required to close the distance between this web and the right of the property owner to use an asset as he or she pleases.

In other words, how far can the popular will for preservation go in regulating private behavior before the property owner must be compensated in accord with Fifth Amendment takings jurisprudence?

This was the dilemma for the U.S. Supreme Court in *Penn Central v. City of New York* (1978).

Penn Central was lately a merger of two distressed railways whose freight and passenger business had been undercut by the advent of interstate highways.

Operating under the supervision of a bankruptcy court and needing to raise cash, Penn Central proposed to build an office tower of more than 50 stories over Grand Central Terminal another *Beaux Arts* wonder, and one of the most famous buildings in the city.23
The New York Landmarks Commission denied the application, calling the plan, among other things, an “aesthetic joke.” Penn Central sued, and the case was decided for the city by the Supreme Court some nine years later.

The opinion for the 6-3 majority by Justice William Brennan set forth a test to determine if a preservation regulation rose to a taking under the Fifth Amendment for which the owner must be compensated.

The test was whether the landmarks law as applied deprived Penn Central of its investment-backed expectations for the property. The Court found that Penn Central could continue to use the building as a rail terminal. The company could also sell the air rights over the building to a neighbor, a potentially lucrative commodity in relentlessly-vertical midtown Manhattan.

Penn Central could hardly be blamed for thinking that its investment-backed expectation was to collect premium rents for 50 stories of office space in the heart of one of the commercial and financial capitals of the world.

The Supreme Court’s evaluation of the purposes of the landmarks law was dicta, but preservationists were cheered by this endorsement of the ordinance:

“The New York City law is typical of many urban Landmark laws in that its primary method of achieving its goals is […] by involving public entities in land-use decisions affecting these properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users.”

The dissenters in *Penn Central*, led by Associate Justice William Rehnquist, were vehement.

“The question then … is whether the cost associated with New York’s desire to preserve a limited number of “landmarks” … must be borne by all of the taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.”

Justice Rehnquist’s formulation is of a piece with the admonition of a Kentucky trial lawyer defending accident cases used to give juries before they were to be given the case:

“When you say, ‘Let’s give them something,’ you’re not giving them anything. You’re making somebody else give it to them.”

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**A CONTEMPORARY KENTUCKY PRESERVATION CONFLICT**

Codified preservation policy set against the owner’s plan for demolition was the issue joined in Kenton Circuit Court in *Columbia Sussex Corp. v. Covington*, a case decided by last year by Judge Patricia M. Summe.

The building at issue is a distinctive Romanesque creation dating from 1909. Built by the Bavarian Brewing Company and highly visible from Interstate 75, the main five-story structure features crenellated ramparts suggestive of a castle. It captures the old-world flavor of much of Covington.

It has been hard for a succession of owners to make the property profitable for at least half a century. It is quite nearly true that the building has sat empty for almost half of its existence.

Buffeted by competition from big national brands in the 1960s, Bavarian Brewing Company went out of business and the building was abandoned.

The complex was rehabilitated for use as a brew pub in the 1990s, which also expired. The building was operated as a restaurant and night club for three years, which in turn expired in 2004. Since then, the complex has stood vacant, subject to the perils of many large empty buildings in an urban setting.
Columbia Sussex is a substantial northern Kentucky hospitality concern with interests in hotels and casinos throughout the United States. The company bought the Bavarian complex in 2008.

Claiming it could find no economically viable use for it, the company applied for a demolition permit in 2014 to the City of Covington. The application was referred to the city’s Urban Design Review Board. The board denied the application by a vote of 8-0, a decision ratified by the City Commission.

Columbia Sussex sued, saying that it had found the structure prohibitive to develop or sell, even in the midst of a robust market for commercial real estate.

“The structure itself is the fundamental barrier to developing the property,” the company asserted in one of its briefs.

Columbia Sussex also argued that Covington’s regulatory process did not take into account that a decade of disuse had rendered the building blighted within the meaning of Kentucky law, a factor weighing in favor of demolition.

Covington argued that Columbia Sussex had not tried hard enough to find a profitable use for the complex. Historic breweries have been repurposed elsewhere, and brew pubs in general have become a popular leisure business, it was argued.

The city also defended its land-use codes. Its regulations included an outright ban on demolition of the main Bavarian building, and incentives for the redevelopment and adaptive reuse of the property. Judge Summe left undisturbed the city’s decision. The application was given appropriate due process, she ruled, and she treated as well-settled the city’s historic preservation policies.

Since the decision, Kenton County has announced plans for an adaptive re-use of the building for use as its administrative offices. Historic preservation has become an article of faith of land-use policy across the U.S. and here in Kentucky. But conflict with property owners who would rather decline the burdens of historical designation is a permanent theme in land-use litigation.

**ENDNOTES**

2. Id. at 2.
3. Id. at 36.
4. Id. at 6.
5. Id. at 8.
6. Id. at 39.
7. Id. at 43.
9. Id. at 18.
13. Id. at 157.
15. 272 U.S. 365.
16. Id. at 389.
18. Website, National Trust for Historic Preservation.
19. Huxtable at 47.
20. Id. at 52.
21. Id. at 12.
23. Id. at 115.
24. Id. at 109-110.
25. Id. at 139.
27. Case No. 15-CI-300.
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TINY HOUSE

BIG

PROBLEMS

BY: RACHEL DICKEY
Most of us have been taught to dream big. This value system has resulted in a literal increase in the size of things we buy. You can now buy larger vehicles than ever before, and large homes are more common place than ever. To put things into perspective, the average family home built in 2015 was 2,500 square feet, which is 61 percent larger than homes from 1975. However, some people are going to the opposite extreme. Last year USA Today reported that there are an estimated 10,000 tiny houses in the United States. These tiny houses range in size, but are generally classified as tiny when they are less than 400 square feet.

Many tiny house enthusiasts seek financial independence or are looking to live sustainably, or off the grid. Others look to tiny homes as a means of solving societal problems like homelessness. However, tiny living raises serious legal questions. On the one hand, many people looking to build tiny homes are faced with zoning and building codes that were not written with the tiny house in mind. On the other hand, areas with little to no zoning or building regulations are struggling to impose standards that will ensure safe building practices.

To further complicate matters, the legislative changes occurring in other states are attributable to the efforts of small grass roots organizations. Consequently, resulting laws tend to be sporadic and area specific, with substantial differences existing from one jurisdiction to another.

Take California for example. California led the charge in enacting tiny house friendly legislation, but even California’s tiny house rules vary substantially across the state. Some California counties allow tiny houses on wheels to be located in the backyards of people who need assistance from a caregiver. Other California counties have taken things a step further by permitting tiny homes to be located in backyards, regardless of the need for a caregiver, so long as certain conditions are met.

Even attempts to utilize tiny houses to aid the homeless resulted in different outcomes. California Assembly Bill 2176 was designed to address the homelessness crisis in San Jose. The bill allows the City of San Jose to temporarily suspend portions of the state building safety and health codes for the purpose of building “unconventional” housing structures upon the declaration of a “housing crisis.” Meanwhile, in Los Angeles a group bypassed legislation and supplied tiny houses to homeless individuals living under freeways. The city, when faced with substantial protests regarding their confiscation of the houses, explained that the tiny houses were not the answer because they posed safety threats and blocked thoroughfares when placed under freeway overpasses.

While many cities throughout the U.S. struggle to become tiny house friendly, other cities are attempting to capitalize on their lack of zoning and building laws and have received mixed results. In Spur, Texas, a 2014 resolution from its Mayor, Manuel Herrera, declared Spur the “Tiny House Capital of America.” However, it wasn’t long before growing displeasure from its more seasoned townsfolk led the city to conclude that some level of regulation was necessary. Now building permits are required for all homes being built in the city of Spur regardless of their size. In addition, all tiny homes in Spur must now be hooked up to the electric grid and sewer.

While communities all over the country struggle to catch up with this growing trend, either by reducing restrictions, or by putting in place increased restrictions, many tiny house proponents have been pushing for a change to the International Residential Code (“IRC”), which serves as the basis for many states’ residential codes. The hope is that changes to the IRC will result in more consistency from jurisdiction to jurisdiction. Recently, a committee of the International Code Council voted to approve a tiny house specific appendix which, after it goes through the final stages of the approval process, will be incorporated into the 2018 IRC.

Those efforts were spearheaded by Andrew Morrison, owner of www.TinyHouseBuild.com, who authored Public Comment RB168-16, and coauthored the appendix on Tiny Houses for the IRC. When asked for comment regarding his efforts, Mr. Morrison stated:

“The inclusion of tiny houses in the building code provides a legal pathway to home ownership that otherwise does not exist for many. It also provides building departments across the country with the parameters they need to provide adequate oversight of health and safety standards for home construction. I am currently working with tiny house advocates across the country to adopt the approved tiny house appendix from the 2018 IRC into their state codes. Several states including Oregon, Massachusetts, Maine, New Mexico, Idaho, and others are already well into the process of adoption. As states continue to embrace tiny houses, our citizens will increasingly regain the elusive option of home ownership and, with it, pride of ownership. This will improve communities and provide access to housing for thousands of Americans.”

These changes are seen as a huge win for tiny house enthusiasts. However, the 2018 IRC must still be adopted in each individual jurisdiction for it to be applicable.

Currently in Kentucky, any home built on a foundation is governed by the 2013 Kentucky Residential Code (KRC) Second Edition, which is an adoption of the 2012 International Residential Code (IRC) with amendments. The Department of Housing, Buildings and Construction issues the KRC but does not have jurisdiction over single-family residential homes. Local building inspectors maintain jurisdiction over residential structures.

When asked for comment on the state of tiny house legislation in Kentucky, Elizabeth Goss Kuhn, Communications Director for the Public Protection Cabinet, stated:

“The safety of Kentuckians in their home remains a top priority of the Department of Housing, Buildings and Construction, and the Department is actively reviewing the issues raised by the growing popularity of tiny homes.”

While many tiny homes cannot comply with the size provisions of the residential code, it does provide a degree of flexibility.
may be permitted when a builder complies with other safety provisions in the code, including but not limited to fire safety standards, and standards for snow load, wind speed, and, in some areas of Kentucky, seismic design standards.15

However, the KRC is only the tip of the iceberg when it comes to navigating the legality of tiny homes. After all, the IRC and KRC only apply to homes on foundations. Adding wheels to your tiny home, or purchasing a prefabricated tiny home, adds an additional layer of complexity.

Typically, tiny homes in Kentucky fall into three categories and each type requires a different legal analysis:

• Permanent or site built tiny homes
• Pre-fabricated or manufactured tiny homes
• Portable tiny homes, sometimes called THOW (Tiny House on Wheels)

Manufactured homes that are installed on a permanent foundation, must meet federal HUD standards16 and local codes may pose additional restrictions. For example, the Louisville Development Code (LDC), which provides a definition for factory built housing and requires that the transportation features be removed,17 also requires that factory built homes be larger than 900 square feet and have a certain degree of consistency with other nearby homes where they are installed.18

Leaving the wheels on your tiny homes will require you to register the home as a motor vehicle and the KRC will not apply because there is no foundation. The home will be inspected by the Kentucky Transportation Cabinet to ensure it is road safe, but the home itself falls outside the purview of the KRC, leaving it in a grey area. The hardest part of living in a tiny house on wheels is finding a place where you can not only park the house, but also live in it permanently. If there is a zoning restriction preventing you from living in a vehicle on your property, then a tiny home is likely to be prohibited as well, absent a variance.

So what do you do if a client calls and wants to live in a tiny home? Here a few threshold questions you should ask:

• What type of tiny house do they want?
• Do they already have floor plans?
• Will they be connecting to utilities?
• Will they be putting the home on property they own or on someone else’s property?
• What is the address of the intended location?
• Will the tiny home be the only residence on the property?

All of these questions will impact the subsequent legal analysis. After obtaining as many answers as you can, the next step is to contact the local zoning authorities in your jurisdiction. After all, if you cannot meet or get exceptions to the zoning requirements,
then the analysis stops. Local zoning officials can help provide insight regarding what has or has not been permitted in the past. Once you determine what types of tiny homes are permitted and where, you can begin to explore the various building restrictions that apply.

Overall, the laws that impact tiny house living are in a state of transition and when faced with the question of whether tiny houses are legal in Kentucky, the answer for now is, it depends. Being proactive and working with local zoning and building code authorities on the front end will help to ensure the best result for your client.

ABOUT THE AUTHOR

RACHEL DICKEY is an attorney at Weber Rose, PSC, in Louisville, as well an entrepreneur and business owner. She is the former staff attorney to Kentucky Court of Appeals Judge Glenn Acree. In addition to serving as outside counsel for a variety of startups and businesses, her practice includes human resources consulting and real estate. Dickey was recently named “40 under 40” by Louisville’s Business First Magazine.

ENDNOTES

1. Rebecca Beitsch, Tiny Houses are Trendy, Minimalist and Often Illegal, PBS News Hour (Jul.6, 2016), http://www.pbs.org/newshour/rundown/tiny-houses-are-trendy-minimalist-and-often-illegal/.

2. Charisse Jones, Recession-Starved Millennials Fuel Growing Interest in Tiny Homes, USA Today (May 18, 2016), http://www.usatoday.com/story/money/2016/05/18/recession-millenials-tiny-home-house/84284316/; See also www.tinyhousemap.com (a website with interactive map showing the location of tiny house enthusiasts around the United States).


4. See e.g. Fresno Code § 15-2754.

5. Assembly Bill No. 2176, Chapter 691, an act to amend Section 8698 of, and to add and repeal Section 8698.3 of, the Government Code relating to House, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2176.

6. CAL Gov. Code § 8698.3 (b) (1-2) (“San Jose), in lieu of compliance with state and local building, housing, health, habitability, or safety standards and laws, may adopt by ordinance reasonable local standards for the design, site development, and operation of emergency bridge housing communities and the structures and facilities therein, to the extent that it is determined at the time of adoption that strict compliance with state and local standards or laws in existence at the time of that adoption would in any way prevent, hinder, or delay the mitigation of the effects of the shelter crisis. The Department of Housing and Community Development shall review the city’s draft ordinance to ensure it addresses minimum health and safety standards. The department shall, as set forth in Section 9795 of the Government Code, provide its findings to the Senate and Assembly housing committees and the Senate Judiciary Committee within 30 calendar days of receiving the draft ordinance.

(2) During the shelter crisis, except as provided in this section, provisions of any state or local building, housing, health, habitability, or safety standards or laws shall be suspended for the emergency bridge housing communities provided that the city has adopted health and safety standards for emergency bridge housing communities consistent with ensuring minimal public health and safety and those standards are complied with. Landlord tenants laws codified in Sections 1941 to 1942.5, inclusive, of the Civil Code providing a cause of action for habitability or tenantability, shall be suspended for the emergency bridge housing communities provided that the city has adopted health and safety standards for emergency bridge housing communities and those standards are complied with. During the shelter crisis, the local and state law requirements for an emergency bridge housing project to be consistent with the local land use plans, including the general plan, shall be suspended.”.


8. Id.


10. Id.


12. Id.


15. Local building officials refer to IRC § 104.11, Alternative Materials, Design and Methods of Construction and Equipment, which allows for the use of alternative methods when the intent of code’s provisions are still met.


17. Louisville Development Code 4.1.2, Factory Built Housing.

18. (“Minimum width of each unit’s first story shall be at least equal to the average of the two nearest residential buildings in the same block face (residential buildings on either side of the infill lot, or two nearest residences, if the adjacent structures are non-residential”).

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*Announcements sent to the Bench & Bar’s Who, What, When & Where column or communication with other departments other than the Executive Director do not comply with the rule and do not constitute a formal roster change with the KBA.
Kentucky is a traditional “race-notice” jurisdiction following the lien theory where a prior recorded interest in real property takes priority over a subsequent recorded interest. KRS §382.280 is the controlling statute which states that “all bona fide deeds of trusts or mortgages shall take effect in the order that they are legally acknowledged or proved and lodged for record.” Therefore, lien priority is determined by the order in which documents are recorded in the office of the county clerk. Those who take a lien interest encumbering the real property are on notice of those who already have a recorded interest.

Kentucky’s long-standing “race-notice” lien theory was tested in 2006 wherein the Court of Appeals created an exception under the doctrine of equitable subrogation when it came to Purchase Money Mortgages and prior recorded judgment liens when it issued its decision in *Kentucky Legal Systems v. Dunn*, 205 S.W.3d 235 (Ky. App. 2006).

A Purchase Money Mortgage is “[a] mortgage on land executed to secure the purchase money by a purchaser of the land contemporaneously with the acquisition of the legal title thereto, or afterward, but as a part of the same transaction.” 54A Am Jur 2d, Mortgages §97. Therefore, the mortgagor uses the funds from the loan transaction to simultaneously purchase real property and encumber the property with the mortgage.
The Kentucky Court of Appeals ruled in Dunn that a Purchase Money Mortgage took precedence over a prior recorded judgment lien against the mortgagor or owner of real property whether the holder of the Purchase Money Mortgage had knowledge of the lien or not. Dunn shook up the race-notice theory and re-prioritized the liens contrary to statute and stated that without the funds from the mortgage, the mortgagor/owner wouldn’t have had an interest in the property in which the prior recorded judgment lien would attach. Id at 237. Therefore, the doctrine of equitable subrogation applies and the prior recorded judgment lien then is moved to a junior lien position behind that of the Purchase Money Mortgage.

The decision in Dunn was quite the opposite of the race-notice rule that was traditionally followed by lenders. After the Dunn decision, some real property transactions involving Purchase Money Mortgages were conducted without satisfying prior recorded judgment liens against the mortgagor/owner of the property. Although not satisfied at the time of the purchase money transaction, the prior recorded judgment liens remained of record, albeit, junior in lien priority to the Purchase Money Mortgage. The judgment lien holders were simply relegated to a junior lien position much to their chagrin.

In Mortgage Electronic Registration Systems Inc. [MERS] v. Roberts, 366 S.W.3d 405 (Ky. 2012), the Supreme Court of Kentucky applied the doctrine of subrogation and reaffirmed the traditional “race-notice” lien theory. MERS, as the holder of a mortgage by assignment, attempted to step into the shoes of a prior mortgage holder where there were multiple refinances of the original Purchase Money Mortgage but a properly recorded judgment lien attached to the real property prior to another refinance which was ultimately assigned to MERS.

The Court in Roberts opined that equitable subrogation was unavailable when actual or construction notice of intervening judgment lien exists and the traditional race-notice theory was re-established and reaffirmed. The Roberts decision was contrary to the Dunn decision.


The facts in the Hays case differ once again but the Court was faced with a decision whether Roberts expressly overruled Dunn or by implication since the Roberts decision was handed down by the Supreme Court of Kentucky.

Hays held a judgment lien against Lloyd. Lloyd later sold property to Bright whose Purchase Money Mortgage was financed by Nationstar’s predecessor in interest. Hays’ lien was not paid prior to the transfer of ownership to Bright nor out of the proceeds of Bright’s mortgage. Bright subsequently defaulted on her loan and Nationstar filed a foreclosure action, naming, among others, Hays for the outstanding unreleased lien interest. Hays asserted a superior lien interest in the property but Nationstar relied on Dunn in seeking to establish lien priority which Hays opposed while relying on Roberts that a pure “race-notice” lien theory of recording is proper.

The trial court ruled in favor of Nationstar agreeing that Dunn controlled. The Court of Appeals then reviewed the matter and held that Roberts overruled Dunn by implication since the Roberts decision is binding upon all lower courts. Id. at 330. The Roberts decision is binding on the intermediate appellate Courts by virtue of having been rendered by the Kentucky Supreme Court. Kentucky’s traditional “race-notice” recording scheme was reaffirmed. Therefore, Dunn’s purchase money carve-out to Kentucky’s “race-notice” lien theory is no more. In other words, Dunn is done.

Because Dunn is no longer good law in Kentucky, practitioners involved in sale or refinancing transactions of real property must take note of the Hays decision when determining lien priority. Similarly, creditors’ rights attorneys who examine title for the purpose of identifying outstanding lien interests before filing a foreclosure action must be aware that the “race-notice” lien theory has been reaffirmed in light of the Hays decision. Senior judgment liens affecting the property can no longer be disregarded in a Purchase Money Mortgage transaction.

**ABOUT THE AUTHOR**

**PATRICIA JOHNSON** practices in the field of creditors’ rights with the Florence firm of Gerner & Kearns Co., L.P.A. Her first encounter with real property transactions was as a law clerk at the firm of Bankemper, Jacobs & Kehoe. Johnson is a native Northern Kentuckian and lives in Fort Thomas with her husband, Todd, and two children, Trent and Katie. She is a member of the Site Based Decision Council at Highlands High School and generously gives her time volunteering at various high school sporting activities in which her kids participate.
AVOIDING CAPITAL GAINS TAX ON REAL ESTATE THROUGH THE POWER OF A 1031 EXCHANGE
HISTORY
For approximately 90 years, Section 1031 of the Internal Revenue Code (26 U.S.C §1031) has allowed real estate owners to avoid capital gains tax on property appreciation by exchanging like-kind property in a transaction commonly known as a “1031 exchange.” Whether the real estate exchanged was a multi-million dollar office complex owned by a trust, partnership, or Limited Liability Company, or a $50,000 single family rental home owned by one individual, property owners have avoided enormous tax liability through this very popular procedure. It is estimated that 1031 exchanges amount to tens of billions of dollars in annual transactions—no small matter to consider for real estate or tax practitioners.

The popularity of 1031 exchanges increased substantially in 1979 following the landmark case of Starker vs. U.S., 432 F.Supp.864 (D. OR. 1977) aff’d, rev’d and rem’d 602 F. 2d 1341 (9th Cir., 1979). In that case, Starker exchanged title to his property for a contractual promise by the buyer, Crown-Zellerbach, to acquire and convey like-kind property selected by Starker at a later date. No cash changed hands in exchange for Starker’s conveyance to Crown-Zellerbach. Instead, Starker’s net sale proceeds were held by Crown-Zellerbach as a “net exchange value” credit on its books. Starker later redeemed his credit by selecting properties that Crown-Zellerbach acquired and then immediately transferred title to Starker. This delayed exchange transaction was disallowed by the IRS, but Starker prevailed on appeal and set the precedent for 1031 “deferred” exchanges.

REQUIREMENTS OF EXCHANGE
Broadly speaking, a 1031 exchange is a swap of one business or investment asset for another. Although such a swap is ordinarily taxable, if all of the requirements for a 1031 exchange are met, the taxpayer will owe either no tax or limited tax in that tax year as a result of the exchange. In other words, the taxpayer rolls over the gain from one piece of real estate to another. Even if the taxpayer realizes a significant profit on the swap, the tax liability is deferred until the acquired property is sold for cash. It is possible to indefinitely postpone paying tax on the transaction by continually exchanging real estate as long as no cash proceeds are ever received. Moreover, the capital gains tax liability may be permanently avoided when the taxpayer dies because his or her heirs will be entitled to a stepped-up basis in the real estate owned by the taxpayer at the time of death.

Although this article focuses on 1031 exchanges involving real estate, it should be mentioned that some exchanges of personal property (paintings, etc.) can qualify for a 1031 exchange. With regard to a real estate 1031 exchange, there are a number of well-established rules and requirements that a taxpayer must follow to qualify for the tax deferment. Below is a list of the most critical requirements for a successful exchange:

• The exchange requires “like kind” real estate, a broad term that allows you to exchange an apartment building for a vacant lot, or a strip mall for a farm, or a piece of undeveloped land in your home town for a high rise condominium in New York. However, you can’t trade an ownership interest in a car dealership for a rental house, as they are different kinds of assets. All properties involved in the exchange must be investment property, not your primary or secondary home.

• You may have a “deferred” exchange, but specific time restrictions are strictly enforced. After transferring the “relinquished property,” a taxpayer attempting to carry out a 1031 exchange has 45 days to identify, in writing, to a “Qualified Intermediary” the property or properties that will be acquired to complete the exchange (the “replacement property”). Thereafter, the taxpayer has 180 days from the sale of the relinquished property to purchase the replacement property(ies).

• It is permissible to identify up to three replacement properties and at least one of the identified properties must ultimately be purchased. There are a few exceptions to this rule which allow the selection of more than three properties, but only if
the taxpayer actually purchases at least 95 percent of the properties identified or if the total combined cost of all properties identified is less than 200 percent of the sales price of the relinquished properties.

• Loans on property must be considered in determining whether, and in what amount, an exchange qualifies the taxpayer for deferral of capital gains taxes. The property owner is prohibited not only from receiving any cash from the sale of the relinquished property, but also from reducing any mortgage debt or other liability on the property.

• Vacations homes are tricky. Even if a vacation home is primarily rented, its status as property that qualifies for a 1031 exchange is lost if the taxpayer uses that vacation home for the greater of 14 days or 10 percent of the number of days during the 12 month period that the dwelling unit is rented at a fair rental value.

• There are special rules for exchanges between related persons. If the taxpayer or a person related to the taxpayer acquire property in a 1031 exchange and either party disposes of the property within two years of the exchange, the transaction is disqualified under Section 1031.

• The taxpayer listed on the deed for the relinquished property must be the same taxpayer listed on the deed for the replacement property.

• In order to defer 100 percent of the capital gains from the sale of the relinquished property, the replacement property must be of equal or greater value. In other words, all capital gains must be reinvested. In determining the amount of capital gains that qualify for deferral, the sale price of the relinquished property will be reduced by any closing costs and the purchase price of the replacement property will be increased by any closing costs.

• Finally, one of the most important rules for a 1031 exchange is that the taxpayer may never touch the money received from the sale of the relinquished property. The Qualified Intermediary, whose role is further explained below, must receive the cash from the sale and purchase the replacement property with the segregated sale proceeds.

TYPES OF 1031 EXCHANGES
There are four different types of 1031 exchanges:

(1) The basic exchange or “simultaneous exchange” is an exchange structured as a simple simultaneous swap of either real or personal property. As time has passed, the majority of exchanges completed now are deferred exchanges.

(2) The “deferred exchange” involves the strict time restrictions discussed above. There is no grace period in meeting those
time limitations unless the taxpayer is adversely affected by a presidentially declared disaster.

(3) The “reverse exchange” was approved by the IRS in the fall of 2000. The IRS issued Revenue Procedure 2000-37 on September 15, 2000, which provides a safe-harbor for how to properly structure a Reverse 1031 Exchange. Frequently, a taxpayer that wishes to acquire property in a 1031 exchange does not yet have a buyer for the property that will be sold as the relinquished property. In such a case, the IRS permits the use of an Exchange Accommodation Titleholder (“EAT”), which is a Qualified Intermediary who purchases the replacement property and holds title until the relinquished property is sold. Once the sale of the relinquished property closes, the taxpayer completes the exchange by acquiring the replacement property from the EAT. The time restrictions applicable to deferred exchanges also apply to a reverse exchange. Therefore, the relinquished property in a reverse exchange must be sold within 180 days of the date the EAT acquires the replacement property.

(4) The “renovation or construction” exchange is a variation of the reverse exchange where the taxpayer sells the relinquished property but is unable to find a suitable replacement property without constructing improvements on the replacement property as part of the exchange. In these transactions, the taxpayer enters into an agreement with an EAT to acquire the replacement property, pay for improvements and, when the improvements are complete, convey the improved replacement property to the taxpayer to complete the transaction.

ROLE OF INTERMEDIARY

The Qualified Intermediary (“QI”) is a neutral third party that meets the requirements under the IRC to facilitate a tax deferred transaction by holding proceeds or taking title to property. The QI cannot have acted as the taxpayer’s attorney within two years of the disposition of the relinquished property. Additionally, anyone who has acted as an employee, accountant, investment banker, broker, or real estate agent for the taxpayer within two years of the sale is disqualified by I.R.C. Section 267(b) and 707(b).

It is not unusual for an attorney to serve as the QI, but licensure is not required for the QI in Kentucky. Typically, the QI will be bonded or insured but, again, this is not required by law.

The primary duties and responsibilities of the QI are:

• Prepare the documents required by the IRS when the relinquished property is sold and again the replacement property is purchased. If the 1031 exchange documents are prepared incorrectly, the IRS may disqualify the exchange.

• Hold the proceeds of the sale of the relinquished property in a separate account until the purchase of the replacement property is completed.

• For a reverse exchange or a renovation exchange, hold title to the replacement property and undertake any additional responsibilities required by a note, mortgage, lease, or other document executed as part of the exchange.

• It is not the role of the QI to provide legal advice to the taxpayer. The QI works closely with real estate attorneys, tax attorneys and CPAs, but retains the role as an intermediary separate from that of the other professionals involved in the real estate exchange.

FUTURE OF 1031 EXCHANGES

A 1031 exchange is an effective method for deferring capital gains tax. It is not a tax loophole but, rather, it is a temporary election that encourages active reinvestment in real estate. It is also a great wealth building tool for those who utilize it.

On a final note, there are looming threats to the continued existence of Section 1031 in proposed tax reforms. Former President Obama’s FY2017 budget proposal would have limited capital gains deferral to one million dollars per taxpayer per year for both real and personal property and excluded art and collectibles from eligibility. Section 1031 has been targeted for elimination in current budget proposals in both the Senate and House of Representatives. In fact, eliminating 1031 exchanges has been proposed as a measure to close budget shortfalls consistently for years. Hopefully, this will not happen, but look for challenges to the 1031 exchange in future tax law revisions. The repeal or limitation of Section 1031 transactions would undoubtedly have a chilling effect on the real estate market and a dramatic impact on real estate owners and investors.

ABOUT THE AUTHOR

STEVE FRANK is a graduate of Emory University School of Law. He is one of the founding partners of Pitt and Frank Attorneys in Louisville, Ky., and president of Kentucky Title, Inc., a 1031 Exchange Intermediary.

KENTUCKY LAW UPDATE

REGISTRATION FOR KLU 2017 IS NOW AVAILABLE!

See page 61 for more information.
On Wednesday, June 21, 2017, in Owensboro, Ky., the University of Kentucky College of Law and the Law Alumni Association inducted three new members, including the first African-American female, into the 2017 Hall of Fame. The annual Hall of Fame & Alumni Awards Reception is held annually in conjunction with the Kentucky Bar Association Convention.

The UK Law Alumni Association Hall of Fame was established to acknowledge graduates and long-serving faculty of the College whose extraordinary professional success and contributions, profound positive influence on the College of Law, and high degree of character and integrity are recognized by their peers. Inclusion in the Hall of Fame is the highest honor bestowed by the UK Law Alumni Association. The 2017 Hall of Fame inductees are Sarah Howard Jenkins, Taft A. McKinstry, and Robert L. Walker.

Sarah Howard Jenkins is the Charles C. Baum Distinguished Professor of Law at the University of Arkansas at Little Rock William H. Bowen School of Law. As an academic-legal professional, Prof. Jenkins has devoted her time and energy to challenging her students to develop a commitment to diligence and competence in the study and practice of the law. Through her scholarship and participation in the quasi-legislative legal reform processes of the American Bar Association (ABA), she sought to ensure parity among the diverse interests in commercial law. Her work has already made a difference for people who otherwise would not have been represented in the reform of commercial law in the late 1980s and 1990s. Prof. Jenkins’ involvement with an ABA Task Force on Suretyship, and one of her articles, was motivated in part by the large number of elderly women in predominantly African American churches who generously guaranteed the debts of family and congregational members. Without her involvement, these members of our community would have been unrepresented in the reform processes.

Prof. Jenkins is a member of the prestigious American Law Institute and she has served as chair of the ABA UCC Subcommittee on Article 1, during the revision of UCC Article 1, and the Subcommittee on Payment Systems, 2007 through 2010. Twice, she has served as chair of the Association of American Law Schools (AALS) Section on Commercial and Related Consumer Law and as member of the AALS Standing Committee on Recruitment and Retention of Minority Faculty and Students. She has published extensively on Commercial Law issues, organized several symposia of distinguished domestic scholars, and is the author of Volume 13 of the Revised Corbin on Contracts.

Finally, and perhaps most importantly, she is the daughter of Vivian and, the late, Honorable George Howard, Jr., the mother of Elizabeth Courtney Jenkins, and, as a follower of Jesus Christ, she espouses a biblical worldview.

Taft A. McKinstry is managing member of Fowler Bell PLLC and chair of the firm’s commercial law and bankruptcy and creditors’ rights groups. With sophisticated experience built on more than 40 years of practice, McKinstry is known for finding successful solutions to highly complicated commercial, bankruptcy and litigation matters.

She represents local and national clients in a variety of industries including insurance, heavy equipment, equine, coal, oil and gas production, retail and e-commerce. McKinstry’s appellate experience encompasses numerous published opinions, including cases before the Kentucky Supreme Court and the Sixth Circuit Court of Appeals.
McKinstry is a member of the Visiting Committee of the University of Kentucky College of Law and a member of the Board of Directors of Commerce Lexington, having previously served as its general counsel. She has served as chair of the Central Kentucky Network of International Women’s Insolvency and Restructuring Conference (IWIRC).

McKinstry was inducted as a Fellow into the American College of Bankruptcy in 1994, has been rated AV by Martindale-Hubbell since 1987, and has been recognized in the Best Lawyers in America continuously since 1994. She is also a Fellow of the Litigation Counsel of America.

McKinstry graduated from UK Law in 1972 where she was a member of the Kentucky Law Journal. She received her Bachelor of Arts with a major in mathematics and business minor in 1969 from the University of Kentucky.

ROBERT L. WALKER retired in 2016 as the senior vice president and chief financial officer of Western & Southern Financial Group (Western & Southern) based in Cincinnati, Ohio.

Prior to joining Western & Southern in 1998, Walker was senior vice president and chief financial officer at Providian Corporation in Louisville, Ky. Earlier roles at Providian included general counsel and vice president of tax. Additionally, he held the position of chief financial officer at National Data Corporation. He began his career as tax counsel for the Mead Corporation.

Professionally, Walker currently serves as a director of the board and member of the Executive Committee for Computer Services, Inc., in Paducah, Ky. He also continues to serve on the Finance Committee of Western & Southern as well as on the University of Kentucky College of Law Visiting Committee. He is also a past member of the Transylvania University board of trustees, the Kentucky Bar Association and Financial Executives International.

In the Cincinnati community, Walker served on the board of TriHealth, Inc., and is a past board chair. He was also a member of the Cincinnati Opera board of trustees and is a past board member and treasurer of the Playhouse in the Park. In the Louisville community, Walker served on the boards of Leadership Kentucky and Kentucky Shakespeare Festival and is a past board member and treasurer of Actors Theater of Louisville.

Walker holds a Bachelor of Arts in economics from Transylvania University and a Juris Doctor from UK Law. He resides in Naples, Fla., and Cincinnati with his wife, Susan. They have two grown children and three grandchildren.

Other honorees recognized at the reception included Eric P. Blackhurst, 1986 (Professional Achievement), Thomas L. Rouse, 1978 (Community Service), Allison Ball, 2008 and Bradley D. Clark, 2009 (Young Professional), Judge Janie McKenzie-Wells, 1986 (Distinguished Jurist), and Michael A. Rowady, 1941 (Legacy).
Long known as The Lawyer’s School for its practice-ready graduates, Salmon P. Chase College of Law is developing a second identity, as the leaders-in-training school.

A combination of experiences in and out of the classroom is preparing students to rise in professional and community leadership positions shortly after graduation. Among the leaders emerging from recent graduation classes are partners in established law firms, bar association officers, appointed and elected judges, peer-recognized practitioners, and business executives.

For the past three years, Chase has offered an elective course in leadership for lawyers. But even the father-and-son team of lawyers who teach it, Chase graduate Greg Sizemore and his son, Nathaniel Sizemore, say they cannot really teach leadership. What they do is help students identify and learn to apply leadership principles that can help them to become leaders.

“There are four key principles that make successful people great at what they do: hard work, passion, competency, and propensity, meaning they capitalize on their strengths,” Nathaniel Sizemore says.

“If you do all four well,” Greg Sizemore adds to the explanation, “you have a really good chance of being successful at what you do. The concept is leading oneself strongly, first.”

Even though leadership skills are the clear focus of the one-semester Leadership Skills for Practice-Ready Lawyers course, other student experiences contribute to leadership skill-building in less obvious ways. Among them are participation in competition teams, clinical programs, and externships.

“Get outside the classroom,” is the advice Brandi Rogers, who was graduated in 2006 and is a family court judge in western Kentucky, followed and offers to students. “The internships, volunteer work, and networking events are learning opportunities. You will learn to lead by being in the presence of great leaders.”

Exterships move students out of the familiarity of classrooms and into interactions with lawyers and judges. “Students in the externship program complete two assignments that are critical to leadership development,” says Professor Jennifer Kinsley, director of experiential learning.

“First, they participate in legal networking, either an organized bar association function or by reaching out to an attorney they do not know. This helps students realize the importance of building a professional network and increases their comfort level in reaching out to key players in the legal community. Second, they complete at least two hours of non-legal community service. This helps them realize the importance of giving back to the community and leading through doing.”

A required 50 hours of pro bono law-related work for all students also allows students to experience responsibilities outside a classroom and to become comfortable with them.

Recent graduates recognize that student activities are part of their foundation for growing into professional leadership. “My moot court experience and years on law review assisted in developing leadership qualities by teaching me important advocacy skills and instilling confidence in my abilities,” says Colby Cowherd, who was graduated in 2012 and is a partner in an established Northern Kentucky law firm and immediate past chair of the Northern Kentucky Bar Association Young Lawyers Section.

Clinic experiences help develop the personal trait Adjunct Professor Greg Sizemore refers to as leading oneself. In the Small Business and Nonprofit Law Clinic, for example, Professor Barbara Wagner sees students assume responsibility for the type of client leadership they will have to display in practice. “If you do a not-very-good job on a classroom assignment, you just hand it in and move on. In the clinic, if you do a not-very-good job, you have to keep responding to my comments until you come up with a work product that I approve to release to the client,” she says.

With each Chase experience being a piece in a mosaic of leadership skills, the course the Sizemores teach offers an opportunity to see the whole image before graduation. The course utilizes lectures, assigned reading, speakers, and classroom exercises to explore how lawyers apply leadership skills in such areas as professional ethics, government, business, and education.

The goal, says Nathaniel Sizemore, is for students to realize that professional success will require more than knowledge of black-letter law. “This class causes students to think holistically as they journey as an attorney,” he says.
In 1917, the Supreme Court addressed the impact of certain zoning restrictions on segregation of housing on the basis of race.

The decision of Buchanan v. Warley struck down Louisville’s zoning ordinance prohibiting black individuals from owning or occupying property in an area that was occupied by a majority of white residents.

This fall, the Brandeis School of Law will host a symposium examining the impact of that landmark case and where Louisville stands now in terms of race and zoning.

Racial Justice in Zoning – One Century After Buchanan will feature eight nationally renowned scholars in zoning law, race and the law, history and urban planning.

Speakers include professors at prominent universities across the United States, such as Sheryll Cashin, a professor at Georgetown University Law Center who writes about civil rights and race relations in America.

Four of the speakers, also co-organizers of the symposium, are professors at the University of Louisville:

- Tony Arnold (Law; Urban & Public Affairs)
- Cate Fosl (Women & Gender Studies; History)
- Cedric Merlin Powell (Law)
- Laura Rothstein (Law)

The symposium is co-sponsored by the University of Louisville Brandeis School of Law, the interdisciplinary Center for Land Use and Environmental Responsibility and the Anne Braden Institute for Social Justice Research.

One might have thought that a century after this decision, Louisville and cities across the nation would be less segregated. But structural racial inequalities persist in zoning, even if facially race-based zoning has been unconstitutional for a century.

The court based its decision on due process and didn’t confront the issues of race or equal protection—the impact of which is still felt today, says Professor Cedric Merlin Powell.

“It was the right decision, but what about the result? Even the 2017 Louisville is segregated,” he says, referring to the city’s Ninth Street Divide, the physical and symbolic barrier between Louisville’s black and white populations. Because the decision didn’t address the root causes of discrimination, it left room for other expressions of racism.

Some of the zoning tools that have contributed to unequal and segregated land-use conditions include exclusionary zoning techniques in higher-income suburban areas, such as large-lot zoning, low-density single-family residential zoning, development regulations that make housing expensive and barriers to rezoning for multifamily affordable housing.

Barriers also include zoning and land use patterns that place polluting industrial facilities near and among low-income neighborhoods of color and provide too little green and blue infrastructure—such as trees, parks, greenways, pedestrian walkways, rain gardens, urban gardens, restored streams and native vegetation—in low-income neighborhoods of color.

Other policies have intersected with zoning to make segregation even worse, including redlining, housing discrimination and under-supply of affordable housing.

Nationally, land use patterns show significant racial disparities 100 years after Buchanan. These disparities are especially stark in Louisville.

West Louisville, in particular, has faced related issues of poverty that have resulted from longstanding housing discrimination. The presence of industrial and polluting facilities, vacant and abandoned properties and disinvestment has also plagued West Louisville, which is where the property in the Buchanan case was located.

Nonetheless, many more legal, policy, planning and advocacy tools now exist to address poverty and racism in our cities, including Louisville.

The symposium will explore where we are now with race and zoning and where we need to go.
With the recent running of the 143rd Kentucky Derby, I was reminded that yet another year has passed since my graduation from the University of Kentucky College of Law. Though I have miles to go to become the lawyer I aspire to someday be, I feel that I have made great strides as a lawyer in my nine years of practice. I attribute my advancement as a lawyer to a number of things. Since we have recently graduated another crop of young lawyers, and will soon be admitting them to the Kentucky Bar, I thought I would share a few of the key things I have learned that have helped me as a young lawyer, in the hope that these keys will be useful to other young lawyers in their careers.

FIND A MENTOR(S)
No matter how well-educated and well-prepared we think we are to practice law coming out of law school, the truth is that we have not yet been through any legal “battles,” or experienced any legal successes or failures from which we can draw upon. It is critically important for all young lawyers to find a more senior lawyer who has been through the legal “battles” who can serve as a sounding board and confidant in guiding the young lawyer. In my experience, lawyers are welcoming and excited to shepherd young lawyers along in their careers. It is important as a young lawyer to get the most out of the mentor/mentee relationships you develop. That includes not being afraid to ask questions, no matter how big or small. Mentoring lawyers will likely not hesitate to fondly recall some of the growing pains they experienced and share lessons learned along the way with their young lawyer mentees, in the hope that their prior experiences can assist the young lawyers in their advancement. I have found that mentoring lawyers take great pride and joy in being a part of helping a “cub” young lawyer grow to become a bear of the Bar. If you as a young lawyer have difficulty finding a mentor, a good place to start is the Kentucky Bar Association’s “Great Place to Start” mentoring program. Details regarding the program can be found on the association’s website at kbagps.org.

WORK HARD
Hard work and dedication are how we all obtained a law degree and licenses to practice law in the first place. There is no doubt that to succeed as a young lawyer, that same hard work and dedication will need to be exhibited. The nature of our profession is such that there are often highs and lows in our workloads. When you are in a high workload period, you cannot be afraid to roll up your sleeves and get to work. You will feel a significant sense of achievement if you know you have put in the hard work to deserve the positive result you achieve. Even if you do not achieve your desired result, you will get consolation in knowing that the result was not due to a lack of effort on your part.
HONOR THE PROFESSION BY PRACTICING WITH CIVILITY

It truly is a great achievement to be a member of the Kentucky Bar. Young lawyers should give the Bar and its lawyers the respect that is deserved by practicing with civility. Your reputation precedes you, and as my mentors aptly remind me, it can take years to develop a good reputation and only one bad day or action to destroy it. It seems so simple and obvious that the Golden Rule should be followed and applied by lawyers in practice. However, too many lawyers (young and old alike), do not practice the Golden Rule and act with civility. This can be detrimental to your practice. You never know when you may require some leniency or a favor from the lawyer with whom you are currently doing battle. If you have always treated that lawyer fairly and with civility, then you are much more likely to have your request honored. Following the Golden Rule will serve all young lawyers well in their practice.

FIND JOY IN WHAT YOU DO

Not every day as a practicing lawyer will be sunshine and roses. However, it is important to find an area of law that you most enjoy, and do everything you can to make that area your primary practice. If polled, I am confident that most lawyers would agree that they are not doing the exact same kind of work today that they were doing the very first day they began practicing law. Do not be afraid to try practicing in new and different areas of law, in order to find what you most enjoy doing.

DO NOT FORGET TO TAKE BREAKS

The practice of law is demanding and can consume your life. At times (e.g., if you are in trial or closing a big deal), this is necessary and unavoidable. However, there must be something that you can turn to in order to take your mind off of the law and decompress. Finding outside interests will provide levity in your life and enable you to have more vigor for your law practice. It is true that being a lawyer is a very noble profession, and even a calling of sorts for many of us. But at the end of the day, it is just a job! Do not let your law practice diminish the other joys in your life, and make sure to always make time for your life outside of work.

Young lawyers, remember that we are vital to the Bar and we are literally the future of the practice of law in Kentucky. I very much look forward to serving as the Young Lawyers Division Chair for the 2017-2018 Bar year.

ABOUT THE AUTHOR

ERIC M. WEIHE is a member with Stoll Keenon Ogden PLLC in their Louisville, KY office.

Chair Eric M. Weihe, Vice-Chair Zachary A. Horn, Secretary Treasurer Miranda D. Click, and Immediate Past Chair Rebecca R. Schafer. Not pictured is Chair-Elect Jenna S. Overmann.
A mong the best legal-writing teachers either of us has ever had are two-dozen legal-writing “all stars.” One of us has met only a few of them, and the other has met none of them. The vast majority of them have never lectured on legal writing or written any books about it. So what’s so special about them? The answer is: They write superbly. It’s that simple. And we’ve found that when we read their writings and pay attention to what they do right, we can improve our own writing.

There’s a tradition of this in other fields, as described in an excellent presentation by writing instructor Patrick Barry called “The Language of Leadership.”1 When Edouard Manet was a young painter, he registered as a copyist at the Louvre, so he could see good painting. When Charlie Parker was a young musician, he took a low-paying job as a dishwasher at a music club so he could listen to the bands that passed through. When Ted Williams was a young ballplayer, he never missed a chance to watch his older teammate, Jimmy Foxx, take batting practice, so Williams could see what Fox did right. Whether you are painting, making music, hitting baseballs, or writing about the law, you can learn a lot by seeing others’ examples.

The stories of Manet, Parker, and Williams are why, every day in the second semester of the first-year legal-writing course that one of us teaches and one of us took, students are assigned an excerpt from a brief or judicial opinion by one of two-dozen exceptional legal writers. Some of the writers are currently practitioners. A few are politicians who once practiced law, such as President Barack Obama or Senator Ted Cruz. Several sit on the Supreme Court. Still others are intermediate appellate court judges, like the D.C. Circuit’s Judge Brett Kavanaugh. They vary in terms of backgrounds, legal fields, gender, race, and ideological inclinations, but what they have in common is this: They are among the best in the business when it comes to making the complicated sound simple, the confusing sound obvious, and the arguable sound obvious.

As good as their writings are, it’s not enough to just read them. Students in the class must write down and turn in descriptions of the writing principles these authors display, including principles explained in the course’s only textbook, Bryan Garner’s Legal Writing in Plain English.2 Let’s take a look at three writing principles that can improve any brief – and at how they’re employed by three of the “all stars.”

#1: Writing a Strong Facts Section.
A well written facts section should tell a story that contains all legally significant facts (even those that may be unfavorable to your client) and omits irrelevant details, legal conclusions and arguments. But in many cases, it isn’t easy reducing pages of discovery and years of litigation into a facts section. It can be hard to separate the significant from the insignificant. And many people struggle to tell the story in chronological order.

One example of a well written facts section is in the brief filed by Joshua Rosenkranz in Facebook, Inc. v. ConnectU, Inc. on behalf of his client Mark Zuckerberg in litigation against those who claim Zuckerberg stole their idea.3 (If you’ve seen The Social Network, you know the story. If you haven’t, stop reading this and go see it!) Rosenkranz begins, “The plotline of this controversy is all too familiar: Wunderkind entrepreneur conceives of a transformative business and propels it to a meteoric success, but failed rivals insist they thought up the idea first and demand all the profits.”4

In one sentence, Rosenkranz has managed to capture the reader’s attention and sum up the issue. He begins the subsequent paragraphs with: “The wunderkind in this case is Mark Zuckerberg,” and “The rivals were fellow Harvard students: brothers Cameron and Tyler Winklevoss and Divya Narendra.” By framing the issue in this way, his client is the good guy and the opposing parties are the bad guys. Throughout the facts section, Rosenkranz continues to write in a way that encourages the reader to side with his client.

#2: Using Effective Headings and Subheadings.
Headings and subheadings, when used correctly, provide a roadmap for the reader. Bryan Garner offers four characteristics of the perfect roadmap.5 First, headings and subheadings should be complete sentences.6 Second, they should “contain (typically) 10 to 35 words.”7 Third, headings and subheadings should be “capitalized normally (never in all caps) but set in single-spaced boldface type.”8 And fourth, they should “contain not just a conclusion but ordinarily a roadmap.9 Jeffrey Fisher’s roadmap in Ohio v. Clark incorporates all of these:

ARGUMENT
I. The Primary Purpose Test Applies Here.
A. The Primary Purpose Test Protects The Integrity of the Confrontation Clause’s Requirement of Live Testimony.
B. The Primary Purpose Test Applies To All Statements Designed To Aid Criminal Investigations, Not Just To Those Made By Adults To Police Officers.

II. The Primary Purpose Of The Dialogue Between L.P. And His Teachers Was To Ascertain Facts For An Investigation Into Apparently Criminal Past Conduct.
A. The Teacher’s Perspective.
B. The Declarant’s Perspective.
C. The Circumstances of Questioning.
III. The History And Development Of Hearsay Law Confirm That L.P.'s Statement Were Testimonial.

IV. The States Have A Readily Available Solution To The Problem Of Child Testimony.
   A. The State's Own Law Needlessly Prevented It From Presenting Constitutionally Acceptable Testimony From L.P.
   B. Allowing States To Prosecute Child Abuse Cases By Way Of Ex Parte Accusations Such As Those Here Would Fatally Undermined The Adversarial System.10

#3: Using Topic Sentences, Bridges Between Paragraphs, and Signposts to Provide Clarity Through Structure. 
To improve your writing’s clarity, Bryan Garner recommends introducing each paragraph with a topic sentence, bridging between paragraphs, and providing signposts along the way.11 Michael Carvin’s brief in Friedrichs v. California Teachers Association has examples of these writing principles throughout:12

• After describing how the Court in Pickering v. Board of Education balanced the interests of a government employee and a government employer, Carvin applies the test to his case’s facts in a paragraph that begins: “This Court’s post-Pickering decisions confirm that the balance favors Petitioners.”13

This sentence shifts the reader’s focus to precedent that is favorable to his client. As you would expect, the rest of the paragraph discusses “post-Pickering decisions.” Carvin’s topic sentence does what Garner says it should do: It “announces what the paragraph is about, while the other sentences play supporting roles.”14 This may sound rudimentary, but it’s a writing principle that too many attorneys (and a few students) honor only in the breach.

• Carvin ends one paragraph with: “This Court invalidated the mandatory assessments, explaining that ‘First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.’ And he begins the next paragraph with: “Similarly ‘the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed’ regardless of whether the association is political.”15

Here Carvin transitions from one paragraph to the next by using the word “similarly.” Garner suggests that “a good paragraph opener establishes a connection by using pointing words (this, that, these, those, the), echo links (words or phrases in which a previously mentioned idea reverberates), and explicit connectives (words whose chief purpose is to supply transitions, such as also, further, therefore, and yet).”16

Carvin tells the reader his position is supported by two reasons. He then signals to the reader, here is reason number one, here is reason number two. This makes his argument easier to follow.

To sum up, if you are seeking to improve as a writer, start by reading and noting what strong writers do. As one of the current Justices on the Supreme Court tells some of his clerks, “You can’t write anything that’s good if you haven’t read anything that’s good.”

ABOUT THE AUTHORS
LEAH SPEARS is a third-year student at the University of Louisville’s Brandeis School of Law and clerks in Louisville at the Office of the Commonwealth’s Attorney. JUSTIN WALKER clerked for Justice Anthony Kennedy and Judge Brett Kavanaugh, and he teaches legal writing as an assistant professor at Brandeis.

(ENDNOTES)
1. https://www.youtube.com/watch?v=b1TpvgCK7TA.
4. Id. at 5.
5. Garner, supra note 2, at 22.
6. Id.
7. Id.
8. Id.
9. Id.
10. Garber, supra note 3, at 50.
12. Id. at 50.
13. Garber, supra note 2, at 81.
15. Garber, supra note 2, at 83.
16. Friedrichs, supra note 12, at 33.
In our last discussion, we asked where we are and where we are going in the modern practice of law. Online pundits identify certain common challenges, foremost being getting new business, reducing administrative expenses and adapting to increasingly complex technology. This brings me to ask: what is needed to train and prepare legal practitioners in the competitive use of information and computing technologies? While such technologies may reduce the power gap between large and small firms, they also enable new forms of online legal service providers. These put increasing pressure on the small and solo practices that once provided general legal services to families and small businesses. And, increasingly, on big firms whose big corporate clients push for cost reductions and speedy service.

Just as change has been central to this column, so too has our review of the use of technology in the law office. It was of special interest to me; starting out I could not afford a secretary but, luckily, I knew how to type. It has continued as a special interest both as to the impact of the technology on practice and its impact on what we practice. More and more, it plays a role as to whether or not we can continue to practice at all with the changing dynamics of the business of law. The trade press continues to discuss even whether firms can survive if they do not “digitalize” in the face of online providers like LegalZoom, Rocket Lawyer and US Legal. Such companies through scale and technology offer cheap basic, intermediate and even complex services. I believe that a good attorney-client relationship and an efficient service system will always be best for a client and reduce the risk of serious mistakes. But increasingly the question is what can people afford with an increasingly complex legal and regulatory system we all must navigate. If financial circumstances lead someone to use discounted legal services, how great must the injury be before they must turn to a lawyer for help beyond what those discount services offer.

I first started teaching with a course on computers in the law at a paralegal program. Such courses represented “A practical introduction to the use of computers in the legal environment, with concentration on various computer applications for the legal professional and computerized legal research.” The foundation was word processing and computerized legal research tools. From that we would discuss other tools, such as spreadsheets, simple databases and presentation programs like PowerPoint. These then might lead to discussions of specialized legal tools for managing discovery and case planning.

What would such a course look like now? Rather, what would be the fundamentals to begin in building for a legal practice? And has the power curve for computer support for small and solo practices changed as to what is needed to effectively compete in the current legal services market? Computer-assisted legal research (CALR) is now central to legal research, equal to or, sometimes, in place of standard printed materials. It is available for all members of the Kentucky Bar as part of membership through the basic Case-maker research tool. Word processing is central to coursework and practice. It seems everybody has it, and everyone uses it. Although some use WordPerfect, my sense is that the Microsoft Word suite predominates. Coupled with the Adobe Acrobat PDF writer, those documents go straight into the format for electronic filing in federal and Kentucky courts. With both online legal research and online electronic filing, attorneys must have Internet access with browsers compatible to the court’s needs.

*IS THIS ENOUGH? OR ARE THERE EVOLVING CHANGES AND OPPORTUNITIES TO MAKE US FIERCE COMPETITORS IN THIS CHANGING WORLD?*
We’ve discussed some of the threats to small and solo practices in terms of internal issues, but another way to view the issues, with a nod to Roald Dahl, might be:

1. increasing statutory complexity that increases the effort needed to represent a client, including internal administrative efforts in managing such case;
2. computer system complexity that may arguably offer solutions to this but require training and knowledge that may not be easily developed, especially when trying to run a practice;
3. stagnant wage increases that make it more difficult for clients to pay for such representation;
4. online legal service providers who can offer fundamental transactional services cheaply; and
5. the difficulty in just getting things to all work together as smoothly as possible.

How should we explore this and the profession’s needs? I’d expect we would need research on both legal specific and general computer applications within legal practice. That research might then be presented in a table applications, looking at cost, functions and use in the general practice of law or within specific specialty areas.

Should we survey the bar itself to see what you are seeing?

We will examine these questions in our next column. Any advice or comments you have, please send them on to future@losavio.win.net.

ABOUT THE AUTHOR

MICHAEL LOSAVIO teaches in the Department of Justice Administration and the Department of Computer Engineering and Computer Science at the University of Louisville on issues of law, society and information assurance in the computer engineering and justice administration disciplines. His focus is on law and social sciences as they relate to computer engineering, evidence and digital forensics. Courses include digital and computer crime, transnational cybercrime and legal issues with data mining and information assurance. He holds a J.D. and a B.S. in Mathematics from Louisiana State University.
A SNAP SHOT OF HANGING YOUR SHINGLE  
BY: HAILEY SCOVILLE BONHAM

Whether you are a new law school graduate or have been practicing for several years, it is the same question – “Okay, I have decided to start my own firm, but how do I start?”

I faced this question a few years ago. I had been practicing for almost 10 years. As a result, I was feeling confident in my skill as an attorney, but I was blissfully ignorant of the mechanics of payroll, insurance, occupational tax and the like. My intention is to provide a skeleton of a checklist to help keep you organized through the process. As a disclaimer I remind you to consult all applicable ethical rules and opinions.

You have the obvious needs of a location, furniture, office supplies, and equipment. My advice in these areas is to ask around. Talk with other attorneys about what they pay in rent, where they purchased their furniture (or if they have any to sell), if they are leasing any equipment, and the benefits of leasing versus purchase.

First, you need to name your firm and set up your Professional Limited Liability Company (PLLC) with the Secretary of State. Once you have registered, you will be able to apply and receive an Employer Identification Number, aka a Federal Tax Identification Number, for your business. Once you have your Tax ID, you can open your business bank accounts.

Second, locate a certified public accounting firm. They will be an incredible resource to making sure you have properly set up your entity. Unless you are well versed in tax I cannot stress the importance of not trying to do this on your own. Think of the pro se litigant and all of the fumbles you have seen one make—don’t be a pro se accountant.

Third, it is time to get creative and think letterhead, website and email formation. I had a logo, letterhead and business cards created at near pennies. I keep the letterhead saved on my computer as a header so that when I type a letter and print, it just prints the letterhead simultaneously. In the age of electronic mail preferences, paying for and storing watermark paper is a thing of the past. I keep my business cards saved in PDF format and upload and order from an online supplier as needed.

You may be thinking, “Really letterhead is 3rd on this list? That seems like it would be much further down.” However, you will need your letterhead to send to your malpractice carrier when they write the policy. Being able to give your banker, insurance agent, CPA, etc., your business card will not only make you look professional, but it will get your name out there. You will need to send letters to your clients and Courts where you practice informing them of your move. You also need to consider advertising your new firm.

Fourth, the only thing I dread more than taxes is insurance. Sometimes I feel like I must be the most insured human on the planet; however, it is a necessary evil. You will need malpractice insurance, potentially workman’s compensation insurance, and renter’s insurance. Shop around and ask other attorneys who they use for insurance.

Fifth, you have a location, you are insured, and the accounts are set up, you now need to update the Kentucky Bar Association with your new contact information. Also, if you have been previously practicing in another firm you should send a letter to each judge and clerk’s office notifying them of your new contact information in addition to filing a notice in each case.

Sixth, have a budget and as part of that budget consider the cost of a staff person. It may take some time before you have a steady stream of income, so you need to have some savings to tap into to cover costs until you are fully operational.

Setting up a new firm can be a daunting task and there are many more steps, and pitfalls, than provided herein. Hopefully these steps will help you stay organized and quiet some of the anxiety. The one nugget I will impart is that if you are willing to work hard, then tell that little voice inside you to hush because - yes, you can do this!

ABOUT THE AUTHOR
HAILEY SCOVILLE BONHAM graduated from Eastern Kentucky University in 2001 receiving a B.S. in nursing. After becoming a registered nurse she went onto Salmon P. Chase College of Law where she graduated on the Dean’s List in 2004. She became a solo practitioner in 2014 in London, Ky., where she lives with her husband and two children.
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We hope you enjoy this online service! If you have questions, please contact the KBA Membership Department at (502) 564-3795.

The Kentucky Bar Association continues to present the Bench & Bar magazine in audio version through the KY NFB-NEWSLINE®. The KY NFB-NEWSLINE® audio information service is available to eligible subscribers by dialing a toll-free telephone or local call number on a touch-tone telephone; Newsline Mobile App on your i-Device; or on the web at www.nfbnewslineonline.org. Eligible individuals include those who cannot use conventional print because of a visual impairment; learning disability; physical impairment restricting the use of fingers, hands or arms; or other conditions causing limited access to print information.

For more information, visit our website at: http://www.nfbnewsline-ky.org
and our Facebook page at: https://www.facebook.com/audionewskentucky/

HANK JONES
Insurance & Personal Injury Mediation

PAT MOLONEY
Healthcare, Nursing Home & Medical Malpractice Mediation

STEVE BARKER
Employment & Business Disputes Mediation

When you need to settle your case, don’t settle on your mediator.

The Sturgill Turner Mediation Center is equipped with experienced, AOC certified mediators and superior conference facilities, allowing us to provide prompt, quality mediation services. Located in Lexington and available for mediations statewide. Learn more about mediators Hank Jones, Pat Moloney and Steve Barker at STURGILLETURNERMEDIATIONCENTER.COM.
The Board of Governors met on Friday, March 17, 2017. Officers and Bar Governors in attendance were, President M. Sullivan; President-Elect W. Garmer; Immediate Past President D. Farnsley; Young Lawyers Division Chair R. Schafer and Young Lawyers Division Chair-Elect E. Weihe. Bar Governors 1st District – M. Pitman, F. Schrock; 2nd District – J. Meyer, T. Kerrick, 3rd District – H. Mann; 4th District – B. Simpson; 6th District – G. Sergent, S. Smith; and 7th District – E. McGuire, J. Vincent. Officers and Bar Governors absent were: Vice President D. Ballantine, Bar Governors M. Dalton, A. Cubbage, M. Barfield and E. O’Brien.

In Executive Session, the Board considered three (3) default disciplinary cases, involving three attorneys and two (2) restoration cases. Judy McBrayer Campbell, Frankfort, Brenda Hart of Louisville, Dottye Moore of Elizabethtown and Dr. Leon Mooneyhan of Shelbyville 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 a status report from the Kentucky Commission on the Future of the Legal Profession, KYLAP Task Force, Rules Committee and Task Force on Judicial Evaluations.
- Approved the Audit Committee’s recommendation to increase the fixed asset capitalization threshold from $500 to $5,000.
- 2017 Annual Convention Chair and Bar Governor J.D. Meyer reported that $61,000 has been raised in sponsorships which included sponsors for all the featured speakers, one spotlight speaker, convention app, kickoff reception and specialty breaks. He reported that the March/April Bench & Bar will be mailed at the end of March and will include the pre-registration annual convention brochure with the registration information. Meyer also provided an update on the following matters: Board/Court reception, Bench & Bar & YLD joint reception, entertainment for the annual banquet, one day shuttle opportunity from Louisville, shuttle service throughout the day from the outlying hotels in Owensboro and the available parking areas close to the convention center.
- Young Lawyers Division (YLD) Chair Rebecca Schafer reported that the main focus of YLD has been the Legal Food Frenzy initiative. She reported to date 87 law firms had signed up and there was only one week left for sign-ups. The goal is to raise 600,000 pounds of food, or $150,000. Schafer reported that awards are based on the most total pounds. The firm or legal organization raising the most pounds will win the grand prize, the Attorney General’s Cup. Prizes will also be awarded to seven categories: solo law firm, small law firm, mid-size law firm and large law firm, law school, corporate legal department, and government entity. Winners will be announced at the YLD Annual Luncheon at the Annual Convention on June 22 in Owensboro. Schafer also reported that YLD is planning its programs for the annual convention and the KBA’s Diversity & Inclusion Summit Pipeline Program.
- Approved Federal Judge Thomas B. Russell of Paducah as the recipient of the 2017 Distinguished Judge Award. Judge Russell’s award will be presented during the annual convention along with the other following awards: Distinguished Lawyer – Pierce Hamblin of Lexington; President’s Special Service Award – W. Douglas Myers (posthumously); Bruce K. Davis Bar Service Award – Past and Present Ethics Hotline Committee members and Donated Legal Services Award – Ned Pillersdorf of Prestonsburg.
- Approved the 2017 KBA Annual Convention expense reimbursement for the current and new board members: lodging at the Hampton Inn & Suites Hotel at a rate of $119 single/double per night for a maximum of four (4) nights and reimbursement for round trip mileage at the AOC approved current rate per mile and meal expenses incurred on Monday, June 19 and Tuesday, June 20 above and beyond group meal functions on those dates.
- Approved the waiver of the 2017 KBA Annual Convention registration fee for Supreme Court, Court of Appeals and AOC staff attorneys.
- Approved the appointment of Justice Mary Noble of Nicholasville (Ret.) to the Clients’ Security Fund Board of Trustees to fill the reminder of Justice Martin Johnstone’s term ending on June 30, 2018.
- Approved the issuance of a Proclamation in support
Do you have a matter to discuss with the KBA’s Board of Governors? Board meetings are scheduled on:

- September 15-16, 2017
- November 17-18, 2017

To schedule a time on the Board’s agenda at one of these meetings, please contact John Meyers or Melissa Blackwell at (502) 564-3795.

SUMMARY OF MINUTES KBA BOARD OF GOVERNORS MEETING
MAY 19, 2017

The Board of Governors met on Friday, May 19, 2017. Officers and Bar Governors in attendance were, President M. Sullivan; President-Elect W. Garmer; Vice President D. Ballantine; Immediate Past President D. Farnsley; Young Lawyers Division Chair R. Schafer and Young Lawyers Division Chair-Elect E. Weihe. Bar Governors 1st District – M. Pitman; 2nd District – J. Meyer, T. Kerrick, 3rd District – M. Dalton, H. Mann; 4th District – A. Cubbage, B. Simpson; 5th District – M. Barfield, E. O’Brien; 6th District – G. Sergent; and 7th District – E. McGuire. The following Bar Governors absent were: F. Schrock, S. Smith and J. Vincent.

In Executive Session, the Board considered one (1) reinstatement case and one (1) restoration case. Judy McBrayer Campbell, Frankfort, Brenda Hart of Louisville, Dottye Moore of Elizabethtown and Dr. Leon Mooneyhan of Shelbyville 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:

- Approved the submission of three nominees to the Supreme Court of Kentucky for appointment for one person from each District to the CLE Commission for a three year term ending on June 30, 2020: 5th Supreme Court District – Carl N. Frazier of Lexington, Stephanie M. Wurdock of Lexington and Jonathan A. Hall of Lexington; and 7th Supreme Court District – Christopher A. Conley of Ashland, Leigh G. Latherow of Ashland and Earl “Mickey” McGuire of Prestonsburg.
- Approved the submission of three nominees to the Supreme Court of Kentucky for appointment of one person from each Supreme Court District to the IOLTA Board of Trustees for a three year term ending on June 30, 2020: 5th Supreme Court District – Robert W. Kellerman of Frankfort, Nicole S. Bease of Frankfort and Cassie W. Barnes of Versailles; and 7th Supreme Court District – Rhonda M. Copley of Ashland, Cevester (C.V.) Reynolds of Prestonsburg and William H. Wilhoit of Grayson.
- Blackwell reported the Supreme Court approved the FY 2017-2018 KBA and IOLTA Budgets.
- Blackwell gave an update on the IT project.
- Blackwell provided an update on the restroom renovations. Blackwell reported that a pre-bid meeting is scheduled on April 21, bid opening May 12 and project to start in June.

TO KBA MEMBERS
Do you have a matter to discuss with the KBA’s Board of Governors? Board meetings are scheduled on:

- September 15-16, 2017
- November 17-18, 2017

To schedule a time on the Board’s agenda at one of these meetings, please contact John Meyers or Melissa Blackwell at (502) 564-3795.
NOTICE

TO: THE PUBLIC AND MEMBERS OF THE PRACTICING BAR FOR THE EASTERN AND WESTERN DISTRICTS OF KENTUCKY

Pursuant to 28 U.S.C. § 2071, Rule 83 of the Federal Rules of Civil Procedure and Rule 57 of the Federal Rules of Criminal Procedure, the United States District Courts for the Eastern and Western Districts of Kentucky hereby give public notice of the following:

The Joint Local Rules Commission for the Eastern and Western Districts of Kentucky has recommended, and the District Court has authorized for release for a period of public comment through August 31, 2017, the revision of certain Joint Local Rules of Civil Practice and Joint Local Rules of Criminal Practice. The proposed amendments are as follows:

A. LR 5.5 – Service of Documents by Electronic Means – will be amended as follows in order correct a previous clerical error:

LR 5.5 Service of Documents by Electronic Means

Documents shall be served through the court’s transmission facilities by electronic means to the extent and in the manner authorized by further General Order 05-03 of the Court. Transmission of the Notice of Electronic Filing (NEF), with a hyperlink to the electronically filed document, constitutes service of the filed document upon each party in the case who is registered as an electronic case filing user with the Clerk. Any other party or parties shall be served documents according to these Local Rules and the Federal Rules of Civil Procedure.

B. LCrR 17.1 and 17.2 – Subpoena to Testify in a Criminal Case; Subpoena for Production of Books, Documents, or Objects in Advance of Trial or Hearing – will be adopted as follows in order to provide rules for subpoenas in criminal matters:

17.2 Subpoenas for Production of Books, Papers, Documents, Data, or Objects in Advance of Trial or Hearing

(a) Forms. A party seeking to compel only the production of books, papers, documents, data, or other objects pursuant to Rule 17(c), in advance of the trial, hearing or proceeding at which the items are to be offered in evidence, must use AO Form 89B “Subpoena to Produce Documents or Objects in a Criminal Case” including all instructions.

(b) Return Date of Subpoena. No subpoena in a criminal case may compel or require the production of books, papers, documents, data, or other objects in advance of the trial, hearing or proceeding at which those items are to be offered in evidence, unless the Court has entered an order pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure.

(c) Motions for Pre-Proceeding Document Production. Motions for the issuance of a subpoena duces tecum to compel production before a trial or evidentiary proceeding must be made to the Court.

(1) A party moving for issuance of a subpoena duces tecum for production in advance of trial or hearing must support the request in the motion by specifying the facts supporting the issuance of the subpoena. Notice of filing shall be given to opposing counsel unless the Court, for good cause shown, authorizes the filing of an ex parte motion without notice to the opposing party.

(2) The Court will determine whether the material sought should be produced, the place, date, time, and method of production, and may place limits on the scope of the requested subpoena duces tecum.

(d) Discovery. It shall be the duty of counsel for any party to disclose in discovery to opposing counsel any books, papers, documents, data, or other objects produced pursuant to a trial subpoena consistent with Rule 16 of the Federal Rules of Criminal Procedure and any reciprocal order of discovery entered by the Court.

Comments concerning the proposed rule amendments are welcome. Comments must be submitted in writing or via email on or before August 31, 2017 and should be sent to:

Brian F. Haara
Chair, Joint Local Rules Commission
Tachau Meek PLC
101 South Fifth Street, Suite 3600
Louisville, Kentucky 40202
bhaara@tachaulaw.com
Announcement:

The Kentucky Cabinet for Health and Family Services is accepting applications for persons willing to serve as a chairperson of a Medical Review Panel pursuant to KRS 216C. Eligible applicants must be licensed to practice law in the Commonwealth of Kentucky.

Chairpersons will be selected on a case by case basis. This is a great opportunity to hone your management and mediation skills. Reimbursement shall be in accordance with KRS 216C, Section 23(2).

To apply, please complete the application found at [mrp.ky.gov](http://mrp.ky.gov) and submit to [mrp@ky.gov](mailto:mrp@ky.gov). The Cabinet for Health and Family Services will maintain a list of all applicants by Supreme Court district for use pursuant to KRS 216C, Section 8(2).

By Mail:  
CHFS, ATTN: MRP  
275 East Main Street, 5W-A (MRP)  
Frankfort, Kentucky 40621

Electronically:  [mrp@ky.gov](mailto:mrp@ky.gov)

MEMBERS OF THE KENTUCKY BAR ASSOCIATION’S ATTORNEYS’ ADVERTISING COMMISSION RECOGNIZED

LISA BRONES HUBER of Louisville, right, was recognized for her service to the KBA’s Attorneys’ Advertising Commission (AAC) from 2011-17 and as AAC Chair from 2014-15 during the AAC’s June 5 annual meeting. Making the presentation was Steven Pulliam, deputy bar counsel, on the left.

During the KBA Annual Convention in Owensboro, Steven Pulliam, deputy bar counsel, at right, presented outgoing Attorneys’ Advertising Commission member, RHONDA JENNINGS BLACKBURN of Pikeville, with a plaque recognizing her service to the KBA’s Attorneys’ Advertising Commission from 2014-2017.
The Kentucky Lawyer Assistance Program offers weekly open recovery meetings for lawyers, law students and judges in Northern Kentucky and Lexington. The Northern Kentucky Lawyers in Recovery meeting is held at 5:00 p.m., on Tuesdays at 510 Washington Avenue, Newport, KY 41071. Please bring your own coffee. The Lexington Kentucky Lawyers in Recovery meeting is held at 7:30 a.m. on Wednesdays at the Alano Club downtown, 370 East Second Street, Lexington, KY 40508.

All meetings are open to law students, lawyers and judges who are already involved or who are interested in a 12-step program of recovery, including but not limited to Alcoholics Anonymous, Narcotics Anonymous, Overeaters Anonymous and Al-Anon. Come meet other attorneys and network. All meetings and contacts are confidential. SCR 3.990. For additional information, please visit www.kylap.org, call (502) 226-9373, or email abeitz@kylap.org.

Contact KYLAP DIRECTOR YVETTE HOURIGAN for more information about the KYLAP FOUNDATION, INC., FORGIVABLE LOAN PROGRAM. (502) 226-9373 · yhourigan@kylap.org

Nonprofit Organization Law Can Be Complex
My Practice Is Limited to Advising Nonprofits and The Professionals Working With Them

Assistance Provided With
Organization Formation
Organizational Policies & Procedures
Assessment of Operations
Continuous Improvement Systems (Quality)
Board Governance Issues
Complex Tax Matters
For-Profit Subsidiaries and Joint Ventures
Merger, Consolidation or Dissolution of Nonprofits

Conley Salyer, Attorney, J.D., L.L.M.; Alumni Examiner, Malcolm Baldrige National Quality Award (MBNQA). csalyer@nonprofitattorney.net, (859) 281-1171, 710 E. Main Street, Lexington, KY 40502. www.nonprofitattorney.net This is an advertisement.

Donate Tab
Added to KYLAP Website

Did you know that you can make your secure tax-deductible gift to the KYLAP Foundation, Inc., online, now?

Just go to the KYLAP website at www.kylap.org, and click on the DONATE button located near the bottom of the page, or click on the “Foundation” tab and use the DONATE button. You may make a one-time gift or a recurring gift each month safely through PayPal. You do not need to have a PayPal account to make your donation. Every dollar donated by lawyers goes directly to help treat lawyers with mental health issues including depression and addiction to drugs or alcohol.

To learn more about the KYLAP Foundation, Inc., a 501(c)(3) corporation, visit www.kylap.org/foundation/. You can make a difference in a struggling lawyer’s life.
Access the Kentucky Bar Association’s CAREER CENTER at http://www.kybar.org/careercenter

JOB SEEKERS, YOUR NEXT CAREER OPPORTUNITY COULD BE CLOSER THAN YOU THINK.

- **Access** to high quality, relevant job postings. No more wading through postings that aren’t applicable to your expertise.
- **Personalized job alerts** notify you of relevant job opportunities.
- **Career management** – you have complete control over your passive or active job search. Upload multiple resumes and cover letters, add notes on employers and communicate anonymously with employers.
- **Anonymous resume bank** protects your confidential information. Your resume will be displayed for employers to view EXCEPT your identity and contact information which will remain confidential until you are ready to reveal it.
- **Value-added benefits** of career coaching, resume services, education/training, articles and advice, resume critique, resume writing and career assessment test services.

http://www.kybar.org/careercenter
A SPECIAL THANK YOU TO OUTGOING CHAIR, W. MITCHELL HALL, JR.

On Friday, May 12, 2017, W. Mitchell “Mitch” Hall, Jr., adjourned his final KBA Continuing Legal Education Commission meeting of the 2016-2017 educational year. The KBA staff and CLE Commission will miss having Mitch at the helm and are forever thankful for his leadership and oversight. Over his six year term Mitch has been extremely generous with his time, wisdom, and efforts for the benefit of all members of the bar. Hall is a graduate of the University of Kentucky College of Law. He practices with the Ashland firm of VanAntwerp Attorneys. Hall’s practice is devoted to commercial matters and litigation, including medical malpractice, labor and employment law, insurance defense, and school law. He was appointed as the 7th Supreme Court District representative to the CLE Commission in 2011 and reappointed in 2014.

CONGRATULATIONS TO NEW CLE COMMISSION CHAIR JASON F. DARNALL

Congratulations to First District Commission Member Jason F. Darnall, who has been named by the Kentucky Supreme Court to serve as the chair of the CLE Commission. Darnall, a native of Marshall County, graduated from the University of Kentucky and graduated magna cum laude from Salmon P. Chase College of Law. He has a private practice, serves as Assistant Marshall County Attorney, is the City Attorney for Hardin, and acts as legal advisor to the Marshall County Fiscal Court. He was first appointed to the CLE Commission in June of 2015 and has since served on numerous CLE planning and organizing committees.

THE CLE COMMISSION WELCOMES TWO NEW APPOINTEES

The KBA CLE Commission is pleased to announce the Kentucky Supreme Court’s new appointments to the Commission. LEIGH GROSS LATHEROW has been appointed to represent the Seventh Supreme Court District. CARL FRAZIER has been reappointed to a second term to represent the Fifth Supreme Court District.

LEIGH GROSS LATHEROW is a graduate of the University of Kentucky and the University of Kentucky College of Law. She is admitted to practice in Kentucky, Ohio, West Virginia, the U.S. District Court for the Southern District of Ohio, the Eastern District of Kentucky and the Western District of Kentucky, the Sixth Circuit Court of Appeals and the United States Supreme Court. Latherow is a partner with VanAntwerp Attorneys in Ashland and her practice is devoted primarily to civil litigation and employment consulting.

CARL FRAZIER is a member in Stoll Keenon Ogden’s Lexington office. A member of the business litigation and tort, trial & insurance services practices, he counsels and advocates for individuals and businesses with disputes in state and federal courts and before regulatory agencies. Frazier is currently serving as chair of the 2017 Kentucky Bar Association (KBA) Diversity and Inclusion Summit. He previously served as co-chair of the KBA Diversity Working Group, which promotes diversity and inclusion within the legal profession, on the KBA Board of Governors and its Executive Committee, and as chair of the KBA Young Lawyers Division. Frazier also served as CLE programming committee chair for the 2016 Kentucky Bar Convention, which was responsible for planning over 60 seminars. Frazier received his B.A. from Transylvania University and his J. D. from the University of Kentucky College of Law.

The CLE Commission welcomes and congratulates these new appointees and looks forward to working with them over the next year.
This easy to use search engine contains up to date information on CLE events that have been accredited by the Kentucky Bar Association Continuing Legal Education Commission.

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

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

Looking for upcoming KBA accredited CLE events? Look no further...check out HTTP://WEB.KYBAR.ORG/CLESEARCH/LISTPROGRAMS.ASPX

The KLU program series is an exceptional benefit of KBA membership and Kentucky is the only mandatory CLE state that provides its members a way of meeting the annual CLE requirement at no additional cost. Registration is available online at kybar.org/page/KLUDatesandlocations.

Thank you to those individuals whose contribution of time and expertise helped make the June 2017 new lawyer program a great success!

Moderators, Speakers and Contributing Authors

Judge Glenn E. Acree
Ashleigh N. Bailey
Ashley L. Chilton
Robbie O. Clements
Mary E. Cutter
Jason F. Darnall
Guion L. Johnstone
Rebecca R. Schafer
R. Michael Sullivan
Kelly L. Stephens
Eric M. Weihe

Thank you to those individuals whose contribution of time and expertise helped make the June 2017 new lawyer program a great success!

Kentucky Bar Association
2017 New Lawyer Program
At its heart, the Kentucky Bar Foundation is about attorneys and judges helping others. To celebrate the longstanding tradition of service among members of the Kentucky Bar, the Kentucky Bar Foundation is proud to spotlight these attorneys “doing good” in their communities! For more information about the Foundation and its charitable work on behalf of Kentucky’s legal community or to submit pictures of your recent volunteer project for a chance to be featured in a future issue, visit www.kybarfoundation.org.

**IOLTA COMPLIANCE NOW ONLINE**

**IT’S THAT TIME OF YEAR! Every Kentucky-licensed attorney MUST certify their compliance under SCR 3.830, which governs IOLTA.**

SCR 3.830(13) requires every lawyer admitted in Kentucky to certify their compliance with or exemption from the rule on or before September 1st of each year. Attorneys are reminded of this annual requirement on their KBA dues statement, and, effective this year, all attorneys MUST complete a short online Compliance Certification Form through the KBA’s secure website. Attorneys either provide their IOLTA account information or certify their exemption from participating in the IOLTA program. Exemptions are allowed only for those attorneys who fall within the specific categories enumerated in SCR 3.830(14). Firms with multiple attorneys are encouraged to submit a single online form on behalf of all of their attorneys.

For additional information about the Kentucky IOLTA Fund, including answers to frequently asked questions, visit www.kybarfoundation.org/iolta.

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Pregliasco Straw-Boone Doheny Banks & Bowman, PLLC attorney **ELIZABETH ANN DUNCAN** was one of 80 attorneys who taught 3,000 students in 21 Jefferson County Public High Schools about responsible use of credit through the Bar Foundation’s CARE Program.

**ZACHARY A. HORN**, an attorney with McBrayer, McGinnis, Leslie & Kirkland, volunteered at ACCESS Soup Kitchen and Men’s Shelter in Frankfort.

Attorney **KAELIN G. REID**, with Mattingly & Nalley-Martin, PLLC, in Lebanon volunteered with the CARE (Credit Abuse Resistance Education) Program to teach students about responsible credit use and the consequences of its abuse.

Pregliasco Straw-Boone Doheny Banks & Bowman, PLLC attorney **ELIZABETH ANN DUNCAN** was one of 80 attorneys who taught 3,000 students in 21 Jefferson County Public High Schools about responsible use of credit through the Bar Foundation’s CARE Program.

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**Make Your Submission to Kentucky Attorneys Doing Good**

The Kentucky Bar Foundation seeks to highlight attorneys’ volunteer work in its “Kentucky Attorneys Doing Good” campaign. For a chance to be featured, please email pictures of you “in action” to KBF Executive Director Guion Johnstone at gjohnstone@kybar.org.

We’re excited to spotlight the good work that Kentucky attorneys do for their communities!

*Your submission of a photograph constitutes your permission for it to be used by the Kentucky Bar Foundation, as well as the Kentucky Bar Association, in their programs, publications, e-newsletter, websites, social media pages, and any and all other print and online materials. By submitting, you acknowledge that you hold the rights to the photo for publication in all KBF or KBA materials.*
# 2017 Grants

"Providing Help Today and Hope for Tomorrow"

<table>
<thead>
<tr>
<th>Organization</th>
<th>Amount</th>
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<tbody>
<tr>
<td>Appalachian Citizens' Law Center, Eastern &amp; Western Kentucky</td>
<td>$10,000</td>
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<tr>
<td>Black Lung Project</td>
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<tr>
<td>Boullware Mission, Inc., Western Kentucky</td>
<td>$10,000</td>
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<tr>
<td>Court Referral Outpatient Substance Abuse Treatment Program for Women</td>
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<tr>
<td>Catholic Charities, Inc., Statewide</td>
<td>$20,000</td>
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<tr>
<td>Immigration Legal Assistance Project</td>
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<td>Children's Law Center, Inc., Campbell &amp; Jessamine Counties</td>
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<tr>
<td>Pro Se Child Custody Clinic</td>
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<tr>
<td>Credit Abuse Resistance Education (CARE) Programs, Statewide</td>
<td>$16,000</td>
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<tr>
<td>Doctors &amp; Lawyers for Kids, Jefferson &amp; Surrounding Counties</td>
<td>$10,000</td>
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<tr>
<td>Capacity Building Initiative</td>
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<tr>
<td>ElderServe, Jefferson County</td>
<td>$5,000</td>
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<tr>
<td>ElderServe's Crime Victim Services</td>
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<tr>
<td>Family &amp; Children's Place, Jefferson &amp; Surrounding Counties</td>
<td>$10,000</td>
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<tr>
<td>Kosair Charities Child Advocacy Center &amp; Shively Visitation Center</td>
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<tr>
<td>Family Enrichment Center, South Central Kentucky</td>
<td>$7,000</td>
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<tr>
<td>Part-time Supervised Visitation Monitor &amp; Brown Bag Trainings</td>
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<td>The Healing Place, Inc., Statewide</td>
<td>$5,000</td>
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<td>The Healing Place Peer Mentor Program</td>
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<tr>
<td>The International Center, Western Kentucky</td>
<td>$20,000</td>
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<td>New Life Project – Preventing Violence &amp; Supporting Survivors in the Refugee &amp; Immigrant Communities</td>
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<tr>
<td>Kentucky Equal Justice Center, Statewide</td>
<td>$11,000</td>
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<td>Maxwell Street Legal Clinic: Preparing Families, Protecting Children</td>
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<td>Kentucky Lawyer Assistance Program Foundation, Statewide</td>
<td>$10,000</td>
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<tr>
<td>KYLAP Volunteer Training &amp; Retreat</td>
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<tr>
<td>Kentucky Refugee Ministries, Inc., Fayette &amp; Surrounding Counties</td>
<td>$11,000</td>
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<tr>
<td>Fee Subsidies for Vulnerable Refugees &amp; Immigrants</td>
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<td>Legal Aid of the Bluegrass, Fayette &amp; Surrounding Counties</td>
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<td>Legal Aid University</td>
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<td>Legal Aid Society, Inc., Statewide</td>
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<td>Volunteer Lawyers for Veterans Program</td>
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<td>Mediation Center of Kentucky, Fayette County</td>
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<td>Family Motion Hour Mediation Program</td>
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<td>Mentoring Plus, Northern Kentucky</td>
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<td>Mentoring Plus</td>
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<td>The Nest - Center for Women, Children &amp; Families, Fayette &amp; Surrounding Counties</td>
<td>$5,000</td>
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<tr>
<td>The Nest’s Interpersonal Violence Legal Project</td>
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<td>Soup for the Soul, Inc., Calloway County</td>
<td>$5,000</td>
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<td>Community Service Volunteer Project</td>
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<td>Sunrise Children’s Services, Statewide</td>
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<tr>
<td>Partnering with the Courts to Provide Life Changing Services for Vulnerable Children &amp; Troubled Families</td>
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<td>Uspritus, Inc., Statewide</td>
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<td>Improving Child Welfare &amp; Court Collaboration</td>
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<tr>
<td>YouthBuild Louisville, Jefferson County</td>
<td>$2,000</td>
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<tr>
<td>YouthBuild Louisville</td>
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| KBF Scholarships                                                            |         |
| - Louis D. Brandeis School of Law                                           | $10,000 |
| - Salmon P. Chase College of Law                                            | $10,000 |
| - University of Kentucky College of Law                                     | $10,000 |

| KBA Distinguished Judge Award on behalf of Judge Thomas B. Russell, Paducah  | $2,000  |
| Kentucky Legal Aid (to be designated for Paducah)                           |         |

| KBA Distinguished Lawyer Award on behalf of Pierce W. Hamblin, Lexington    | $2,000  |
| Legal Aid of the Bluegrass (to be designated for Legal Assistance to Kentucky Veterans) |         |

**TOTAL AWARDS - $265,000**
IN MEMORIAM

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

NAME | CITY | STATE | DATE DECEASED
--- | --- | --- | ---
Claude Ray Bowles Jr. | Louisville | KY | April 18, 2017
Tiffany Jacquel Bowman | Simpsonville | KY | March 25, 2017
Gary W. Brittain | Corbin | KY | February 3, 2017
Paul D. Deaton | Paintsville | KY | April 20, 2017
Martin Glazer | Louisville | KY | April 27, 2017
Fred Goldberg | Prospect | KY | April 24, 2017
Spencer E. Harper | Louisville | KY | April 27, 2017
Keith U. Laurin | New Albany | IN | May 16, 2017
James B. Lenihan | Louisville | KY | May 6, 2017
Pamela Robinette May | Pikeville | KY | May 14, 2017
Raymond Wayne McGee | Lexington | KY | May 27, 2017
Roger Marion Oliver | Berea | KY | May 23, 2017
William Taylor Robinson III | Florence | KY | May 9, 2017
James M. Todd | Lexington | KY | February 14, 2017
Donald F. Zeller | Louisville | KY | May 26, 2017

AMY TAYLOR BROECKER KESSLER, 52, left us suddenly and way too soon on May 18, 2017. She will be so incredibly missed by her husband Herman, children, Christopher Taylor Kessler and Caroline Bell Kessler, parents Carla Sue and Brad Broecker, sister Leslie Broecker, sister-in-law Marty Bybee, Sister & Brother in-law Lindsey and Joe Marting, Uncle Spruce and Aunt Linda Broecker, Aunt Lynne and Walter Anderson, Pat & Penn Broecker, cousins many dear friends and Socks, Speedo and Cheeto. She was the vice president of the Broadway Across America, Midwest Region. A graduate of Vanderbilt University and the University of Louisville Brandeis School of Law. She had a life-long passion for helping children, especially those with learning differences. She served on, and chaired, the Summit Academy Board of Directors, the STAR Board at the U of L and the March of Dimes.

The above information for Amy Taylor Broecker Kessler was pulled from a version that appeared in the Courier-Journal from May 21 to May 23, 2017. To access the full obituary, visit: http://www.legacy.com/obituaries/louisville/obituary.aspx?pid=185494551.

JAMES B. “JIM” LENIHAN, 92, passed away minutes before the running of the 143rd KY Derby, in his home, surrounded by his family. He was a horse owner and horse lover who enjoyed life to the fullest. He always had a positive attitude and a good story to tell.

Lenihan was a WWII Navy Veteran and he enjoyed many reunions with his Navy brothers, who served with him on the USS Isherwood. He was an attorney and partner at Hargadon, Lenihan & Harrington, where he practiced personal injury law and was a voice for countless people who he saw as less fortunate than he. He often spoke about what a lucky man he was. He had many professional associations and memberships throughout his lengthy career. Highlights include being president of the KY Academy of Trial Attorneys in the 70s, being part of the KY Bar Association in a variety of capacities for decades, and being the legal counsel for the Paisley Party Crew.

He was preceded in death by his loving wife, Pat Lockard Lenihan. He is survived by his sons, James B. “Jimmie” Lenihan (who also acted as his caregiver for many years) and Stuart M. Lenihan; grandchildren, Brittany Lenihan and Michael Lenihan and friend, family member and caregiver Charlotta “Charlie” Smith.

The above information for James B. “Jim” Lenihan was pulled from a version that appeared in the Courier-Journal on May 8, 2017. To access the full obituary, visit: http://www.legacy.com/obituaries/louisville/obituary.aspx?pid=185321326.
After nearly 40 years of dedicated practice of law, public service, and advocacy for the vulnerable, **PAMELA TODD MAY**, 64, passed away May 14, 2017, at her home in Pikeville, Ky.

May received her undergraduate degree from Morehead State University, graduating with honors in 1975 with majors in political science, history and speech. May went on to graduate from the University of Kentucky College of Law in 1978 and was admitted to the bar the same year.

May worked as an assistant Pike County Attorney before entering private practice with the firm of Stratton, May and Hays where she became a partner. In 1993, May founded her own law firm, now known as East Kentucky Law Group. May served as Chief Legal Counsel for Pikeville Medical Center, Inc., for 31 years.

May served as an author to Kentucky Health Law and was recognized by the Women's Law Caucus in 2012 for her outstanding contribution as a woman in law. May also served as president of Pike County Bar Association. She was a member of the Kentucky Academy of Hospital Attorney’s, the American Health Lawyers Association, the Physician/Attorney Liaison Committee of the Kentucky Medical Society, and the Steering Committee for the Health Care Section of the Kentucky Bar Association.

May played a pivotal role in representing individuals after the decision by the Social Security Administration to terminate the benefits of 900 Eastern Kentuckians. In response to their needs, she worked with Pikeville Medical Center, Inc., to provide medical records for free to these individuals and counsel, assisted in organizing the first seminar at the University of Kentucky Law School to train volunteer lawyers in representation of 1,500 individuals who had lost or were threatened to lose their benefits, provided training to volunteer lawyers to obtain and utilize medical records, as well as volunteer their firm to represent a number of the affected individuals.

May is survived by her mother, Pasquina S. Todd, her husband, Walter E. May, her daughter, Andrea Robinette Lowe, her son, Phillip Anthony Todd Robinette, and one grandson, William Anthony Bodie Lowe, one sister, Patricia T. Bausch, as well as nieces and a nephew.

**SPENCER E. HARPER JR.** died in his sleep on Thursday, April 27 at the Sunrise Senior Living Center, Louisville after a brief illness. Born in Little Rock, Ark., on Oct. 17, 1933, Harper and his family subsequently moved to Louisville where he attended St. Xavier High School and the University of Louisville as an Officer Cadet in the Air Force ROTC. As an Air Force Officer, he graduated, **cum laude**, from the University of Louisville Law School, serving with honor as a Captain in the Air Force Judge Advocate General’s office through 1961, when Harper joined the law firm Grafton, Ferguson and Fleischer in Louisville. His name was added to the firm in 1967. Its successor, Harper Ferguson & Davis, merged with Ogden, Newell and Welch in 1998. He remained of counsel to its successor firm, Stoll Keenon Ogden, until his death. Specializing in municipal bond issues, Harper was known for his creativity in securing financing for many of Kentucky’s most distinctive growth projects spanning the last 50 years.

He is survived by Mrs. Harper and two sons, Spencer III of New York, N.Y. and Grafton of Santa Monica, Calif. He was predeceased by his brother, Frank D. Harper, a Navy Veteran, of Norfolk, Va.

Professionally, Harper was a member of the Louisville, Kentucky, and American Bar Associations as well as the prestigious American College of Bond Counsel and the National Association of Bond Lawyers. In 2011, he received the first Lawyer of the Year award in Public Finance from “The Best Lawyers in America.”

**MARTIN GLAZER**, 93, passed away April 27, 2017 at Westport Place Health Campus. Martin had a long and distinguished career in Frankfort as assistant attorney general for the Commonwealth of Kentucky. He also worked as a hearing officer for a number of local agencies, including the Board of Medical Licensure, the Board of Nursing, and the Board of Realtors. He was a veteran of World War II, having served in the army air corps. Martin was a graduate of the Brandeis School of Law at the University of Louisville.

Survivors include his daughter, Ann Glazer Niren and her husband Howell Niren, step-sons, Dr. Andy Gold and his wife, Lauren Schuver, and Rob Gold and his wife Debby Gold. In addition, he leaves behind grandchildren and step-grandchildren.

The above information for Martin Glazer was pulled from a version that appeared in the Courier-Journal from April 28 to April 30, 2017. To access the full obituary, visit: http://www.legacy.com/obituaries/louisville/obituary.aspx?pid=185226818.

**CLAUDE RAY “CHIP” BOWLES, JR.**, 58, of Louisville, passed away April 18, 2017. He was a partner at Bingham Greenebaum Doll LLP, general counsel to The Game Manufacturers Association (GAMA), chair of the American Bankruptcy Institute's Chapter 11 Professional Fee Study, vice-chair and driving force behind the American Bankruptcy Institute's National Ethics Task Force, and a devoted husband, father, and friend. He went to the University of Kentucky where he graduated with a B.A. in history with high distinction in 1981 followed by law school, graduating with a J.D. with high distinction in 1984. Bowles served as the career law clerk to the Honorable Henry H. Dickinson, United States Bankruptcy Judge for the Western District of Kentucky-an environment that nurtured his natural aptitude for legal writing. He is survived by his son Charles Ray Bowles, a student at NYU’s Robert F. Wagner Graduate School of Public Service.

The above information for Claude Ray “Chip” Bowles, Jr., was pulled from a version that appeared on Legacy.com. To access the full obituary, visit: http://www.legacy.com/obituaries/cknj/obituary.aspx?n=claude-ray-bowles-chip&pid=185224763.
Amye L. Bensenhaver has been named director of the Bluegrass Institute’s newly created Center for Open Government. The Bluegrass Institute is a free market think tank with a longstanding commitment to government transparency and accountability. She will lead the Institute’s initiatives in advancing the cause of open government in Kentucky commencing with the publication of a report in which she argues for clarification and modernization of the commonwealth’s sunshine laws. Bensenhaver served as an assistant attorney general for 25 years working in the area of open meetings and open records.

Five attorneys and two staff from the Fulkerson law firm have joined the McBrayer law firm in Lexington. Attorneys Calvin Fulkerson, Amber Knouff, Kyle Virgin, Chad Thompson and Kathryn Eckert together bring a breadth of knowledge and experience to McBrayer. The Fulkerson group specializes in medical malpractice, which will enhance McBrayer’s healthcare practice, allowing us to support healthcare providers’ needs from regulatory compliance to licensing and beyond. The added practice services of these new attorneys also encompass other professionals, including lawyers, architects, engineers, accountants and realtors who face malpractice claims.

From Left to right: Kathryn Eckert, Kyle Virgin, Calvin Fulkerson, Amber Knouff, and Chad Thompson.

Business law firm Bingham Greenebaum Doll LLP announces two new attorney hires in its Lexington office, partner P. Branden Gross and associate Jacob K. Michul, to further strengthen the firm’s real estate and transactional practices in Indiana, Kentucky and Ohio markets. Gross has extensive experience in real estate and finance law and is now a member of firm’s economic development department and real estate practice group. His comprehensive practice focuses on real estate transactions, real estate title examinations and title insurance, commercial real estate acquisitions, banking law and financing, equipment and asset based financing, land use, real estate taxes, landlord and tenant negotiations and disputes, and loan enforcement and defense. Gross also assists in-state and out-of-state investors with acquisitions of property in Kentucky in relation to like-kind exchanges (IRC Section 1031). Michul focuses his practice primarily on real estate and business transactions and is now a member of our economic development department and real estate practice group. Michul regularly helps clients navigate a broad range of commercial real estate matters, including acquisitions, dispositions, leasing, financing, development, title examinations and insurance, investment, operations, and land use/zoning. He also provides clients with general counsel services and advises clients in connection with business mergers and acquisitions, business financing and structuring, and a variety of commercial contracts. Gross earned his J.D. in 2002 from the University of Kentucky College of Law, and his B.A. in history with Departmental Honors from the University of Kentucky College of Arts and Sciences in 1999. Michul earned his J.D. in 2009 from the University of Kentucky College of Law, and his B.S. in economics, magna cum laude, from the University of Kentucky Gatton College of Business and Economics in 2006.

Gwin Steinmetz & Baird PLLC announces that Anna C. Zwicky has joined the nursing home defense practice. Zwicky is a 2016 graduate of the University of Louisville Brandeis School of Law and is admitted to practice in Kentucky.

Stites & Harbison, PLLC, welcomes attorney John S. Wathen to the Louisville office. He joins the creditors’ rights & bankruptcy service group. Wathen’s practice focuses on lender liability actions, contested mortgage litigation (TILA, RESPA, FDCPA, FCRA, and state law claims), commercial real estate disputes, general commercial litigation, and representing creditors in bankruptcy.
court. Wathen earned his J.D. from the University of Kentucky College of Law in 2013 and his Bachelor of Arts in history from Vanderbilt University in 2010. Wathen is admitted to practice in Kentucky and the United States District Court for the Western District of Kentucky.

The law firm of O’Bryan, Brown & Toner, PLLC, announces that Kathleen Watson has joined their Louisville office as an associate attorney. Watson was born and raised in Henderson, Ky. She obtained a B.S. with honors from Murray State University and went on to obtain her J.D. with high honors and a Certificate of Excellence in Advocacy from Northern Kentucky University, Salmon P. Chase College of Law. While in law school, she was a senior associate editor of the NKU Law Review and a pupil of the Chase Inn of Court. Watson joined O’Bryan, Brown & Toner, PLLC, as an associate in the Spring of 2017. Her practice is dedicated to representing health care clients and attorneys against claims of professional negligence. She is licensed to practice law in Kentucky, Ohio and Indiana.

Dickinson Wright PLLC announces that Kerry B. Harvey, former United States Attorney for the Eastern District of Kentucky, has joined the firm’s Lexington office as a member. Harvey served as the United States Attorney for the Eastern District of Kentucky from 2010 into 2017. He served as the Department of Justice’s Chief Federal Law Enforcement Officer in Kentucky’s 67 easternmost counties and was responsible for achieving landmark criminal convictions and civil recoveries for fraudulent healthcare practices, prosecuting significant public corruption cases, and prosecuting large-scale drug trafficking organizations. Harvey’s national responsibilities and significant efforts at DOJ included serving on the National Heroin Task Force; serving three years on the Attorney General’s Advisory Committee (AGAC), select appointees by the Attorney General as advisors to the Attorney General and as the voice for United States Attorneys nationwide; serving as co-chairman of the AGAC’s Healthcare Fraud Working Group; and establishing the highly successful U.S. Attorney’s Heroin Education Action Team, an initiative to increase public awareness of the opioid epidemic. Harvey is a member of the Kentucky Bar Association. He received his B.S. from Murray State University and his J.D. from the University of Kentucky College of Law.

Bluegrass Elderlaw, PLLC, announces the addition of Katherine E. Finnell to the firm. Finnell formerly owned and operated Katherine Finnell, LLC, a successful estate planning firm. She received her B.A. from the University of Kentucky in 2004 and earned her J.D. from Northern Kentucky University Chase College of Law in 2008. In 2016, she earned her LLM in Elder Law from Western New England University. She is a member of the American, Kentucky and the Fayette County Bar associations. She has experience in elder law, estate planning, corporate law, and foreclosures.

Dickinson Wright PLLC announces that Andrew L. Sparks, former Assistant United States Attorney for the Eastern District of Kentucky, has joined the firm’s Lexington office. Sparks assists clients with internal and government investigations, health care and False Claims Act matters, and commercial litigation. Before joining Dickinson Wright, he served as Assistant United States Attorney for the Eastern District of Kentucky for 15 years. Sparks served as the chief of the fraud division, where he led the unit responsible for all matters involving health care fraud, financial fraud, bank fraud, tax fraud, public corruption, cybercrime, environmental crime and civil False Claims Act cases. Sparks has also been an adjunct professor at the University of Kentucky College of Law, where he taught classes in litigation skills and legal writing. He has received commendations from numerous federal agencies, including the Department of Justice, the Department of Homeland Security, the Department of Health and Human Services, the Department of Labor, the United States Postal Service, the United States of Bureau of Prisons, and
the Internal Revenue Service. Sparks received his B.A. from Transylvania University and his J.D., with honors, from the University of Kentucky College of Law.

Gwin Steinmetz & Baird PLLC announces that Kevin M. Murphy has joined the firm as a partner. Murphy focuses his practice in the nursing home defense practice.

Luke A. Swain joins Dinsmore & Shohl LLP’s Louisville office as an associate in the firm’s corporate department. Swain returns to Dinsmore from Houston, Texas, where he defended clients in tax controversy matters. He focuses his practice primarily on taxation, as well as trust & estate issues. Swain has defended businesses and shareholders around the country in audits and examinations on both state and federal levels, handling complex tax defense during both exam and appeals. Swain also counsels clients on a variety of general corporate and traditional business matters including business formation, M&A transactions, executive compensation, and employee benefits. Swain earned his J.D. from University of Kentucky College of Law and earned his LLM in Taxation from New York University School of Law.

Bubalo Goode Sales & Cronen PLC has announced Taylor Mayer as the firm’s newest attorney in its Louisville location. His work will focus on representing consumers in mass tort claims against medical device manufacturers. Mayer graduated, summa cum laude, from the University of Kentucky with an undergraduate degree in finance. He went on to graduate from the Indiana University Maurer School of Law in Bloomington in 2013.

 Middleton Reutlinger announces that the intellectual property practice group is expanding with the addition of an associate, Kylie Hofmann. Hofmann focuses on trademark and copyright law. Prior to joining Middleton Reutlinger, Hofmann worked as an associate in the Louisville office of a regional law firm. While there, she focused on business and developing an understanding of business formation and finance. Hofmann received her Bachelor of Arts in communications with a minor in Spanish from the University of Louisville. She then received a Juris Doctor from the University of Louisville Louis D. Brandeis School of Law.

Wyatt, Tarrant & Combs, LLP, announces that the Leadership Kentucky Selection Committee recently selected Kathie McDonald-McClure to be part of Leadership Kentucky 2017. Leadership Kentucky is an educational organization dedicated to developing the talents and energies of Kentucky’s present and emerging leaders. McDonald-McClure is a partner in Wyatt’s Louisville office and concentrates her law practice on health care with a focus on contractual and regulatory compliance and on data privacy and security with a focus on incident response and policy development. She serves on GLI’s Health Policy Committee and its Health Enterprises Network Advisory Board. McDonald-McClure is a member of the Kentucky, Louisville and American Bar associations, the American Health Lawyers Association, the Health Care Compliance Association and International Association of Privacy Professionals, among others. McDonald-McClure attended both Murray State University and the University of Louisville, earning her B.S.B.A. with highest honors from the University of Louisville. She earned her law degree from the University of Louisville Louis D. Brandeis School of Law.

Attorneys from Dinsmore & Shohl, LLP, attended the Civil Rights Investigator and Certification training with the Association of Title IX Administrators (ATIXA). ATIXA is a professional association for high school and college Title IX coordinators and administrators interested in effectively implementing Title IX best practices on their campuses. The
Dinsmore attorneys certified as investigators include Michael W. Hawkins, Mindy Barfield and Elizabeth Younger, members of the new Title IX group within the firm. Collectively, these attorneys have extensive experience representing colleges and universities and conducting Title IX audits and investigations. Title IX has proved to be a powerful tool in helping advance gender equity in schools. Dinsmore’s new Title IX group aims to provide Title IX compliance and investigation training opportunities, as well as campus policy audits and investigative services for colleges, universities, and school districts across the Ohio River Valley and Great Lakes regions.

Gold Medal Products Co., the world’s leading manufacturer and distributor of concession food equipment and supplies, announces James Adam Browning has been appointed to the office of president. Browning joined Gold Medal in 2010 and most recently served in the dual role of executive vice president and general counsel. Browning received his B.S. from Centre College in 2000 and his J.D. from NKU – Chase College of Law in 2003 and previously practiced as an attorney at Dinsmore & Shohl. Gold Medal was founded in 1931 and currently employs over 500 people across 14 locations including its 500,000 sq. ft. manufacturing headquarters in Cincinnati.

John M. Williams received the Fayette County Bar Association’s 2017 Citizen-Lawyer Award at the Fayette County Bar Association Law Day Celebration and Luncheon on May 1, 2017. This award is given annually in recognition of distinguished civic activity and exemplary legal services to clients, the community and the bar. Williams is a member of the Lexington law firm of Rajkovich, Williams, Kilpatrick & True, PLLC.

Medical News recently appointed Stites & Harbison, PLLC, attorney Kelly White Bryant to serve on its editorial board. She also was recently elected to serve on the Kentucky Academy of Hospital Attorneys’ Board of Directors. Medical News, an IGE Media publication, is the region’s leading monthly newspaper covering the business of healthcare in Kentucky and Southern Indiana. Medical News and the editorial board help provide healthcare leaders with actionable news and information to help them grow their businesses and practices. The Kentucky Academy of Hospital Attorneys is one of 22 allied societies of the Kentucky Hospital Association. The allied societies offer networking and educational opportunities for different health related fields. Bryant is a member (partner) of Stites & Harbison based in the Louisville office. As a member of the health care service group, her practice is devoted to health law, focusing on regulatory matters, transactional matters and certificate of need matters. Besides her two recent board appointments, she also serves on the Board of Directors of the Neighborhood House, a community center serving Portland and surrounding neighborhoods.

The Fayette County Bar Association (FCBA) has honored Matt Parsons with its 2017 Outstanding Young Lawyer Award. FCBA presented the award May 1 during its Annual Law Day Luncheon. The Outstanding Young Lawyer Award recognizes a member of the FCBA who has practiced in Fayette County for less than 10 years, fulfilled an attorney’s duties to the court, clients and community, and shown dedication to the justice system through community involvement. As a member of Stoll Keenon Ogden, Parsons focuses his practice on civil litigation, particularly in the areas of business litigation, products liability and warranty defense, insurance defense, and employee benefits litigation. Parsons currently is past president of the FCBA Young Lawyers Section and previously served on the boards of directors of the FBCA and the Fayette County Bar Foundation. He currently is a volunteer instructor with Junior Achievement and leads fundraising efforts for God’s Pantry Food Bank and other charities. He is a graduate of the University of Kentucky College of Law and holds a bachelor’s degree in computer information systems from the Kelley School of Business at Indiana University.

Bubalo Goode Sales & Cronen PLC announces that Managing Partner Gregory Bubalo has achieved recertification in civil pretrial and civil trial law through The National Board of Trial Advocacy (NBTA). Approximately three percent of American lawyers are board certified in a specialty area. Bubalo has been an NBTA member in good standing for 15 years since initial
certification in April 2002. The NBTA was formed out of a strong conviction that both attorneys and their clients would benefit from an organization designed specifically to create an objective set of standards illustrating an attorney’s experience and expertise in the practice of trial law. Bubalo graduated magna cum laude and Phi Beta Kappa from Illinois College and magna cum laude from Indiana University School of Law.

The Lexington Christian Academy recognized attorney Peter Brackney as its 2017 distinguished alumni of the year. The Distinguished Alumni Award is given for a life that typifies a commitment to Christ in every area of their lives and someone who has made contributions to their church, their community, or their profession. He graduated from Lexington Christian Academy in 2002 before attending the University of Kentucky for both undergraduate studies and law school. He has served on the boards of the Blue Grass Trust for Historic Preservation, ProgressLex, the Lexington History Museum, Nicholasville NOW!, and South Elkhorn Christian Church. Brackney practices primarily in the areas of estate planning and bankruptcy at his firm, Brackney Law Office, PLLC, located in Lexington.

Sarah P. Jarboe became a partner at English Lucas Priest and Owsley (ELPO) on Jan. 1, 2017. Jarboe handles environmental law and civil litigation for ELPO. She is serving as chair of the environment, energy and resources law section of the Kentucky Bar Association, sits for the second year on the American Bar Association’s Section of Environment, Energy, and Resources (SEER) Fall Conference Planning Committee, and participated in SEER’s 2014-2015 Leadership Development Program. Jarboe is a graduate of Vanderbilt Law School, and earned her Bachelor of Arts degree at the University of Louisville. She joined ELPO in 2013 after serving as a law clerk for two years for Chief Justice John D. Minton of the Kentucky Supreme Court.

Hare Wynn announces that Brian M. Vines was admitted to partnership on May 1, 2017. Over the course of his time with at Hare Wynn, Vines has exhibited the highest level of professionalism, dedication to the firm’s clients and commitment to the firm’s core values. The firm congratulates him for the manner in which he has distinguished himself in the courtroom and in his community. He operates out of the firm’s Lexington office and represents individuals, businesses and even the Commonwealth, in litigation across Kentucky and the country. He has practiced law since 2007, joining Hare Wynn in 2011.

Thompson Miller & Simpson PLC announces that Mitchell Denham was recently appointed to a second four year term on the Norton Children’s Hospital Foundation. Denham serves on the Foundation’s Finance and Grants Committee. Previously appointed to the University of Louisville’s Board of Trustees by the Governor of Kentucky Matt Bevin, the Kentucky Senate confirmed the appointment of Stites & Harbison, PLLC, attorney Brian Cromer to serve on the Board of Trustees for a three-year term. Cromer is a member (partner) of Stites & Harbison based in the Louisville office. His practice focuses on providing a variety of legal services for companies at all stages, from large public companies to middle market businesses to new ventures. He is a member of the Board of Directors of Greater Louisville, Inc. He serves on the Board of Trustees of Kentucky Wesleyan College. He served as a member of the Steering Committee of 21st Century Parks, a non-profit organization that acquired and developed Floyds’ Fork, which has 4,000 acres of parkland in Metro Louisville.

U.S. Sen. Mitch McConnell appointed a Somerset judge to a national juvenile justice advisory board. Pulaski County Circuit Judge David Tapp will have a three-year term on the Coordinating Council on Juvenile Justice and Delinquency Prevention. The council reports to the president and Congress through the Department of Justice. Judge Tapp has been a circuit court judge since 2005. He received his J.D. from the University of Louisville.

WHO, WHAT, WHEN & WHERE

Photo by JeffRogers.com

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