Kentucky Law Edition

ARTICLES
Relationship Between Federal and State Constitutional Law ..................Honorable Donald C. Wintersheimer 257

Setting Child Support for the Low Income and High Income Families in Kentucky ........Judge Gregory M. Bartlett 281

The Role of Ethics and Unauthorized Practice Opinions in Regulating the Practice of Law in Kentucky ..................William H. Fortune 309

Expert Testimony in Kentucky: Think Fast — Today's Standard May Change Tomorrow ..................Joan Brady 333

The Kentucky Ban on Insurers' In-House Attorneys Representing Insureds ..........................Grace M. Giesel 365

Kentucky Real Property Law in Review: Three Cases, Taxes, and a "Non-Closing" ..................Caryl A. Yzenbaard 407

Provision for the Surviving Spouse Under Kentucky Law ........................................Robert L. Stenger 429

NOTES
Giuliani v. Guiler: Stealing the General Assembly's Thunder ..........................Jamie M. Ramsey 445

Lane v. Commonwealth: The Kentucky Supreme Court Doesn't Turn the Other Cheek ..................Paige L. Bendel 473
ARTICLES

RELATIONSHIP BETWEEN FEDERAL AND STATE CONSTITUTIONAL LAW

BY HONORABLE DONALD C. WINTERSHEIMER

I. INTRODUCTION

As has been pointed out in previous articles, the primary focus of constitutional law in the United States has been the Federal Constitution and its judicial interpretations. Many legal scholars have been preoccupied with federal constitutional questions. However, the Federal Constitution relies extensively on mechanisms provided in state constitutions and leaves nearly all matters within the boundary of state authority to be regulated by state constitutions and laws.

There has been an increased interest in the judicial interpretation of individual rights as provided in state constitutions. This development frequently provides greater civil liberties for citizens than are generally required by the Federal Constitution and the state constitutional decisions are generally insulated from federal review.

The Federal Constitution is a grant of enumerated powers upon which all exercises of federal authority must be based. In contrast, state constitutions serve as a limitation on the otherwise sovereign power of the states to make laws and govern themselves.

1. The Honorable Donald C. Wintersheimer is an Associate Justice of the Kentucky Supreme Court and is a Distinguished Jurist in Residence at Salmon P. Chase College of Law. (B.A., Thomas Moore College; M.A., Xavier University; J.D., University of Cincinnati).

II. UNITED STATES SUPREME COURT DECISIONS

In *Agostini v. Felton*, the United States Supreme Court recently overruled two twelve-year old decisions that had barred sending public school teachers into parochial schools. In a 5-4 ruling, the Court held that a federal program that funds remedial instruction and counseling of disadvantaged children in public and private schools does not violate the First Amendment's Establishment Clause.

In *Agostini*, the opinion delivered for the majority of the Court by Justice O'Connor held that a federally-funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of a sectarian school by government employees under a program containing safeguards such as those present in New York City's Title I program. Consequently, *Aguilar*, and that portion of its companion case, *Ball*, addressing a "shared time" program, are no longer valid law.

The majority noted that *Zobrest v. Catalina Foothills School District* rejected an Establishment Clause challenge to a parochial school student's use of a publicly-funded sign language interpreter. *Zobrest* expressly rejected the notion, relied on in *Ball* and *Aguilar*, that based solely on one's presence on private school property, a public employee will be presumed to inculcate religion into the students. The end of that assumption eliminates the perceived need in *Aguilar* for a "pervasive monitoring." The Supreme Court found no genuine basis for confining *Zobrest* to the use of sign language interpreters. The Court further said the rule of *Ball*, to the effect that "all government" aid that directly aids the educational function of

5. Id. at 2016.
6. Id.
7. Id.
10. Id.
11. Id. at 2011.
12. Id.
religious schools is invalid, was abandoned in \textit{Witters v. Washington Department of Services for the Blind}.\textsuperscript{13} \textit{Witters} upheld a state tuition grant to a blind seminarian under a program like Title I, which offered educational aid without regard to the religious or secular nature of the institution.\textsuperscript{14} In both \textit{Zobrest} and \textit{Witters}, the United States Supreme Court observed that any money that found its way to the religious institution did so as a result of a private decision by the recipient of such aid.\textsuperscript{15}

It would appear that the \textit{Agostini} decision would have little impact on the Kentucky position expressed in \textit{Fannin v. Williams},\textsuperscript{16} which held that the appropriation of tax money for distributing textbooks to children in non-public school was in violation of Section 171 of the Kentucky Constitution as well as a number of other constitutional sections.\textsuperscript{17} The majority in \textit{Fannin} held that the problem was not whether the statute in question would pass muster under the Federal Constitution, but whether it satisfied the more detailed and explicit provisions of the Kentucky Constitution found in Section 186.\textsuperscript{18}

\textbf{The Relationship Between States' Rights and the Federal Judiciary}

In a series of other decisions rendered near the end of the 1997 term, the United States Supreme Court indicated an increased respect for individual state sovereignty in a number of areas that might be considered social or cultural. In striking down portions of the Religious Freedom Restoration Act,\textsuperscript{19} the United States Supreme Court in \textit{City of Boerne v. P.F. Flores},\textsuperscript{20} in a 6-3 decision, substantially reduced the authority of Congress under the

\begin{footnotes}
\footnotetext{13. 474 U.S. 481 (1986).}
\footnotetext{14. \textit{Agostini}, 117 S. Ct. at 2111 (citing \textit{Witters}, 474 U.S. at 487).}
\footnotetext{15. \textit{Id.} at 2012.}
\footnotetext{16. 655 S.W.2d 480 (Ky. 1983).}
\footnotetext{17. \textit{Id.} at 484; Section 171 of the Kentucky Constitution deals with taxes to be levied and collected for public purposes only by general laws and to be uniform within classes. KY. CONST. § 171.}
\footnotetext{18. \textit{Id.} at 483; Section 186 of the Kentucky Constitution provides that:
All funds accruing to the school fund shall be used for the maintenance of the public school of the Commonwealth and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes. KY. CONST. § 186.}
\footnotetext{20. 117 S. Ct. 2157 (1997).}
\end{footnotes}
Fourteenth Amendment to protect churches and personal faith in a rather routine zoning dispute arising out of a Texas church's appeal from a refusal to allow it to enlarge its missionary style sanctuary.\textsuperscript{21} In \textit{Idaho v. Coeur d'Alene Tribe of Idaho},\textsuperscript{22} the United States Supreme Court suggested a restriction on the jurisdiction of the federal judiciary in suits where individual states are accused of violating constitutional rights.\textsuperscript{23} The \textit{Idaho} decision determined that the federal courts did not have jurisdiction over the case in which the State of Idaho was accused of violating the constitutional right to due process.\textsuperscript{24} The Court found that Idaho had sovereign immunity from a suit in federal court.\textsuperscript{25} The Eleventh Amendment to the Federal Constitution, which has been considered dormant for a number of years, reads as follows:

"[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state."\textsuperscript{26}  

\textit{Ex Parte Young}\textsuperscript{27} held that a suit might go forward in federal court if the plaintiff named the governor of the state as a defendant as distinguished from the state itself.\textsuperscript{28}  In 1996, \textit{Seminole Tribe v. Florida}\textsuperscript{29} reversed the attempt of Congress to waive the sovereign immunity of the states under the authority of the Interstate Commerce Clause, but did not consider whether the states could be forced into federal court in a Fourteenth Amendment suit.\textsuperscript{30} \textit{Idaho} would still allow federal suits in extraordinary cases, determined on a case by case basis, although it indicates that when a claim is brought against a state for violation of a constitutional right, the primary adjudication should be left to the state courts, "assuming the availability of a state forum with the authority and procedures adequate for the effective

\begin{itemize}
\item \textsuperscript{21} Id.
\item \textsuperscript{22} 117 S. Ct. 2028 (1997).
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. at 2043.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} U.S. CONST. amend. XI.
\item \textsuperscript{27} 209 U.S. 123 (1908).
\item \textsuperscript{28} Id. at 157.
\item \textsuperscript{29} 116 S. Ct. 1114 (1996).
\item \textsuperscript{30} Id.
\end{itemize}
vindication of federal law."\(^{31}\)

Some people believe that federal involvement in constitutional rights became popular when it was thought that there was no other option available to block states from violating individual civil rights. Some now believe that excessive federal involvement in local affairs can no longer be justified. In many respects, these decisions must be considered on a case by case basis and the future decisions of the United States Supreme Court will undoubtedly elaborate on the questions raised by the various cases rendered in 1996 and 1997.

III. KENTUCKY'S APPROACH TO THE INTERPLAY BETWEEN FEDERAL AND STATE CONSTITUTIONAL LAW

Recent Kentucky Supreme Court decisions have highlighted the interplay between federal and state constitutional law provisions.

A. Flying J\(^{32}\)

\textit{Flying J Travel Plaza v. Commonwealth, Transportation Cabinet}\(^{33}\) was a billboard case. The Transportation Cabinet sought an injunction directing Flying J to remove a sign and precluding them from erecting or maintaining any sign in violation of the Billboard Act.\(^{34}\) The Kentucky Supreme Court pointed out that the First and Fourteenth Amendments of the Constitution of the United States provide protection for commercial free speech.\(^{35}\) Although reasonable time, place and manner restrictions may be used, the state government had the responsibility of justifying such restrictions.\(^{36}\) The court went on to state that the legal reasoning relating to commercial speech is also applicable to non-commercial speech.\(^{37}\)

\(^{31}\) Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2037 (1997) (noting a State's right and duty to interpret and follow the Constitution within their own judiciaries).

\(^{32}\) Flying J Travel Plaza v. Commonwealth, Transportation Cabinet, 928 S.W. 2d 344 (1996).

\(^{33}\) Id.


\(^{35}\) Flying J, 928 S.W.2d at 348.

\(^{36}\) Id.

\(^{37}\) Id. at 350.
Brown v. Hartlage\textsuperscript{38} states in part that "[t]he courts are charged with reviewing state regulations to determine if a regulation is necessary to serve a compelling state interest and if it had been narrowly written to protect against the evil that the government can control."\textsuperscript{39} This decision was cited with approval in \textit{J.C.J.D. v. R.J.C.R.} \textsuperscript{40}

In \textit{Flying J}, the court held that the regulations which prohibit commercial speech but which allow time, date, temperature or weather information to be displayed are substantially broader than necessary to protect the governmental interests of highway safety and aesthetics.\textsuperscript{42} The Cabinet failed to demonstrate a reasonable connection between the requirements of highway safety and aesthetics and did not narrowly tailor the regulation to achieve any desired objectives on the part of the government.\textsuperscript{43} As a result it developed an unconstitutional regulation on commercial free speech.\textsuperscript{44} The court went on to hold that the regulations were also unconstitutional restrictions upon non-commercial free speech because the state has chosen to allow some non-commercial messages to be displayed, therefore it must allow all non-commercial messages within the time frame to be displayed.\textsuperscript{45}

\textbf{B. Associated Industries}

In \textit{Associated Industries of Kentucky v. Commonwealth},\textsuperscript{46} the Kentucky Code of Legislative Ethics\textsuperscript{47} and the Executive Branch Code of Ethics\textsuperscript{48} were challenged as being unconstitutional under the Constitutions of both Kentucky and the United States.\textsuperscript{49} The provisions which include equal protection, right of petition, right of association and due process were challenged for vagueness or

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{38} 456 U.S. 45 (1982).
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} 803 S.W.2d 953, 955 (Ky. 1991).
\item \textsuperscript{41} \textit{Flying J}, 928 S.W.2d at 348.
\item \textsuperscript{42} \textit{Flying J}, 928 S.W.2d at 351.
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} \textit{Id.} at 349.
\item \textsuperscript{46} 912 S.W.2d 947 (1995).
\item \textsuperscript{48} KY. REV. STAT. ANN. §§ 11A.001-11a.990 (Michie 1993 & Supp. 1996).
\item \textsuperscript{49} \textit{Associated Indus.}, 912 S.W.2d at 949. Changes to the Kentucky Code of Legislative Ethics and the Executive Branch Code of Ethics, were prompted in 1993 by Kentucky's political scandal involving indictment and conviction of legislators and lobbyists for criminal misconduct. \textit{Id.} at 950.
\end{itemize}
\end{footnotesize}
overbreadth.  

The Kentucky Supreme Court ultimately held that these statutes were neither overly broad nor were they violative of the appellant's freedom of association and right to petition under the Kentucky Constitution or the United States Constitution. One of the appellant's basic positions was that the fundamental constitutional rights to freedom of association and freedom of petition, guaranteed by the First Amendment to the United States Constitution and Section One of the Kentucky Constitution, were adversely impacted by the Code of Ethics legislation. All parties agreed with the premise that the First Amendment to the United States Constitution and Section One of the Kentucky Constitution are designed to protect the rights of citizens in a democratic society to participate in the political process of self-government. The United States Constitution, by the First Amendment, provides, "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." This Amendment becomes applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Kentucky Constitution separately heralds the protection of these rights by the provisions of Section One of the Kentucky Constitution:

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

Fourth: The right of freely communicating their thoughts and opinions.

Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.

50. Id.
51. Id. at 951.
52. Id. at 952.
53. Id.
54. U.S. CONST. amend. I.
55. Associated Indus., 912 S.W.2d at 952.
56. KY. CONST. § 1.
The appellant's specific arguments included broad attacks upon the statutory reporting and disclosure scheme imposed upon it by this legislation. It relied upon both Constitutions, supplemented with the statement that the most fundamental protection of Kentucky citizens comes from its own constitution, with the United States Constitution serving as a floor. Therefore, Kentucky is free to interpret its own constitution and afford its citizenry rights of petition and association in excess of those which are federally guaranteed.

The court held that the conduct prohibited by Kentucky Revised Statute section 6.811 and the registration, disclosure, and reporting requirements of the respective codes did not constitute impermissible abridgement of the First Amendment right to petition and freedom of association. Moreover, the court observed that the right to associate for the advancement of political ideas is undoubtedly protected by the United States Constitution. The majority also noted the close relationship between the freedom of speech, the freedom of association and the right to petition the government, asserting that the freedom of speech "remains the highest of the liberties safeguarded by the Bill of Rights." Furthermore, the court stated that the government may cautiously regulate the exercise of the right of political association when the government can demonstrate "that a sufficiently important interest exists and there is employed a narrowly drawn means which avoids unnecessary abridgement of associational rights."

The court determined that the legislation did not violate the United States Constitution "although a theorist may correctly assert that under Kentucky's Constitution the rights of association and petition may not be absolutely synonymous with that of the federal constitution." The court was not convinced in this case that the freedoms of petition and association under the Kentucky

57. Associated Indus., 912 S.W.2d at 952.
58. Id.
59. Id.
60. Id. (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)).
61. Associated Indus., 912 S.W.2d at 952 (citing United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n., 389 U.S. 217, 222 (1967)).
62. Associated Indus., 912 S.W.2d at 952-53 (citing Buckley v. Valeo, 424 U.S. 1, 25 (1976)).
63. Associated Indus., 912 S.W.2d at 953.
Constitution should have been given a broader scope or a different analysis than the corresponding rights under the United States Constitution.\textsuperscript{64}

In addition, the court pointed out that

[w]hile there is an absence of state authority relative to identical treatment as to the corresponding rights of association and petition under Section 1(6) of the Kentucky Constitution and that of the United States Constitution, there is a similarity between the wording of the state and federal constitutional rights of freedom of association and petition.\textsuperscript{65}

The rights of association and petition under the federal constitution are closely allied to freedom of speech, which is subject to the closest scrutiny.\textsuperscript{66} The court held that United States v. Harris\textsuperscript{67} "continues to represent a valid interpretation of constitutional law to be cited as authority by the state court as well as the federal court."\textsuperscript{68} Also, the court recognized that some refinement has developed with the authority so mentioned.\textsuperscript{69}

Furthermore, the court reasoned that the registration, disclosure and reporting provisions of the Kentucky Code of Legislative Ethics\textsuperscript{70} and the Executive Branch Code of Ethics\textsuperscript{71} were constitutional in view of the purpose and intent expressed by the legislature in enacting such laws.\textsuperscript{72} The court held that the "legislature has not sought to prohibit lobbying, but has provided modestly for a modicum of information from those who, for hire, attempt to influence legislation; or, who collect or spend funds for that purpose."\textsuperscript{73} It finally declined to hold that the "registration, reporting and disclosure provisions of the two codes are an impermissible burden on the members' freedom of association and right to petition."\textsuperscript{74}

\textsuperscript{64} Id. (citing Commonwealth v. Foley, 798 S.W.2d 947, 953 (1990)).
\textsuperscript{65} Associated Indus., 912 S.W.2d at 953-54.
\textsuperscript{66} Id. at 954 (citing Buckley v. Valeo, 424 U.S. 1, 25 (1976)).
\textsuperscript{67} 347 U.S. 612 (1954).
\textsuperscript{68} Associated Indus., 912 S.W.2d at 954.
\textsuperscript{69} Id.
\textsuperscript{72} Associated Indus., 912 S.W.2d at 954.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
C. Burge

As an example of the changing circumstances, or attitudes of the Kentucky Supreme Court, the decision of Commonwealth v. Burge\(^7\) reversed the previous position of the court expressed in Ingram v. Commonwealth\(^6\) and Walden v. Commonwealth.\(^7\) The majority in Ingram distinguished the interpretation of Section Thirteen of the Kentucky Constitution from the interpretation of the Double Jeopardy Clause of the United States Constitution in the venerable case of Blockburger v. United States.\(^8\) Burge returns to the Blockburger definition of Double Jeopardy in Kentucky.\(^9\)

Specifically, the Kentucky Supreme Court overruled Ingram,\(^8\) Walden,\(^9\) Hall v. Commonwealth,\(^8\) Jones v. Commonwealth,\(^8\) Hellard v. Commonwealth,\(^4\) Hamilton v. Commonwealth,\(^8\) and Denny v. Commonwealth,\(^8\) and held that a sentence of imprisonment for criminal contempt did not prevent a prosecution for burglary, assault and retaliation against a witness on double jeopardy grounds.\(^7\) The court clarified the double jeopardy position by stating that double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct so long as each statute requires proof of an additional fact which the other does not.\(^8\) In any Double Jeopardy analysis, the court must determine whether the act or transaction complained of constitutes a violation of two distinct statutes and if it does, whether each statute requires proof of the act.\(^9\) In this case, the sentence of imprisonment for indirect criminal contempt based on

\(\)\(^7\) 947 S.W.2d 805 (Ky. 1997).
\(\)\(^6\) 801 S.W.2d 321 (Ky. 1990).
\(\)\(^7\) 805 S.W.2d 102 (Ky. 1991).
\(\)\(^8\) Ingram, 801 S.W.2d at 323 (distinguishing Blockburger v. United States, 284 U.S. 299 (1932)).
\(\)\(^9\) Burge, 947 S.W.2d at 811.
\(\)\(^10\) 801 S.W.2d 321 (Ky. 1990).
\(\)\(^11\) 805 S.W.2d 102 (Ky. 1991).
\(\)\(^12\) 819 S.W.2d 39 (Ky. Ct. App. 1988).
\(\)\(^13\) 756 S.W.2d 462 (Ky. 1988).
\(\)\(^15\) 659 S.W.2d 201 (Ky. 1983).
\(\)\(^16\) 670 S.W.2d 847 (Ky. 1984).
\(\)\(^17\) Commonwealth v. Burge, 947 S.W.2d 805, 811-12 (Ky. 1997).
\(\)\(^18\) Id. See KY. CONST. § 13. See also KY. REV. STAT. ANN. § 505.020(1)(a) & (2) (Michie 1993 & Supp. 1996) (containing Kentucky's double jeopardy clause).
\(\)\(^19\) Burge, 947 S.W.2d at 811.
a violation of a restraining order did not prevent prosecution for first-degree burglary on double jeopardy grounds.\(^{90}\) The crime of contempt did not require proof that defendant entered the home with the intent to commit a crime while carrying a deadly weapon.\(^{91}\) Also, the crime of burglary did not require proof that the defendant had knowledge that a valid court order prohibiting such conduct was in effect.\(^{92}\)

The court recognized that in \textit{Cooley v. Commonwealth},\(^ {93}\) it had followed decisions of the Supreme Court of the United States and interpreted Section Thirteen of the Kentucky Constitution as affording protections which paralleled those guaranteed by the Fifth Amendment to the Federal Constitution.\(^ {94}\) Accordingly, the United States Supreme Court's decisions are germane to any analysis of double jeopardy under both the federal and state Constitutions.\(^ {95}\)

In \textit{Burge}, the reasoning cited by the United States Supreme Court in \textit{United States v. Dixon}\(^ {96}\) was adopted by the Kentucky Supreme Court in a 5-2 majority opinion.\(^ {97}\) The court announced that Kentucky would now depart from the "same conduct" test promulgated in \textit{Walden v. Commonwealth},\(^ {98}\) and the "single impulse" test enunciated in \textit{Ingram v. Commonwealth},\(^ {99}\) and declared that double issues arising out of multiple prosecutions will be analyzed in accordance with the principles set forth in \textit{Blockburger}\(^ {100}\) and Kentucky Revised Statute section 505.020.\(^ {101}\)

In its discussion of whether criminal contempt can be a bar to prosecution on double jeopardy grounds, the court followed the \textit{Dixon} formula once again, stating that the Kentucky Supreme

\(^{90}\) \textit{Id.} at 812.
\(^{91}\) \textit{Id.}
\(^{92}\) \textit{Id.}
\(^{93}\) 821 S.W.2d 90 (Ky. 1991).
\(^{94}\) \textit{Burge}, 947 S.W.2d at 809.
\(^{95}\) \textit{Id.}
\(^{97}\) \textit{Burge}, 947 S.W.2d at 809.
\(^{98}\) 805 S.W.2d 102, 106-07 (Ky. 1991). The "same conduct" test states that double jeopardy occurs when the same conduct constituting one offense is used to prove an essential element of another offense. \textit{Burge}, 947 S.W.2d at 809.
\(^{99}\) 801 S.W.2d 321, 323-24 (Ky. 1990). The "single impulse" test is premised on the theory that one incident of criminal conduct cannot be used to prove multiple offenses. \textit{Burge}, 947 S.W.2d at 809-10.
\(^{100}\) 284 U.S. 299 (1932).
\(^{101}\) \textit{Burge}, 947 S.W.2d at 811.
Court had no hesitation in declaring that the protections of Section Thirteen of the Kentucky Constitution attach in a non-summary criminal contempt proceeding just as they do in other criminal prosecutions.\textsuperscript{102}

\textit{D. Summe}

\textit{Summe v. Judicial Retirement & Removal Commission,}\textsuperscript{103} involved an appeal from a decision of the Judicial Removal and Retirement Commission (JRRC) involving two counts brought against Circuit Judge Patricia M. Summe, Kenton County, stemming from her successful campaign for circuit judge in the 1994 election.\textsuperscript{104}

Summe raised arguments concerning the constitutionality of both the Commission's decision\textsuperscript{105} and Canon 7B(1)(c).\textsuperscript{106} Canon 7B(1)(c) of the Code of Judicial Conduct, Kentucky Supreme Court Rules 4.300 provides that:

A candidate, including an incumbent judge for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or misrepresent his identity, qualifications, present position, or other facts.\textsuperscript{107}

First, appellant argued that the Commission's prohibition against the use of a newspaper-type format and the use of a letter was unconstitutional in that it infringed upon appellant's constitutional right to freedom of speech under the First

\begin{footnotesize}
\begin{itemize}
\item[102.] \textit{Id. at 812}. See \textit{Eldred v. Commonwealth}, 906 S.W.2d 694, 707 (Ky. 1995).
\item[103.] 947 S.W.2d 42 (Ky. 1997).
\item[104.] \textit{Id. at 43}. Count I charged that Judge Summe depicted a tabloid-style newspaper titled "Kenton County Citizen's Courier" as a regularly published independent newspaper, when in fact it was campaign literature published solely for the purpose of supporting her campaign. \textit{Id.}. Count II regarded a letter written by a friend of Judge Summe's, supporting her campaign and mailed to 800 nurses in Kenton county. \textit{Id. at 46}.
\item[105.] \textit{Id. at 44}.
\end{itemize}
\end{footnotesize}
Amendment of the United States Constitution and Section Eight of the Kentucky Constitution. 108 Second, appellant contended that the language in Canon 7B(1)(c) is unconstitutionally overbroad and vague. 109 In support of her arguments, appellant again cited to J.C.J.D. v. R.J.C.R., 110 and also to Buckley v. Judicial Inquiry Board. 111

The majority opinion held that J.C.J.D., was not controlling in this case as it was based on the former version of Canon 7B(1)(c). 112 Furthermore, they stated that Buckley was not persuasive as that opinion addressed an Illinois rule similar to Kentucky's former Canon 7B(1)(c). 113

It may be of some interest that in J.C.J.D. the duly elected members of the Kentucky Supreme Court all recused themselves because the case involved a person who was sitting on the court. The panel reviewing the case was composed entirely of special justices appointed by the Governor.

The present Canon 7B(1)(c) was challenged under the First, Fifth and Fourteenth Amendments to the United States Constitution as overbroad or vague in Ackerson v. Kentucky Judicial Retirement and Removal Commission. 114 In Ackerson, the federal district court upheld the Canon with respect to its prohibition against campaign statements committing or appearing to commit a judicial candidate to particular legal issues which would likely come before him or her if elected to the bench. 115

Specifically, the court stated:

This interest [the necessity of maintaining the impartiality of the legal process] is simply too great to allow judicial campaigns to degenerate into a contest of which candidate can make more commitments to the electorate on legal issues likely to come before him or her.

We therefore find that the canon is sufficiently and closely drawn so as to avoid unnecessary abridgment of judicial candidate's right of free speech during the

108. Summe, 947 S.W.2d at 47.
109. Id.
110. 803 S.W.2d 953 (Ky. 1991).
111. 997 F.2d 224 (7th Cir. 1993).
112. Summe, 947 S.W.2d at 47.
113. Id.
115. Id. at 315.
campaign. We also find the canon is neither vague nor overbroad in this regard. 116

Later, in the Kentucky Supreme Court's decision in *Deters v. Judicial Retirement and Removal Commission*, the unconstitutionality of the present Canon 7B(1)(c) was reviewed and rejected as follows:

The language of our present canon 7B(1)(c) has, however, been specifically upheld by a Federal Court as having been "sufficiently and closely drawn so as to avoid unnecessary abridgment of a judicial candidate's rights of free speech during the campaign." The opinion recognized that, while candidates for elective judicial office are not without the protection of the First Amendment, their campaign conduct has nevertheless been regulated to a greater degree than non-judicial candidates. 118

Also, the court noted in *Deters* 119 that the present Canon was promulgated after *J.C.J.D.* and was more narrowly tailored than its predecessor. 121 Moreover, in adopting the federal court's decision in *Ackerson* the court stated "there is a compelling state interest in so limiting a judicial candidate's speech, because the making of campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system." 122 Therefore, the court upheld the constitutionality of the Commission's decision and Canon 7B(1)(c). 123

In *Summe*, Justice Graves wrote a strong dissent, in which I joined. 124 The dissent disagreed with the majority's conclusion that the JRRC's decision and Canon 7B(1)(c) satisfy constitutional requirements. 125 The dissenters argued that the decision imposed

---

116. *Id.*
117. 873 S.W.2d 200 (Ky. 1994).
118. *Id.* at 204. (citation omitted)(quoting *Ackerson v. Kentucky Judicial Retirement and Removal Comm'n*, 776 F. Supp. 309 (W.D. Ky. 1991)).
119. 873 S.W.2d 200 (Ky. 1994).
120. 803 S.W.2d 953 (Ky. 1991).
121. *Deters*, 873 S.W.2d 200 (Ky. 1994).
122. *Id.* at 205.
123. *Id.*
125. *Id.* at 52.
a chilling effect upon the First Amendment rights of judicial candidates and the public's need to be informed.\textsuperscript{126} To further their argument about the effect of the majority's decision, the dissent noted that "it was public knowledge that what Patricia Summe printed was true and the statutorily required disclaimer, acknowledging that Patricia Summe's campaign paid for the advertisements, was properly on the document."\textsuperscript{127}

The dissent in \textit{Deters} stated:

Political free speech is primary as the cornerstone of a responsible representative democracy because it relates directly to the function of government in a free society. An informed electorate is the foundation of true liberty. The judiciary is no exception and is subject only to limitations which must be carefully and narrowly drawn. . . .

There is a fundamental right of people to know any candidate's views and to obtain the information that is relevant to them in making their electoral choices. A restriction on a candidate's right to engage in legitimate political discussion restricts the electoral process by not allowing the voters to obtain the necessary information. . . . The need and right of the voter to have information should be unchallenged and should be paramount in this consideration. . . .\textsuperscript{128}

The First Amendment to the United States Constitution guarantees the fundamental right of free speech.\textsuperscript{129} Thus, Congress can make no law, nor can the government enforce any law which abridges this guaranteed freedom. Similarly, Section Eight of the Kentucky Constitution provides that "every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."\textsuperscript{130}

Accordingly, the dissent in \textit{Summe} claimed that the JRRC had violated Judge Summe's rights to freedom of speech under both the United States and Kentucky Constitutions.\textsuperscript{131} Furthermore, the dissent cited \textit{J.C.J.D. v. R.J.C.R.}\textsuperscript{132} as standing for the

\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} 873 S.W.2d at 205-06 (Wintersheimer, J., dissenting).
\textsuperscript{129} See U.S. CONST. amend. I.
\textsuperscript{130} KY. CONST. § 8.
\textsuperscript{131} \textit{Summe}, 947 S.W.2d at 53.
\textsuperscript{132} 803 S.W.2d 983 (Ky. 1991).
proposition that freedom of speech extends to all candidates for public office, including judicial candidates.\textsuperscript{133} Indeed, a central argument for the dissent was that even though states have the authority to regulate judicial elections, nevertheless, "a person does not surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office."\textsuperscript{134}

Moreover, quoting \textit{Buckley v. Valeo},\textsuperscript{135} the dissent noted that political candidates have the same free speech guarantees as every person and the same "right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election."\textsuperscript{136} Furthermore, the dissent quoted \textit{Buckley} to argue that a political candidate, such as a judge, needs to "make [his] views known so that the electorate may intelligently evaluate the candidate's personal qualities and their positions on vital public issues before choosing among them on election day."\textsuperscript{137} The dissent emphasized the importance of political advertisements as providing information to voters so that they can make intelligent election decisions, but conceded that such ads are also designed to get a candidate elected.\textsuperscript{138}

Additionally, the dissenters cited \textit{Peel v. Attorney Registration and Disciplinary Commission of Illinois}\textsuperscript{139} to claim that the United States Supreme Court has recognized the public's ability to selectively review advertisements, and also to argue that the disclosure of truthful, relevant campaign information is more beneficial to voter decision-making than the suppression of a candidate's views.\textsuperscript{140} Although \textit{Peel} addressed commercial speech, the idea that the open disclosure of information allows the public to make informed choices is equally applicable to political advertisements for judicial candidates.\textsuperscript{141}

Next, the dissent discussed \textit{J.C.J.D. v. R.J.C.R.},\textsuperscript{142} where the Kentucky Supreme Court had suggested that a broad rule

\begin{footnotes}
\item[133] \textit{Summe}, 947 S.W.2d at 53.
\item[134] \textit{Id.} at 54 (citing American Civil Liberties Union of Fla., Inc. v. Florida Bar, 744 F. Supp. 1049 (N.D. Fla. 1990)).
\item[135] 424 U.S. 1 (1976).
\item[136] \textit{Summe}, 947 S.W.2d at 54 (quoting \textit{Valeo}, 424 U.S. at 52).
\item[137] \textit{Id.} (quoting \textit{Valeo}, 424 U.S. at 53).
\item[138] \textit{Id.}
\item[139] 496 U.S. 91 (1990).
\item[140] \textit{Summe}, 947 S.W.2d at 54.
\item[141] \textit{Id.}
\item[142] 803 S.W.2d 953 (Ky. 1991).
\end{footnotes}
prohibiting judicial candidates from expressing views on disputed legal and political issues would "turn the judicial election into a popularity contest."143 Also, the dissenters repeated the well-known principle that there is a "strong presumption of unconstitutionality" when the government attempts to regulate speech because of its subject matter.144 The dissent further asserted that "state laws which restrict free speech that can result in disciplinary action against the speaker are subject to very strict scrutiny."145

Patricia Summe, argued the dissenters, was punished for political speech that is not prohibited by either the Judicial Canons or laws of Kentucky.146 Furthermore, criticism of a judge's legal position, such as Summe's criticism of her opponent, does not, without more, undermine the public's respect and confidence in the judiciary.147 Additionally, the dissent asserted, political ads which criticize an opponents viewpoint "do not equate to committing a judicial candidate to making a pledge to rule in a particular way."148

To conclude, the dissent claimed that while the governmental supervision of judicial elections is necessary, the public has a right to expect that such supervision "will not erode the equally necessary principle that the First Amendment extends strong protection to judicial elections."149 Thus, the dissent argued that Summe's free speech rights had been abridged and that both counts against her should have been reversed.150

IV. PREEMPTION

It is axiomatic that state law may be preempted by federal law.151 The Supremacy Clause of the United States Constitution

143. Summe, 947 S.W.2d at 54 (citing J.C.J.D., 803 S.W.2d at 956).
144. Id.
145. Id. (citing In re Primus, 436 U.S. 412 (1978)).
146. Summe, 947 S.W.2d at 54.
147. Id. (citing J.C.J.D., 803 S.W.2d at 955).
148. Summe,947 S.W.2d at 54-55.
149. Id. at 55.
150. Id.
151. See U.S. Const. art. VI, cl. 2. The Supremacy Clause states: "This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . any thing in the Constitution or laws of any State to the contrary notwithstanding." See also Developments in the Law--The Interpretation of
requires that federal law displaces state law where there is an actual conflict between the two.\textsuperscript{152} Frequently, scholars and writers on the subject have raised the question of whether there is a difference in the constitutional analysis when a state constitutional provision, rather than a state statute or administrative practice, is challenged as violating the federal Constitution.

The interaction between a Kentucky tort claim and the federal Food and Drug Administration regulations can be seen in the recent case of \textit{Niehoff v. Surgidev Corporation}.\textsuperscript{153} In this case, the Kentucky Court of Appeals affirmed a Circuit Court's summary judgment, holding that plaintiff Helen Niehoff's product liability claim for compensatory and punitive damages was properly dismissed because federal law preempted any claim for state tort relief.\textsuperscript{154}

When the case reached the Kentucky Supreme Court, the issue was whether Niehoff's claims, under Kentucky tort law, were in conflict with any specific federal regulation applicable to the medical device which allegedly caused the loss of Niehoff's eye.\textsuperscript{155} The product involved was a Style 10 intraocular lens (IOL), manufactured by Surgidev Corporation.\textsuperscript{156} The Style 10 lens at issue had been an experimental device, provided to ophthalmologists who served as clinical investigators under an "Investigational Device Exemption" which had been granted by the Federal FDA in 1978.\textsuperscript{157}

The majority in \textit{Niehoff} asserted that the purpose of Congress and the FDA in allowing the surgical use of an investigational device "did not imply any intention to insulate Surgidev from liability to a patient who had not assumed the risk."\textsuperscript{158} The

\textit{State Constitutional Rights, 95 Harv. L. Rev. 1324 (1982) (discussing state constitutional rights in the federal system and noting the supremacy of federal law as a constraint on state autonomy).}


\textsuperscript{153} 950 S.W.2d 816 (Ky. 1997).

\textsuperscript{154} Id. at 817.

\textsuperscript{155} Id.

\textsuperscript{156} Id. An IOL is "an artificial lens which replaces the natural crystalline lens in the human eye following cataract surgery." A prescription IOL is surgically implanted in the patient's eye, replacing the diseased natural lens. Id.

\textsuperscript{157} Id.

\textsuperscript{158} Id. at 818.
Kentucky Supreme Court held that Niehoff's claims for negligence and strict liability for the injury caused by the IOL were not preempted in state court by federal law. Moreover, the majority reasoned that "recovery under a Kentucky claim does not rest on a specific finding that any particular claim would conflict with the enforcement of any specific federal regulation." To reach their conclusion the majority in Niehoff found the United States Supreme Court's decision in Medtronic, Inc. v. Lohr to be instructive. The Lohr Court held that state law tort claims are not automatically preempted by federal medical device regulations. The Lohr decision was a 4-1-4 plurality, which involved a lengthy concurring opinion written by Justice Breyer, where he disagreed with the reasoning of the plurality, but concurred in the result. Similar to the issue in Niehoff, Lohr dealt with the question of whether federal Medical Device Amendments preempted a claim brought under the common law of Florida for negligence and strict liability. The Niehoff majority stated that it was highly influenced by the decision in Lohr, but more persuaded by the analysis and interpretation it applied to the Lohr decision.

The Niehoff court discussed the doctrine of federal preemption as being derived from the Supremacy Clause contained in Article VI of the United States Constitution. The court also noted that the historic police powers of the states are not preempted unless Congress clearly manifests a purpose to do so. Moreover, the court indicated that the United States Supreme Court has stated that it is reluctant to interpret a federal statute in such a way as to find preemption in areas of the law traditionally controlled by the states. Ultimately, federal preemption of a state cause of

159. Id. at 822-23.
160. Id. at 823.
162. Niehoff, 950 S.W.2d at 818.
163. Id. (citing Lohr, 116 S. Ct 2240 (1996)).
164. Id. at 819-20 (Breyer, J., concurring).
166. Niehoff, 950 S.W.2d at 819-20.
167. Id. at 820.
168. Id. (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)).
169. Niehoff, 950 S.W. 2d at 820 (citing CSX Transp. v. Easterwood, 507 U.S. 658 (1993)).
action "depends on the purpose of Congress in enacting the federal statute."¹⁷⁰

The Niehoff majority further noted that preemption of a state law claim by a federal statute or regulation may be determined in either of two ways: in the language of the statute,¹⁷¹ or implied from the structure and purpose of the federal statute.¹⁷² This so-called implied preemption occurs when there is an actual conflict between state law and federal law, or where the federal law "so thoroughly occupies the legislative field that it may be reasonably inferred that Congress left no room for the state to supplement it."¹⁷³

Following Lohr, the majority in Niehoff claimed that Congress gave the FDA a unique role in determining the preemptive scope of the federal Medical Device Amendments.¹⁷⁴ The Niehoff court interpreted Lohr as establishing the rule that "state law will be preempted only to the extent that the FDA has promulgated a relevant federal requirement."¹⁷⁵

The Kentucky Supreme Court concluded that the Medical Device Amendments did not preempt Kentucky law because there was no specific state requirement which "contravenes, contradicts or conflicts with a specific federal regulation."¹⁷⁶ The tort claims brought by Ms. Niehoff under Kentucky common law were not in conflict with any specific federal regulation applicable to the intraocular lens manufactured by Surgidev.¹⁷⁷

V. CONCLUSION

As noted by James Madison in Federalist Number 45:
The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. . . . The powers reserved to the several states

¹⁷¹. Id.
¹⁷². Id.
¹⁷³. Id.
¹⁷⁴. Id. at 821.
¹⁷⁵. Id.
¹⁷⁶. Id. at 823.
¹⁷⁷. Id.
will extend to all the objects which in the ordinary course of affairs, concern the lives, liberties and properties of the people and the internal order, improvement and prosperity of the state.\textsuperscript{178}

Early in this century, Woodrow Wilson also commented on the sometimes conflicting relationship between state and federal government.\textsuperscript{179} Wilson asserted that the state-federal balance of power cannot "be settled by the opinion of any one generation, because it is a question of growth and every successive stage of our political and economic development gives it a new aspect and makes it a new question."\textsuperscript{180} As such, Kentucky's constitutional law continues to evolve, in part, because of its placement within the larger federal system.

Recently, the United States Supreme Court decided two cases which exemplify the ongoing judicial interpretation of the proper limits of state and federal jurisdictions. In \textit{Foster v. Love},\textsuperscript{181} the Court held that Louisiana's "open primary" statute violated federal law.\textsuperscript{182} Under the Louisiana statute, primary elections were held during October of a federal election year, which had the effect of conclusively electing most of the state's Senators and Representatives a month before the national election in November.\textsuperscript{183} The Court relied on the Elections Clause of the Constitution\textsuperscript{184} and stated that Congress "has the power to override state regulations by establishing uniform rules for federal elections, binding on the States."\textsuperscript{185} Thus, under a federal statute, Congress has declared that all federal elections are to be held on a single day throughout the country.\textsuperscript{186} In striking down the Louisiana statute as conflicting with federal law, the Court noted an important policy behind a single federal election day: to prevent early elections in one state from influencing later elections.

\textsuperscript{178} \textit{The Federalist} No. 45, at 328 (James Madison)(John Harvard Library ed., 1974).
\textsuperscript{179} See generally \textit{Woodrow Wilson, Constitutional Government in the United States} (1908).
\textsuperscript{180} Id. at 173.
\textsuperscript{181} 118 S. Ct. 464 (1997).
\textsuperscript{183} \textit{Foster}, 118 S. Ct. at 467.
\textsuperscript{184} U.S. Const. art. I, § 4, cl. 1.
\textsuperscript{185} \textit{Foster}, 118 S. Ct. at 466 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832-33 (1995)).
\textsuperscript{186} Id. (citing 2 U.S.C. §§ 1, 7 (1997); 3 U.S.C. § 1 (1997)).
The relationship between the state and federal court systems was raised in *Baker v. General Motors Corporation*. In that case, the United States Supreme Court held that the national Full Faith and Credit command did not bar a Federal District Court in Missouri from allowing a former General Motors employee to testify against General Motors in a state law products liability action. This was the case despite the fact that a Michigan court had entered an earlier injunction blocking the former employee from testifying against General Motors without the company's written consent.

In *Baker*, the Court recognized that "the full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent sovereign States into a nation." Thus, as a general rule, a final judgment rendered by a court with proper jurisdiction in one state, is binding in other courts nationwide. The *Baker* Court, however, decided the issue narrowly. Rather than finding a "roving public policy exception" to the Full Faith and Credit Clause for state court judgments, the Court reasoned instead that Michigan lacked the "authority to control courts elsewhere by precluding them in actions brought by strangers to the Michigan litigation from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth." Nevertheless, the Court carefully limited its holding by stating that "no general exception to the full faith and credit command" had been created, nor is a states now permitted "to refuse to honor a sister state judgment based on the forum's choice of law or policy preferences." While it is too early to determine the impact of *Baker*, it will likely affect future product liability cases against General Motors, where plaintiffs

187. Id. at 468.
189. See U.S. CONST. art. IV, § 1 (Full Faith and Credit Clause).
191. Id. at *8 (quoting Sherrer v. Sherrer, 334 U.S. 343, 355 (1948)).
192. Id. at *7.
193. Id. at *8.
194. Id. at *10.
195. Id.
196. Id.
wish to have former General Motors employees testify as expert witnesses.

Both *Foster* and *Baker* illustrate the tension between state and federal law that is a valid part of our constitutional system. The state-federal relationship is constantly changing, and the interaction between state and federal constitutions contributes to this evolution.
SETTING CHILD SUPPORT FOR THE LOW INCOME AND HIGH INCOME FAMILIES IN KENTUCKY

BY JUDGE GREGORY M. BARTLETT

In 1990 the Kentucky General Assembly revised the method for setting child support in Kentucky, adopting guidelines which significantly limited the discretion of trial judges to determine a fair amount of support to be paid for minor children. The Legislature was responding to a federal mandate to the states to enact schedules designed to improve the rate of collection of support for dependent children. The federal government had determined that child support collection by the states had been lagging due, in part, to inconsistency in the amount of support being awarded. Thus, as a prerequisite to continued participation in the federal programs, states were obliged to adopt guidelines, based upon economic studies, which would establish a presumptive amount of support in each case. No judge or domestic relations commissioner would disagree with the observation that the existence of the child support guidelines has simplified and taken much of the guess work out of setting the support obligation in the great majority of cases. In addition, few

1. Judge Bartlett is currently serving as Judge of the Kenton County Court, Third Division. He has held this position since 1993. He received his Bachelors from Thomas More College in 1967, his Master from Xavier in 1971, and his J.D. from the University of Kentucky Law School in 1973. He has served as Adjunct Professor at Chase College of Law since 1988


4. See LAURA MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION, § 1.01, at 1-3 to 1-5 (1997). Ms. Morgan's treatise is an excellent and thorough treatment of the application of child support guidelines throughout the United States.

5. Id. § 1.02, at 1-5 to 1-13. This section contains a discussion of the Family Support Act of 1988, and relevant legislation preceding and following its enactment.
judges would express much regret over the limitation on their ability to vary from the statutory schedules in most cases. There are, however, two kinds of cases where the guidelines do not apply, thereby necessitating the exercise of the trial court's discretion.\(^6\) The first are those where the support obligor has no "gross income" as defined in the statute,\(^7\) and the second are the less common situations where the parties' "combined monthly adjusted gross income" exceeds the highest bracket contained in the guidelines.\(^8\)

This article will examine several recent decisions from the Kentucky Court of Appeals, as well as amendments to the guidelines statute, which have addressed the problem of setting support for the parent with no income.\(^9\) In addition, those circumstances where either the parents or dependent children are receiving Social Security benefits will be considered. Finally, this article will discuss how our courts should set reasonable child support for the high income earning parent.

I. CHILD SUPPORT OBLIGATION OF THE PARENT WITH NO INCOME

As originally enacted, the Kentucky child support guidelines set forth in Kentucky Revised Statute section 403.212 did not require payment of support until the combined monthly adjusted parental gross income equalled $100.00.\(^10\) In addition, the statutory definition of "gross income" specifically excluded benefits from "means-tested" public assistance programs such as Aid to Families with Dependent Children ("AFDC"), Supplemental

---

\(^6\) Compare Keplinger v. Keplinger, 839 S.W.2d 566, 568 (Ky. Ct. App. 1992) where the court observed that setting an appropriate amount of child support is an art rather than a science, but that the trial court's discretion has been restricted by the Legislature. See also, Downey v. Rogers, 847 S.W.2d 63, 64-65 (Ky. Ct. App. 1993) in which the Court noted that the guidelines do not address every possible situation, and thus, there is the need for flexibility in their application.


\(^8\) At present, the highest combined monthly adjusted parental gross income set out in KY. REV. STAT. ANN. § 403.212(6) (Michie 1993 & Supp. 1996) is $15,000.


Security Income ("SSI"), and food stamps.11 As a result, in Youngblood v. James, the court of appeals held that a person whose sole income was from SSI could not be compelled to pay child support.12 The court found a clear legislative intent to exclude SSI benefits from the definition of "income," and found no statutory basis to deviate from the presumptive application of the guidelines.13 In that case, Youngblood was physically unable to work, and thus could not be considered to be voluntarily unemployed so as to have an income imputed to him.14 With no actual or imputed income, his support obligation under the guidelines was zero.15 Moreover, he had no other assets with which to pay support, a fact that allowed the court to distinguish his case from the earlier ruling in Redmon v. Redmon.16

In Redmon, the court of appeals ruled that the complete absence of any income does not per se excuse a parent from the duty to pay child support.17 The trial court had refused Mr. Redmon's request to modify his child support obligation, even though he was incarcerated and had no income.18 The judge had made the finding that application of the guidelines would be inappropriate in accordance with Kentucky Revised Statute section 403.211(3)(g) since Redmon had "voluntarily" committed the criminal acts.19 The court of appeals affirmed, but not on the basis that Redmon was voluntarily unemployed, a fact that would preclude a defense to payment per Kentucky Revised Statute section 403.212(2)(d), but rather, the court merely held that, under the facts of the case, application of the guidelines would be inappropriate.20 The facts showed that Redmon had sufficient assets from which to pay support, despite his lack of income.21 The court in Redmon avoided the issue of whether the commission of a

13. Id.
15. KY. REV. STAT. ANN. § 403.212(6).
17. Id. at 465-66.
18. Id. at 464.
19. Id.
20. Id. at 465-66.
21. Id.
crime would be considered "voluntary unemployment," as the lower court found. 22

In Redmon, the court cited McKinney v. McKinney, 23 which held that a person can be considered unemployed or underemployed for purposes of Kentucky Revised Statute section 403.212(2)(d) only upon a finding that there was an intent to avoid a child support obligation. In 1994, the legislature negated the McKinney decision by amending Kentucky Revised Statute section 403.212(2)(d) to allow a court to find voluntary unemployment or underemployment without further finding an intent to avoid or reduce a child support obligation. 24 As a result of this amendment, it will be easier for trial courts to find a parent to be voluntarily unemployed or underemployed, and to order support to be paid by imputing income, even though the parent has no current earnings whatsoever.

The 1994 General Assembly also directly confronted the issue of whether a person with no income, including one who is receiving SSI, should be required to pay child support. 25 That session of the legislature amended the Child Support Guidelines, imposing a minimum support obligation of $60.00 per month, regardless of income. 26 The combined monthly adjusted gross income brackets now start at zero, rather than at $100.00. 27 Thus, the legislature has declared that every person, even one who has absolutely no income, is presumed to owe a minimum of $60.00 per month for child support. 28

The legislature likewise nullified the decision in Youngblood v. James 29 by amending the statutory definition of gross income in Kentucky Revised Statute section 403.212(2)(b) to specifically include, rather than specifically exclude, the receipt of SSI benefits. 30 However, the validity of that statutory amendment has been questioned by a recent court of appeals decision which is

22. Id.
26. Id.
27. Id.
28. Id.
currently on discretionary review by the Kentucky Supreme Court.\textsuperscript{31}

In \textit{Morris v. Commonwealth},\textsuperscript{32} the court of appeals held that Kentucky Revised Statute section 403.212(2)(b), as amended in 1994, is unconstitutional as it is in conflict with federal law.\textsuperscript{33} The court said that it was joining the majority of other states in finding that the inclusion of SSI benefits as income for calculation of child support violates 42 U.S.C. § 407.\textsuperscript{34} That statute exempts federal disability benefits from legal process.\textsuperscript{35} Although Congress, as part of the Child Support Enforcement Act of 1975,\textsuperscript{36} had lifted the exemption from process in proceedings for the collection of child support and alimony, this exception to the exemption statute was limited to disability payments based on "remuneration for employment."\textsuperscript{37} Since SSI benefits are not based upon remuneration for employment, but rather are "means-tested" or "needs-based," and more in the nature of welfare, the court concluded that they remain exempt by federal law from attachment or legal process.\textsuperscript{38}

The \textit{Morris} court rejected the argument that the federal exemption law did not apply since Morris' check was not garnished or attached.\textsuperscript{39} The court found no real distinction between the levy of legal process and the power of a contempt order.\textsuperscript{40} In either event, the recipient is forced to give over part of a subsistence level income to pay support.\textsuperscript{41} Finally, the court refused to order

\textsuperscript{31} Morris v. Commonwealth, 926 S.W.2d 674 (Ky. Ct. App. 1996) (motion for discretionary review granted and opinion of the Court of Appeals ordered de-published on June 11, 1997).
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 676 n.1 (citing multiple jurisdictions holding such).
\textsuperscript{37} Id. § 659(a).
\textsuperscript{38} Morris, 926 S.W.2d at 676; see also Daugherty v. Daugherty, 921 S.W.2d 131 (Mo. Ct. App. 1996) (holding that AFDC benefits were not subject to attachment for the payment of child support); but cf. Ghidotti v. Barber, 564 N.W.2d 141 (Mich. Ct. App. 1997) (finding a recipient of AFDC was found to be voluntarily unemployed and ordering her to pay support, but not from her AFDC money). In \textit{Ghidotti}, the court approved the setting of a support amount based on imputed earning capacity, but allowed the obligor to accumulate an arrearage until she returned to employment. \textit{Id.} at 145.
\textsuperscript{39} Morris, 926 S.W.2d at 676.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 678.
payment of the statutory minimum amount of support in accordance with the 1994 amendment of Kentucky Revised Statute section 403.212(4). While conceding that a person with no income might, under some other set of facts, be ordered to pay child support, Morris could not be compelled to do so since he was disabled and without other assets.

The Morris court also cited the language of the child support recovery statute, Kentucky Revised Statute section 205.710(13), which, until a 1996 amendment, provided that a parent who is receiving SSI benefits shall be presumed unable to pay child support. Thus, when the Morris case was decided, there were two conflicting statutes. First, there was Kentucky Revised Statute section 403.212(2)(b), which presumed a recipient of SSI benefits to be able to pay support by expressly including those benefits into the guideline calculation. Second, there was Kentucky Revised Statute section 205.710(13), which just as clearly stated that a person on SSI would be presumed unable to pay. This contradiction was resolved by the 1996 amendment to Kentucky Revised Statute section 205.710(13) which deleted SSI recipients from the class of individuals who are presumed to be unable to pay child support.

In light of the aforementioned statutory revisions, it is evident that the Kentucky General Assembly would like to have SSI considered as income when setting child support in accordance with the guidelines. However, unless it is overturned by the Kentucky Supreme Court, the holding in Morris will prohibit trial judges from doing so. Nevertheless, that case may not have necessarily eliminated the ability of courts to order a parent, who has no income other than "means-tested" government aid, to pay some amount for the support of a dependent. The recent decision of the court of appeals in Brashears v. Commonwealth authorized such an award, thereby raising a possible conflict with the position set forth in Morris.

42. Id.
43. Id.
44. Morris, 926 S.W.2d at 678.
46. Id. § 205.710(13).
In Brashears, the Cabinet for Human Resources obtained an order requiring a parent, whose only income was receipt of Aid to Families with Dependent Children for one child in his custody, to pay the statutory minimum amount of $60.00 for the support of another child who was in the custody of his former wife. Since his former spouse likewise had no income, their combined parental income was zero. Brashears argued that ordering him to pay even the minimum support would be unjust and inappropriate. First, he claimed that imposing the minimum obligation upon him was a violation of federal law which provides that the guideline amount will be rebuttably presumed as correct. Since he had no income other than AFDC and since he was not found to be voluntarily unemployed, the minimum support award was irrebuttable for him. He further noted that, although Kentucky Revised Statute section 403.211(2) creates a rebuttable presumption in favor of the guideline amount, Kentucky Revised Statute section 205.710(13), on the other hand, presumes that a recipient of AFDC cannot pay any support. Finally, Brashears maintained that making him pay support out of AFDC would further impoverish the child in his custody for whom those benefits were designated.

In rejecting Brashears' arguments, the court of appeals held that having no income except AFDC does not rebut the presumption in Kentucky Revised Statute section 403.211(2) that the minimum support obligation of $60.00 per month is appropriate. While failing to address the opposing presumption that AFDC recipients are unable to pay support, as set out in Kentucky Revised Statute section 205.710(13), the court simply declared that being unemployed and having no gross income does not eliminate a parent's duty to support his children. Moreover, noting that Brashears was able-bodied, the trial judge was not required to make a finding that he was voluntarily unemployed as

49. Id.
50. Id. at 874.
51. Id.
52. Id.
53. 944 W.W.2d 874 (Ky. Ct. App. 1997)
54. Id.
55. Id.
56. Id. at 874-75.
57. Id. at 875.
a condition to entering a support order.\textsuperscript{58} Rather, all the judge had to do was simply to apply the guidelines which call for an award of $60.00 per month, despite a zero combined parental income.\textsuperscript{59}

Finally, in response to the claim that forcing him to pay support for one child out of AFDC benefits intended for another child would be unjust, the court, in so many words, advised that Brashears should get a job and earn money to meet his legal obligations.\textsuperscript{60}

Although both cases dealt with "means-tested" programs, the Brashears and Morris decisions represent contrasting approaches to the issue of whether persons who receive such benefits should be forced to pay child support out of those funds. The seemingly hard-line position of the court in Brashears parallels the philosophy of the legislature as reflected by the previously mentioned statutory amendments. By comparison, the ruling of the Morris court is consistent with most decisions from other jurisdictions which have refused to order support to be paid out of SSI income.\textsuperscript{61} At the heart of the conflict between the results in these two cases is the statutory child support minimum in Kentucky Revised Statute section 403.212(4) and the presumption of appropriateness in Kentucky Revised Statute section 403.211(2).

In both Morris and Brashears, the courts acknowledged that the parent/obligor had no statutory income, either actual or imputed.\textsuperscript{62} In Morris, the court excluded SSI benefits from the father's income despite the statute which expressly provided for inclusion.\textsuperscript{63} The Brashears court had no difficulty in finding the parent to have no income since Kentucky Revised Statute section 403.212(2)(b) clearly exempts AFDC payments from the definition of gross income.\textsuperscript{64} Nevertheless, Mr. Morris was not compelled to pay child support out of his SSI money, the court of appeals believing that to do so in that case would essentially violate the

\textsuperscript{58} 944 S.W.2d 875 (Ky. Ct. App. 1997).
\textsuperscript{59} Id.
\textsuperscript{60} Id. Cf. Shaddox v. Schoenerger, 869 P.2d 249, 252 (Kan. Ct. App. 1994) (reversing a child support award against a parent whose only income was AFDC for another child in her custody). See also Quesenberry v. Lloyd, 676 A.2d 906 (Del. 1996).
\textsuperscript{61} Morris v. Commonwealth, 926 S.W.2d 674 (Ky. Ct. App. 1996) (citing cases).
\textsuperscript{62} See Morris, 926 S.W.2d at 674; Brashears, 944 S.W.2d at 873.
\textsuperscript{63} Morris, 926 S.W.2d at 674.
\textsuperscript{64} Brashears, 944 S.W.2d at 874.
federal prohibition against attaching those benefits. 65 On the other hand, Mr. Brashears was deemed liable for child support, with a different panel of the court of appeals refusing to accept his unemployment as a defense to the obligation to pay the statutory minimum. 66 The receipt of SSI was sufficient proof, in and of itself, to avoid a support order being placed against Morris, but the receipt of AFDC benefits, which are likewise means-tested, did not exempt Brashears from the minimum support obligation. 67

It is difficult to find fault with the outcome in the Brashears case, given the fact that the parent/obligor was found to be able-bodied and capable of working to pay support for his child. 68 What is troubling about that decision is the court's approval of the strict application of the statutory presumption that a person with no income is able to pay child support, without the necessity of a finding that the parent is voluntarily unemployed or has other assets. 69 The Morris court was apparently willing to allow the receipt of SSI to rebut the statutory presumption. 70 But the Brashears court was not willing to allow the receipt of AFDC to have the same effect. 71

The approach taken by the court in Morris appears to be the more fair and reasonable. While acknowledging the legislative will that a parent with zero income should nonetheless be presumed able to pay support, the entitlement to federal means-tested financial aid should rebut that presumption. 72 The Brashears court stated that it would be illogical for the fact that creates the presumption to also rebut it. 73 However, the fact that a person is receiving AFDC, SSI or some other subsistence level aid from a government agency is evidence of poverty that should meet the presumption and require the trial court to find some other proof of the ability to comply with a support order. For example, a court would be within its authority to impose a child support obligation on a parent who, although on AFDC or SSI, is found to

65. Morris, 926 S.W.2d at 676.
66. Brashears, 944 S.W.2d at 873.
67. Id.
68. Id.
69. See id.
70. Morris, 926 S.W.2d at 674.
71. Brashears, 944 S.W.2d at 813.
72. Morris, 926 S.W.2d at 678.
73. Brashears, 944 S.W.2d at 875.
have other assets or to be voluntarily unemployed or underemployed.74 Moreover, in the absence of such a finding it would seem questionable that a defaulting parent could be punished by an order of contempt.

II. SETTING CHILD SUPPORT WHERE THE PARENT OR CHILD RECEIVES SOCIAL SECURITY BENEFITS

On occasion, courts are presented with the problem of setting child support where one or both parents and the child are receiving Social Security Disability benefits due to the parent's disability or retirement.75 In some other instances, the child is receiving benefits due to his or her own disability.76 Not all jurisdictions treat such benefits in the same manner when calculating child support under the guidelines.77 Some states, including Kentucky,78 credit the disabled/retired parent's child support obligation with the amount received by the dependent child. Others subtract the payment to the child from the parent's combined support obligation and then apportion the balance between the parents.79 At least one state makes the decision whether to grant a credit to the parent a matter for the discretion of the trial judge.80 In short, courts have adopted a variety of methods for setting an appropriate amount for support where the child is receiving a government check due to a parent's disability or retirement.

III. WHEN THE PARENT/OBLIGOR IS DISABLED OR RETIRED

The courts of Kentucky have previously considered the effect of Social Security death benefits on the obligation of a deceased

77. See MORGAN, supra note 4, § 2.03[e][9] at 2-22 to 2-29.
parent's estate to continue child support payments. In *Hamilton v. Hamilton*, the court of appeals held that the trial court did not abuse its discretion in terminating the support obligation of the deceased father's estate, where the child began receiving social security benefits which were $200.00 in excess of the amount ordered in the divorce decree. The court noted the prevailing view throughout the country was that government benefits may be credited against a parent's support liability. It was clear from the opinion that the court reserved to the trial court the discretion to refuse to give the credit, in whole or in part, depending on the circumstances of each case.

Five years later, the Kentucky Supreme Court confirmed the rule in the *Hamilton* case by its decision in *Board v. Board*. Again, the estate of a deceased parent was allowed a credit against child support in the amount of the social security survivor's benefits paid to the widow. The court, noting that Social Security benefits are not gratuitous but are a substitute for lost earning power, reasoned that failure to grant the estate credit for these benefits would result in a windfall for the wife. The court further acknowledged the evidence that the children were being adequately supported by the mother's receipt of the social security payments.

The rationale of the decisions in both *Board* and *Hamilton* was extended to a case involving Social Security disability benefits in *Miller v. Miller*. In that decision, the court of appeals held that the trial court erred in refusing to give a father credit against his child support obligation for the amount of Social Security benefits paid to his child on account of the father's disability.

---

82. *Id.* at 768.
84. *Id.*
85. 690 S.W.2d 380 (Ky. 1985).
86. *Id.* at 881.
87. *Id.*
88. *Id.*
89. 929 S.W.2d 202 (Ky. Ct. App. 1996).
90. *Id.* at 204-05.
Furthermore, the court ruled that any excess benefits over the amount of court-ordered support could be applied to any arrearage, but only an arrearage which may have accrued after the father was declared disabled. It is evident from the language of this case that the court has left the application of excess benefits to any arrearage to the discretion of the trial court on a case-by-case basis.

It is equally evident that the *Miller* court did not consider the credit for Social Security benefits to be a matter for the discretion of the court, but rather an entitlement. The holding declared that the trial court erred in refusing to give the credit, and nowhere does the court suggest that there are circumstances under which the credit could be denied. This is consistent with the rationale behind the court's decision. Borrowing language of cases from other jurisdictions, the court described Social Security benefits as being a replacement for lost income. Since the child support obligation was satisfied by a payment made on behalf of the father, he should receive the credit.

The *Miller* case places Kentucky among the majority of jurisdictions that allow a direct credit or offset for Social Security disability or retirement payments. However, in one important respect, the court of appeal's treatment of these benefits differs from that of other states. In *Miller*, the court upheld the inclusion of the child's benefits in the income of the custodial parent, rather than in the income of the disabled non-custodial parent, when completing the child support guidelines. As a result, the combined parental income, and consequently the total amount of parental support, was greater than if the disability benefit had been excluded altogether from both parents' income. But the custodial parent's percentage of income was greater also.

---

91. *Id.* at 205.
92. *See id.*
93. *See id.*
94. *Id.* at 204-05.
95. *Id.*
96. *See Morgan, supra note 4, §2.03[e][9] at 2-25 to 2-28; DiSabatino, supra note 83; see also, e.g., Miller v. Miller, 830 P.2d 574 (Alaska 1995); In re Allsup, 926 S.W.2d 323 (Tex. App. 1996).*
97. *Miller, 929 S.W.2d at 205.*
98. *Id.*
99. *Id.*
Believing that the benefit payments should be part of the total parental income, and noting that the non-custodial parent did not suggest that they be attributed to him, the court found them to fit within the statutory definition of gross income to the custodial parent.\(^\text{100}\)

The inclusion of the payments in the custodial parent's income is inconsistent with the nature of these benefits, and contrary to the way that other courts treat them.\(^\text{101}\) It is also unfair to the custodial parent.\(^\text{102}\) But more importantly, it is not in the interest of the dependent child since the effect of including the benefits in the income of the custodial parent is to reduce the support obligation of the non-custodial parent.\(^\text{103}\) If, as noted by the opinions in *Miller* and *Board*, both Social Security benefits are a replacement for income, it is the disabled parent's income that is being replaced.\(^\text{104}\) Likewise, although the benefit checks may be forwarded to the custodial parent, they are on behalf of the disabled parent and for the use of the child. Thus, the amount of the benefits should properly be included in the disabled parent's income when calculating support under the guidelines.\(^\text{105}\) If this were done, the disabled parent's proportionate share of combined income would be greater, and his or her liability for child support would increase. Since this was not the central issue in *Miller*, perhaps our Kentucky Court of Appeals or Supreme Court will soon clarify or correct this situation, and direct trial courts to include benefits paid to the child in the disabled parent's income column.

Although Kentucky now follows the majority rule, there are several other ways that Social Security disability and retirement benefits are treated under the guidelines. In Ohio, the amount received by the child as a result of either parent's disability is deducted from the total child support obligation before apportion-
ment of liability between the parents. The courts of that state reason that the Social Security benefits must be considered as financial resources of the child and that it would be unfair to credit the entire payment against the support owed by just one of the parents.

An even more persuasive argument for the Ohio method is that it focuses on the interests of the minor child, rather than on the impact on either parent. Indeed, the Ohio scheme would generally result in more support being paid for the child. For example, had the Kentucky courts used the Ohio formula in the Miller case, the non-custodial parent would have had to pay approximately $80.00 per month for support in addition to the Social Security benefit received by the child. Requiring Mr. Miller to pay $80.00 per month probably would not have been an undue burden on him, but would also have had the salutary effect of reinforcing the fact that he, as a parent, owes a primary duty to provide for his child.

Appellate courts in Maryland and New York have also ruled that government benefits, such as Social Security, should be considered as financial resources of the child. However, unlike Ohio courts, these courts do not credit those benefits against the combined parental support obligation. Instead, the child's

107. Carpenter, 672 N.E.2d at 706; Previte, 650 N.E.2d at 921.
108. Carpenter, 642 N.E.2d at 707; McNeal, 603 N.E.2d at 438.
109. Miller v. Miller, 929 S.W.2d 202 (Ky. Ct. App. 1996). In this case, the combined monthly parental support obligation was found to be $592. Id. at 203. As a result of the court's inclusion of the child's Social Security check of $291 in the custodial parent's income, the non-custodial parent's monthly support obligation was set at $166; and, with the credit, he was not required to make any additional payment. Id. at 205. Had the court followed the majority rule and included the child's check in the father's income, his share of the support obligation would have been $207, still less than the credit. However, had the court used the Ohio method, the child's $291 benefit would have been deducted from a combined parental support obligation of $565, leaving both parents to share the balance of $274. Mr. Miller could have been ordered to pay an additional $82 per month, over and above the Social Security benefit.
110. Id.
112. Anderson, 700 A.2d at 845; Graby, 664 N.E.2d at 488.
receipt of Social Security is just one factor for the trial court to consider in determining whether the support amount is unjust or inappropriate so as to allow for deviation from the guidelines.\textsuperscript{113} The New York Court of Appeals criticized those formulae which allow a direct credit, stating that they often effectively abolish the child support liability of a parent who has the ability to pay.\textsuperscript{114} Also, by relieving one parent of the duty to support, the goal of maintaining the child's standard of living is impeded.\textsuperscript{115}

The Indiana Supreme Court has likewise rejected the automatic credit for Social Security benefits.\textsuperscript{116} In \textit{Stultz v. Stultz},\textsuperscript{117} the court held that the decision to grant or deny the credit would lie in the discretion of the trial court on a case-by-case basis.\textsuperscript{118} Declaring that this was consistent with the state's strong emphasis on trial court discretion, the Indiana Supreme Court held that the credit should not be automatic, but rather merely one factor for the court to consider.\textsuperscript{119} However, the court added that, if the trial court awards the credit, the amount of the child's check should be included in that parent's gross income.\textsuperscript{120}

The Social Security benefits in \textit{Stultz} were due to the parent's retirement.\textsuperscript{121} The court noted a distinction between disability benefits and retirement benefits, commenting that granting a credit should generally be denied, at least with respect to the latter.\textsuperscript{122} The court emphasized the importance of maintaining the child's standard of living, and recognized the unfairness which would result by granting the credit.\textsuperscript{123} The retired parent would pay no support, while suffering no decrease in his own income.\textsuperscript{124}

\textsuperscript{113} \textit{Anderson}, 700 A.2d at 845; \textit{Graby}, 644 N.E.2d at 488.
\textsuperscript{114} \textit{Graby}, 664 N.E.2d at 491.
\textsuperscript{115} \textit{Id}.
\textsuperscript{116} \textit{Stultz v. Stultz}, 695 N.E.2d 125, 130 (Ind. 1995) (reversing the decisions of the Indiana Court of Appeals in \textit{Poynter v. Poynter}, 590 N.E.2d 150 (Ind. Ct. App. 1992) which had held that the disabled parent was entitled to the credit).
\textsuperscript{117} \textit{Shultz}, 695 N.E.2d 125.
\textsuperscript{118} \textit{Id}.
\textsuperscript{119} \textit{Id} at 128.
\textsuperscript{120} \textit{Id} at 126 n.2.
\textsuperscript{121} \textit{Id} at 126.
\textsuperscript{122} \textit{Shultz}, 695 N.E.2d 128-29.
\textsuperscript{123} \textit{Id}.
\textsuperscript{124} \textit{Id}.
IV. WHERE THE DEPENDENT CHILD IS DISABLED

When the dependent child of the parties is disabled and receiving SSI benefits, there is less variation among jurisdictions as to the method of calculating child support under the guidelines. In the first place, it is generally accepted that the amount received by the child should not be included in the custodial parent's income.125 This is consistent with the position of most states that SSI benefits are not within the definition of gross income for the purpose of determining the income of the parents.126 Moreover, these benefits, which are intended to provide special assistance to disabled children in low-income households, are a supplement to other income, not a substitute for the parents' duty to their children.127 As a result, every jurisdiction that has addressed the issue has held that parents are not entitled to a credit against their child support obligation for SSI benefits paid to a disabled child.128

In Barker v. Hill, the Kentucky Court of Appeals reversed the order of the trial court which had deducted the child's monthly SSI payment from the father's support obligation.129 As a consequence, the father was relieved of the duty to make any further payment for his son.130 In reversing, the court rejected an automatic credit or offset, but stated that it would be appropriate to view these benefits as independent financial resources of the child as per Kentucky Revised Statute section 403.211(3).131 However, before

127. Bennett, 472 S.E.2d at 673. Since these benefits are aimed at providing special assistance to disabled children in low-income households, it is unlikely that a court would consider them as a basis to modify the parent's support obligation. Though treated as the child's independent financial resource, the amount of these payments will usually be offset by the child's extraordinary needs.
129. 949 S.W.2d 896 (Ky. Ct. App. 1997).
130. Id. at 897.
131. Id. at 897. As stated previously, it is likely in most cases that the child's benefit check will not meet his or her special needs. See supra note 127. Thus, the child's SSI would not justify a reduction of the parent's support obligation. By comparison, substantial payments to a child pursuant to the structured settlement of a personal
deviating from the presumptively correct amount of support under the guidelines, the trial court is required by Kentucky Revised Statute section 403.211(2) to find that application of the guidelines would be unjust or inappropriate. Since no findings had been made, the court remanded the case for further proceedings to determine whether a deviation from the guidelines would be warranted.

Although it is clear from this decision that a disabled child's receipt of SSI is one factor that may be weighed in setting a just and appropriate amount of support, the court of appeals in Barker implied that the trial court should not be too ready to reduce the parent's obligation. The court commented that "there is nothing inherently unjust or inappropriate about making a father support his child, if he is able to do so, before looking to a government welfare program that is intended to supplement the resources of the needy." This stance is similar to that taken by the courts of other jurisdictions, and certainly is consistent with the goal of providing for the reasonable needs of the child.

V. SUGGESTIONS FOR SETTING CHILD SUPPORT FOR LOW INCOME PARENTS

Setting child support in cases where the parents have little or no income is one of the most frustrating tasks which a judge must undertake. Since providing for the child's reasonable needs is paramount, the court must require parents to pay an amount that would meet those needs based upon the parents' income or earning capacity. As the court of appeals noted in the Barker case, there is nothing unjust or inappropriate about making a parent support his or her child, if able to do so. Indeed, it is the parents' primary obligation, and the courts should demand that they expend the utmost effort to provide for their children.

The recent legislative amendments to the guideline statutes,
and the decision of the court of appeals in the Brashears case, reflect a strict approach to the enforcement of the obligation to pay support, even for those parents with minimal or no income.\textsuperscript{138} However, the opinion in the Morris case offers a better way of dealing with the low income parent.\textsuperscript{139} When a parent is receiving "means-tested" government benefits as his or her only income, that fact alone should rebut the presumption that the parent is able to pay child support.\textsuperscript{140} This does not mean that such parent should be excused from the duty to pay any support. On the contrary, the court would retain the discretion to set support on a case-by-case basis, upon a showing that the parent is voluntarily unemployed or has other assets available from which support could be paid. Accordingly, the Kentucky Supreme Court should affirm the decision in Morris. The court should also reverse the ruling in Brashears, and declare that receipt of welfare benefits would be sufficient proof to rebut the presumption that a parent has the ability to pay the minimum amount for child support.

There is likewise a need to change the method of calculating support in those instances where the child is receiving benefits on account of a parent's disability. The holding in the Miller case should be reversed by the Kentucky Supreme Court, or nullified by statutory amendment, in two respects. First, the disabled parent/obligor should not be given a dollar-for-dollar credit for benefits paid to the child. Although the rationale for the credit is that the disability checks are a replacement for the parent's income, it will often absolve the disabled parent from any further financial responsibility, despite the child's needs and the parent's ability to pay an additional amount. Second, the benefits received by the child should not be included in the income of the custodial parent when computing support under the guidelines. Since the checks are for the child's benefit and are based on the disabled parent's earnings, there is no just or logical reason to include them in the other parent's income.

A better rule would be the one followed by the courts of Ohio where the amount of the benefits received by the child is not included in the income of either parent, and is deducted from the

\textsuperscript{138} Brashears v. Commonwealth, 944 S.W.2d 873 (Ky. Ct. App. 1997).
\textsuperscript{139} Morris v. Commonwealth, 926 S.W.2d 674 (Ky. Ct. App. 1996).
\textsuperscript{140} Id.
total parental support obligation.\textsuperscript{141} This method will generally result in greater total support being made available for the child's reasonable needs, and will treat both parents fairly.

VI. DETERMINING THE CHILD SUPPORT OBLIGATION OF HIGH INCOME PARENTS

It is an unfortunate fact of life in our society that judges must set the amount of child support for far more parents who are at the poverty level than for those who are affluent. Since the guideline brackets apply to combined parental income up to $15,000 per month,\textsuperscript{142} the number of cases where the court must look outside the statutory tables are necessarily few. Nevertheless, determining what is a fair and reasonable amount for the support of a child of high income parents requires a different, but not always easier, analysis for the trial judge.

Where the combined parental income exceeds the amount in the highest bracket of the guidelines, Kentucky Revised Statute section 403.212(5) provides that the court may use its judicial discretion in determining the appropriate level of child support.\textsuperscript{143} However, that section of the statute is silent as to what factors the trial court should consider in exercising its discretion,\textsuperscript{144} and there have been no decisions from our appellate courts which would provide assistance to the trial courts in this regard. When the parental income falls within the tables, there is a rebuttable presumption in favor of the guideline amount.\textsuperscript{145} In accordance with Kentucky Revised Statute section 403.211(3), the court may deviate from the guidelines only after making a specific finding that application of the guidelines would be inappropriate or unjust.\textsuperscript{146} The statute sets forth a number of factors that would suffice to rebut the presumption, including the extraordinary needs of the child, the extraordinary needs of either parent, and the fact that the parents' combined income exceeds the

\textsuperscript{143} Id. § 403.212(5).
\textsuperscript{144} Id.
\textsuperscript{145} Id. § 403.211(2).
\textsuperscript{146} Id.
guidelines. Nevertheless, the statutes do not expressly state what factors the court should weigh when setting child support for parents whose combined income is beyond the uppermost bracket of the tables. In the absence of direction from the statutes or precedent from the appellate courts, what method should trial judges follow in determining proper support in such cases? Should the courts simply make a mathematical extrapolation based on the percentage of support to income contained in the tables? Should the highest bracket figure be presumed as the proper amount of support unless the custodial parent shows that the child's reasonable needs would not be met? Or should the court consider pre-guideline factors including the standard of living that the child would have enjoyed had the marriage not been dissolved?

There are three basic methods used by the courts of other jurisdictions to set child support when the parental income is off the charts. The first is the formula approach. A number of states have statutory formulae which apply to all income levels, including the highest. A variation of this method is where states which have guideline tables use a formula for those cases where the parental income exceeds the top guideline bracket.

147. Kentucky Revised Statute Section 403.211(3) reads as follows:
   A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:
   (a) A child's extraordinary medical or dental needs;
   (b) A child's extraordinary educational, job training, or special needs;
   (c) Either parent's own extraordinary needs, such as medical expenses;
   (d) The independent financial resources, if any, of the child or children;
   (e) Combined parental income in excess of the Kentucky child support guidelines;
   (f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act; and,
   (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

Id. § 403.211(3).

148. See MORGAN, supra note 4, §4.07[b] at 4-36 to 4-45.

149. See, e.g., In re Tukker M.O., 544 N.W.2d 417 (Wis. 1994); In re Marriage of Lee, 615 N.E.2d 1314 (Ill. App. Ct. 1993).

These jurisdictions would allow the court to deviate from the result reached by strict application of the formula.\(^{151}\) A second method employed by some courts is to presume that the child support amount indicated for the highest income in the tables is correct.\(^{152}\) In order to rebut this presumption, the parent would have to show that the guideline amount is either inadequate or in excess of that needed to meet the child's reasonable needs. The third approach is where the court disregards the guidelines and engages in a common law analysis of the child's needs and the parent's ability to pay.\(^{153}\) This last process may have been what the legislature envisioned when it enacted Kentucky Revised Statute section 403.212(5).

The suggestion that courts should set child support by some form of mathematical extrapolation has not been well received.\(^{154}\) The rejection of such a mechanical approach is consistent with studies showing that, while the total money spent on a child may increase with the parents' income, the percentage of such expenditures to the parental income decreases.\(^{155}\) This fact is exemplified by the guideline tables wherein the support amount as a percentage of combined income decreases at the upper levels of parental income.\(^{156}\) Thus, to avoid a windfall to the child and/or the custodial parent, judicial discretion based on a finding of the child's needs is preferred over a mathematical formula.

The Kentucky statute does not provide a formula for calculat-
ing support when parental income exceeds the guidelines.\footnote{157} Nowhere in the statute is there any suggestion that a mathematical extrapolation would be appropriate.\footnote{158} Likewise, there is no provision for a presumption that the highest amount in the tables would be the correct figure for support, subject to proof by the custodial parent of the need for additional funds.\footnote{159} The only direction given to the courts for setting support outside of the tables is contained in Kentucky Revised Statute section 403.211(5) which requires the court to order child support based upon the needs of the child or the previous standard of living, whichever is greater, when the obligor parent is in default or has failed to produce evidence of income.\footnote{160} Thus, it is reasonable to conclude that, when parental income exceeds the guidelines, courts may deviate upward from the highest support amount, and in exercising discretion under Kentucky Revised Statute section 403.212(5), should conduct a pre-guidelines analysis to determine the reasonable needs of the child.\footnote{161}

Before the adoption of the current guidelines, courts set child support in accordance with the former Kentucky Revised Statute section 403.210.\footnote{162} That statute provided that a court could order a parent to pay an amount deemed to be reasonable or necessary for the child's support, after considering all relevant factors.\footnote{163} Those relevant factors included the financial resources of the child; the financial resources of the custodial parent; the financial resources and needs of the non-custodial parent; the physical and emotional condition of the child, and his/her emotional needs; and the standard of living the child would have enjoyed had the marriage not been dissolved.\footnote{164} These factors are substantially the same as those set forth in the guidelines which would allow the court to deviate.\footnote{165} In the absence of case authority to direct trial judges in exercising their discretion under Kentucky Revised Statute section 403.212(5), it would seem that consideration of

\footnote{157. See KY. REV. STAT. ANN. § 403.212(5) (Michie 1993 & Supp. 1996).}
\footnote{158. See id.}
\footnote{159. See id.}
\footnote{160. Id. § 403.211(5).}
\footnote{161. See id. § 403.312(5).}
\footnote{162. See id. § 403.210.}
\footnote{163. Id.}
\footnote{164. Id.}
\footnote{165. See id. § 403.211(3).}
these factors would be the best approach to setting child support for parents whose combined income exceeds the highest amount under the guidelines.

The primary focus of the pre-guidelines analysis was on the reasonable needs of the child and the ability of the parent to pay. In *Stewart v. Madera*, the court emphasized the importance of maintaining, wherever possible, the child's standard of living in setting a support figure. Since there is no question that a parent whose income is beyond the guideline tables has the ability to provide for the basic needs of his or her child, the real issue in these cases is what amount is "reasonable and necessary" as support for such a child. And, although the independent financial resources of the child can be a consideration in some instances, the financial resources of the parent is generally not the controlling factor in the high income cases. Rather, the amount of support must be based upon the needs of the child, and upon maintaining the child's standard of living.

Several arguments can be made for limiting the child support obligation to an amount no more than that which would provide for the child's reasonable needs. It has been noted that "excessive" child support in essence results in a distribution of the parent's estate, which is contrary to the principle that, while owing a duty of support for a minor, a parent has the right to disinherit a child. It can be further claimed that an excessive award of support results in a windfall to the child and/or the custodial parent. The non-custodial parent will often contend that child support is truly an award of maintenance to the spouse.

167. *Id.* at 439.
168. *Id.* at 439 n.1.
169. *Id.*
170. *Id.* at 439. See also, *Daniels v. Daniels*, 726 S.W.2d 705 (Ky. Ct. App. 1987).
Finally, a more compelling argument is that a support award which is greater than that reasonably necessary for support deprives the non-custodial parent of a proper role in deciding the child's lifestyle.\textsuperscript{175} This is a particularly serious consideration when the parents have joint legal custody, and therefore should have equal input into the manner in which the child is reared.

The foregoing concerns regarding "excessive" child support are alleviated, if not eliminated, by focusing on the standard of living that the child would have enjoyed had the marriage continued. If proof is presented that during the marriage the parents spared no expense and lavished luxuries upon the child, and that this would have likely continued but for the dissolution,\textsuperscript{176} the non-custodial parent cannot credibly argue that the child should be hereafter raised in a spartan manner. On the other hand, parents of considerable wealth may hold the firm belief that a child should not be "spoiled," but rather should be taught frugality and the value of earning the rewards of the good life.\textsuperscript{177} One thing is certain, a child should not be expected to live at a minimum level of comfort while the non-custodial parent is living the life of luxury.\textsuperscript{178}

Assuming that child support should be based upon the standard of living that the child would have enjoyed had the marriage continued, what type of evidence should be presented to the court? Proof of food, clothing and educational expenses,\textsuperscript{179}

\begin{itemize}
\item 175. See, State v. Hall, 418 N.W.2d 187 (Minn. Ct. App. 1988); Harmon, 578 N.Y.S.2d at 897.
\item 176. See Giacalone v. Giacalone, 876 S.W.2d 616, 620 (Ky. Ct. App. 1994) (holding that the trial court was justified in deviating from the guidelines in order to allow a child to attend parochial school; the court noted the history of the parents' intention about their children's education as being a factor in favor of deviation).
\item 179. In some cases, courts have ordered high income parents to establish trust funds for the future educational costs of the children. Boyt v. Romanow, 664 So. 2d 995 (Fla. Dist. Ct. App. 1995); Nash v. Mulle, 846 S.W.2d 803 (Tenn. 1993). Such funds, sometimes referred to as "good fortune" trusts, may be particularly appropriate where the parent is expected to have a brief, though lucrative, career. Such was the case in In re Paternity of Tukker M.O., 544 N.W.2d 417 (Wis. 1996). For a discussion of such good fortune trusts, see, MORGAN, supra, note 4, §4.07[b][4], 4-45 to 4-46.
\end{itemize}

One case rejected the right of the court to order such educational trust funds as being beyond the court's authority to order post-majority support. Finley v. Scott, 687 So. 2d 338 (Fla. Dist. Ct. App. 1997).
such as private school tuition would present no difficulty. Additionally, the cost of other non-essentials, such as private music or dance lessons, and for various recreational, social or cultural activities, could be easily documented. The more difficult matters to prove would involve housing and transportation costs. The child of affluent parents may arguably expect to continue living in a home comparable to that in which he or she resided while the parents were together and to be transported in late model vehicles. Proof of these items will normally require expert testimony from an economist in order to establish the portion of such expenses which would be attributable to the dependent child as opposed to the custodial parent. In any event, since the custodial parent will be requesting the trial court to order payment above the amounts contained in the guidelines, counsel for that party should be prepared to present proof of these expenses.

A more difficult issue in setting support for the child of a wealthy parent is whether the court should take into consideration the desire of the custodial parent to stay at home. In most cases, this issue would be addressed as part of a request for payment of spousal maintenance. One of the bases upon which

180. See Giacalone, 876 S.W.2d at 616.
181. Compare Smith v. Smith, 845 S.W.2d 25 (Ky. Ct. App. 1993) where the court held that private music lessons were not an extraordinary expense so as to allow deviation from the guidelines. That case, however, did not involve parents whose income exceeded the guidelines.
184. See Badertscher, supra note 174; Dodson, supra note 174.
185. See KY. REV. STAT. ANN. § 403.200 (Michie 1993 & Supp. 1996) which governs the award of spousal maintenance. However, in some cases the custodial parent may not be receiving maintenance, such as where the support issue is raised in a post-decree motion to modify support after the noncustodial parent has experienced a substantial increase in income. Likewise, maintenance may have been terminated by the custodial parent's remarriage.
a court may award maintenance is that the spouse seeking payment is a custodian of a child "whose condition or circumstances" make it appropriate that the custodian not seek work outside the home. It can be reasonably argued that a child's pre-dissolution standard of living, where one parent did not work outside the home, is such a "condition or circumstance" justifying an award of maintenance.

The maintenance statute further states that, in determining the amount of maintenance, the court should consider the financial resources of the party seeking maintenance "including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian." That phrase seems to imply that a court could set child support at an amount which would allow the parent to be a stay-at-home custodian. Certainly, if the parties have a history of one parent not working or offer proof that they had agreed that one of them would remain at home, the court would be justified in considering the amount of support necessary to achieve that goal, in the interests of maintaining the child's standard of living.

When called upon to award child support for a child of a high income parent, the court has broad, but not unbridled, discretion. The trial judge must require proof of the reasonable needs of the child, and proof of the standard of living that the child would have enjoyed had the marriage continued. This standard of living should be in keeping with the community in which the child resided during the marriage. It should also reflect the right of both parents to instill values in the child. In summary, as with custody and visitation issues in a domestic case, the court must strive to lessen the impact of the dissolution on the child.

VII. CONCLUSION

When the Kentucky Legislature adopted the child support guidelines in 1990, trial courts were relieved of the burden of deciding the amount of child support to be paid in the great majority of cases. Nevertheless, judges retain the discretion to

---

187. Id. § 403.200(2)(a).
vary from the guidelines where it would be appropriate and just. The exercise of such discretion is most important at the extremes of the economic spectrum. Whether the case involves a parent with few resources or one of wealth, the court should not hesitate to exercise its discretion and to deviate from the guidelines in order to insure that the reasonable needs of the child are met and to lessen the impact of the dissolution on the child's standard of living.
INTRODUCTION

The purpose of this article is to discuss the role of ethics and unauthorized practice opinions in regulating the practice of law, with suggestions for clarification and improvement.

The Kentucky Bench and Bar, the quarterly journal of the Kentucky Bar Association ("KBA"), prints "Advisory Ethics Opinions" and "Unauthorized Practice Opinions" over the signatures of the respective chairs of the Ethics and Unauthorized Practice of Law ("UPL") Committees. This article describes: 1) how ethics and unauthorized practice opinions are generated; 2) the legal effect of the opinions; 3) the relationship of ethics opinions to attorney discipline; 4) the Board of Bar Governors' role in shaping the opinions; and 5) the role of the Kentucky Supreme Court. The article concludes by suggesting that the Kentucky Supreme Court appoint the members of the Ethics and UPL Committees and that the court have the power to review opinions on the court's own motion.
I. HOW OPINIONS ARE GENERATED AND THEIR LEGAL EFFECT

Section 116 of the Kentucky Constitution provides that "the Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar." The KBA helps the court admit, educate, and discipline Kentucky attorneys. The KBA, through its Board of Governors, executive director, bar counsel, and membership, functions as the court's agent in these matters.3

Supreme Court Rule 3.530,4 one of the rules adopted by the court pursuant to Section 116, furthers the educational mission of the court and bar by providing that an attorney may ask a member of the Ethics Committee (a "hot-line" member) for advice about the ethical propriety of contemplated conduct.5 The requesting attorney is protected from discipline if the attorney follows the advice of the hot-line member (and if the attorney's portrayal of the problem is complete and accurate).6

Hot-line members refer questions to the Ethics Committee when they are unsure of the correct answer, or feel that the question is one that needs to be answered for the benefit of the entire bar — i.e., by a formal opinion. In addition, local bar associations may ask the Committee for advisory opinions. Matters which seem to be of general importance are discussed at meetings of the Ethics Committee and formal opinions are prepared for consideration by the Board of Governors. The Board can approve, modify, or disapprove Ethics Committee opinions. In addition, the Board can approve the opinion but direct that it be issued to the requesting attorney as an informal (i.e. private) opinion.7 The UPL Committee functions in the same way as the Ethics Committee, except that most of the questions are posed by local bar associations concerned about non-lawyers practicing law. The UPL Committee takes unauthorized practice questions which come to the Ethics Committee through its hot-line members. Like ethics opinions, unauthorized practice opinions are referred to the

---

2. KY. CONST. § 116 (Banks-Baldwin 1997).
3. Ex Parte Auditor of Public Accounts, 609 S.W.2d 682, 689 (Ky. 1980).
4. KY. SUP. CT. R. 3.530 (Banks-Baldwin 1997).
5. KY. SUP. CT. R. 3.530(1) (Banks-Baldwin 1997).
6. KY. SUP. CT. R. 3.530(3) (Banks-Baldwin 1997).
7. KY. SUP. CT. R. 3.530(2) (Banks-Baldwin 1997).
Board of Governors, which has the final say on whether, and in what form, opinions are released.

Formal ethics and unauthorized practice opinions approved by the Board of Governors are published — in full or in synopsis form — in the *Kentucky Bench and Bar*, the publication of the KBA.\(^8\) The publication does not reflect the supervisory role of the Board of Governors. Ethics and unauthorized practice opinions are not published in the Southwestern Reporter or in the annotations to the Kentucky Revised Statutes. The opinions in the *Bench and Bar* are not indexed.\(^9\)

The governing rule states that ethics and unauthorized practice opinions are *advisory only*.\(^{10}\) They do not have the force of law and lawyers are not obligated to follow them. However, the rule provides for review of an opinion by the Supreme Court of Kentucky upon petition by any person or entity "aggrieved or affected" thereby,\(^{11}\) a provision which appears to acknowledge that ethics and UPL opinions, though advisory, might affect a person or entity adversely. In *American Insurance Association v. Kentucky Bar Association*,\(^{12}\) for example, the insurance industry sought review of Ethics Opinion E-368 and Unauthorized Practice Opinion U-36.\(^{13}\) In E-368,\(^{14}\) the Ethics Committee and Board of Governors stated that a lawyer may not enter into a contract with a liability insurer in which the lawyer or his firm agrees to do all of the insurer's defense work for a set fee.\(^{15}\) The insurance industry obviously believed that after E-368 attorneys would claim they could not ethically work on a set fee basis, would insist on being paid by the hour, and pad their bills. Thus, the net effect would be higher defense costs and reduced profits for the industry. The industry challenged E-368 by filing an appeal with the Kentucky Supreme Court within thirty days after the opinion was published.

---

8. KY. SUP. CT. R. 3.530(4) (Banks-Baldwin 1997).
9. Opinions issued prior to 1993 (through E-358 and U-45) are compiled and indexed in UNIVERSITY OF KENTUCKY COLLEGE OF LAW, OFFICE OF CONTINUING LEGAL EDUCATION, KENTUCKY LEGAL ETHICS OPINIONS AND PROFESSIONAL RESPONSIBILITY DESKBOOK (Richard Underwood, ed. 1993) (hereinafter "DESKBOOK"). References to ethics and unauthorized practice opinions before 1993 will be to the DESKBOOK.
10. KY. SUP. CT. R. 3.530(3) (Banks-Baldwin 1997).
12. 917 S.W.2d 568 (Ky. 1996).
13. Id.
15. Id.
in the *Kentucky Bench and Bar*.

The industry also challenged U-36, a 1982 unauthorized practice opinion stating that an insurance company may not use house counsel (salaried employees) to represent its insureds once suit is filed. U-36 had relied on definitive statements by the Kentucky high court that a corporation cannot legally practice law. The industry had complied with the mandate of the cases relied on in U-36 and hired outside counsel to represent its insureds after suit was filed. By challenging U-36 in the *American Insurance* case, the industry gave the Kentucky court an opportunity to take another look at the issue.

Unfortunately for the insurance industry, the Kentucky Supreme Court affirmed both U-36 and E-368. With regard to U-36, the court rejected cases from other jurisdictions and approved the result in U-36, though primarily on grounds of conflict rather than unauthorized practice. In the view of the court, house counsel might be conflicted by representation of an insured after suit is filed. "[A]s a prophylactic measure not unlike the imputed disqualification rules," the court held that such representation is prohibited.

With regard to E-368, the court opined that set fee arrangements between attorneys and liability insurers create impermissible conflicts with insureds (who are the attorneys' "clients"). While noting nineteen potential conflicts between insured and insurer, the court seemed most concerned with the fact that attorneys might face financial loss in time-consuming cases, which might cause the attorneys to provide inadequate representation of the insureds. However, the court did not explain how an insured might be harmed by inadequate

17. Id. U-36 approved in-house representation of the insured's interest before suit is filed. Id.
18. Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965); Hobson v. Kentucky Trust Co. of Louisville, 197 S.W.2d 454 (Ky. 1946); Kendall v. Beiling, 175 S.W.2d 489 (Ky. 1943).
19. American Ins., 917 S.W.2d at 574.
20. Id.
21. Id.
22. Id. at 571.
23. Id. at 573.
24. Id.
25. Id. at 572.
representation, since the insurer pays the claim.

While the logic of *American Insurance* is debatable, there is no question but that E-368 is now the law of the Commonwealth. What had been merely advisory became a legal mandate. Even before affirmance, however, E-368 likely had inhibited attorneys otherwise willing to handle defense work on a set fee basis, and thereby affected the insurance industry.

II. WHAT LEGAL SCHOLARS HAVE SAID ABOUT ETHICS COMMITTEES AND THEIR OPINIONS

In 1982 Professors Finman and Schneyer evaluated the work of the American Bar Association's Committee on Ethics and Professional Responsibility ("CEPR"). By their standards CEPR failed miserably. They examined the twenty-one formal opinions issued by CEPR since the adoption of the Code of Professional Responsibility; the twenty-one opinions contained forty-eight holdings. They graded the holdings by two criteria: "correctness" (i.e., is the holding logical and is it based on a value judgment likely to be accepted?), and "reasoning." They considered the attributes of good reasoning to be: 1) identification of a tenable rule-based rationale, 2) identification of relevant authorities, 3) identification of problems of interpretive choice, 4) careful analysis of problems of interpretive choice, and 5) clarity.

According to Finman and Schneyer, only twenty-one of CEPR's forty-eight holdings were correct, and fourteen of the twenty-one correct holdings added nothing to conclusions that lawyers would draw on their own from reading the Code. By their analysis, CEPR's reasoning fared even worse. "[E]ight opinions fail to identify a tenable rationale; eleven opinions fail to identify relevant authority; thirteen overlook problems of interpretive choice; eight fail to analyze such problems adequately; and many opinions suffer from serious ambiguity."
After dissecting each of CEPR's twenty-one opinions and exposing the shallow and illogical reasoning therein, the authors advanced their solution: to make the process adversarial by appointing lawyers to research and argue contrary positions on the questions before the Committee.

Charles Wolfram wrote the "book" on ethics and professional responsibility, and he found little good to say about ethics opinions. According to Wolfram, the influence of ethics opinions has waned. Courts rarely rely on them, and they are often dogmatic, poorly reasoned, and badly written. In generalizing about ethics committees and their work, Wolfram focused on ABA opinions and tracked Finman and Schneyer's critical analysis of those opinions.

In 1991 Professor Richard Underwood, chair of the Ethics Committee of the Kentucky Bar Association, deflected the criticism of Finman, Schneyer and Wolfram by focusing on the role of ethics committees in issuing private opinions to requesting lawyers. Underwood pointed out that ethics committees are not courts and do not decide cases; thus, analogies to judicial systems are not well-taken.

If there is one point to be made in responding to critics of ethics committees...it is that complex advocacy models complete with "the usual" appellate review are fiscally profligate and delay creating, and may defeat the very purpose of having bar sponsored committees and "hot-lines." As a prime corollary, I would suggest that a cult of precedent and methodology of priestly casuistry are likewise undesirable. The ethics rules can and should be applied as rules of reason. According to Underwood, the principal value of an ethics committee is to keep the honest practitioner on track.
tioner, unsure of the propriety of anticipated conduct, can obtain an advisory opinion which, if followed, will protect him from discipline. The practitioner is thus kept on the right track and the public well served.

Underwood did not focus on the role of formal opinions, other than to say that they serve the purpose of educating the bar, "assuming that lawyers will read them." 41

In a 1992 article, Professor Jorge Carro studied the impact of ethics opinions on judicial decisions. 42 By computerized search he found 1194 opinions cited in 639 state and federal cases between 1924 and 1990. 43 He found ethics opinions cited in a variety of contexts, most often in cases dealing with conflict of interest. 44 Not surprisingly, he concluded that ABA formal opinions are more influential than state opinions. 45 He found that some state courts (New York for example) cite ethics opinions frequently, while other state courts (California for example) rarely do so. 46 Contrary to Wolfram's dismissive analysis, Carro concluded that courts treat ethics opinions with deference, almost as if they were judicial opinions. 47

The courts treat these opinions with great deference, and, in fact, attribute to them a degree of attention similar to that usually found in the treatment of judicial opinions. In discussing the ethics opinions of the bar, courts follow, distinguish, criticize, parallel, and harmonize them just as courts do with judicial opinions. 48

However, Carro agreed with Finman and Schneyer that ethics opinions are not always well-reasoned and well-written. While not advocating Finman and Schneyer's adversarial solution, Carro urged ethics committees to recognize their impact on judges and lawyers and to strive to improve the quality of formal opinions. 49

William Hunt, then disciplinary counsel for the Tennessee

41. Id.
43. Id. at 16-17.
44. Id. at 22.
45. Id. at 23-26.
46. Id. at 38-39 (New York courts cited ethics opinions 73 times during the study period; California courts only 11 times). Id.
47. Id. at 35.
48. Id.
49. Id. at 36.
Board of Professional Responsibility, analyzed Tennessee ethics opinions issued between 1980 and 1988. In Tennessee, formal opinions are issued by ethics committees of the Board of Professional Responsibility, the body charged with disciplining attorneys. The members of the board are appointed by the Tennessee Supreme Court and the board operates as an arm of the court. The rule refers to the board as the Supreme Court Board of Professional Responsibility and to the ethics committees as the Supreme Court Ethics Committees. The committees are empowered to issue formal opinions which "shall bind the Committee, the person requesting, and the Supreme Court Board of Professional Responsibility, and shall constitute a body of principles and objectives upon which members of the bar can rely."

Thus, the ethics committees function as an arm of the supreme court, rather than the Tennessee Bar Association. While the opinions are not binding on courts, two factors give the opinions more significance than opinions issued by a bar committee: the close relationship between the board and the Tennessee Supreme Court and the fact that the board is charged with both discipline and the issuance of ethics opinions. The official status of Tennessee opinions may be to cause them to be treated as one would treat regulations of an administrative agency — as binding until successfully challenged. The disciplinary counsel's description of the opinions uses language one would associate with legal rules. After describing the 100 plus opinions as if they were a body of law, he concludes by saying that a "significant body of precedent has already been created to guide Tennessee

51. Id.
52. TENN. SUP. CT. R. 9, sec. 26.5(a) (1996) (there are three ethics committees, one for each geographical area of the state).
53. Id.
54. State v. Jones, 726 S.W.2d 515, 519 (Tenn. 1987).
56. E.g., Hunt, supra note 50, at 307 ("The Board later applied this reasoning to bar an attorney from representing a client in a case contesting a will that he had signed as a witness."); id. at 311 ("In its next opinion on this issue, the Board required attorneys to comply with a 'Kentucky' rule in addition to the aforementioned 'New Jersey' rule"); id. at 313 ("[T]he Board later found that a juvenile court judge was unable in his part-time practice to bring an action against the County Commission. . . .") (emphasis added in all quotes).
attorneys."57

According to Professors Little and Rush, the close relationship between the Tennessee board and the Tennessee Supreme Court might serve to shield the board from liability for anti-trust violations.58 The "state action" exemption59 from the Sherman Act requires the challenged restraint to be both clearly articulated as state policy and actively supervised by the state.60 Since some state ethics and unauthorized practice opinions might be regarded as anti-competitive,61 it is important to shield the issuing body from anti-trust liability.

III. DUE PROCESS IN THE DISCIPLINARY PROCESS

Attorneys are entitled to know what they may be disciplined for. They should not have to guess what a disciplinary committee or court might find to be "conduct tending to bring the bench and bar into disrepute,"62 or have the "appearance of impropriety."63 While it is probably true that rules for attorneys cannot be drafted with the precision of criminal codes,64 vague rules should be avoided if possible and attorneys who attempt to follow the rules should have safe passage in the disciplinary process.

In Gentile v. State Bar of Nevada65 the United States Supreme Court set aside a state disciplinary action on due process grounds, holding that the attorney had been led by the "safe harbor" provision of Nevada Supreme Court Rule 17766 to believe that his

57. Id. at 325.
61. See discussion infra note 148.
62. This was the standard in former Kentucky Supreme Court Rule 3.140 (now changed); see Kentucky State Bar Ass'n v. Vincent, 537 S.W.2d 171 (Ky. 1976) for a defense of this vague standard.
64. Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Durham, 279 N.W.2d 280, 283-84 (Iowa 1979) (stating that it is impossible to draft a set of rules covering all professional activity warranting discipline).
66. NEV. SUP. CT. R. 177 (1997) (substantially the same as Kentucky Rule of
description of his defense in a criminal case\textsuperscript{67} to the media was permitted by the rules of conduct.\textsuperscript{68} The Court held that the safe harbor provision, as interpreted by the Nevada Supreme Court, was void for vagueness because it did not give fair notice of what was permitted and what was prohibited.\textsuperscript{69}

\textit{Gentile} stands broadly for the proposition that attorneys are entitled to fair notice of what they may be disciplined for. Attorneys are entitled to assume that the "disciplinary code" consists of Supreme Court rules, which include the Model Rules of Professional Conduct,\textsuperscript{70} and decisions of the Kentucky Supreme Court interpreting the rules.

In a variety of contexts, the Kentucky Supreme Court opines on attorneys' ethics.\textsuperscript{71} If the context is disciplinary, the court applies specific rules of conduct.\textsuperscript{72} In one instance, however the court, perhaps inadvertently, has violated this principle by relying on a rule which does not impose a duty. Rule 1.4 says that an attorney \textit{should} keep a client reasonably informed, and \textit{should} explain matters to a client to enable the client to make reasonable decisions.\textsuperscript{73} The Model Rules Committee made Rule 1.4 non-mandatory out of concern that failure to communicate was too vague to serve as a basis for discipline.\textsuperscript{74} Other rules, except Rule 6.2,\textsuperscript{75} use the mandatory "shall" or "shall not." In spite of the non-mandatory nature of Rule 1.4, the court often cites the rule as one

\begin{itemize}
\item \textsuperscript{67} 501 U.S. 1030 (1991) (stating that the police, rather than his client, had stolen money and drugs from a storage facility).
\item \textsuperscript{68} Id. at 1049-53; see also William Fortune et al., MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK: THE LIMITS OF ZEALOUS ADVOCACY, 383 (1996) (hereinafter "HANDBOOK").
\item \textsuperscript{69} Id. at 1048.
\item \textsuperscript{70} The Model Rules are subsections of Kentucky Supreme Court Rule 3.130.
\item \textsuperscript{71} \textit{E.g.} Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997) (disqualification); Whitaker v. Commonwealth, 895 S.W.2d 953 (Ky. 1995) (criminal appeal); Hubble v. Johnson, 841 S.W.2d 169 (Ky. 1992) (fee dispute).
\item \textsuperscript{72} But see Kentucky State Bar Ass'n v. Vincent, 537 S.W.2d 171, 173 (Ky. 1976) (disciplining an attorney for "bringing the bench and bar into disrepute," and defending that vague standard. The attorney had been convicted of failure to file income tax returns, which he argued was not a crime of moral turpitude. The bench-and-bar-into-disrepute rule, Kentucky Supreme Court Rule 3.140, has been repealed).
\item \textsuperscript{73} KY. SUP. CT. R. 3.130(1.4) (Banks-Baldwin 1997).
\item \textsuperscript{74} The author served on the Model Rules Committee.
\item \textsuperscript{75} KY. SUP. CT. R. 3.130(6.2) (stating "A lawyer should not seek to avoid appointment by a tribunal except for good cause.")
\end{itemize}
of the bases for discipline. With one exception, however, the court has relied on other rules, in addition to Rule 1.4, in disciplining attorneys. The references to Rule 1.4 in those cases might, therefore, be considered "harmless error." However, the court should quit referring to Rule 1.4 as if the verb form was "shall."

In non-disciplinary contexts the court is not confined by the rules of conduct. The court may draw on general principles to decide the case at bar, and in so doing, establish and modify legal relationships between attorneys and other persons. Unfortunately, in two recent conflicts cases, the court deliberately resurrected the discredited phrase "appearance of impropriety" as a yardstick by which to judge attorneys' behavior in conflict of interest cases. The first was the American Insurance case, in which Justice Stumbo justified the affirmance of E-368 by saying, "[w]e dispose of these arguments by first stressing that the mere appearance of impropriety is just as egregious as any actual or real conflict."

The second case was Lovell v. Winchester, a mandamus action to require the trial court to disqualify an attorney who allegedly had obtained confidential information from a prospective client, rejected the case, and then represented the client's opponent. The court held that the attorney must be disqualified. The result is not surprising and could have been reached by simply relying on Rule 1.9. However, the court went out of its way to embrace the "appearance of impropriety" standard:

Even though the comment to Rule 1.9 specifically rejects the "appearance of impropriety" standard in favor of a fact-based test applied to determine whether the lawyer's duty

---

76. E.g. Kentucky Bar Ass'n v. Hatcher, 929 S.W.2d 193 (Ky. 1996); Monroe v. Kentucky Bar Ass'n, 927 S.W.2d 839 (Ky. 1996); Kentucky Bar Ass'n v. Thomas, 927 S.W.2d 838 (Ky. 1996).
77. Kentucky Bar Ass'n v. Davenport, 855 S.W.2d 340 (Ky. 1993).
78. E.g. Clark v. Burden, 917 S.W.2d 574 (Ky. 1996) (stating that the doctrine of apparent authority does not ordinarily vest an attorney with authority to settle a client's case).
80. 941 S.W.2d 466 (Ky. 1997).
81. Id.
82. Id. at 469.
83. KY. SUP. CT. R. 3.130(1.9) (Banks-Baldwin 1997).
of loyalty and confidentiality to a former client will likely be compromised by the subsequent representation, the appearance of impropriety is still a useful guide for ethical decisions. . . . For these reasons, courts still retain the appearance of impropriety standard as an independent basis of assessment. 84

To this point, the court has not disciplined a lawyer because the lawyer's conduct gave the appearance of impropriety. 85 It would violate due process to rest discipline on such a vague standard. However, now that it is clear that the court is concerned with appearances, lawyers might assume they can be disciplined for conduct which violates no rule but does not "pass the smell test." If so, the appearances "standard" creates uncertainty and causes unwarranted concern over conduct which is consistent with the letter and spirit of the rules of conduct.

IV. THE EFFECT OF ETHICS OPINIONS ON ATTORNEY BEHAVIOR

If an attorney recognizes an ethical issue, the attorney presumably will turn first to the Rules of Professional Conduct. If the attorney does not find the answer in the rules, the attorney might attempt to find the answer in the KBA Ethics Opinions — a difficult task since the opinions are not compiled or indexed in a common source. If the attorney is aware of the Ethics Committee's hot-line service, the attorney might call a hot-line member and "run it by" that member. The hot-line member would consult the rules and ethics opinions and opine whether the contemplated conduct is "ethical" or not. An attorney who follows the advice is thereby shielded from discipline — but not from other adverse consequences, notably disqualification.

This description of the process exposes a number of flaws: 1) no compilation or indexing of ethics and unauthorized practice opinions; 2) different answers by different hot-line members (though Professor Underwood checks hot-line responses that are copied to him); and 3) the limited protection afforded to one who follows the advice of a hot-line member.

84. Lovell, 941 S.W.2d at 468-69 (emphasis added).
85. But see Kentucky Bar Ass'n v. Marcum, 830 S.W.2d 839 (Ky. 1992) (discussing violation of specific rule; appearance of impropriety language also used).
The major flaw in the process, however, is more subtle. Formal ethics opinions are advisory only. They do not operate as rules and one cannot be disciplined for violation of an ethics opinion. However, most formal opinions have been written in terms which grant ("may") or deny ("may not") permission. Inquiring attorneys and ethics committee members tend to think of the opinions as equal in authority to court rules. The result is, that when known, the opinions tend to shape conduct to the same degree as the rules. Attorneys are afraid to engage in conduct when told by the Ethics Committee and Board of Governors that they may not engage in such conduct.

There is scant evidence, however, that the Supreme Court of Kentucky looks to ethics opinions in disciplinary cases. In recent years, only Kentucky Bar Association v. Geisler\(^{86}\) cited an ethics opinion, and the opinion relied on in Geisler was an opinion of the American Bar Association, not the KBA.\(^{87}\) That is not to say that the court might not cite an ethics opinion as support, or even adopt the reasoning of an ethics opinion. In Geisler, the attorney was charged with violation of Rule 4.1\(^{88}\) for settling a case without telling her opponent that her client had died.\(^{89}\) In ABA Formal Opinion 95-397,\(^{90}\) the ABA Committee had opined that failing to make such disclosure amounted to a false statement of material fact.\(^{91}\) The court in Geisler relied on the opinion, not as the source of authority, but rather for its reasoning.\(^{92}\)

Geisler can be compared to In re A,\(^{93}\) in which the Oregon Supreme Court declined to discipline an attorney who failed to disclose the death of his client.\(^{94}\) The Oregon court looked at the Disciplinary Rules, and ABA and Oregon ethics opinions construing the rules, and concluded that disciplining the attorney

---

\(^{86}\) 938 S.W.2d 578 (Ky. 1997).
\(^{87}\) Id. at 579 (The attorney in Geisler did not tell her opponent that her client had died; the court relied on ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-397 (1995) in publicly reprimanding the attorney).
\(^{88}\) KY. SUP. CT. R. 3.130(4.1) (Banks-Baldwin 1997) (stating "In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.").
\(^{89}\) Geisler, 938 S.W.2d at 579.
\(^{91}\) Id.
\(^{92}\) Id. (This opinion was issued after the relevant facts in Geisler.)
\(^{93}\) 554 P.2d 479 (Or. 1976).
\(^{94}\) Id. at 481 (During a deposition the client said his mother was in Salem, but neglected to say she was buried in Salem).
would be unfair, since there was substantial disagreement over the proper course of conduct.95

Ethics and unauthorized practice opinions which interpret rules should be respected as persuasive — though non-binding — interpretations. The appropriate caveat to such an opinion might be, "We believe the rule should be interpreted to allow (or disallow as the case may be) the following conduct." That differs, of course, from the language which has been generally used, "May a lawyer engage in the contemplated conduct?" Answer "yes" or "no". The "no" response implies that discipline will be imposed for a violation of the opinion (not the rule supporting the opinion). On occasion, the committee has flatly stated that conduct violates the Rules of Professional Conduct.96

For example, take the issue of interviewing employees of an organization without the consent of the organization's lawyer. In Shoney's, Inc. v. Lewis,97 the court directed the trial court to disqualify an attorney who had taken statements from a restaurant's manager prior to filing a sexual harassment action.98 The attorney took the statements knowing that the restaurant was represented by counsel in the matter and without the consent of that counsel.99 The court disqualified counsel and ordered the managers' statements suppressed.100 The rule applied by the court in Shoney's was Rule 4.2, stating that a lawyer shall not knowingly communicate with a represented party without the consent of that party's counsel.101 In finding that Lee's managers were represented parties, the court turned to the Official Comment to Rule 4.2, which says that the Rule prohibits communications with persons having a managerial responsibility on behalf of an organization.102 The court further found that the prohibition applied prior to the filing of suit; i.e., that the word "party" in Rule 4.2 does not imply that the rule is limited to situations in which one has become a "party" by the filing of

95. Id. at 487.
97. 875 S.W.2d 514 (Ky. 1994).
98. Id.
99. Id. at 514-15.
100. Id. at 516.
101. KY. SUP. CT. R. 3.130(4.2) (Banks-Baldwin 1997).
102. KY. SUP. CT. R. 3.130(4.2) cmt. (Banks-Baldwin 1997).
In E-381 and E-382 the Committee answered the following questions: 1) May a lawyer communicate with a former employee of an organization without the consent of the organization's lawyer? (Answer: Yes); 2) May a lawyer communicate with a manager without the consent of the organization's lawyer? (Answer: No, citing Shoney's); 3) May a lawyer communicate with a non-manager employee whose acts or omissions in connection with a matter cannot be imputed to the organization and whose statements about the matter will not constitute an admission of the organization? (Answer: Yes); 4) May a lawyer communicate with a non-manager employee whose acts or omissions in connection with a matter may be imputed to the organization or whose statements about a matter may be admissible against the organization? (Answer: No).

The first question, answered by E-381, is consistent with the logic and language of Rule 4.2, but was not decided by the court in Shoney's. The second question was answered by the court in Shoney's. The opinion merely restates the rule from that decision. The third and fourth questions and answers were taken from the same comment relied on by the court in Shoney's. The opinion serves, therefore, as a good prediction of what the court would do in the first, third and fourth situations. There are contrary views, however, and it is far from clear whether the court would adopt the position of E-381 and E-382. The court might extend the no-contact rule to all employees, or on the other hand, it might limit Shoney's to employees of managerial status. Further, the court might reject E-381 and hold that former employees, as well as current employees, are off-limits.

The point is that E-381 and E-382 are reasonable predictions of what the court would do in an appropriate case; they do not establish rules which bind the court. The only way in which the court might deem that it is bound by E-381 and E-382 is that a lawyer who acts in reliance on those opinions (for example by

---

103. In 1995, the ABA House of Delegates substituted "person" for "party" in ABA Model Rule 4.2 to make it clear that the no-contact rule does not require that the represented person be a "party" to litigation. HANDBOOK, supra note 68, at 199.
106. Shoney's, Inc. v. Lewis, 875 S.W.2d 514 (Ky. 1994).
107. HANDBOOK, supra note 68, at 203-07.
interviewing a former employee in reliance on E-381) should have a due process defense to disciplinary charges even if the court disagrees with the ethics opinion relied on. 108

E-381 and E-382 are reasonable interpretations of Rule 4.2. Occasionally, however, an opinion purports to establish new rules of conduct. The best recent example is E-380, 109 which interprets Rule 1.5 110 (the rule which requires that fees be reasonable) as permitting a lawyer to designate a fee as a "non-refundable retainer" so long as the overall fee is reasonable. 111 The opinion goes on to say, however, that for the retainer to be "valid" the arrangement must be in writing and state the time frame in which the arrangement exists. 112 By purporting to impose a writing requirement, E-380 goes beyond that which is required by Rule 1.5. 113 It can be predicted that a client will rely on E-380 and sue for return of a non-refundable retainer on the ground that the agreement, not being in writing, is unenforceable.

Similarly, in E-379 114 the Committee opined that a lawyer may not report a non-paying client to a credit bureau. 115 The Committee relied on an Alaska opinion which stated that referral to a credit bureau would result in unauthorized disclosure of confidential information. 116 The Committee contrasted referrals to a collection agency, which are directly related to the collection of a fee and are thus permissible. 117 The Committee's reasoning is defensible but the distinction is subtle and the conclusion — that it is unethical to report a non-paying client to a credit bureau — is not obvious. An attorney unaware of E-379 might innocently turn over delinquent accounts to a credit bureau.

Many ethics opinions speak to relationships between lawyers and identified groups. Some opinions reach non-obvious

---

108. Cf. Kentucky Bar Ass'n v. An Unnamed Attorney, 769 S.W.2d 45 (Ky. 1989) (explaining that attorney had a right to rely on reported case, even though case was wrongly decided; no discipline imposed).
112. Id.
113. Ky. Sup. Ct. R. 3.130(1.5) (Banks-Baldwin 1997) (requiring only that contingent fee arrangements be in writing).
115. Id.
117. Id.
conclusions:

— **Attorneys and charities:** E-388 — an attorney may not advertise that he will donate a portion of his fee to the client's favorite charity; rules cited: 5.4 (sharing fees with a non-lawyer) and 7.20 (giving something of value to someone for recommending the lawyer).\(^{118}\) E-391 — an attorney may not enter into an agreement with a charity whereby he charges a reduced fee for estate planning services to persons making bequests to the charity; rule cited: 7.20 (giving something of value to someone for recommending the lawyer).\(^{119}\)

— **Attorneys and other professionals:** E-390 — an attorney may not accept a referral fee from an investment counselor; rules cited: 1.7 (conflicts), 1.8 (business relations with client), 2.1 (attorney as independent advisor), and 5.4 (sharing fees with non-lawyer).\(^{120}\) E-367 — an attorney may not offer gifts to realtors to encourage the realtors to refer clients to him; rule cited: 7.20(2) (offering something of value to a non-lawyer for recommending the lawyer's services).\(^{121}\)

— **Attorneys and insurance companies:** E-378 — an attorney may not defend both an insured in a personal injury action and the insurer sued under the Unfair Claims Settlement Practices statute;\(^{122}\) rules cited: 1.2 (obligation to client), 1.6 (client confidences), 1.7 (conflicts), and 1.8 (payment by third party).\(^{123}\) E-368 — an attorney may not enter into an arrangement with a liability insurer whereby the attorney agrees to handle all of the liability claims against insureds for a set fee; rules cited: 1.7 (conflicts) and 1.8 (payment by third party).\(^{124}\)

— **Attorneys and unions:** E-358 — an attorney may not pay for union officials' meals or lodging or pay to become

\(^{118}\) Advisory Ethics Opinion E-388, 60 KY. BENCH & B. 56 (Summer 1996).

\(^{119}\) Advisory Ethics Opinion E-391, 60 KY. BENCH & B. 45, 45-46 (Fall 1996).

\(^{120}\) Advisory Ethics Opinion E-390, 60 KY. BENCH & B. 45, 45 (Fall 1996).

\(^{121}\) Advisory Ethics Opinion E-367, 58 KY. BENCH & B. 40, 41 (Summer 1994).

\(^{122}\) KY. REV. STAT. ANN. §§ 304.12-230 (Banks-Baldwin 1997).


\(^{124}\) Advisory Ethics Opinion E-368, 58 KY. BENCH & B. 52, 52-53 (Fall 1994), opinion aff'd, American Ins. Co. v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky. 1996).
members of a Designated Counsel Group;\textsuperscript{125} rule cited: 7.20(2) (giving something of value to a non-lawyer to recommend the lawyer's services).

To the extent that attorneys aware of these opinions treat them as rules, the opinions shape attorney behavior. To the extent that attorneys are unaware of the opinions, the opinions serve as potential traps which might snare an attorney who engages in behavior "prohibited" by the opinions.

V. THE EFFECT OF UNAUTHORIZED PRACTICE OPINIONS

The UPL Committee interprets Kentucky Supreme Court Rule 3.020, which states that: "The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel, or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services."\textsuperscript{126} This is a sweeping definition, which, if applied broadly, would subject CPAs, financial advisors, real estate salesman, trust officers, and others to charges of unauthorized practice.\textsuperscript{127} However, UPL opinions by and large are applications of two Kentucky cases: \textit{Frazee v. Citizens Fidelity Bank}\textsuperscript{128} and \textit{Kentucky State Bar Association v. Henry Vogt Machine Company, Inc.}\textsuperscript{129}

\textit{Henry Vogt} is the easier case to understand and apply. In that case, Henry Vogt's personnel director questioned witnesses and made arguments in an administrative hearing.\textsuperscript{130} The court held such activity to be the practice of law.\textsuperscript{131} \textit{Henry Vogt} stands for the proposition that any activity on behalf of a client in a judicial or quasi-judicial hearing is the practice of law.

In \textit{Frazee}, contempt citations were sought against five trust

\textsuperscript{125} Advisory Ethics Opinion E-358, 57 KY. BENCH & B. 43, 48-49 (Summer 1993).
\textsuperscript{126} KY. SUP. CT. R. 3.020 (Banks-Baldwin 1997).
\textsuperscript{127} KY. REV. STAT. ANN. § 524.130 (Banks-Baldwin 1997) (making the unauthorized practice of law a Class B misdemeanor; unauthorized practice cases more commonly reach the high court on citations brought by the Kentucky Bar Association charging the "practitioners" with contempt of the Supreme Court by willfully disobeying its rules against unauthorized practice).
\textsuperscript{128} 393 S.W.2d 778 (Ky. 1965); \textit{Frazee} builds on Hobson v. Kentucky Trust Co., 197 S.W.2d 454 (Ky. 1946).
\textsuperscript{129} 416 S.W.2d 727 (Ky. 1967).
\textsuperscript{130} Id.
\textsuperscript{131} Id.
companies for their activities in preparing wills and trusts and administering trusts and estates. Starting from the position that a corporation cannot practice law, the court examined the defendants' activities and declared off-limits activities involving interpretation of the law, drafting of pleadings, court appearances, and drafting of legal documents. Other trust activities — twenty-eight enumerated items — were approved. In Frazee, the court attempted to deprive trust companies of all but their ministerial and business activities.

Applying Henry Vogt, the UPL Committee has forbidden laymen from representing others in a number of trial-like hearings: civil service commissions, Board of Tax Appeals, faculty and student grievance committees, Board of Claims, zoning boards, and Department of Workers' Claims. In the opinion declaring lay representation before the Department of Worker Claims to be the unauthorized practice of law, the UPL Committee recognized that the General Assembly had authorized lay representation of injured workers. Relying on Section 116 of the Constitution, Henry Vogt, and its own opinions, the Committee declared lay representation to be the unauthorized practice of law, notwithstanding its approval by the legislature.

Frazee has proved more difficult to apply. While acknowledging that preparation of tax returns involves legal advice and legal instruments, the UPL Committee recognized that it was impractical to declare such to be the practice of law. The Committee declared the pension and profit sharing field to be the practice of law, but approved real estate agents' completion of

---

132. Frazee, 393 S.W.2d at 781.
133. Id. at 784.
134. Id.
135. U-12 (1975), DESKBOOK, supra note 9, at 11-16.
141. KY. REV. STAT. ANN. § 342.320(9) (Banks-Baldwin 1997) "Notwithstanding any provisions of law to the contrary, the provisions of this chapter shall not be construed or interpreted to prohibit non-attorney representation of injured workers covered by this chapter."
143. U-25 (1979), DESKBOOK, supra note 8, at 11-30.
purchase contracts and other documents.\textsuperscript{145} In 1981, the Committee approved real estate closings by laymen,\textsuperscript{146} but in 1997 the Board of Governors considered (but later rejected) an opinion that would require a lawyer at closings.\textsuperscript{147}

\textbf{VI. ANTI-TRUST IMPLICATIONS}

Some ethics and unauthorized practice opinions might be viewed as anti-competitive and in restraint of trade.\textsuperscript{148} In \textit{Goldfarb v. Virginia State Bar},\textsuperscript{149} the United States Supreme Court held that the Virginia State Bar Association violated the Sherman Antitrust Act.\textsuperscript{150} The State Bar Association had stated that it was unethical to cut fees, which caused Fairfax County lawyers to refuse to do a title examination for less than the minimum fee set by the defendant, Fairfax County Bar Association.\textsuperscript{151} The Court rejected the bar associations' contention that they were agents of the state of Virginia and were therefore not subject to the Sherman Act.\textsuperscript{152} The Court pointed out that the Virginia Supreme Court had not mandated minimum fee schedules; to the contrary the court had declared that a lawyer should not permit himself to be controlled by a minimum fee schedule.\textsuperscript{153} While the Virginia Supreme Court had granted the State Bar the authority to issue ethical opinions, there was no indication that the Virginia Supreme Court approved the content of the opinions.\textsuperscript{154} In order to qualify for the state-action exemption, the Court said it was not enough that the "anti-competitive conduct is prompted by state action; rather anti-competitive activities must be compelled by the State acting as sovereign."\textsuperscript{155}

Two years later the Supreme Court decided \textit{Bates v. State Bar}

\begin{thebibliography}{99}
\bibitem{145} U-41 (1986), DESKBOOK, \textit{supra note} 9, at 11-55.
\bibitem{146} U-31 (1981), DESKBOOK, \textit{supra note} 9, at 11-36.
\bibitem{148} Little and Rush, \textit{supra note} 58, at 356.
\bibitem{149} 421 U.S. 773 (1975).
\bibitem{150} \textit{Id}.
\bibitem{151} \textit{Id.} at 777-78.
\bibitem{152} Parker v. Brown, 317 U.S. 341 (1943) (explaining that the Sherman Act was not intended to apply to state action).
\bibitem{153} 421 U.S. at 789.
\bibitem{154} \textit{Id.} at 791.
\bibitem{155} \textit{Id}.
\end{thebibliography}
of Arizona. While famous as the case which extended First Amendment protection to attorney advertising, Bates is also an anti-trust case. The Court held that the Arizona State Bar was entitled to the state-action exemption because, in prosecuting Bates and O'Steen for ethical violations, the Bar was acting as the Arizona court's agent, enforcing a rule adopted by the court.

In California Retail Liquor Dealer's Association v. Midcal Aluminum, Inc. the Court held that wine "fair trade" contracts, established pursuant to California's price-fixing statute, were not entitled to the state-action exemption. The Court set down a two-part test for the exemption: 1) the restraint must reflect state policy; and 2) the state must actively enforce the restraint. The Court held that the fair trade contracts passed the first part of the test, since the California legislature clearly intended wine producers to be able to control retail prices, but that the program flunked the second part of the test, since the state took no active role in setting prices. Making the courts available to private enforcement actions did not, said the Court, constitute active supervision.

In Hoover v. Ronwin, the Court applied Goldfarb, Bates and Midcal to state bar examiners, appointed by the Arizona Supreme Court and authorized by that court to administer and grade the state bar examination. The Court held that Bates controlled and the examiners were entitled to the state-action exemption. The Arizona Supreme Court had authorized the bar examination process and had the ultimate say in passing on candidates' applications for admission.

In a 1981 article, Professors Little and Rush analyzed the antitrust implications of state ethics opinions. They opined that the potential for antitrust liability could be minimized by steps to

157. Id. at 360 (Disciplinary Rule 2-101(B); the ABA Code of Professional Responsibility had been adopted in Arizona by court rule).
159. Id. at 113-14.
160. Id. at 105.
161. Id. at 105-06.
162. Id.
164. Id.
165. Id. at 572.
166. Little & Rush, supra note 58.
satisfy the two-part *Midcal* test.\(^{167}\) They suggested: 1) having the state supreme court appoint the members of the ethics committee; 2) providing for review of ethics opinions by the state supreme court on petition of an aggrieved member of the bar, a bar association, or the ethics committee itself; and 3) providing that ethics opinions be binding on the committee.\(^{168}\) In *Bates* and *Hoover*, the state supreme court both set policy and actively supervised the complained-of activities.\(^ {169}\) Clearly, the closer the ties between the ethics committee and the state supreme court, the more likely it is that the activities of the committee will fall within the state-action exemption.\(^ {170}\)

The activities of the Kentucky Ethics and UPL Committees fall within the state-action exemption. There are several reasons for this. First, Section 116 of the Kentucky Constitution gives the supreme court plenary power over rules of procedure and attorney discipline. Second, the court adopted the procedural rule creating the Ethics and UPL Committees. Third, the court has declared that the KBA (which appoints the committee members) "exists solely by virtue of rules of this court . . . [and] their accountability is to this court only, of which they are an integral part."\(^ {171}\) Fourth, aggrieved persons have a right to appeal an adverse decision of the Ethics or UPL Committee to the supreme court. Thus, the Kentucky process appears to be within the state-action exemption as exemplified by the *Bates* and *Hoover* decisions. On the other hand, direct appointment of committee members by the court would remove all doubt on this issue.

**VII. RECOMMENDATIONS**

1) By court rule, ethics opinions are advisory. Therefore, in disapproving conduct the Ethics Committee and the UPL Committee should use words of caution rather than words denying

\(^{167}\) Id.

\(^{168}\) Id. at 368-69.


\(^{170}\) Kentucky has a "little Sherman Act." Kentucky Revised Statutes section 367.175 has been given the same construction as the Sherman Act. *Mendell v. Golden-Farley of Hopkinsville, Inc.*, 573 S.W.2d 346 (Ky. Ct. App. 1978). Presumably the courts would construe the statute as not intended to apply to state action.

\(^{171}\) *Ex parte* Auditor of Public Accounts, 609 S.W.2d 682, 687 (Ky. 1980) (emphasis added).
permission. While lawyers who choose to adhere to the opinions' advice should be shielded from discipline, lawyers (and others) who choose otherwise cannot be disciplined for "violation of an opinion."

Questions posed as they were in E-353 reflect the proper role of ethics opinions — to approve conduct and to caution against, but not prohibit, conduct. In E-353, the questions were framed as follows:

1) Should a lawyer who represents the Transportation Cabinet (under contract, retainer, or otherwise) at the same time represent another client against the Transportation Cabinet? Answer: "No."
2) May a lawyer who represents the Transportation Cabinet (under contract, retainer, or otherwise) represent a client against another agency of the Commonwealth of Kentucky (i.e. The Revenue Cabinet)? Answer: "Yes."

The answers to the posed questions thus cautioned lawyers against the conduct described in the first question but approved the conduct described in the third question. Opinions approving conduct should bear the caveat that courts are not obligated to follow ethics opinions in non-disciplinary contexts.

2) Under the present rule, ethics and UPL opinions are not released as formal opinions without the affirmative vote of three fourths of the Board of Governors. Therefore, formal opinions should reflect the action of the Board of Governors. They should be prefaced with the statement that the opinion was "approved without change," or "modified," as the case may be. The Board should also use cautionary and permissive language, rather than

173. Id.

174. In the body of the opinion, however, the Committee used mandatory language in discussing the conduct which was the subject of the first question. Turning to the specific questions, we note that in KBA E-281 (1984) ..., decided under the Code, the Committee opined that a private lawyer representing a state agency on a personal service contract could not represent a private client against the same agency in a different, unrelated matter. This view is consistent with the Rules, and to this extent we see no reason to depart from E-281.

175. KY. SUP. CT. R. 3.530(2) (Banks-Baldwin 1997).
words of prohibition ("may not").

3) Supreme Court Rule 3.530 should be amended to provide that the Kentucky Supreme Court appoints the members of the Ethics and UPL committees. That would make it clear beyond doubt that those who serve on those committees are within the state-action exemption.

4) Supreme Court Rule 3.530 should be amended to provide for the Kentucky Supreme Court to review formal opinions on the court's own motion, as well as on appeal by an aggrieved party. If the court should decline review, the opinion would be published in the Kentucky Bench and Bar as an advisory opinion of the Ethics Committee or UPL Committee, and the Board of Governors. If the court accepted review it could affirm, modify, or republish the opinion as it saw fit. An ethics opinion of the court would appear in the Southwestern Reporter, and would have the same effect as a rule of court. Clearly separating the advisory (opinions of the committees and board) from the mandatory (opinions of the court) would accomplish the following:

- adequate notice to attorneys of mandatory (court) opinions;
- minimize the regulatory effect of advisory opinions;
- bring the advisory opinion system clearly within the state-action exemption to the anti-trust laws;
- give the court the means to review negative opinions in situations where no person feels sufficiently aggrieved to take an appeal;
- give the court the means to review permissive ("you may") opinions in cases where the court feels the Committee was wrong.

It is entirely consistent with the court's role as promulgator of rules and regulator of the profession for the court to have the power to review ethics opinions sua sponte.

5) The court should quit citing Rule 1.4 as a basis for discipline, since that rule does not purport to require communication. The court should cease and desist from further use of the term "appearance of impropriety," since an appearances standard does not adequately advise attorneys of what is impermissible conduct.
EXPERT TESTIMONY IN KENTUCKY:
THINK FAST –
TODAY'S STANDARD MAY CHANGE TOMORROW

BY JOAN BRADY

With speed that might be considered breathtaking compared to the evolution of most legal standards, Kentucky has revised the rules for the admission of expert testimony three times in the past five years. First, in 1992, the Supreme Court of Kentucky firmly pronounced that courts should apply the common law Frye test to determine the admission of expert testimony. The second development occurred almost simultaneously, when Kentucky codified new Rules of Evidence which contained specific provisions governing expert testimony. Finally, in Mitchell v. Commonwealth, the Supreme Court of Kentucky replaced the Frye test with the new test for the admission of expert testimony announced by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc. In December, 1997, the United States Supreme Court refined Daubert's test; it remains to be seen whether Kentucky will follow suit.

This article will examine the impact these changes have had on Kentucky courts and practitioners, and will suggest a road map for the future. Part I will examine the application of the Frye test in Kentucky. Part II will review the adoption of the Kentucky Rules of Evidence. Part III will discuss the Supreme Court's decision in Daubert. Part IV will review the differences between

---

1. Joan Brady earned her J.D. from the University of South Carolina in 1989. Since that time, she has clerked for judges on both the Fourth and the Sixth Circuit Courts of Appeals, was previously associated with Frost & Jacobs, and currently is Career Law Clerk to U.S. Magistrate Judge J. Gregory Wehrman.
5. 908 S.W.2d 100 (Ky. 1995).
federal interpretation of Daubert and that in Kentucky. This section will focus on the Sixth Circuit's and Kentucky's respective difficulties in interpreting Daubert's scope, application, and applicable standard of review. Finally, Part V proposes some reconciliation between federal and state interpretations, but argues that full uniformity may not be desirable in light of the state of flux of federal case law and proposed changes to the Federal Rules of Evidence.

I. FRYE V. UNITED STATES AS APPLIED IN KENTUCKY

Under the "general acceptance" test articulated by Frye, courts merely have to identify the field in which the underlying scientific principle, technique or methodology falls and then determine whether the principle has been generally accepted by other experts in that field. If it is generally accepted then the expert testimony is admissible.

Although Kentucky did not actually cite Frye until the 1980's, Kentucky embraced the principles of Frye at least four decades earlier, well before most courts adopted the landmark test. Unlike its federal counterpart, Kentucky's application of Frye was primarily restricted to novel scientific evidence in criminal cases. However, it is unclear whether the lack of citation to Frye in any civil case was a conscious limitation, or merely a result of the relative infrequency with which scientific evidence visited Kentucky courtrooms during the first half of the century.

Through its years in applying the principles of Frye, the court

10. In Harris v. Commonwealth, 846 S.W.2d 678, 680 n.3 (Ky. 1992), the court noted examples of application of the Frye test or its principles in numerous cases dating back to 1940.
11. Frye was rarely cited by federal courts prior to the 1970s. See Kesan, supra note 8, at 1992.
13. Lawson, supra note 12, § 11.35, at 638 ("During much of the first half of this century, ... scientific evidence made very infrequent visits to Kentucky courtrooms and the soundness of the [Frye] concept got subjected to very little critical analysis.").
determined radar detector evidence\textsuperscript{14} was admissible, but that the results of truth serum\textsuperscript{15} and lie-detector\textsuperscript{16} tests were not. In more recent years, Kentucky courts expanded the scope of Frye to expert testimony from the social sciences. In applying Frye to psychiatric or psychological expert testimony, Kentucky courts seemed less concerned with the novelty of the scientific theory at issue, apparently viewing most psychological or psychiatric techniques or theories as sufficiently novel to warrant application of Frye. Thus, Kentucky applied Frye to consistently exclude psychological or psychiatric testimony concerning psychological "profile" or "syndrome" evidence,\textsuperscript{17} with a minor exception for testimony concerning "battered wife syndrome."\textsuperscript{18}

Kentucky courts adhered to Frye until 1982. Then, in an abrupt departure from prior case law, Kentucky all but rejected the Frye standard in Brown v. Commonwealth.\textsuperscript{19} Like Frye,\textsuperscript{20} Brown involved a novel scientific test which lacked general acceptance or use.\textsuperscript{21} In perhaps a critical distinction, however, the evidence — a type of blood-typing far more rudimentary than modern DNA testing — was offered by the prosecution rather than the defense.\textsuperscript{22} The Kentucky Supreme Court affirmed the admission of the evidence, curiously omitting any citation to Frye.

\begin{itemize}
  \item \textsuperscript{14} Honeycutt v. Commonwealth, 408 S.W.2d 421 (Ky. Ct. App. 1966).
  \item \textsuperscript{15} Dugan v. Commonwealth, 333 S.W.2d 755 (Ky. Ct. App. 1960).
  \item \textsuperscript{16} Conley v. Commonwealth, 382 S.W.2d 865 (Ky. Ct. App. 1964).
  \item \textsuperscript{17} See, e.g., Tungate v. Commonwealth, 901 S.W.2d 41 (Ky. 1995) (profile evidence inadmissible under Frye or Daubert); Dyer v. Commonwealth, 816 S.W.2d 647 (Ky. 1991) (pedophilia profile); Brown v. Commonwealth, 812 S.W.2d 502, 504 (Ky. 1991) overruled on other grounds by Sringler v. Commonwealth 956 S.W.2d 883 (Ky. 1997) (child sexual abuse accommodation syndrome); Mitchell v. Commonwealth, 777 S.W.2d 930, 933 (Ky. 1989) (same); Hester v. Commonwealth, 734 S.W.2d 457 (Ky. 1987), cert. denied, 484 U.S. 989 (1987) (same); Lantrip v. Commonwealth, 713 S.W.2d 816, 817 (Ky. 1986) (same); Bussey v. Commonwealth, 697 S.W.2d 139, 141 (Ky. 1985) (same).
  \item \textsuperscript{18} Commonwealth v. Rose, 725 S.W.2d 588, 590 (Ky. 1987), cert. denied, 484 U.S. 838 (1987) (testimony concerning the general existence of "battered wife syndrome" was admissible, but testimony that the defendant suffered from the syndrome when she shot her husband was not); see also KY. REV. STAT. ANN. § 503.050(3) (Michie 1994 & Supp. 1996) (authorizing the introduction of evidence of prior acts of domestic violence and abuse against the defendant by a victim of homicide or assault).
  \item \textsuperscript{19} 639 S.W.2d 758 (Ky. 1982).
  \item \textsuperscript{20} The test at issue in Frye was a rudimentary polygraph test, known as a systolic blood pressure deception test. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
  \item \textsuperscript{21} Brown, 639 S.W.2d at 760.
  \item \textsuperscript{22} Id.
or prior case law. Quoting a chief critic of Frye and proponent of the relevancy test, the court ruled that "[a]ny relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion." Shortly after its decision in Brown, the Kentucky Supreme Court returned to Frye, explicitly citing Frye for the first time. The court continued to apply Frye without further comment until after the adoption of the Kentucky Rules of Evidence. Thus, despite language in Brown which implicitly rejects Frye in favor of a relevancy test, commentators have dismissed Brown as an "aberration."

As recently as 1992, the Kentucky Supreme Court adamantly pledged its allegiance to Frye. In Harris v. Commonwealth, the court expressly noted that it had adhered to the principles of Frye for more than fifty years. But winds of change had begun to blow. Although the court in Harris made no mention of the fact, the Kentucky Supreme Court had months earlier adopted new rules of evidence which would ultimately lead, in remarkably short order, to a complete rejection of Frye.

23. Id.
24. Under the relevancy test, the trier of fact admits any relevant expert testimony under the same standards applied to non-expert testimony, and excludes relevant evidence only for reasons of "prejudicing or misleading the jury or consuming undue amounts of time." LAWSON, supra note 12, § 11.35 at 636 (quoting MCCORMICK ON EVIDENCE § 608 (3d ed. 1984)).
25. Id. (quoting MCCORMICK, EVIDENCE 203 (2d ed. 1972)).
27. Mr. Brown later sought post-conviction relief on the basis that the admission of the expert's testimony was contrary to Frye. Mr. Brown relied on post-trial evidence which indicated that the expert's application of the novel techniques ultimately had been discredited by the expert himself as well as by the scientific community at large. Brown's state post-conviction motion was nevertheless denied, Brown v. Kentucky, 932 S.W.2d 359 (Ky. 1996), as was his federal petition for writ of habeas corpus. Brown v. O'Dea, Covington Civil No. 97-30 (E.D. Ky. 1997).
29. 846 S.W.2d 678, 680 (Ky. 1992).
II. THE KENTUCKY RULES OF EVIDENCE

The Kentucky Rules of Evidence were adopted on July 1, 1992, but were not interpreted by the Kentucky Supreme Court for another two years. From 1992 until 1994, the test for the admission of expert testimony under the new Kentucky Rules was uncertain.

The Kentucky Rules of Evidence are modeled on the Federal Rules of Evidence. Kentucky Rule of Evidence 702 governs the admission of expert testimony, and is identical in language to its federal counterpart. Kentucky Rule of Evidence 702 reads "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Related Kentucky Rules governing expert testimony also parallel federal counterparts, with two notable exceptions: 1) additional language in Kentucky Rule of Evidence 703 concerning reliance by experts on inadmissible

30. KY. R. EVID. 101.
31. Federal Rule of Evidence 702 states:
   If scientific, technical, or other specialized knowledge will assist the
   trier of fact to understand the evidence or to determine a fact in issue, a
   witness qualified as an expert by knowledge, skill, experience, training,
   or education, may testify thereto in the form of an opinion or otherwise.
FED. R. EVID. 702.
32. KY. R. EVID. 702.
33. Kentucky Rule of Evidence 703 reads:
   (a) The facts or data in the particular case upon which an expert bases
       an opinion or inference may be those perceived by or made known to the
       expert at or before the hearing. If of a type reasonably relied upon by
       experts in the particular field in forming opinions or inferences upon
       the subject, the facts or data need not be admissible in evidence.
   (b) If determined to be trustworthy, necessary to illuminate testimony,
       and unprivileged, facts or data relied upon by an expert pursuant to
       subdivision (a) may at the discretion of the court be disclosed to the jury
       even though such facts or data are not admissible in evidence. Upon
       request the court shall admonish the jury to use such facts or data only
       for the purpose of evaluating the validity and probative value of the
       expert's opinion or inference.
   (c) Nothing in this rule is intended to limit the right of an opposing
       party to cross-examine an expert witness or to test the basis of an
       expert's opinion or inference.
KY. R. EVID. 703.
The Federal Rule of Evidence 703 has no subparts and is comprised solely of language identical to Kentucky Rule of Evidence 703(a). Professor Lawson believes that the addition of subparts (b) and (c) in the Kentucky Rule is consistent with "the position adopted in federal caselaw." LAWSON, supra note 12, § 6.15 at 298.
evidence and disclosure of that evidence to the jury; and 2) the absence of a rule in the Kentucky Rules permitting the admission of "ultimate issue" testimony.  

Like the Federal Rules, the Kentucky Rules are silent on whether they embody the Frye test or revise it. However, the Commentary to Kentucky Rule of Evidence 702 states that "Rule 702 is identical to a provision in the Federal Rules and in every essential respect is identical to the law which has existed in Kentucky for many years." Thus, the Commentary implies that Kentucky Rule of Evidence 702 embodies Frye. A leading commentator on Kentucky evidence law predicted in 1993: "It would be surprising for the [Kentucky] Supreme Court to construe [the silence of the rules on the issue] as anything other than an indication to maintain the status quo on the general acceptance requirement."  

Initially, the Kentucky Supreme Court emphasized its continued reliance on Frye without mention of the new rules in Harris v. Commonwealth. Shortly thereafter, in Staggs v. Commonwealth, the court noted the recent enactment of the rules, but left open the question of whether the rules altered Frye. The majority's implicit suggestion that it might reconsider Frye prompted a concurrence from Chief Justice Stephens which firmly emphasized the court's long adherence to Frye. Thus, practitioners were left to speculate on whether the adoption of the

34. Federal Rule of Evidence 704 permits testimony on ultimate issues. The General Assembly originally enacted Kentucky Rule of Evidence 704 paralleling that provision but the Kentucky Supreme Court rejected the rule. LAWSON, supra note 12.

35. The Commentary to the Evidence Code was prepared by the Evidence Rules Study Committee of the Kentucky Bar Association, and has not been adopted or approved by the Kentucky Supreme Court, although the same committee drafted the Kentucky Rules of Evidence. Catron, supra note 27, at 497 (citing Judge William S. Cooper, et al., Kentucky Rules of Evidence sec. J, at J-1 (UK/CLE Monograph 1992)).

36. Id. at n.205.

37. LAWSON, supra note 12, § 6.15 at 300.

38. 846 S.W.2d 678 (Ky. 1992).

39. 877 S.W.2d 604 (Ky. 1993).

40. Id. at 605 (stating that because the case was tried prior to the effective date of Kentucky Rule of Evidence 702, the court would rely on the "pre-KRE rule" of Frye).

41. Id. at 607.
Kentucky Rules of Evidence effected any change in the common law.

Notwithstanding the court's professed adherence to traditional Frye analysis, the majority in Staggs appeared to modify that standard. In fact, the court's analysis arguably relates more to the Kentucky Rules of Evidence and Daubert than to Frye.42

Rather than stopping at the "general acceptance" inquiry of Frye, the majority stated that it is appropriate to inquire whether the technique or theory "is accepted as reliable for the purpose for which it is intended to be used at trial."43 The methodology must be "reliable as relevant to an issue being tried" and appropriately applied.44 The court ultimately ruled that the testimony at issue was "more prejudicial than probative" and irrelevant.45

Thus, in Staggs, the court foreshadowed its future adoption of Daubert by focusing on "foundation, reliability, and relevance" and by interjecting other inquiries such as the prejudicial impact of the evidence.46 When the Kentucky Supreme Court was finally called to interpret the impact of the Kentucky Rules, it rejected its longstanding reliance on Frye in favor of the similar reliability and relevance test established in Daubert.47

III. DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC.

Within a year of the adoption of the Kentucky Rules of Evidence, the United States Supreme Court decided Daubert v. Merrell Dow Pharmaceuticals, Inc.48 The Supreme Court addressed criticism of Frye head-on, and attempted to resolve the "sharp divisions among the [federal] courts regarding the proper standard for the admission of expert testimony."49 In Daubert, the Court unanimously held that the Federal Rules of Evidence.

---

42. Daubert was published on June 28, 1993, several months prior to the publication of Staggs in November of 1993; however, the Kentucky Supreme Court made no mention of Daubert.
43. Staggs, 877 S.W.2d at 606 (emphasis added).
44. Id.
45. Id.
46. Id.
47. Mitchell v. Commonwealth, 908 S.W.2d 100, 101 (Ky. 1995). See also infra section IV(B).
49. Id. at 585.
superseded Frye. A majority of the Court went on to formulate a new test for the admission of expert testimony, based upon the Federal Rules.

*Daubert* involved conflicting expert testimony in a civil case. The plaintiffs were suing Merrell Dow based upon allegations that their children's birth defects were caused by their mothers' prenatal ingestion of Bendectin, a drug marketed by the defendant. The defendant moved for summary judgment, submitting in support of its motion an affidavit of a well-credentialed expert physician and epidemiologist who concluded that no published study had found the prenatal use of Bendectin during the first trimester of pregnancy to be a risk factor for human birth defects.

In response to the defendant's motion, the plaintiffs submitted the testimony of eight experts with equal credentials who concluded that the prenatal use of Bendectin can cause birth defects. Plaintiffs' experts' opinions were based upon "in vitro" (test tube) and "in vivo" (live) animal studies that found a causal link between the drug and malformations, as well as the "re-analysis" of previously published epidemiological studies.

The district court granted summary judgment, concluding that plaintiffs' evidence was inadmissible because it was not based on principles "sufficiently established to have general acceptance" under *Frye*. The Ninth Circuit Court of Appeals affirmed. The appellate court concluded that expert opinion based on methodology "that diverges significantly from the procedures accepted by recognized authorities in the field . . . cannot be shown to be generally accepted as a reliable technique."

The Supreme Court reversed the lower courts, holding that *Frye* had been superseded by the Federal Rules of Evidence.
specifically Rule 702.60 Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."61 However, rather than simply rejecting Frye and letting the Federal Rules speak for themselves, Justice Blackmun, writing for the majority, judicially crafted a new two-pronged test for the admissibility of expert evidence derived primarily from Federal Rule of Evidence 702.62

For scientific expert testimony, trial judges are required to be evidentiarx "gatekeepers." They must affirmatively determine: "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."63 In other words, the court must "assess whether the reasoning or methodology underlying the testimony is scientifically valid . . . and whether that reasoning or methodology properly can be applied to the facts in issue."64 To be sufficiently helpful to the jury, or relevant, the evidence must "fit" the case; that is, it must be "sufficiently tied to the facts of the case," or connected "to the pertinent inquiry."65

Since the second portion of the test concerning relevance is both case specific and an inquiry intimately familiar to most judges, the Court focused on the first portion of the new test: the reliability of scientific knowledge.66 To qualify as "scientific knowledge," the evidence must be "derived by the scientific method," or "ground[ed] in the methods and procedures of science."67 The Court set forth a non-exhaustive list of four factors for use in determining whether the theory or technique qualifies as "scientific knowledge": 1) whether the theory can be tested, or its "falsifiability;" 2) whether it has been "subjected to peer review and publication;" 3) "the known or potential rate of error" and "the existence and maintenance of standards" controlling the

62. Id. at 592.
63. Id.
64. Id. at 592-93.
65. Id. at 591-92.
66. Id. at 594-95.
67. Id. at 590.
technique; and 4) the general acceptance of the technique in the relevant scientific community. The last factor, of course, is virtually identical to the former Frye test.

In addition to setting forth the new test under Rule 702, the Court indicated that the court must carefully review the expert opinion testimony under other evidentiary rules. Thus, trial courts must assess under Federal Rule of Evidence 403 whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or the potential to mislead the jury. The Court specifically reminded trial courts to carefully consider Rule 703 which concerns the admission of opinions based on otherwise inadmissible hearsay, and Rule 706 which permits court appointed experts.

Despite the fact that the Court had before it an extensive lower court record, the Court declined to apply the new test to the facts presented. Thus, the largest portion of the majority opinion in Daubert - that announcing a new test for the admissibility of scientific evidence - is dicta. In fact, the majority prefaced its discussion of the new test by explaining that the Court was offering only "general observations."

Chief Justice Rehnquist, joined by Justice Stevens, concurred in the majority's conclusion that Frye had been superseded, but dissented from the adoption of a new test in the form of such

68. Id. at 593-94.
69. See supra notes 8-9 and accompanying text.
70. Id. at 595.
71. Federal Rule of Evidence 403 reads
   Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403.
72. Daubert, 509 U.S. at 595.
73. Federal Rule of Evidence 703 reads
   The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.
74. Federal Rule of Evidence 706 reads "The court may appoint any expert witnesses agreed upon by the parties and may appoint expert witnesses of its own selection. . . ." FED. R. EVID. 706(a).
75. Daubert, 509 U.S. at 795.
76. Id. at 593.
"general observations."

The dissent expressed concern that the new test was "vague and abstract" and difficult to interpret. In addition to its concern over the interpretation of the new test, the dissent expressed concern that it would require judges "to become amateur scientists" to fulfill their gatekeeping responsibilities.

It was initially unclear whether the new test announced in Daubert was more rigorous than the previous Frye test or more lenient. Although some heralded Daubert as reducing the flow of junk science into the courtroom, the Supreme Court itself referred to the former Frye test as embodying "a rigid 'general acceptance' requirement [that] would be at odds with the 'liberal thrust' of the Federal Rules." Thus, the Court implied that the new test would permit more scientific evidence to be admitted than under the "austere" Frye standard. Following the decision in Daubert, commentators were split in their viewpoints of whether the new test would result in the admission of more or less expert testimony.

In practice, Daubert seems to have heightened judicial awareness and infused judges with new vigor in tackling their role as judicial gatekeepers. Courts may not be entirely sure how to apply Daubert's amorphous standards, but they are determined to try. Thus, although the Supreme Court undoubtedly envisioned a more liberal standard of admissibility, more evidence is excluded under Daubert than under Frye.

---

77. Id. at 598 (Rehnquist, J., dissenting).
78. Id.
79. Id. at 600-01.
81. Daubert, 509 U.S. at 588.
82. Id. at 589.
84. See Nancy S. Farrell, Congressional Action To Amend Federal Rule of Evidence 702: A Mischievous Attempt to Codify Daubert v. Merrell Dow Pharmaceuticals, Inc., 13 J. CONTEMP. HEALTH L. & POLY 523, 538 (1997); Thomas Lyons, Frye, Daubert, and Where Do We Go From Here, 45-Jan R.I.B.J. 5, 26 n.168 (1997) (noting a 1994 survey suggesting that as many as two thirds of decisions citing Daubert excluded expert testimony); contra Kesan, supra note 8, at 2013 (stating that under Daubert's more liberal admissibility requirement, courts are admitting more scientific evidence in civil and criminal cases).
IV. DIFFERING INTERPRETATIONS: DAUBERT IN THE FEDERAL COURTS AND DAUBERT IN KENTUCKY

A. Daubert in the Sixth Circuit

It is clear that Daubert did not resolve the criticisms of the prior Frye test. Indeed, the application of Daubert has proved more difficult than Frye for many courts.\(^\text{85}\) Significant issues have developed relating to when to apply Daubert (scope), how to apply Daubert (application), and the applicable standard of appellate review. Daubert has been the subject of extensive criticism and debate, evoking more than one hundred and fifty law review articles to date.\(^\text{86}\)

Unlike a significant number of states which have either rejected Daubert or taken a "wait and see" approach,\(^\text{87}\) Kentucky

\(^{85}\) The difficulties of applying Daubert were illustrated on remand to the Ninth Circuit Court of Appeals, which reluctantly undertook its "uncomfortable task" of applying a test "far more complex and daunting" than required under Frye. Daubert v. Merrell Dow Pharm. Inc., 43 F.3d 1311 (9th Cir. 1995). The court ultimately held that plaintiff's evidence was inadmissible, id. at 1322, but not before struggling with both prongs of the new test. In an attempt to determine reliability or scientific validity from an extra-scientific vantage point, the court created two new factors in addition to the four articulated by the Supreme Court: 1) whether the testimony is based on pre-litigation research; and 2) whether the research has been subjected to peer review. Id. at 1318. The court's analysis seemed to bear out one commentator's prediction that "formulating additional factors . . . is likely to be a cottage industry." Michael H. Gottesman, Admissibility of Expert Testimony After Daubert: The "Prestige" Factor, 43 EMORY L.J. 867, 884 n.44 (1994). In an attempt to apply the relevance prong, the court tried to quantify the statistical amount of "relative risk" necessary to satisfy plaintiff's burden of proof. 43 F.3d at 1320.

\(^{86}\) A search on WESTLAW in the Journals & Law Reviews database (JLR) for articles using Daubert's case name in the title alone turned up 156 articles. Several hundred articles concerning Daubert were located with more inclusive searches. In contrast, a search for articles prior to Daubert in which Frye's case name formed part of the title located only fifteen articles.

\(^{87}\) Eight states have expressly rejected Daubert and retained Frye, while many others have simply avoided either adopting or rejecting Daubert at present. For states expressly retaining Frye, see, e.g., State v. Bible, 858 P.2d 1152, 1183 (Ariz. 1993), cert. denied, 511 U.S. 1046 (1994); People v. Leahy, 882 P.2d 321, 331 (Cal. 1994); Fishback v. People, 851 P.2d 884 (Colo. 1993); Flanigan v. State, 625 So.2d 827, 828 (Fla. 1993); Schultz v. State, 664 A.2d 60 (Md. App. 1995); State v. Carter, 524 N.W.2d 763, 779 (Neb. 1994); People v. Wesley, 633 N.E.2d 451, 453-54 (N.Y. 1994); State v. Jones, 922 P.2d 806 (Wash. 1996). For states implicitly retaining Frye but leaving open the possibility of adopting Daubert, see People v. Dalcollo, 669 N.E.2d 378 (Ill. App. Ct. 1996); State v. Alt, 504 N.W.2d 38, pet. for rev. granted and remanded, 505 N.W.2d 72 (Minn. Ct. App. 1993). See also Kesan, supra note 8, at 1992 (concluding that two years after Daubert, twenty-two states continue to follow Frye).
adopted Daubert in 1995. Since Kentucky has announced its intention to follow federal law on this issue, Kentucky practitioners must determine what that is. Kentucky courts should look first for guidance to decisions by the Sixth Circuit Court of Appeals or to Kentucky's federal district courts. While many issues remain unresolved, the decisions do provide some guidance on when to apply Daubert, how to apply Daubert, and the appropriate standard of review.

1. When to Apply Daubert in the Sixth Circuit

The Sixth Circuit has published two important decisions on the scope of Daubert. Rule 702, of course, creates a standard for admitting "scientific, technical, or other specialized knowledge." Daubert explicitly concerns only "scientific knowledge." Does the same test apply to all expert testimony? Initially, the Sixth Circuit implied that Daubert does apply to all expert testimony. However, the court recently reversed course and concluded that Daubert does not apply to nonscientific testimony. The court has not yet attempted to define "scientific."

The Sixth Circuit first addressed this issue in Berry v. City of Detroit. Plaintiff had filed a civil rights suit against the city of Detroit and one of its police officers alleging that the defendants were liable for the shooting death of plaintiff's son. A jury returned a verdict of six million dollars against both the officer and the city. The sole issue on appeal concerned the city's municipal liability, which was premised on a theory that the city failed to adequately train or discipline its officers in the use of fatal force.

The Sixth Circuit reversed, holding that the jury's award was based upon the inadmissible testimony of plaintiff's expert. The court first concluded that the expert — whom the court described as a "sociologist cum sheriff" and who lacked any relevant degree,
formal training or credentials — did not possess the qualifications to testify on whether the alleged failure of the police department to properly discipline its officers proximately caused the shooting. 98

Although the court prefaced its remarks by noting that Daubert applied to scientific evidence and thus was "only of limited help" as applied to the testimony presented, the court applied Daubert quite stringently. 99 The court specifically concluded that the evidence was not reliable based on three out of the four factors used to determine scientific validity in Daubert. 100 The court noted that the expert's discipline theory had not been tested, had not been peer reviewed or published, and had not been shown to be generally accepted. 101 The court did not speak specifically to the error rate, but did conclude that the expert's testimony rested upon suspect methodology and was based upon false assumptions. 102 Other cases have similarly applied Daubert to nonscientific expert testimony. 103

In subsequent cases, the Sixth Circuit began to retreat from its application of Daubert's four factors relating to "scientific validity" to nonscientific testimony. However, the court continued to apply the more general relevancy and reliability prongs of Daubert to nonscientific testimony. 104 The Sixth Circuit also cited Daubert when reviewing nonscientific testimony under Rule 403. 105 Both federal district courts in Kentucky have similarly applied Daubert to nonscientific expert testimony. 106

98. Id. at 1348-49. The court concluded that the expert's bachelor's degree in sociology and master's degree in education were essentially not relevant to his testimony on "all manners of police practices and procedures." Id.
99. Id. at 1349.
100. Id.
101. Id. at 1350.
102. Id. at 1352.
103. See, e.g., Cook v. American S.S. Co., 53 F.3d 733 (6th Cir. 1995) (applying Daubert to exclude testimony by a stress analysis expert that a marine rope failed from exposure to a torch, based upon his personal observation of char marks).
104. See United States v. Thomas, 74 F.3d 676, 681 (6th Cir. 1996) (affirming the admission of expert testimony by a police officer about methods and techniques of street level drug dealers, and citing Daubert as "relative to the 'gatekeeper' function . . . applicable to all expert testimony").
105. Id.; Brock v. Caterpillar, 94 F.3d 220 (6th Cir. 1996) (finding inadmissible in a product liability action the plaintiff's expert testimony that an improved brake system used on a later model could have been used on the bulldozer in question).
106. See, e.g., Rice v. Cincinnati, New Orleans & Pacific Ry. Co., 920 F. Supp. 732 (E.D. Ky. 1996) (excluding plaintiff's "expert" testimony from fellow trainmen that the cab of the engine in which plaintiff was riding was improperly designed and that the
Despite the number of cases applying *Daubert* to nonscientific testimony, the Sixth Circuit more recently held in *United States v. Jones*\(^{107}\) that *Daubert* does not apply to such evidence. In *Jones*, the court specifically concluded that handwriting analysis, or forensic document examination, need not be analyzed under *Daubert*.\(^{108}\) *Jones* clearly holds that *Daubert*’s four factors do not apply to anything but scientific evidence, and suggests that *Daubert*’s requirements of reliability and relevance likewise do not apply to nonscientific evidence.\(^{109}\)

Notwithstanding the latter suggestion, however, the court actually examined the reliability of the expert testimony presented.\(^{110}\) The court first concluded that handwriting analysis was a field of expertise which was sufficiently reliable to be admissible under Rule 702, based upon the general admissibility of such testimony in prior cases, and the detailed nature of the expert's testimony as presented.\(^{111}\) Providing mixed signals to lower courts, the court also cited *Daubert* in concluding that the reliability of the testimony could be challenged by cross-examination, presentation of contrary evidence and careful instruction on the burden of proof.\(^{112}\)

Although the Sixth Circuit appears to have determined that *Daubert* applies only to scientific evidence, the court has not adequately defined that category of evidence. In *Jones*, the court’s conclusion that forensic document examination is not "scientific" appears contrary to prior case law, the opinions of experts in the field, and legal commentators.\(^{113}\)

By contrast, the Sixth Circuit has concluded that the testimony

---

\(^{107}\) 107 F.3d 1147 (6th Cir. 1997).
\(^{108}\) Id. at 1158.
\(^{109}\) Id. at 1157.
\(^{110}\) Id. at 1159.
\(^{111}\) Id. at 1160-61.
\(^{112}\) Id. at 1161.
of an electrical engineer concerning his test of an allegedly
defective circuit breaker is "scientific" enough to apply Daubert,114
in a decision that is contrary to the opinion of at least one other
federal court.115 Can an electrical engineer who tests an individual
circuit breaker be expected to testify that his methodology has
been tested, subjected to peer review, published, and has a known
error rate?116

Since Jones, the Sixth Circuit has not yet decided a case under
Daubert involving testimony from a social scientist. Although the
application of Daubert to the "soft" sciences appears likely based
on prior case law,117 it remains to be seen whether such evidence is
within the ambit of "scientific knowledge" in this circuit.118

Clearly, the application of the factors to quasi-scientific or
social science requires some flexibility. A happy medium adopted
by some courts and advocated by many commentators is to require
all expert testimony to be both relevant and reliable under
Daubert.119 However, the inquiry required to establish these two
prongs will vary with the type of testimony presented. Thus,
forensic document examination and engineering tests will not

(affirming the exclusion of electrical engineer's testimony as unreliable under Daubert,
citing four factors).

115. See McKendall v. Crown Control Corp., 122 F.3d 803 (9th Cir. 1997).

116. The evidence could have been excluded under the reliability prong of Daubert
without resort to the four "scientific validity" factors, based on the expert's testimony
that he had no protocol for the test, no notes, had discarded raw data, and had not
calibrated his equipment. The expert was apparently permitted to testify that the
possibility of causation was 50%, give or take 25%; however, that testimony should have
been excluded under the relevance prong of Daubert, because it did not assist the jury in
determining the issue of causation. See id. at 137.

117. See, e.g., Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994); United States v.
Waddell, 28 F.3d 1215 (6th Cir. 1994) (Table, text available on WESTLAW) (applying
Daubert to testimony by forensic psychologist regarding defendant's state of mind);
United States v. Kozminski, 821 F.2d 1186 (6th Cir. 1987) (applying Frye to expert
psychological testimony).

at 1997 WL 473273) (applying only general Daubert framework to testimony from social
psychologist concerning false confessions) with United States v. Rincon, 28 F.3d 921 (9th
Cir. 1994) (strictly applying Daubert to expert testimony concerning eyewitness
identification, on remand from the United States Supreme Court, 510 U.S. 801 (1993)).

119. See, e.g., Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996)
discussing application of Daubert to all expert testimony, including that from the social
sciences); See also Jennifer Laser, Note, Inconsistent Gatekeeping in Federal Courts:
Application of Daubert v. Merrell Dow Pharmaceuticals, Inc. To Nonscientific Expert
require application of the four factors enumerated in Daubert for scientific validity, but neither will they be entitled to a free pass from the judicial gatekeeper.


Once a court has determined that Daubert applies to the testimony at issue, it must determine how to interpret Daubert's standards. As indicated above, the federal courts have had difficulty in applying the "flexible" and "non-exhaustive" list of "scientific validity" factors to evidence not strictly within the realm of Newtonian science. However, the Sixth Circuit has also struggled with the application of the factors to evidence identical in kind to that presented in Daubert. Two cases illustrate this difficulty.

The first case in which the Sixth Circuit struggled with applying the four "scientific validity" factors of Daubert was United States v. Bonds.120 In that case, the prosecution offered evidence of a DNA121 profile match based on analysis of bloodstains by the FBI's DNA laboratory.122 The prosecutor's expert concluded that the probability of an unrelated, randomly selected individual matching the DNA profile was one in 35,000.123

On appeal, the defendants argued that the DNA evidence should not have been admitted because it was based on a seriously flawed method of calculating the probabilities of a match.124 Relying on a post-trial report by the National Research Committee of the National Academy of Sciences,125 the defendant argued that the probability of a match was only one in seventeen.126

The [defendants'] challenge is essentially that had the tests been performed differently, using a different database for the calculation of the statistical probabilities of the match,

120. 12 F.3d 540 (6th Cir. 1993).
121. DNA stands for deoxyribonucleic acid. "DNA is the molecule, found in the nucleus of nearly every cell of every living thing, that houses genetic information." Id. at 549 (footnote omitted).
122. 12 F.3d at 549.
123. Id. at 550.
124. Id. at 547.
125. The court declined to review the report itself because it was not part of the district court record, but reviewed the substance of the report because it was part of the record. Id. at 552-53.
126. 12 F.3d at 552.
and using different materials in performing the test or using a different multiplication rule, the results would have been more accurate and perhaps different.\textsuperscript{127}

The Sixth Circuit affirmed the admission of the evidence.\textsuperscript{128}

The court first emphasized \textit{Daubert}'s focus on the principles and methodology underlying the testimony, without regard to an expert's conclusions:

\begin{quote}
[T]he \textit{Daubert} Court has instructed the courts that they are not to be concerned with the reliability of the conclusions generated by valid methods, principles and reasoning. Rather, they are only to determine whether the principles and methodology underlying the testimony itself are valid. If the principles, methodology and reasoning are scientifically valid then it follows that the inferences, assertions and conclusions derived therefrom are scientifically valid as well. Such reliable evidence is admissible under Rule 702, so long as it is relevant.\textsuperscript{129}
\end{quote}

The Sixth Circuit concluded that although FBI's "deficiencies in calculating the rate of error" were "troubling," the evidence was nevertheless admissible because "the error rate is only one in a list of nonexclusive factors" to determine scientific reliability, and other factors favored admission of the testimony.\textsuperscript{130} In light of the existence of peer review and general acceptance by the scientific community, the court reasoned, "it is implicit that the rate of error is acceptable to the scientific community."\textsuperscript{131} The court held that "\textit{Daubert} requires only scientific validity for admissibility, not scientific precision."\textsuperscript{132}

Although the Sixth Circuit characterized the error rate as acceptable to the "scientific community," is not the inquiry under \textit{Daubert} whether the error rate is acceptable to the court? The Sixth Circuit's analysis in \textit{Bonds} has been criticized as improperly using one gatekeeping factor (general acceptance of DNA testing techniques) to defeat another factor (rate of error).\textsuperscript{133} The court

\begin{flushright}
\textsuperscript{127} Id. at 558.
\textsuperscript{128} Id. at 574.
\textsuperscript{129} Id. at 556.
\textsuperscript{130} Id. at 560.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 558.
\textsuperscript{133} Kesan, supra note 8, at 2031.
\end{flushright}
left unaddressed defendants' argument that the imprecision of the methodology resulted in inaccurate results.

Similar difficulties were presented by *Glaser v. Thompson Medical Company, Inc.* Plaintiffs alleged that Bryan Glaser suffered a stroke as a result of his ingestion of a single Dexatrim diet pill, which caused him to fall and suffer further injuries. The defendant argued on summary judgment that there was no scientific evidence that one capsule of Dexatrim could cause the harm alleged, and that Bryan's injuries were caused when he fainted for unrelated reasons. The Sixth Circuit reversed the trial court's award of summary judgment to the defendant, holding that plaintiff's evidence on causation was sufficient to create a genuine dispute of material fact.

Extensively reviewing the literature and research upon which the expert based his opinion, the court held that plaintiff's expert's testimony was admissible, because "sufficient, valid, peer-reviewed scientific evidence, along with [the expert's] own clinical and research experience, provide a solid foundation" for the expert's conclusions that Dexatrim causes harm. The court concluded that all four factors advocated the admission of the testimony under the reliability prong, and that the testimony would assist the jury under the relevance prong of *Daubert.*

A dissent by Judge Boggs argues cogently that the expert's testimony should have been excluded because the expert simply "assigned" a probability of 80% that the diet pill caused the plaintiff's injuries, without explaining the origin of the probability estimates, or offering evidence that the probabilities were based on any scientific method. The dissent persuasively argues that the majority focuses too much on the methodology supporting the expert's general testimony, and ignores the lack of reliable methodology to support the expert's conclusions.

Like *United States v. Bonds*, *Glaser* demonstrates the
difficulties of applying Daubert's four "scientific validity" factors to determine whether testimony is "good science". Much of the majority's lengthy discourse reads more like a journal of medicine or science than a legal opinion, and the dissent is no less redundant with scientific detail.

Despite these difficulties, the Sixth Circuit has often done a better job than its federal counterparts in separating the Daubert admissibility determination from subsequent evaluation of the weight of the evidence. Thus, even where scientific evidence satisfies the rigorous admissibility requirements of Daubert, the court has not hesitated to grant summary judgment in toxic tort cases where it remains insufficient to satisfy plaintiff's burden of proof on causation. 143

The Sixth Circuit's use of summary judgment in this respect was recently cited with approval by the Supreme Court in General Electric Co. v. Joiner. 144 In Joiner, an electrician alleged his small cell lung cancer was promoted by his exposure to PCBs, dioxins and furans used in electrical transformers. 145 The district court granted summary judgment to the defendants on the basis that plaintiffs could not prove that Mr. Joiner suffered significant exposure to furans or dioxins, and that expert testimony failed to show that his cancer could be caused or promoted by exposure to PCBs alone. 146 The trial court excluded plaintiffs' experts' testimony under the relevance prong of Daubert, on the basis that it was based upon an erroneous assumption that plaintiff had been exposed to both PCBs and furans/dioxins. 147 Alternatively, the court rejected the testimony under the reliability prong. 148 In so doing, however, the court ignored the four reliability factors of Daubert and instead simply held that the studies relied upon did not support the experts' conclusions. 149

The Eleventh Circuit reversed, holding that the court erred by making "independent scientific judgments on the basis of

143. See, e.g., Elkins v. Richardson-Merrell, Inc., 8 F.3d 1068 (6th Cir. 1993); see also Turpin v. Merrell Dow Pharm., Inc., 959 F.2d 1349 (6th Cir. 1992).
144. 118 S. Ct. 512, 519 (1997) (citing with approval Turpin v. Merrell Dow Pharm., Inc., 959 F.2d 1349 (6th Cir. 1992)).
145. 118 S. Ct. at 514.
147. Id. at 1320-22.
148. Id. at 1323.
149. Id. at 1326.
individual studies.” The Court of Appeals specifically analyzed the reliability factors specified in Daubert before concluding that the testimony was based upon sufficiently reliable scientific methodology to be admissible.

The Supreme Court reversed the Eleventh Circuit, holding that the district court did not abuse its discretion by rejecting the conclusions of the plaintiffs' experts. Importantly, the majority retreated from language in Daubert which stressed that courts should focus only on methodology and not on conclusions. "[C]onclusions and methodology are not entirely distinct from one another." The Court sanctioned the rejection of testimony where "there is simply too great an analytical gap between the data and the opinion proffered.

3. Standard of Review

Like its decisions on the scope of Daubert, the Sixth Circuit's decisions on the standard of review to be applied by appellate courts are in conflict. In several early cases, the court applied an "abuse of discretion" standard without significant discussion.

Then, in Cook v. American S.S. Company the court held that three different standards of review applied to various types of Daubert findings. The court stated that the trial court's findings of fact concerning the qualifications of an expert under Federal Rule of Evidence 104(a) are reviewed "for clear error." By contrast, the court held that a trial court's determination of whether the opinion constitutes "scientific, technical, or other specialized knowledge" under the reliability prong of Daubert, "is a question of law we review de novo.

151. Id. at 532-33.
153. Id. at 519.
154. Id. In a concurrence in part and dissent in part, Justice Stevens critized the majority's failure to apply the Daubert test as well as the blurring of the distinction between methodology and conclusions. Id. at 521-23.
155. 118 S. Ct. at 519.
157. 53 F.3d 733 (6th Cir. 1995).
158. Id. at 738.
159. Id.
160. Id.
determination of relevancy under Rule 702 and \textit{Daubert} is subject to review for abuse of discretion.\footnote{161. \textit{Id}. The determination of which standard to apply was not an easy one. In one case, the court applied both a "de novo" standard and an "abuse of discretion" standard of review to the same issue. United States v. Thomas, 74 F.3d 676, 682 (6th Cir. 1996) (applying different standards to issue of whether testimony involved "specialized knowledge" which would be "helpful to the jury").}

In \textit{United States v. Jones},\footnote{162. 107 F.3d 1147 (6th Cir. 1997).} the court attempted to reconcile the conflict created by \textit{Cook}. The court reiterated its reliance on the abuse of discretion standard for both factual and legal determinations required under \textit{Daubert}. "If a district court incorrectly decides a legal issue," however, "then that court has abused its discretion."\footnote{163. \textit{Id}. at 1153.} Curiously, the court left open the possibility of adopting a de novo standard of review in the future for scientific evidence.\footnote{164. \textit{Id}. at 1155. The court left to other courts "the task of resolving the precise contours of the de novo standard, if such a standard exists." \textit{Id}.}

That possibility has now been foreclosed by the Supreme Court, which recently reversed the Eleventh Circuit's application of a "particularly stringent standard of review" to the exclusion of expert testimony under \textit{Daubert}, and instructed lower federal courts to apply only the traditional "abuse of discretion" standard of review.\footnote{165. General Elec. Co. v. Joiner, 118 S. Ct. 512, 517 (1997).}

\subsection*{B. Daubert in Kentucky}

Since Kentucky's adoption of \textit{Daubert} in 1995,\footnote{166. Although the Kentucky Supreme Court briefly cited \textit{Daubert} in Cecil v. Commonwealth, 888 S.W.2d 669, 675 (Ky. 1995), the court did not expressly adopt \textit{Daubert}'s test until the following year in Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995).} Kentucky courts have struggled with many of the same issues addressed in the federal courts. In particular, Kentucky's decisions reflect confusion over when and how to apply the new test.

\subsubsection*{1. When to Apply \textit{Daubert}}

To date, \textit{Daubert}'s application by Kentucky courts has been restricted to criminal cases.\footnote{167. Since \textit{Daubert} was a civil case, one would presume that Kentucky will not hesitate to apply its standards to civil cases when the opportunity arises.} Kentucky courts have struggled more than federal courts with a prerequisite issue under \textit{Daubert} -
whether expert testimony is appropriate at all under Rule 702. When testimony from mental health experts is needed, Kentucky has not hesitated to apply Daubert. However, Kentucky recently narrowed its interpretation on the scope of Daubert in a way that is in conflict with Sixth Circuit law.

Daubert only applies to "expert" testimony, but Kentucky courts have struggled to define "expert testimony" under Kentucky Rule of Evidence 702. Expert testimony under Kentucky Rule of Evidence 702 should always be excluded where it encompasses knowledge within the scope of the ordinary juror. For example, the Kentucky Court of Appeals affirmed a trial court's exclusion of "expert" testimony concerning the general use of "stakes and rope" barriers in the golf course industry, because the only issue presented was whether the course's specific placement of the barrier without adequate warning was negligent. No expert was required to determine that issue.

By contrast, in Bowling v. Commonwealth, a police officer gave "expert" testimony that the features of a handgun were "identical" to an impression made on a holster seized from the defendant's residence. The officer's opinion was based only on his personal observation of "a wear mark that was consistent with a deformity on the trigger guard of the handgun." The Kentucky Supreme Court cited Kentucky Rule of Evidence 702, but not Daubert, as supporting the liberal admission of the testimony even "where there is reservation as to its helpfulness or the expert's qualifications."

Daubert teaches that trial courts should be vigilant in excluding "expert" testimony which is not truly essential, and which is of questionable reliability or relevance. In Bowling, the officer was permitted to testify despite the lack of any foundation on the number of weapons and holsters he had examined, his methodology or technique (whether by eye or by use of a

168. See, e.g., Cecil, 888 S.W.2d at 674.
171. 942 S.W.2d 293 (Ky. 1997).
172. Id. at 305.
173. Id.
174. Id.
Kentucky courts should be wary of characterizing testimony as "expert" testimony and should avoid unnecessarily applying Kentucky Rule of Evidence 702 to the testimony of lay witnesses whose testimony is governed by Kentucky Rule of Evidence 701.

There is little doubt that the testimony of mental health professionals is within the scope of Kentucky Rule of Evidence 702. Unlike some federal courts, Kentucky has had no qualms about applying the rigorous requirements of *Daubert* to this type of evidence from the social sciences. In fact, the Kentucky Supreme Court's first citation to *Daubert* occurred in a case involving testimony from a clinical psychologist concerning the defendant's state of mind. The court affirmed the admission of the testimony as both reliable and relevant under *Daubert* and Kentucky Rule of Evidence 702.

Although the court has occasionally affirmed the admission of such "state of mind" evidence in favor of the prosecution, other evidence from mental health experts is generally inadmissible. Kentucky courts have been historically skeptical of such evidence, on the grounds that mental health professionals "are not experts at discerning the truth," but are instead "trained to accept facts provided by their patients without critical examination of those facts." Thus, "profile" and "syndrome" evidence remains

---

176. *Bowling*, 942 S.W.2d at 304.

177. *Luttrell v. Commonwealth*, No. 96-CA-0709-MR, 1997 WL 613355 (Ky. Oct. 17, 1997) (holding that it was "harmless error" for a trial judge to state in front of the jury that a witness could render an expert opinion, but cautioning trial courts to avoid the practice).

178. Ironically, the police officer's testimony in *Bowling* would have been admissible under Kentucky Rule of Evidence 701, which permits lay opinion testimony "rationally based on the perception of the witness." *See also Rowland v. Commonwealth*, 901 S.W.2d 871, 873 (Ky. 1995) (admitting a lay witness's hypnotically refreshed testimony under Kentucky Rule of Evidence 702 and *Daubert* on the basis of unchallenged expert testimony that the witness's statements showed "very little difference" from pre-hypnosis statements).


180. A dissent by Chief Justice Stephens argues that the expert's testimony was improper because it amounted to an opinion on the ultimate issue. *Id.* at 676 (Stephens, J., dissenting).

181. *Cecil*, 888 S.W.2d at 669; *see also Sanborn v. Commonwealth*, 892 S.W.2d 542 (Ky. 1994) (psychiatrist permitted to testify under *Frye* as to lack of triggering event based only on personal disbelief of defendant's story).

inadmissible under Daubert just as under Frye, on grounds that it is not relevant or scientifically reliable.

Kentucky has also published several decisions applying Daubert to scientific evidence from the physical sciences, but Kentucky's most recent decision in this area restricts the application of Daubert in a way that is cause for concern. In Collins v. Commonwealth, the Kentucky Supreme Court concluded that Daubert applies only to novel scientific evidence, and not to testimony concerning "basic" medical findings or research studies.

Jerry Collins was convicted of various crimes based upon the sexual abuse of his stepdaughter. The prosecution's sole expert witness was the victim's treating physician, who testified both as a treating physician and as "an expert on the physical aspects of child sexual abuse cases." The expert testified that the presence of the victim's intact hymen was consistent with sexual abuse, based upon her clinical experience and extensive medical research.

The defendant challenged the admission of the testimony under Daubert. The Kentucky Supreme Court concluded that the expert's testimony did not require Daubert analysis because it concerned "basic female anatomical findings." The court reasoned that the expert's "examinations did not involve any novel scientific techniques or theories," and that the research "involved the study of a female physical characteristic." The expert had testified that the studies on which she relied "were compilations of statistics derived from pelvic examinations of young females in

---

184. Tungate v. Commonwealth, 901 S.W.2d 41, 43 (Ky. 1995) (testimony that defendant lacks "indicators for pedophilia" inadmissible); Newkirk v. Commonwealth, 937 S.W.2d 690, 694 (Ky. 1996) (child accommodation abuse syndrome evidence is inadmissible, discussing "unbroken line of decisions" rejecting such evidence).
185. 951 S.W.2d 569 (Ky. 1997).
186. Id. at 571.
187. Id.
188. Id.
189. Id.
190. 951 S.W.2d at 573.
191. Id. at 574.
192. Id. at 575.
193. Id. (emphasis added).
various age groups." The court concluded that the studies involved "nothing of a scientific nature to trigger the necessity of applying the Daubert analysis." The court's analysis misreads Daubert. Unlike Frye, Daubert plainly holds that it applies to all scientific evidence, not merely that which is novel. The court easily could have applied Daubert's reliability prong given the expert's testimony on publication of the research, general acceptance of the theory, and testability through clinical studies. Although there was no testimony on the rate of error, the court could have specifically questioned the witness as to any known error rate. Finally, the court could have applied the relevance prong of Daubert given testimony that the expert's clinical experience and research both related to young females of the victim's age.

2. Application Issues in Kentucky

Kentucky courts have attempted to provide guidance to courts and litigants when a Daubert hearing is required. However, the Kentucky Supreme Court's holdings arguably result in a waste of judicial resources by requiring duplicative hearings for established scientific evidence, while foregoing judicial review of unreliable scientific evidence if not challenged by a party.

In Mitchell v. Commonwealth, a case involving DNA evidence, the court affirmed the admission of the evidence under Daubert, but instructed that future admission of DNA evidence should be dealt with "on a case-by-case basis." Where the admission of such testimony is challenged under Daubert, litigants should proffer the expert's testimony, and trial courts should conduct preliminary hearings.

Justice Wintersheimer's concurrence cautions against the risk of inconsistent results of the case-by-case approach on DNA evidence and urges the court to hold under Daubert that no further

194. Id.
195. Id.
197. 908 S.W.2d 100 (Ky. 1995).
198. Id. at 101 (citing Harris v. Commonwealth, 846 S.W.2d 678 (Ky. 1992)).
199. Id.
hearings need be held on the admissibility of DNA evidence, except "where the challenge is that proper testing methods were not utilized." Justice Wintersheimer persuasively argues that the scientific validity of DNA testing has been established, and "[t]here is no need to further burden the taxpayers by a superfluous inquiry when a valid standard currently exists." More recently, the Kentucky Supreme Court affirmed the admission of DNA evidence where the prosecution made no apparent attempt to establish the evidence as admissible, and the trial court apparently conducted no inquiry under Kentucky Rule of Evidence 702 or Daubert prior to admitting the evidence. The Supreme Court held that it is "the duty of a party against whom such evidence is offered to object to the introduction and request a pretrial hearing, and thus give the trial judge an opportunity to determine whether the evidence should or should not be admitted."

The court's holding condones leaving the evidentiary gate open and unattended if no party objects. While this approach may speed trials and facilitate appellate review, it hardly comports with Daubert. Although it is appropriate to deem the failure to object a waiver of evidentiary error, the court's language sweeps too broadly. It is incumbent upon a proponent of expert evidence to prove its admissibility under Rule 702, and Daubert requires trial courts to be vigilant in reviewing such evidence prior to its admission.4

Finally, in a recent case the Supreme Court of Kentucky missed its opportunity to clarify the standards for applying Daubert. In Newkirk v. Commonwealth, the court noted criticism of Daubert as providing "more ambiguity than clarity," and stated only: "The precise contours of Daubert and Rule 702 are still in formation."
3. Standard of Review

Kentucky courts are less confused concerning the applicable standard of review under Daubert. Beginning in Mitchell v. Commonwealth, the court announced that it would review Daubert determinations under the abuse of discretion standard. Aside from a few references to the likely identical "clearly erroneous" standard, Kentucky courts have consistently reviewed all Daubert findings under that standard.

V. THE DESIRABILITY OF RECONCILIATION

There are many advantages to reconciliation with federal law, but there are also a few pitfalls. Reconciliation was clearly the intent of the drafters of the Kentucky Rules of Evidence. Reconciliation diminishes the likelihood of forum shopping, while providing a larger body of case law from which to draw for interpretation of evidentiary issues. On the other hand, Kentucky should be wary of blindly following the federal courts' lead without critical examination, particularly in light of the state of flux of federal law and potential changes in the Federal Rules of Evidence.

A. Reconciliation with Sixth Circuit Case Law

In the few short years since Daubert, numerous conflicts in the federal courts have arisen and the Sixth Circuit has vacillated on the scope of Daubert, its application, and the standard of appellate review. Kentucky should look to Sixth Circuit law for interpretation of issues involving application, but not of issues concerning the scope of Daubert or the standard of review.

Kentucky should adopt a broader view of the scope of Daubert than has been recently adopted by the Sixth Circuit. However,

but on the grounds that it lacked relevancy and invaded the province of the jury by expressing an opinion on the ultimate issue. Id.

In his dissent, Justice Graves indicates that he would have admitted the testimony under Frye. Id. at 696. Special Justice Barry Willett authored a separate dissent joined by Justice Wintersheimer which argues that the evidence should have been admitted as rebuttal testimony under Daubert, in light of evidence of peer review, publication, general acceptance, and the fact that it would assist the jury under Rule 702. Id. at 696-700.

207. 908 S.W.2d 100 (Ky. 1995).
208. Tungate v. Commonwealth, 901 S.W.2d 41, 43 (Ky. 1995).
209. Catron, supra note 27, at 494-95.
EXPERT TESTIMONY

with the exception of a few cases where the court seemed to over-
emphasize the general reliability of methodology with insufficient
detail paid to specific testimony, the Sixth Circuit's application of
Daubert has been logical and should be followed by Kentucky
courts. Finally, Kentucky should maintain its abuse of discretion
standard of review for Daubert findings.

Although the Sixth Circuit recently opined in Jones that
Daubert applies only to scientific evidence, the court's approach is
problematic and in conflict with the opinions of other federal
courts and commentators.\(^{210}\) If nonscientific expert testimony
need not be reliable or relevant as required under Daubert, then
what is the criteria for admissibility under Rule 702? The Sixth
Circuit's latest approach appears to throw the proverbial baby out
with the bathwater, and could result in the wholesale admission of
"junk" testimony from nonscientific experts which is neither
reliable nor relevant. For this reason, Kentucky should not
reconcile its law on the scope of Daubert with the recent holding of
the Sixth Circuit in Jones but should move toward a more
expansive view of Daubert.

Regardless of whether Daubert should be applied to all expert
testimony or only that deemed "scientific," it is clear that the test
does not apply only to novel scientific theories. Kentucky should
correct its misinterpretation in Collins, and be wary of defining
"scientific" too narrowly.

Kentucky courts and litigants should use preliminary hearings
and motions in limine to resolve Daubert issues prior to trial.
Although this was the practice under Frye, it is of greater import
under Daubert, as recently stressed by Justice Breyer in Joiner.\(^ {211}\)
One practical way to apply Daubert's requirements is to view
scientific evidence on a continuum, ranging from the novel to the

\(^{210}\) E.g., Tyus v. Urban Search Management, 102 F.3d 256, 263 (7th Cir. 1996);
Laser, supra note 118, at 1410 (noting that, under this view, expert opinion is more likely
to escape judicial scrutiny if an expert offers little support for his method or technique. If
Daubert is not applied, all an expert has to show is proper qualifications.)

\(^{211}\) In a concurrence, Justice Breyer pointedly suggested that courts use techniques
such as "Rule 16's pretrial conference authority to narrow the scientific issues in dispute,
preambles hearings where potential experts are subject to examination by the court, and
the appointment of special masters and specially trained law clerks." General Elec. Co. v.
Joiner, 118 S. Ct. 512 (1997) (Breyer, J., concurring). In addition, Justice Breyer
endorsed the use of Rule 706 to appoint unbiased experts to assist the court in evaluating
the testimony presented by the advocates. Id. at 521.
well-established. As under Frye, novel scientific evidence should receive the most scrutiny under Daubert, while well-accepted scientific evidence might receive very little scrutiny or be subject to judicial notice.\textsuperscript{212} It is not that well-accepted theories (such as fingerprint evidence) should not be scrutinized, but that such scrutiny has already occurred. Because Daubert requires such an intensive and often expensive inquiry for both courts\textsuperscript{213} and litigants, the Kentucky Supreme Court should re-examine whether a full-scale inquiry is necessary for DNA evidence.

In making a Daubert inquiry, courts must be vigilant gatekeepers, regardless of whether admissibility is specifically challenged. No longer may courts admit questionable expert testimony under the often over-used adage that reliability issues "go to the credibility of the witness."

On the other hand, the fact that evidence survives an admissibility determination under Daubert does not mean that the court need not further scrutinize its weight. Evidence may be admissible under Daubert but still insufficient to survive summary judgment. Kentucky should follow the Sixth Circuit's lead in broadly interpreting Daubert's admissibility requirements while maintaining strict standards for judgment as a matter of law.\textsuperscript{214}

Kentucky should maintain the abuse of discretion standard of review for Daubert findings. As indicated by the recent decision of the United States Supreme Court in General Electric Co. v. Joiner, 212. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 n.11 (1993).

213. As a general rule, state trial courts have fewer resources than are available to federal courts to conduct this inquiry, despite the fact that nearly 98% of litigation occurs in state courts. See Paige Queen, Note, Evidence: Taylor v. State--Oklahoma Abandons the Frye Test and Forces Its State Court Judges to Enter the Twilight Zone, 49 OKLA. L. REV. 385, 395-400 (1996) (arguing that state application of Daubert is impractical given the disparity of resources between state and federal courts). Unlike federal district judges who have two or three full-time lawyers on staff, extensive libraries, and access to additional staff if necessary, Kentucky's circuit court judges ordinarily share access to a single staff attorney or rely on part-time law students. Kentucky's district court judges have even fewer resources. On the other hand, like federal judges who may appoint their own expert under Federal Rule of Evidence 706, Kentucky judges can appoint an expert under Kentucky Rule of Evidence 706 if necessary to resolve complex issues. Finally, Kentucky trial judges can readily obtain a copy of the Federal Judicial Center's Reference Manual on Scientific Evidence. See Terry Christovich Gay, Pseudo-Scientists at the Gate: The New FJC Manual Will Help How Courts Will Manage Scientific Evidence in the Wake of Daubert is Covered in a New Publication from the Federal Judicial Center, 63 DEF. COUNS. J. 331 (1996).

214. E.g., Elkins v. Richardson-Merrell, Inc., 8 F.3d 1068 (6th Cir. 1993).
there is little advantage to altering the standard for any particular type of Daubert determination.\footnote{118 S. Ct. 612 (1997).}

\section*{B. Potential Changes to the Federal Rules of Evidence}

A final reason for caution in reconciliation with federal law is the fact that it may soon change quite dramatically. Numerous modifications of Rule 702 have been proposed by academics, commentators, Congress, and the American Bar Association.\footnote{See, e.g., Alberts, et al., Toward A Model Expert Witness Act: An Examination of the Use of Expert Witnesses and A Proposal For Reform, 80 IOWA L. REV. 1269 (1995) (proposing a new Model Expert Witness Act); David Faigman, Making the Law Safe For Science: A Proposed Rule For the Admission of Expert Testimony, 35 WASHBURN L. J. 401 (1996) (proposing to amend Rule 702 to codify and clarify Daubert); Farrell, supra note 83 (discussing various Congressional bills introduced in the House of Representatives beginning in 1995 and most recently in the Senate in 1997 which purport to codify Daubert); Perrin, supra note 112 (discussing Congressional amendments proposed to Rule 702 in 1995, and proposing a different amendment to codify, clarify, and extend Daubert to all expert testimony); Adina Schwartz, A "Dogma of Empiricism" Revisited: Daubert v. Merrell Dow Pharmaceuticals, Inc. and the Need to Resurrect the Philosophical Insight of Frye v. United States, 10 HARV. L.J. & TECH. 149, 153 (1997) (proposing a three-tiered standard for the admissibility of expert scientific testimony based upon whether the evidence is sought to be admitted by a criminal defendant, the prosecution, or a civil litigant).}

Most recently, the Evidence Project of the American University, Washington College of Law has proposed significant revisions to the rules controlling the use of expert witnesses.\footnote{The Evidence Project proposes to revise the Federal Rules of Evidence as a whole, but gives particular focus to the rules governing expert testimony. The Project recently surveyed all federal district judges and magistrate judges in order to forward that input to the Advisory Committee on the Federal Rules of Evidence. The proposed revisions have been published at 171 F.R.D. 330 (1997).}

If Federal Rule 702 is modified, as appears likely, will Kentucky follow suit in modifying Kentucky Rule of Evidence 702? In light of the rapid developments and substantial criticism of Daubert, it may be more prudent to keep the status quo for some period of time to review any modification of the federal rules. Otherwise, like last year's "state-of-the-art" computer, Kentucky may end up with a federal standard that is outdated as soon as it is adopted.
THE KENTUCKY BAN ON INSURERS' IN-HOUSE ATTORNEYS REPRESENTING INSURED

BY GRACE M. GIESEL

In recent years clients and law firms alike have scrutinized the process and manner in which legal services are provided in an effort to reduce the costs associated with such services. As part of the resulting evolution, many organizations have turned to in-house legal departments for much of their legal needs. Not

1. Professor of Law, Louis D. Brandeis School of Law at the University of Louisville.

In an effort to reduce legal bills, clients have turned to legal audit firms who evaluate legal bills. See Barbara Lyne, In-House Lawyers Gather to Confer on Money, Respect, NAT'L L.J., Nov. 25, 1991, at 15 (legal auditor address at the American Corporate Counsel Association conference the "most heavily attended and perhaps most enthusiastically received session"). Outside attorneys have not necessarily been pleased with this new actor in the legal services business. See, e.g., David Rubenstein, Fee Reductions Backfire on Fireman's Fund, CORP. LEGAL TIMES, Jan. 1997, at 1 (firm sued auditor and auditor's client for defamation; verdict of $3 million). See also Gail Diane Cox, Cost-Cutting Targets One of Its Own, NAT'L L.J., Feb. 17, 1997, at A1 (insurance client of auditor sued an auditor).

3. See, e.g., In-House Counsel Banking on Lawyers to Play by the Rules, NAT'L L.J., Sept. 22, 1997, at B1 (Michael E. Blair, General Counsel of Mellon Bank Corporation, employer of 87 lawyers as lawyers, stated, "We farm out litigation and credit recovery work because it's more cost-efficient. The bulk of the other work we try to do inside the department."); Neil Solomon, That In-House Counsel is Just a Mirage, NAT'L L.J., May 12, 1997, at A21 (in-house departments ballooned as a result of cost-cutting attempts). See also The 1997 Corporate Legal Times Kirkpatrick & Lockhart LLP 200 Largest Legal Departments, CORP. LEGAL TIMES, Aug. 1997, at 33 (documenting legal departments with hundreds of lawyers; including 20 with 200 lawyers or more); J. Randolph Ayre, In-House—Better Than Ever, NAT'L L.J., Feb. 15, 1982, at 11 (noting that the number of in-house attorneys quadrupled from 1962 to 1982). See generally Abram Chayes & Antonia H. Chayes, Corporate Counsel and the Elite Law Firm, 37 STAN. L. REV. 277, 277-78 (1985); Grace M. Giesel, The Business Client is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and the Legal Profession, 72 NEB. L. REV. 760,
surprisingly, some insurers have sought to use in-house attorneys not only to represent and advise the corporation, but also to defend insureds when the insurance contract between the insured and the insurer obligates the insurer to provide the insured with a defense.

While without doubt the insurance defense relationship of the insurer, the insured, and the attorney, retained outside attorney or employee attorney, presents potential conflicts of interest, the


4. This article will use the terms "in-house" and "employee" attorney to refer to any attorney employed on a salary basis and considered to be an employee of the insurer regardless of whether the attorney is called an "in-house attorney," a "staff attorney," or an attorney in a "captive" law firm whose remuneration consists of a salary and benefits provided by the insurer. King v. Guiliani, no. CV92 0290370 s., 1993 WL 284462 (Conn. Super. Ct. 1993), involved a typical "captive" firm arrangement. The attorneys in that case were full time salaried attorney employees of an insurer. The attorneys worked in the "Law Offices of Gregory A. Thompson." All expenses and salaries of the office were paid by the insurer. Id. at *1. Some courts and ethics bodies have required these "captive" law firms to identify themselves in a way that reflects the involvement of the insurers. Otherwise, the practice is deceptive. See, e.g., In re Youngblood, 895 S.W.2d 322, 331 (Tenn. 1995); N.J. Sup. Ct. Comm. on Unauthorized Practice, Supp. to Op. 23, 1996 WL 520891 (Aug. 26, 1996); In re Weiss, Healey & Rea, 536 A.2d 266 (N.J. 1988); Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline, Op. 95-14, 1995 WL 813802 (Dec. 1, 1995).

In contrast to an employee attorney is a traditional retained attorney. A retained attorney does not receive a salary from the insurer and is not considered an employee of the insurer for benefits or other purposes, though the retained attorney may receive virtually all of her compensation from the insurer.


6. See Douglas R. Richmond, Lost in the Eternal Triangle of Insurance Defense Ethics, 9 GEO. J. LEGAL ETHICS 475 (1996); Charles Silver & Kent Syverud, The Professional Responsibilities of Insurance Defense Lawyers, 45 DUKE L.J. 255 (1995). Everyone agrees that an attorney hired by an insurer to defend an insured has as a client the insured and owes to that client all ethical duties and responsibilities. There is quite a disagreement taking place as to whether one must consider the insurer in this arrangement to be a client as well or simply to be an interested party. See Charles Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 TEX. L. REV. 1583 (1994) (insurer must be viewed as client); 3 RONALD E. MALLEN & JEFFERY M. SMITH, LEGAL MALPRACTICE § 28.3, at 487 (4th ed. 1996) (traditional view is insurer is client also). See also Silver & Syverud, supra at 273 (discussing the debate brewing regarding the appropriate view for the Restatement (Third) of the Law Governing Lawyers); Thomas D. Morgan & Charles W. Wolfram, Lawyers Retained by Liability Carriers to Represent Insureds in the Restatement of the Law Governing Lawyers, COVERAGE (Mar.-Apr. 1996), at 44 (the debate continues); Charles Silver & Michael Sean
1998] INSURERS' IN-HOUSE ATTORNEYS 367

insurer's use of an employee attorney to defend an insured has received particularly careful consideration. Most states facing the question of whether to allow such representation have refused to ban the procedure, finding no unauthorized practice of law and no impermissible conflict of interest. State courts and ethics bodies dealing with the question have recognized that, even so, in any particular case the involvement of an employee counsel could create an ethnically impermissible situation.


Many courts have recognized that the insurer is a client of the attorney along with the insured. See, e.g., Mitchum v. Hudgens, 533 So. 2d 194, 198 (Ala. 1988) (attorney represents both); National Union Fire Ins. Co. v. Stites Profl Law Corp., 235 Cal. App. 3d 1718, 1727 (Cal. Ct. App. 1991) ("so long as the interests of the insurer and the insured coincide, they are both clients of the defense attorney and the defense attorney's fiduciary duty runs to both the insurer and the insured"). See also Richmond, supra at 482 & n.26.

Other courts disagree, taking the stance that only the insured is the client, not the insurer. See, e.g., First Am. Carriers, Inc. v. Kroger Co., 787 S.W.2d 669, 671 (Ark. 1990) (when an attorney is retained by an insurance company to provide a defense under a liability policy, the attorney's client is the insured, not the insurer); In re Youngblood, 895 S.W.2d 322, 328 (Tenn. 1995) ("the employment of an attorney by an insurer to represent the insured does not create the relationship of attorney-client between the insurer and the attorney").

Kentucky takes the position that the attorney has only one client, the insured. See Advisory Ethics Opinion E-388, 58 KY. BENCH & B. 52 (Fall 1994). See also Del O'Roark, In Kentucky, the Insured is your Client—Not the Insurer!, 60 KY. BENCH & B. 49 (Winter 1996).


In *American Insurance Association v. Kentucky Bar Association*, the Kentucky Supreme Court disagreed with almost all of the courts and ethics committees who have addressed the issue of representation of insureds by employee attorneys of insurers. The Kentucky court refused to allow an insurer's in-house lawyers or outside retained attorneys working on a set fee basis to defend insureds. The court based the stance on the theory that such representation would constitute the unauthorized practice of law because it would violate the long held position that a corporation cannot practice law in the state of Kentucky. In addition, the court refused to approve the arrangement because of the conflicts of interest suggested by such representation.

Following Section One of this article, outlining the *American Insurance Association* opinion, Section Two discusses and analyzes the opinion's treatment of the unauthorized practice of law and the precedents and concepts upon which the opinion relies. Section Three of this article discusses and analyzes the *American Insurance Association* opinion's treatment of the conflict of interest issue as it relates to employee attorneys, including the opinion's reliance on the "appearance of impropriety." While the *American Insurance Association* court certainly goes farther by addressing set fee arrangements of retained attorneys, the retained attorney issues are beyond the scope of this article. Finally, this article concludes that the *American Insurance Association* opinion, though perhaps well-intentioned, is flawed hopelessly and does not contribute to reasoned discussion regarding the law governing the practice of law and the legal profession.

---

9. 917 S.W.2d 568 (Ky. 1996).
10. Id.
11. Id. at 571.
12. Id.
13. Id. at 571.
I. THE AMERICAN INSURANCE ASSOCIATION OPINION

A. Background: Advisory Ethics Opinion E-368 and Unauthorized Practice Opinion U-36

In American Insurance Association, the issue of the propriety of an insurer providing an in-house attorney to defend an insured under a policy of insurance came before the Supreme Court of Kentucky. Several insurers and insurer groups requested that the Kentucky Supreme Court review an Advisory Ethics Opinion, E-368, which the Kentucky Bar Association Board of Governors had rendered. The insurers asked the supreme court to review not only the Advisory Ethics Opinion but also an older Unauthorized Practice of Law Opinion, U-36, since the Ethics Opinion appeared to rely upon it.

Advisory Ethics Opinion E-368 dealt with the following questions:

1. May a lawyer enter into a contract with a liability insurer in which the lawyer or his firm agrees to do all of the insurer's defense work for a set fee?; and
2. Regardless of the answer to the first question, may the lawyer agree to accept cases from the insurer with the understanding that the attorney will be responsible for all expenses of litigation (experts, court reporters, etc.) without expectation of reimbursement from the insurer?

Opinion E-368 answered both of these questions in the negative and based the answers, in part, on the conflict of interest such arrangements might create and the infringement such arrangements might exact on the independent professional judgment of the attorney. E-368, in the background section,
noted that insurers had taken other such cost-controlling actions such as employing in-house attorneys to defend insureds. E-368 stated: "This is not permitted in Kentucky, for in addition to the obvious conflicts of interest that would be presented by such an arrangement, the practice would violate the law governing unauthorized practice." E-368 then made reference to U-36, an Unauthorized Practice of Law Opinion.

The referenced unauthorized practice of law opinion, U-36, specifically addressed the following question: "May an insurance company employ in-house counsel (salaried employees) to represent their insured after a lawsuit has been filed?" U-36 first relied on Canon 3 of the American Bar Association Model Code of Professional Responsibility (ABA Code) which governed the conduct of Kentucky lawyers in 1981 when U-36 was created. U-36 referred in particular to DR 3-101(A) of the ABA Code which provided that "[a] lawyer shall not aid a nonlawyer in the unauthorized practice of law." Since 1990, a slightly modified version of the American Bar Association Model Rules of Professional Conduct (ABA Rules) governs attorney conduct in Kentucky. The current Kentucky rule states: "A lawyer shall not: . . . (b) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." Second, U-36 relied on Kentucky Supreme Court Rule 3.020 which defined the practice of law, in pertinent part, as

22. Id.
23. Id.
27. See MODEL RULES OF PROFESSIONAL CONDUCT (1983). Kentucky Supreme Court Rule 3.130 contains the rules governing attorney conduct in Kentucky. Kentucky switched from the Model Code of Professional Responsibility to the Model Rules of Professional Conduct in 1990. Kentucky's rules based on the Model Code were withdrawn and replaced by rules based on the Model Rules by Supreme Court Order 89-1, effective Jan. 1, 1990. In large measure the differences between the Model Rules and the Kentucky Rules are slight. For example, Model Rule 6.2 uses "shall" while the Kentucky version of the same rule uses "should." KY. SUP. CT. R. 3.130(6.2) (Banks-Baldwin 1997). There are a few substantial variations. For example, Kentucky has no version of Model Rule 8.3 which requires that under certain circumstances an attorney has a duty to report ethical shortcomings of other attorneys.
28. KY. SUP. CT. R. 3.130(5.5) (Banks-Baldwin 1997).
follows:

[t]he practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligation, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefor.29

Finally, U-36 relied on Kentucky case law which held that a corporation cannot have a license to practice law and therefore cannot practice law except unauthorizedly.30 Thus, Unauthorized Practice Opinion U-36 answered the question presented by stating that an in-house attorney cannot represent an insured.31


The Kentucky Supreme Court began by stating that it "hereby approve[s] and adopt[s]" Advisory Ethics Opinion E-368 and that it "choose[s] not to disturb" Unauthorized Practice Opinion U-36.32 The court then began the analysis with the challenge to U-36, the in-house counsel opinion, since the insurers argued that fatally flawed U-36 provided the basis for the Advisory Ethics Opinion, E-368.33 The court noted the argument of the insurers that other

30. Unauthorized Practice Opinion U-36, 46 KY. BENCH & B. 36 (Winter 1982). See, e.g., Kendall v. Beiling, 175 S.W.2d 489 (Ky. 1943); Hobson v. Kentucky Trust Co. of Louisville, 197 S.W.2d 454 (Ky. 1946); Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965); Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961). A Kentucky statute states, in relevant part: "a person is guilty of unlawful practice of law when, without a license issued by the [supreme] court, he engages in the practice of law, as defined by rule of the [supreme] court." KY. REV. STAT. ANN. § 524.130 (Banks-Baldwin 1997). The statute also states that the unlawful practice of law is a misdemeanor. Id.
31. Unauthorized Practice Opinion U-50, repeated the prohibition relating to corporations practicing law. U-50 states, "Neither corporations nor their salaried employee attorneys may offer legal services to the public." Unauthorized Practice Opinions, 61 KY. BENCH & B. 54 (Summer 1997).
32. 917 S.W.2d 568, 569 (Ky. 1996).
33. Id. at 570.
jurisdictions have found that insurer in-house attorneys can represent insureds and that such representation can be ethical.\footnote{34}{Id. See also cases and ethics opinions cited, supra note 8.} The court further noted the argument that the insurer and the insured have a "community of interest" in many litigation matters and thus that ethically fatal conflicts of interest do not exist, necessarily, in every representation.\footnote{35}{Id. at 570-71.} Lastly, the court noted the argument that using attorneys who are employees of insurers to defend insureds may be efficient given the expertise developed and the lack of a billable hour incentive to inefficient time consumption.\footnote{36}{Id. at 571.}

Discounting these arguments the court stated, "[N]otwithstanding the trends of other jurisdictions, any alleged nonsensical application of the prohibition against the unauthorized practice of law, and the untapped resource of 'competent, trained and scrupulous' in-house insurance defense counsel as pipe cleaners for a clogged legal system, we do not feel that U-36 deserves review."\footnote{37}{Id. at 571.}

\footnote{34}{Id. See also cases and ethics opinions cited, supra note 8.}
\footnote{35}{Id.}
\footnote{36}{Id. at 570-71.}
\footnote{37}{Id. at 571.} One writer has criticized this opinion harshly and it may be that the tone suggested by the language quoted in the text is somewhat to blame. In a footnote to a discussion of a fear of an insurer overreaching in the tripartite relationship of insured, attorney and insurer, William T. Barker stated:

Suspicion on this point, verging on paranoia, was the key basis on which the Kentucky Supreme Court declared it impermissible for insurance companies (1) to use an attorney employed by the company to defend insureds and (2) to contract with outside counsel to defend insureds and (3) to contract with outside counsel to defend all claims in a given territory for a fixed aggregate fee. American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky. 1996). In an opinion otherwise short on reasoning (and long on ipse dixit), the court stated, as a key premise, "We do not believe that in most instances the interests of the insured and the insurer are alike, but are more apt to agree ... that while the insurer and insured may share some common interests, the parties are subject to a complete divergence at any time." \textit{Id.} at 573. The accusation of paranoia arises from the lack of any evident factual basis for opinion thus stated.


While one must recognize that Mr. Barker represents insurers and may, therefore, have an advocate's bias against the Kentucky Supreme Court's position in the American Insurance Association opinion, the opinion does contain statements that raise questions of bias as well. For example, the court referred to the insurer's argument with regard to the unauthorized practice of law as "nonsensical." \textit{American Ins. Ass'n}, 917 S.W.2d at 571. Yet, other jurisdictions and the American Bar Association would agree with the insurers. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 282
The court found "no compelling reason to overrule the more than fifty years of legal precedent which recognizes the principles outlined in that opinion," meaning the Unauthorized Practice Opinion, U-36. The court quoted the 1943 case of Kendall v. Beiling, a case dealing with the practice not of law but of optometry, stating, "[t]here is scarcely any judicial dissent from the proposition that a corporation cannot lawfully engage in the practice of law." The court continued by quoting from another rather aged case, Hobson v. Kentucky Trust Company of Louisville, stating, "a corporation [ ] cannot obtain license to practice law, since it is wholly incapable of acquiring the educational qualifications necessary to obtain such license, nor can it possess in its corporate name the necessary moral character required therefor." The court then stated that "[n]othing has
changed since the rendering of Kendall and Hobson, or since the adoption of U-36 to assuage the moral dilemmas and ethical concerns connected to the unauthorized practice of law. 43

Interestingly, the court, after returning to and dismissing the "community of interest" argument and "Complainants' Pollyanna postulate that house counsel will continue to provide undivided loyalty to the insured," stated that U-36 "logically discerns when house counsel would fall into that precarious position between employee of insurer and advocate of insured, and, thus logically prevents the occurrence of such a happening, and its onerous fallout." 44 Thus, the court used U-36 not only as a statement defining unauthorized practice but also seemed to use it as a conflict of interest opinion. In addressing the fact that other jurisdictions have allowed employee attorneys to represent insureds, the court stated that the regulation and control of Kentucky lawyers is governed by Kentucky law and principles and that the law of other jurisdictions is "of no concern to us in this matter." 45

Turning to the specific issue in the Advisory Ethics Opinion, E-368, 46 whether attorneys can agree to represent insureds for a set fee from the insurer, the court addressed the insurer's argument that no rule of ethics or principle of law justifies a blanket ban on the fee arrangement proposed. 47 The insurers argued that regardless of the payment arrangement, the attorney for the insured would owe the same duties to the insured client, just as an in-house attorney would. Also, the insurers argued that the potential for conflict might exist in some situations but not all and that potential conflicts also exist in other fee and representation arrangements. 48 The court stated that the set fee does indeed interfere with the lawyer's independence of judgment in contravention of Kentucky Supreme Court Rule 3.130(1.8(f)(2)) and creates an impermissible conflict of interest violative of Kentucky Supreme Court Rule 3.130(1.7(b)), just as E-368

---

43. American Ins. Ass'n, 917 S.W.2d at 571.
44. Id.
45. Id.
46. Advisory Ethics Opinion E-368, 58 KY. BENCH & B. 52 (Fall 1994).
47. Id.
48. Id. at 572-73.
stated.\textsuperscript{49} Even if no actual conflict exists, the court stated: "the mere appearance of impropriety is just as egregious as any actual or real conflict. Therefore, E-368, in the same manner as U-36, acts as a prophylactic device to eliminate the potential for a conflict of interest or the compromise of an attorney's ethical and professional duties."\textsuperscript{50}

Noting that the Kentucky Bar Association in the appeal stated nineteen potential conflicts relating to the fee arrangement, the court continued that it saw "the set free agreement as ripe with potential conflicts."\textsuperscript{51} Because of the court's discussion of in-house counsel in particular and because the parameters of the set fee discussion would encompass the situation of an employee attorney, there is no doubt that the court's conflict of interest discussion applies to employee attorneys.

Finally, the court returned to the law of other jurisdictions which contradicts the \textit{American Insurance Association} position. The court stated: "we are convinced . . . that few of the other

\begin{itemize}
\item \textsuperscript{49} \textit{Id.} at 572. Rule 3.130(1.8(f)) states in relevant part:
  A lawyer shall not accept compensation for representing a client from one other than the client unless:
  (1) Such compensation is in accordance with an agreement between the client and the third party or the client consents after consultation;
  (2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  (3) Information relating to representation of a client is protected as required by Rule 1.6.

\item \textsuperscript{50} \textit{American Ins. Ass'n}, 917 S.W.2d at 573.

\item \textsuperscript{51} \textit{Id.}
\end{itemize}
jurisdictions to which Complainants cite have conducted any meaningful analysis of the issues presented, nor do these jurisdictions share our state's aversion to the practice of law by corporations. To support this statement the court noted that the Kentucky Bar Association had distinguished the Tennessee case of In re Youngblood from the North Carolina case of Gardner v. North Carolina State Bar, by pointing out that North Carolina, like Kentucky, does not allow corporations to practice law while Tennessee "does not proscribe a corporation from practicing law for the public."

II. THE UNAUTHORIZED PRACTICE OF LAW

A. In General

The usual reason given as justification for the regulation of the unauthorized practice of law is the protection of the public from incompetent, unskilled and unethical nonlawyers. Another rationale mentioned in support of the regulation of unauthorized practice is that without the regulation the legal system itself would be harmed by the lack of skill, competence and ethics of nonlawyers. A third occasional rationale is that only with a ban
on unauthorized practice can there be a basis for professional discipline. If a person or entity needs no license to practice then a disbarment or suspension of an attorney has less impact.58

Some historians speculate that modern regulation of the unauthorized practice of law began as a way for attorneys suffering the unpleasant economic effects of the Depression to ensure that legal work and the accompanying legal fees did not go to nonlawyers.59 In reality, the protection of not only the public but also the economic health and vitality of the profession motivated some of the unauthorized practice regulatory action even before the 1930s.60 In the early part of the twentieth century there is evidence of the profession's concern with corporations and fear of competition from corporations in the legal services market. The unauthorized practice of law regulatory activity of the time reflected this motivational fear.61 Without doubt, a ban on the unauthorized practice of law does provide a monopoly for attorneys62 while perhaps preventing any representation at all for prospective clients who cannot afford or access attorneys.63

One need to look no farther than Hobson v. Kentucky Trust Company of Louisville64 for concrete evidence of this

58. WOLFRAM, supra note 56, § 15.1.2, at 833.
59. WOLFRAM, supra note 56, § 15.1.1, at 826 (citing W. HURST, THE GROWTH OF AMERICAN LAW 323 (1950)). Professor Wolfram also discusses the early history of the United States in which laypeople were welcome to practice law. See WOLFRAM, supra note 55, § 15.1.1, at 824-25. See also NONLAWYER ACTIVITY, supra note 55, at 13-32 (discussing history of unauthorized practice regulation and specifically the Depression as motivator); 1994 SURVEY, supra note 55, at xi-xx (discussing history of unauthorized practice regulation); Christensen, supra note 44, at 161-77; Rhode, supra note 55, at 6.

The ABA Standing Committee on the Unauthorized Practice of Law was created in 1931. NONLAWYER ACTIVITY, supra note 55, at 17.

60. Christensen, supra note 56, at 175-76, 187.

61. See Christensen, supra note 56, at 178 (specifically discussing the concern that corporations could provide services more efficiently), and at 178-89 (discussing the first years of the twentieth century in general). Christensen notes that the Illinois State Unauthorized Practice Committee, until 1930, was "The Committee on Corporations Practicing Law." Christensen, supra note 44, at 183. See also Note, What Constitutes the Practice of Law, 31 HARV. L. REV. 886 (1918); George W. Bristol, The Passing of the Legal Profession, 22 YALE L.J. 590 (1913) (discussing the concern for the corporation as a competitor to lawyers).

63. Rhode, supra note 56.
64. 197 S.W.2d 454 (Ky. 1946).
anticompetitive motivation. The Hobson court stated that the plaintiff, a private attorney, alleged that the Trust Company, a corporation, was practicing law "without being licensed or sworn so to do, and in unlawful competition with the plaintiffs.\textsuperscript{65} In Frazee v. Citizen's Fidelity Bank and Trust Company\textsuperscript{66} the complaint was not only that the bank was doing acts within the definition of the practice of law, but that it was advertising and soliciting business at a time when attorneys could not.\textsuperscript{67} Finally, an Unauthorized Practice Opinion U-32,\textsuperscript{68} after addressing the lawyer independence issue, stated, "if corporations were permitted to offer as inducement legal services for the public in connection with their business, the end result would be that all legal work other than actual courtroom trial of cases would be performed by corporations.\textsuperscript{69}

In the United States, the regulation of unauthorized practice of law has declined in the last third of the twentieth century, in part as a result of public needs and perceptions, and in part as the result of First Amendment\textsuperscript{70} and antitrust concerns.\textsuperscript{71} In 1977, the American Bar Association discontinued publication of Unauthorized Practice News\textsuperscript{72} and in 1984, the American Bar Association Unauthorized Practice of Law Committee ceased to exist.\textsuperscript{73}

Regardless of the perhaps noble intentions of the legal profession, unauthorized practice regulation has received a barrage of criticism in the academic literature and the popular press. Unauthorized practice regulation has been described as "among the most complex, controversial problems facing the legal

\textsuperscript{65} Id. at 456.
\textsuperscript{66} 393 S.W.2d 778.
\textsuperscript{67} Id.
\textsuperscript{68} U-32, contained in UNIVERSITY OF KENTUCKY COLLEGE OF LAW, OFFICE OF CONTINUING LEGAL EDUCATION, KENTUCKY LEGAL ETHICS OPINIONS AND PROFESSIONAL RESPONSIBILITY DESKBOOK (Richard Underwood, ed. 1993).
\textsuperscript{69} Id.
\textsuperscript{71} NONLAWYER ACTIVITY, supra note 56, at 23-32. Christensen, supra note 55, at 199-201 (antitrust issues). See generally Christensen, supra note 55, at 190-97, for a discussion of the era in general.
\textsuperscript{72} Christensen, supra note 56, at 190.
\textsuperscript{73} 1994 SURVEY, supra note 456, at xiv.
profession."74 A prevalent criticism is that the legal profession regulates the unauthorized practice of law in the name of protection of the public, but no true evaluation of the need for protection, the public's desire for protection, or the cost of such protection has accompanied the regulation.75 Further, many commentators have noted the patent conflicts of interest present when the legal profession in the form of attorneys, bar associations and judges have the responsibility to decide the bounds of the practice of law.76 Professor Deborah Rhode's survey reported in the early 1980's reflected that consumers viewed unauthorized practice regulation as "self-protective," "monopolistic," and "greedy."77

These concerns are not simply ivory tower speculation or historical artifacts from other jurisdictions or the past. Recently, the response in Kentucky with regard to a proposed unauthorized practice opinion requiring attorneys, not non-lawyers, to handle real estate closings has evinced the reality of the criticism. Not only did the United States Justice Department's Antitrust Division oppose the proposed opinion in the belief that consumers should have the choice as to whether to use an attorney or not, but also the "public" made considerable comment.78 The general counsel of a banking association stated: "This doesn't protect consumers. It protects attorneys."79 A newspaper editorial regarding the issue agreed that "people need all the protection they can get from . . . unscrupulous practices."80 The editorial

74. Id. at vii.
75. See generally Alan Morrison, Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question, 4 NOVA L.J. 363 (1980) (costs have not been a relevant consideration); Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 HARV. L. REV. 702 (1977) (public interest in justice at low cost is last consideration). 1994 SURVEY, supra note 55, at xvii (if UPL is to be based on public protection, specific harm must be established); Christensen, supra note 56, at 201-03 (same). See also ABA/BNA LAWYERS MANUAL OF PROFESSIONAL CONDUCT, 21:8011.
76. Rhode, supra note 56, at 97 ("Enforcement of sweeping prohibitions has rested with those least capable of disinterested action"); Morgan, supra note 69 (noting the self-interest present); Comment, Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power, 28 U. CHI. L. REV. 162 (1960).
77. Rhode, supra note 56, at 40.
79. Id. at A1.
stated that the Kentucky Bar Association must document the problems that occur when non-lawyers participate rather than lawyers.81 "So far," said the editorial, the Bar Association has not "made a compelling case that would justify the anticompetitive grab."82 Thus, in a microcosm, the issues of balancing interests and the economic interestedness of the deciders of the question are presented. An additional consideration in the area of unauthorized practice regulation made obvious by this brouhaha is the injury to the collective reputation of lawyers that occurs when the public becomes cognizant of the monopolistic effect of such regulation.

The justifications related to unskilled nonlawyer representation of clients have little application when a licensed attorney represents the client and therefore carries with him or her the responsibility of competent, ethical representation. This point has been much discussed in recent years in the context of the problem of the multijurisdictional practice of law.83 Kentucky, like many states, makes the unauthorized practice of law a crime if the person participating in an activity within the definition of the practice of law contained in the Supreme Court Rules is not licensed by the Supreme Court of Kentucky or does not otherwise have specific authorization of a court.84 Therefore, attorneys licensed in other states cannot take any of the actions stated in the definition if those actions would be deemed to be within Kentucky. In fact, the ABA Rules, which govern attorney conduct in the majority of United States jurisdictions, state that a lawyer cannot "practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction."85 Because Kentucky defines the practice of law in part as "any service rendered involving legal knowledge or legal advice, whether of

81. *Id.*
82. *Id.* The editorial speculated that the requirement of an attorney rather than a nonlawyer would increase the cost of 100,000 closings each year by $175 per closing. Thus, the ultimate question is a $17.5 million a year question. *Id.* One member of the public, in a letter to the editor, said, "No thanks, guys, I'll call you when I need your services." Letter to the Editor, LOUISVILLE COURIER-JOURNAL, Sept. 19, 1997 (letter of Peter Easton).
83. See generally HAZARD & HODES, supra note 62, § 5.5:100, at 812; 5.5:203 at 817 (discussing the multijurisdictional morass).
84. KY. REV. STAT. ANN. § 524.130 (Banks-Baldwin 1997); Ky. Sup. Ct. R. 3.020 (Banks-Baldwin 1997) (a portion of this rule appears in the text supra at note 29).
85. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5(a) (1983).
representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services,\textsuperscript{86} arguably an Indiana attorney taking a deposition in Kentucky or negotiating a transaction in Kentucky engages in the unauthorized practice of law in violation of law and ethical rule. This is but one area in which the passage of time has rendered the present regulation of the unauthorized practice of law out of step with modern practice.\textsuperscript{87}

Even the notion that an attorney licensed in another state is per se substandard for Kentucky's purposes is not relevant when the question is whether an attorney licensed in Kentucky but who is an employee of an insurer, a corporation, may represent an insured or whether such would constitute the unauthorized practice of law. The rationale supporting the application of unauthorized practice regulation to employee attorneys of corporations has focused on the lawyer-client relationship and its personal nature.\textsuperscript{88} Because the attorney-client relationship is one of trust and confidence, that relationship cannot exist when the corporate employer controls the attorney. A New York court, writing in 1910 in the era of special concern with the threat of corporate competition in the legal services market,\textsuperscript{89} stated in \textit{In re Co-Operative Law Company}:\textsuperscript{90}

The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent and it cannot exist between an attorney employed by a corporation to practice law for it,

\begin{quote}
88. Christensen, supra note 56, at 187-89. See also Frederick C. Hicks & Elliott R. Katz, \textit{The Practice of Law by Laymen & Lay Agencies}, 41 \textit{Yale L.J.} 69, 72 (1931).
89. See supra notes 60-61 and accompanying discussion.
90. 92 N.E. 15 (1910).
\end{quote}
and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client . . . . [The attorney's] master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counselor at law . . . . There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. 91

Thus, this rationale focuses specifically on the idea that an attorney employed by a corporation but representing another client would have his or her independence of judgment impermissibly constrained as a result of the employer corporation exercising employer-like control. 92

Such a stance suggests that employee attorneys are not capable of recognizing when their employer corporation acts to impermissibly constrain their own independence of professional judgment. The stance, further, assumes that the employee attorney will forsake the client and the client's interests for those of the employer corporation. Yet, employee attorneys are not unskilled, incompetent, or unethical. The public does not have to be protected from them; they are licensed and subject to the same ethical rules, laws and fiduciary responsibilities as any other attorney. 93 As the New Jersey court noted in In re Weiss, Healey &

91. Id. at 16.
92. For another example of this sort of reasoning, see Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n of Richmond, 189 S.E. 153 (1937). See also Cal. Ethics Op. 1987-91, 1987 WL 109707 ("The rationale prohibiting a corporation from retaining attorneys to provide legal services to third parties was premised on the personal relationship of trust and confidence between attorney and client which would be undermined by a corporation undertaking to furnish its members with legal advice, counsel and professional services.").
93. See Cal. Ethics Op. 1987-91, 1987 WL 109707 ("it cannot be presumed that simply because the attorneys handling defense cases are salaried employees of Insurance Company that they will act unethically or will otherwise sacrifice their professional obligations to the insureds in favor of the Insurance Company"); Va. Unauthorized Practice Op. 60 (Feb. 15, 1996) ("Staff counsel, in undertaking the representation of the insureds of his or her employer within the guidelines established herein, is clearly bound by the same ethical obligations and constraints imposed on attorneys in private practice."); In re Allstate Ins. Co., 722 S.W.2d 947, 953 (Mo. 1987) ("There is no basis for
"These are not second class lawyers; these are first class lawyers who are delivering legal services in an evolving format."

In the early portion of the twentieth century when the unauthorized practice of law regulation regarding corporations was developing and when courts decided cases such as *In re Co-Operative Law Company*, employee attorneys were not plentiful. The legal profession at the time viewed them as lesser lawyers who did lesser work. Employee attorneys were "kept" attorneys. Thus, the opinions of courts and regulatory bodies of that era, when addressing issues involving employee attorneys, not surprisingly, manifest the collective beliefs of the time that employee attorneys differed from private attorneys; employee attorneys were substandard. Modern courts must consider the New York court's statement in *In re Co-Operative Law Company* quoted above and other statements like it in the historical context of their origin.

A court might accept such statements and precedent without further consideration if everything in the practice of law was the same as it was in 1910. The profession is clearly not the same with regard to in-house attorneys. Employee attorneys make up a large percentage of the practicing bar. In addition to an increase in numbers, in-house attorneys of all sorts have gained much prestige and respect in the last twenty years as corporations have turned to the best and brightest attorneys to do very sophisticated

---

94. 536 A. 2d 266 (N.J. 1988).
95. *Id.* at 269.
96. 92 N.E. 15 (1910).
99. See supra note 3.
legal work. For example, corporations now commonly hire as employees respected partners at major law firms.

While a jurisdiction might conclude that the independence issue remains a concern, such a conclusion regarding the legal profession must be based at least in part on the present status of that profession, not simply on precedent created from world facts no longer true. In General Dynamics Corporation v. Superior Court, the California Supreme Court, en banc, reviewed the issue of whether an in-house attorney might pursue an action against the corporate employer for wrongful termination. After reviewing several prior cases, the supreme court stated that the cases reflected "an anachronistic model of the attorney's place and role in contemporary society." The same is true for cases and ethics opinions which assume that employee attorneys are lesser attorneys, not capable of ethical behavior.

Further, the rules of professional conduct for attorneys in


101. See, e.g., Kelley R. Bowers, After 28 Years at the Firm, Marriott GC Finds Room to Grow, CORP. LEGAL TIMES, Apr. 1997, at 30 (former managing partner of O'Melveny & Myers; says that more lawyers will move in-house due to attractiveness of the position). A classic example of a corporation seeking the best from the private bar is General Electric's hiring in the late 1980s and early 1990s. See Anthony Borden, Ben Heineman's In-House Revolution, AM. LAW., Sept. 1989, at 100 (discussing generally the plan to bring in the best); D. M. Osborne, The Sidley-Heineman Connection, AM. LAW., May 1990, at 33 (GE hired Sidley & Austin partner with environmental regulatory expertise); Audrey Duff, The Long Arm of General Electric, AM. LAW., Dec. 1990, at 38 (GE hired Dewey, Ballentine partner with international expertise); Steven Brill, Miserable on the Outside, Happy on the Inside, AM. LAW., Sept. 1990, at 5 (GE attorneys include partners from elite firms such as Sidley & Austin; Morgan, Lewis & Bockius; Williams & Connolly; Dewey, Ballantine and others).

102. 876 P.2d 487 (Cal. 1994) (en banc).

103. Id. at 489.

104. Id. at 500.
Kentucky specifically deal with the issue of independence of professional judgment in Kentucky Supreme Court Rules 1.8(f) and 5.4. Perhaps the independence issue is better suited for analysis as measured against the requirements of those specific ethical precepts and not as a part of an unauthorized practice of law discussion.


By the discussion of U-36, the Kentucky Supreme Court in American Insurance Association clearly banned employee attorneys of insurers from representing insureds on the basis that such constitutes the unauthorized practice of law. Kentucky, like many other jurisdictions following precedent such as In re Co-Operative Law Company, has long had in place a rule forbidding corporations from practicing law. A corporation can employ

105. KY. SUP. Ct. R. 3.130(1.8(f)) & 3.130(5.4) (Banks-Baldwin 1996).
106. See American Insurance Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 569 (Ky. 1996).
108. See Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778, 782 (1964) (corporation cannot practice law and cannot employ attorney to practice law). See also GA. CODE ANN. § 15-19-51 (1997) ((a) "It shall be unlawful for any person other than a duly licensed attorney at law: (1) To practice or appear as an attorney at law . . . (b) Unless otherwise provided by law or by rules promulgated by the Supreme Court, it shall be unlawful for any corporation . . . to do or perform any of the acts recited"); HAWAI I REV. STAT. ANN. § 605-14 (1996) ("It shall be unlawful for any person, firm, association, or corporation to engage in or attempt to engage in or offer to engage in the practice of law, except and to the extent that the person, firm, or association is licensed or authorized so to do . . . provided that nothing herein shall be deemed to authorize the licensing of a corporation to practice law except as provided in chapter 416"); MICH. COMP. LAWS ANN. § 450.681 (West 1997) ("It shall be unlawful for any corporation or voluntary association to practice as an attorney-at-law for any person other than itself"); MO. ANN. STAT. § 484.020 (1996) ("nor shall any association or corporation, except a professional corporation organized pursuant to the provisions . . . engage in the practice of the law or do law business"); TENN. CODE ANN. § 23-3-103 (1996) ("nor shall any association or corporation engage in the "practice of law" or do "law business"). See also WOLFRAM, supra note 56, § 15.1.3, at 840 ("[p]rohibitions against the practice of law by corporations can be found in the statute books of most states"); 7 AM. JUR. 2D, Attorneys at Law § 109 (1996). For a view from the first half of the century, see Note, The Practice of Law by Corporations, 44 HARV. L. REV. 1114 (1931) (half the states have such statutes prohibiting the practice of law by corporations). The ban on corporate practice is, at least, logical in light of the nonlawyer rationales regarding unauthorized practice regulation if the corporation is using nonlawyers to practice law.

Some jurisdictions have general prohibitions but specific exceptions that can be interpreted as allowing insured representation by insurer attorneys. For example, a Massachusetts statute states:
attorneys to represent its own interests and thus, by application of agency principles, can be said to practice law in this limited sense, but an employee attorney cannot represent or practice law with regard to any other party. To do so is the unauthorized practice of law. The American Insurance Association court quoted from case law to make the point that a corporation simply cannot be licensed to practice law and cannot possess the educational qualifications or requisite moral character to practice law. U-36 had also made this point. Apparently, the Kentucky position is that the employee-employer relationship creates an agency relationship such that the corporation can be deemed, through the attorney-employee, to be representing a client other than the corporation and such representation is clearly within the definition of the practice of law. Therefore, an

---

No corporation or association shall practice or appear as an attorney for any person other than itself . . . provided, that nothing herein shall prohibit a corporation or association from employing an attorney in regard to its own affairs or in any litigation to which it is or may be a party or the insurer of a party.

MASS. GEN. LAWS ANN. ch 221, § 46 (West 1997). One might argue, however, that this exception does not apply to an employee attorney as opposed to a retained attorney.

Other statutory treatments are clearer. For example, a Maryland statute states:

(a) Admission Required. —Except as otherwise provided by law, before an individual may practice law in the State, the individual shall:

(1) be admitted to the Bar; and

(2) meet any requirement that the Court of Appeals may set by rule.

(b) Exceptions — In general. —This section does not apply to:

(3) an insurance company while defending an insured through staff counsel;


110. Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778, 782 (Ky. 1964).

111. American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 571 (Ky. 1996) (quoting Kendall v. Beiling, 175 S.W.2d 480 (Ky. 1943) and Hobson v. Kentucky Trust Co. of Louisville, 197 S.W.2d 454 (Ky. 1946)). See supra text accompanying notes 39-42.


113. This is the reasoning of Gardner v. North Carolina State Bar Ass'n, 341 S.E.2d 517, 519-20 (N.C. 1987), with which the American Insurance Association court aligns itself. Following this reasoning, one can surmise that an outside attorney retained by the insurer to defend the insured is an agent of the insured by virtue of the attorney-client
insurer corporation practices law via an in-house attorney representing an insured.

In discussing the Unauthorized Practice Opinion U-36, the American Insurance Association court noted the conflict issue in stating: "No man can serve two masters," and that U-36 "logically discerns when house counsel would fall into that precarious position between employee of insurer and advocate of insured."\(^{114}\)

To the extent the court bases its position regarding the unauthorized practice regulation on concerns about a corporation, a theoretical lay person, and an impermissibly interfering with the lawyer employee's independence, the court seems to adopt as its own the assumptions about employee attorneys as a class, made, perhaps rightly so, in the early twentieth century but no longer valid, given the role of employee attorneys now.\(^{115}\) The court several times makes individual statements in addition to the overall stance, which evidences the assumptions held. For example, the court, in dismissing the argument that in-house counsel could be ethically and efficiently used, referred to the "untapped resource of 'competent, trained and scrupulous' in-house insurance defense counsel as pipe cleaners for a clogged legal system."\(^{116}\) Why did the court use the quotation marks? The court later refers to insurers' "Pollyanna postulate that house counsel will continue to provide undivided loyalty to the insured."\(^{117}\) Does the court mean to say that in-house counsel are not capable of ethical behavior? In any case, perhaps the independence issue and any other conflicts of interest concerns should most appropriately be dealt with as individual issues involving application of Kentucky's rules of professional conduct, not as an ill-fitting part of the much criticized and suspect regulation of the unauthorized practice of law.

The court's unauthorized practice analysis is technically defensible and certainly follows precedent. But contrary to the court's statement that "[n]othing has changed"\(^{118}\) since the cases

---

\(^{114}\) American Ins. Ass'n, 917 S.W.2d at 571.

\(^{115}\) See supra notes 96-100 and accompanying discussion.

\(^{116}\) American Ins. Ass'n, 917 S.W.2d at 571.

\(^{117}\) Id.

\(^{118}\) Id.
cited and quoted in support of the principle that a corporation cannot practice law, much has changed in Kentucky in addition to the change with regard to the status of employee attorneys and in addition to the decline of interest in unauthorized practice regulation and the disfavor such regulation now receives. For example, a 1997 Proposed Rule of the Supreme Court of Kentucky stated that lawyers in Kentucky can practice in a "limited liability partnership, professional service corporation or limited liability company or any other limited liability entity organized pursuant to applicable statutes." Though the court declined to adopt the rule, such a move was probably beyond the realm of thought when Kentucky and other jurisdictions developed much of the doctrine regarding the corporate practice of law. If the Kentucky Supreme Court eventually makes this rule effective, it can no longer make a blanket pronouncement that corporations cannot practice law. Many other jurisdictions now allow attorneys to practice in these alternative forms though the jurisdictions may have had the same historical position that, corporations, in general, cannot practice law.

Of course, one can argue that corporations made up of attorneys differ from private corporations because no lay entity exercises supreme control. Yet, the same 1997 Proposed Supreme Court Rule stated that an attorney employed by a private corporation may represent the corporation only "and not the

119. For a brief discussion of the change in status of employee attorneys in general, see supra notes 90-94 and accompanying text. For a brief discussion of the decline in popularity of unauthorized practice regulation in general, see supra notes 70-80 and accompanying text.

120. Proposed Rule of the Kentucky Supreme Court 3.022, 61 KY. BENCH & B. 40 (Spring 1997).


122. See WOLFRAM, supra note 56, § 15.1.3, at 840; § 16.2.4 (discussing various forms of law practice now allowed); 7 AM. JUR. 2D Attorneys at Law § 111 (1996) ("most jurisdictions have authorized the practice of law by professional corporations"). Jurisdictions have been attempting to deal with the issue of the effect of the form of the law business on vicarious liability of the attorneys. See also Michael J. Lawrence, Note, The Fortified Law Firm: Limited Liability Business and the Propriety of Lawyer Incorporation, 9 GEO. J. LEGAL ETHICS 207 (1995); Dirk G. Christensen & Scott F. Bertschi, Limited Liability Company Statutes: Use by Attorneys, 29 GA. A. L. REV. 693 (1995).
If the Kentucky Supreme Court eventually adopts this language, yet another crack appears in the ban on corporate practice. If an attorney employee is an agent of the insurer in representing the insured such that the insurer would be engaged in the unauthorized practice of law, it seems that the employee attorney is an agent of the corporation in representing any client pro bono. Thus, the corporation practices law unauthorizedly. Yet the proposed rule would have specifically allowed such.

If the lack of compensation to the corporation for the attorney's services sanitizes the representation of a third party such that there is no unauthorized practice of law, the issue really seems to be one of splitting a fee with a nonlawyer, the corporation. Kentucky Supreme Court Rule 3.130(5.4(a)) prohibits fee-splitting with nonlawyers. Because an insurer does not charge the insured directly for the defense provided by the employee attorney, no court or ethics body has found an employee attorney's representation of an insured to constitute fee-splitting per se. For example, in In re Youngblood the Tennessee Supreme Court noted:

The relationship itself does not establish the practice of fee-splitting. As noted in the ethics opinion, the cost of defending claims against insureds is an underwriting factor which affects the premiums charged for the insurance.

123. Proposed Rule of the Kentucky Supreme Court 3.022, 61 KY. BENCH & B. 41 (Spring 1997).
124. The rule states:
(A) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

KY. SUP. CT. R. 3.130(5.4(A)) (Banks-Baldwin 1997).
See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-392 (1995) (corporation can only recover the actual cost of the attorneys; no profit or overhead recovery allowed).
125. 895 S.W.2d 322 (Tenn. 1995).
However, the payment of a salary for services rendered by the attorney, rather than a fee based on services rendered, does not per se constitute fee-splitting.\(^\text{126}\)

As with the independence of judgment issue, perhaps the rules governing attorney conduct can best provide the analysis rather than the troubled rubric of unauthorized practice regulation.

In holding as it did on the unauthorized practice issue, the Kentucky Supreme Court chose to align itself with North Carolina and the case of *Gardner v. North Carolina State Bar,*\(^\text{127}\) the only instance in which a court or ethics body has found the use of employee attorneys by insurers to defend insureds to be the unauthorized practice of law.\(^\text{128}\) *Gardner* involved the application of North Carolina's statutory ban on the practice of law by corporations. The statute in effect at the time of the *Gardner* opinion stated: "It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State."\(^\text{129}\) Thus, by its decision, the North Carolina Supreme Court took the traditional judicial role of applying the statutes enacted by the legislature of the state of North Carolina. The *Gardner* court determined that an in-house attorney's acts would be the acts of the corporation and that thus the corporation insurer would practice law unauthorizedly if the in-house attorney represented insureds.\(^\text{130}\) Though a corporation's employees may appear if they have a "primary interest" in the litigation, the *Gardner* court believed that "primary interest" meant that the insurer must be a party. In the traditional insurance defense


A recent Kansas Ethics Opinion states that a lawyer may not work for a corporation and provide computer advice as well as advice on related legal issues to corporate clients if the corporation receives a fee for the legal services or if the blended advice is aimed at selling a product. Kansas Bar Ass'n Ethics-Advisory Service Comm., Op. 97-03 (July 9, 1997). The Opinion states that such a goal would impinge too greatly on the independent legal judgment of the attorney required by Rule 5.4. Id. Interestingly, the Opinion distinguished the situation before it from the situation of the defense of an insured by insurer's employee attorney, noting that the former situation is not free of conflicts. Id.

\(\text{\textsuperscript{127}}\) 341 S.E.2d 517 (N.C. 1986). See also American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 573 (Ky. 1996).

\(\text{\textsuperscript{128}}\) *Gardner,* 341 S.E.2d 517.

\(\text{\textsuperscript{129}}\) Id. at 520 (quoting and applying N.C. GEN. STAT. § 84-5 (1985)).

\(\text{\textsuperscript{130}}\) Id.
scenario, the insurer is not a party.131

Kentucky's position on corporations practicing law, unlike North Carolina's, is not statutory but rather is a creature of the case law and rules of the judicial branch. Thus, if wrong or no longer defensible, the American Insurance Association court could have distinguished or simply rejected the precedent without the concern about infringing on the role of the state legislature. Interestingly, the American Insurance Association court distinguished the position of the other states regarding the issue at hand by stating "nor do these jurisdictions share our state's aversion to the practice of law by corporations."132

Yet, in In re Allstate Insurance Company,133 the Missouri Supreme Court, en banc, tackled the question of an insurer corporation providing in-house counsel to defend insureds and declared that such representation did not constitute the unauthorized practice of law despite a Missouri state statute which clearly banned corporations from practicing law.134 The court saw no analytical difference between outside and in-house counsel. If a corporation practiced law via an in-house attorney, the same could occur regarding an outside retained attorney.135 The Missouri court noted that an insurer has a "very substantial interest in litigation involving its insured, and is entitled to retain counsel of its own choosing to protect its interest."136 The court stated:

the statutes in issue were enacted in 1915, when automobiles were relatively few and the liability insurance industry was in its infancy. The only change has been to allow lawyers to form professional corporations. We

131. Id. For an in depth discussion of the Gardner opinion, see Edwards, supra note 7.
132. American Ins. Ass'n, 917 S.W.2d at 573.
133. 722 S.W.2d 947 (Mo. 1987).
134. Id. at 949. Section 484.020(1) of the Missouri Statutes in effect at the time of the case stated:
No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association or corporation, except a professional corporation . . . engage in the practice of the law or do law business as defined in section 484.010, or both.
MO. ANN. STAT. § 484.020(1) (West 1997). This statute is still in effect in Missouri.
135. Allstate, 722 S.W.2d at 950.
136. Id.
conclude that the legislature, in enacting these statutes, did not intend to limit or restrict liability insurers in the selection of attorneys to defend claims against their insured.\footnote{Id. at 951.} The American Insurance Association court specifically distinguished Tennessee and the In re Youngblood\footnote{American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 573 (Ky. 1996).} case, stating that "Tennessee does not proscribe a corporation from practicing law for the public."\footnote{American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 573 (Ky. 1996).} Yet, in fact, Tennessee does have an "aversion" to corporations practicing law. A Tennessee statute states:

No person shall engage in the "practice of law" or do "law business," or both, . . . unless such person has been duly licensed therefor, and while such person's license therefor is in full force and effect, nor shall any association or corporation engage in the "practice or law" or do "law business," or both.\footnote{TENN. CODE ANN. § 23-3-103 (1996).}

In the recent case of Old Hickory Engineering & Machine Company, Inc., v. Henry,\footnote{937 S.W.2d 782 (Tenn. 1996).} the Supreme Court of Tennessee noted that permitting the nonlawyer president of a corporation "to make the affirmations required by Rule 11 would constitute the unauthorized practice of law."\footnote{Id. at 785.} The Old Hickory court quoted Third National Bank in Nashville v. Celebrate Yourself Productions, Inc.,\footnote{807 S.W.2d 704 (Tenn. Ct. App. 1990).} for the proposition that a corporation cannot practice law.\footnote{Id. at 706-07.} In fact, Third National Bank, decided before Youngblood, the insurance representation case, stated: "It is well established that a corporation cannot practice law, nor can it employ a licensed practitioner to practice for it."\footnote{Id.} Thus, the Tennessee Supreme Court, when it decided in Youngblood that no unauthorized practice of law occurred when an insurer provides an employee attorney to defend an insured,\footnote{In re Youngblood, 895 S.W.2d 322, 330-31 (Tenn. 1995).} wrote on a slate of precedent perhaps even more averse to a corporation practicing
INSURERS' IN-HOUSE ATTORNEYS

law than was the case in Kentucky. Tennessee even shares Kentucky's view that an attorney retained to represent an insured does not represent the insurer. Yet, in In re Youngblood, the Tennessee Supreme Court noted that the "identity or community of financial interest between insured and insurer in defending the claim and . . . the insurer's contractual obligation to defend the insured at the insurer's expense" as reasons that this practice has not been deemed to be the unauthorized practice of law by other jurisdictions. The Tennessee court then agreed with the other jurisdictions.

The Tennessee Supreme Court noted the danger to lawyer independence and the fee-splitting issue yet concluded, quoting the California State Bar Formal Opinion 1987-91, on the matter that "the mere fact that the lawyers are employees of [an] Insurance Company does not necessarily compromise the attorney's independent professional judgment," nor was it fee-splitting. Rather, the court took the position that:

specific facts of each situation must be examined to determine if the attorney is aiding a non-attorney in the practice of law. The mere showing of employer-employee, without a definition of the duties, loyalties, prerogatives, and interests of the parties, is not a sufficient basis on which to conclude that the attorney-employee is aiding a non-attorney in the practice of law.

Other courts and ethics bodies use reasoning similar to that in Allstate and Youngblood and agree in their result. For example, in King v. Guiliani, the Connecticut Superior Court, in reviewing the unauthorized practice issue, noted that the "prohibition against the practice of law by corporations has deep roots in Connecticut." The Connecticut court distinguished Gardner and

147. Id. at 328.
148. Id. at 330-31.
149. Id. at 331.
151. In re Youngblood, 895 S.W.2d at 331.
152. Id. at 330. See also supra notes 120-23 and accompanying discussion.
153. Id. at 331.
155. Id. at *3. See also State Bar Ass'n v. Conn. Bank & Trust Co., 145 Conn. 222, 234 (1958) ("Artificial creations such as corporations or associations cannot meet these prerequisites and therefore cannot engage in the practice of law.").
quoted at length from the Allstate opinion in concluding that "[t]he overwhelming weight of authority is to the effect that the salaried employee attorney may properly represent the interests of the insured and the insurance company provided they do not conflict."156

The New Jersey Committee on Unauthorized Practice held that though a corporation cannot practice law except when its own interest is involved, the furnishing of legal services to an insured by a liability insurance company "involves such a community or identity of financial interest so as to define the service involved as in the insurer's own interest."157 The California State Bar Standing Committee of Professional Responsibility and Conduct concluded, after first noting that a corporation could not practice law, that an employee attorney could represent an insured if "appropriate safeguards" are taken.158 The Committee continued: "it cannot be presumed that simply because the attorneys handling defense cases are salaried employees of Insurance Company that they will act unethically or will otherwise sacrifice their professional obligations to the insureds in favor of Insurance Company."159 Virginia Unauthorized Practice Opinion 60160 evaluated employee attorney representation of the insured when no coverage question existed but the claim was not necessarily within policy limits.161 The Opinion stated that even so the insurer had a "direct financial interest" because it will owe all or part of the recovery.162 Therefore, no unauthorized practice of law occurs.163 The American Bar Association long ago took the position that an employee attorney could represent the insured and no unauthorized practice of law would occur.164

159. Id. at *3.
161. Id.
162. Id.
163. Id.
164. ABA Comm. on Professional and Ethics and Grievances, Formal Op. 282 (1950). See also Coscia v. Cunningham, 299 S.E.2d 880 (Ga. 1983), in which the Georgia court considered a Georgia statute which prohibited a corporation from practicing law but
It is certainly true that an insurer's employee attorney would render legal service to the insured, a party other than the corporation. Technically, one can argue that regardless of common interest, the corporation is, therefore, practicing law unauthorizedly. The reasoning supporting the prohibition on corporations practicing law via in-house attorneys, however, rests largely on the danger to the independent judgment of the attorney in representing one other than the corporation. If the insured's interest and the insurer's interest coincide, there is, in the words of In re Allstate Insurance Company, no "temptation to favor the insurer's interest," and therefore no threat to the lawyer's independence. Consequently, no valid reason exists to find such representation to be the unauthorized practice of law.

III. THE CONFLICT ISSUE

A. The General Discussion

The American Insurance Association court determined that the "pressures exerted by the insurer through the set fee interferes with the exercise of the attorney's independent professional judgment, in contravention of Rule 3.130(1.8(f)(2))," and also clashes with Rule 3.130(1.7(b)) in that it creates a situation whereby the attorney has an interest in the outcome of the action which conflicts with the duties owed to the client. Kentucky Supreme Court Rule 3.130(1.8(f)(2)) deals with the requirement that the attorney must "exercise independent judgment while Kentucky Supreme Court Rule 3.130(1.7(b)) provides that the representation of the client cannot be materially limited by interests of another client, a third party or the lawyer." Stating allowed a corporation to employ an attorney "in and about [its] own immediate affairs or in any litigation to which they are or may be a party." Id. at 882. The Georgia court determined that an in-house attorney retained to defend an insured is allowed because it is a representation within the realm of the corporation's affairs. Id. at 882-83.

In Kittay v. Allstate Ins. Co., 397 N.E.2d 200 (Ill. App. Ct. 1979), the court noted the statutory ban on corporate practice but held that the defense of an insured by an in-house counsel was within the exception for a corporation to practice if interested by reason of a policy of insurance. Id.

165. 722 S.W.2d 947 (Mo. 1987).
166. Id. at 952.
that "[w]e do not wear the blinders that Complainants apparently have in place, for we view the situation surrounding the set fee agreement as ripe with potential conflicts," the court noted that the Respondents had named nineteen such conflicts.\footnote{169}{American Ins. Ass'n, 917 S.W.2d at 573.} Finally, the court stated that "the mere appearance of impropriety is just as egregious as any actual or real conflict"\footnote{170}{Id.} and so Advisory Ethics Opinion E-368 is "prophylactic" and proper.\footnote{171}{Id.}

Unfortunately, the American Insurance Association court does not analyze exactly how Kentucky Supreme Court Rules 3.130(1.8(f)(2)) and 3.130(1.7(b)) apply to the facts of the situation. The court does not quote or state the requirements of those rules. Nor does the court apply the rules to the factual context. The court does not consider how the application of the professional independence of the lawyer's judgment rule, Kentucky Supreme Court Rule 3.130(1.8(f)), might be affected by the policies and framework set in place by the insurer to protect such attorney independence. Further, the court does not consider how the application of Kentucky Supreme Court Rule 3.130(1.7(b)), the conflicts rule, might be affected by facts presenting no coverage questions and claims within policy limits.

This failure to apply the rules governing lawyer conduct in a fact-particular manner creates an opinion that lacks principled analysis. The opinion is overly broad in that it prohibits situations in which Kentucky Supreme Court Rules 3.130(1.8) and 3.130(1.7) are not violated. To the extent that the court is of the opinion that employee attorneys can never represent insureds without violating Kentucky Supreme Court Rules 3.130(1.8(f)) and 3.130(1.7(b)), one must question the assumptions about employee attorneys motivating the court's opinion. If the court believes that attorney employees are lesser, unethical attorneys,\footnote{172}{See supra notes 96-100 & 113-14 and accompanying discussion.} such a status-based assumption cannot be defended.

Other courts and ethics bodies have addressed the situation created by the employee attorney, insurer, and insured relationship and have determined that the situation does not, without more, create an impermissible conflict of interest. These
jurisdictions have seen the need for a fact and rule-based inquiry. For example, in *In re Youngblood*,\(^{173}\) the Tennessee Supreme Court reviewed a bar ethics opinion that had concluded that attorney employees could not ethically represent the insured because such attorneys would not "be able to exercise independent judgment or preserve the confidences and secrets of the insured."\(^{174}\) The court, in applying the rules of conduct governing Tennessee attorneys,\(^{175}\) refused to ban the representation. The *Youngblood* court stated:

> nor does that employment necessarily impose upon the attorney any duty or loyalty to the insurer which impairs the attorney-client relationship between the attorney and the insured or impedes the performance of legal services for the insured by the attorney. Where the employer is not also a client, a conflict will not occur unless the attorney is obligated by the terms or circumstances of employment to protect the interest of the employer even to the detriment of the insured.\(^{176}\)

The court continued by noting that "[t]he employer cannot control the details of the attorney's performance, dictate the strategy or tactics employed, or limit the attorney's professional discretion with regard to the representation," or do anything else which "limits . . . the attorney's professional judgment on behalf of or loyalty to the client."\(^{177}\) The Tennessee court concluded that "[b]ecause the [proposed ethics] opinion bases its finding upon the potential for conflict in the relationship of employer-employee rather than particular facts which demonstrate there is, in fact, a conflict of interest, it does not reflect a proper interpretation of the Code."\(^{178}\) The same should be said about the *American Insurance Association* opinion with regard to the Kentucky rules governing

---

173. 895 S.W.2d 322 (Tenn. 1995).
174. Id. at 328.
175. Tennessee follows a version of the Model Code of Professional Responsibility.
176. In re Youngblood, 895 S.W.2d at 328. Tennessee takes the position that the attorney represents only the insured, not the insurer. Id.
177. Id. The court gives the following as specific examples of potential conflict of interest situations: defense under reservation of rights, defense of alternative claims when some claims are not covered, defense of claim for damages exceeding coverage. Id.
178. Id. at 330. Note that Tennessee follows a version of the Model Code of Professional Responsibility, which contains the "appearance of impropriety" standard. Even so, the court did not find an ethical problem. See infra discussion accompanying note 176 regarding the "appearance of impropriety" standard in the Model Code.
attorney conduct.

In *In re Allstate Insurance Company*, 179 the parties had stipulated that the insurer used employee attorneys only when no coverage issues were present and the claim fell within policy limits. 180 The court found no conflict of interest because though the insured is the defendant, the insurer and the insured are both "interested in disposing of the case on the best possible terms." 181 With regard to the independence issue, the court noted that even if an insurer has more control over an employee attorney, the control is unimportant in situations of no "temptation to favor the insurer's interest." 182 The court continued that all lawyers, employees or not, are subject to the same rules of conduct and "[t]here is no basis for a conclusion that employed lawyers have less regard for the Rules of Professional Conduct than private practitioners do." 183

Likewise, the Connecticut Superior Court in *King v. Guiliani*, 184 noted that "[t]here is no evidence in this record that . . . salaried counsel representation is so fraught with potential conflicts that it should never be allowed." 185 The King court had before it a situation presenting no coverage issues and all claims were within policy limits. The court noted that:

> [a]ttorneys who depend on an insurance carrier's referrals for a significant portion of their income could be said to be at risk of favoring the company over the client in a conflict situation in order to keep the carrier's business. Yet, there is no presumption that such attorneys will violate the rules. 186

After reviewing the policies of the insurer involved in the case, the court stated that there was no doubt that the employee attorneys owed "their ethical duties and responsibilities solely to the insured

---

179. 722 S.W.2d 947 (Mo. 1987).
180. *Id.* at 951-52.
181. *Id.* at 952. Missouri law treats the insured and the insurer as clients of the insurance defense attorney. *Id.* The court applied the standards based on the Model Rules of Professional Conduct but noted that standards based on the Code of Professional Responsibility were actually in effect at time of filing. *Id.* The court determined that the conclusions would be the same under either framework. *Id.* at 951-52.
182. *Id.* at 952.
183. *Id.* at 953.
185. *Id.* at *6.
186. *Id.*
clients where there is a conflict and that the clients' interests are paramount.”

The Pennsylvania Bar Association, in Formal Opinion 96-196, the most recent reported treatment of the issue, applying a version of the ABA Model Rules of Professional Conduct, stated that if there is no coverage question, staff counsel can represent the insured even if the attorney represents the insurer as well. The Opinion cautioned that the lawyer must "maintain loyalty" to the client and "exercise independent professional judgment" and must, of course, make appropriate disclosure to the client insured.

Ohio also has viewed the situation as one to undertake with caution. The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline approved of an employee counsel's pursuit of the deductible for the insured and a subrogation claim for the insurer. The Board stated that the representation could occur but that the attorney "must exercise independent judgment, must disclose to the insured the employment relationship, must disclose any differing interest, must inform the insured of options as to representation by outside counsel, and must discuss whether deductibility of expenses is applicable." The Board stated that the disclosure will "help alleviate concerns that the attorney's interests will unknowingly supersede the client's interests." Further, "full disclosure and consent by the insured also protects against an appearance of impropriety that would exist if the employment relationship was not within the insured's knowledge." Finally, disclosure is required because there are "potentially differing interests" that "could affect the lawyer's independent professional judgment." Other opinions deal with the issues similarly. All agree that conflicts and independence

187. Id. at *8.
189. Id.
190. Id.
192. Id. at *3.
193. Id.
194. Id.
195. Id.
problems are possible and must be guarded against but that the facts of the situation must be considered to reach a definitive answer.\(^{196}\)

The American Insurance Association court simply chose to disagree. Had the American Insurance Association court reached this result after consideration, in light of the requirements of the rules governing attorney conduct, of facts relating to insurer policies and procedures to protect the independence of lawyer judgment, facts relating to coverage and facts relating to policy limits, there could be little criticism. But in rendering the American Insurance Association opinion without such reasoning,

---

196. For example, in 1969 the Florida Supreme Court rejected a rule that would have prevented an employee attorney from handling the representation, noting that conflicts can occur with outside attorneys and employee attorneys and that both must provide "completely unhampered professional judgment" and "undivided loyalty." In re Proposed Addition to the Rules Governing the Conduct of Attorneys in Florida, 220 So. 2d 6, 7-8 (Fla. 1969).

The Virginia State Bar's Standing Committee on Legal Ethics, applying Virginia's version of the Code of Professional Responsibility, concluded that a staff attorney of an insurer may represent an insured but must make full disclosure of the relationship of the attorney to the insurer and any limitation in the scope of the representation. Va. Legal Ethics Op. 598 (April 1, 1996). The committee noted that in Virginia the attorney would not be representing the insurer, only the insured. \textit{Id.} This opinion depended on the facts as stated in Virginia Unauthorized Practice Opinion 60, which involved only situations involving covered claims. Va. Unauthorized Practice Op. 60 (Feb. 15, 1996).

The California State Bar Standing Committee of Professional Responsibility and Conduct stated that absent a coverage dispute, the insured and insurer, both clients of the insurance defense attorney, have "a common interest." Cal. State Bar Standing Comm. on Professional Responsibility & Conduct, Ethics Op. 1987-91, 1987 WL 109707, at *5 (1987). The California Opinion stated that a salaried attorney can handle the representation but must beware of conflict situations and withdraw when such a situation presents itself absent consent. \textit{Id.} See also N.Y. State Bar Association Comm. on Professional Ethics, Op. 519, 1980 WL 19218 (March 21, 1980) (insurer's in-house attorney can represent third party because "[i]n such cases, the common interests of both clients clearly preponderate" but attorney cannot handle the representation if there is a coverage question).

As early as 1950 ABA Formal Opinion 282 stated: "a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations. The company and the insured are virtually one in their common interest." ABA Comm. on Professional Ethics and Grievances, Formal Op. 282 (1950). The Opinion continued that in the course of a defense, if a conflict should arise, consent must be obtained for continued representation. \textit{See} ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1370 (1977) (dealing with representing insured regarding the deductible feature of the policy when attorney represents the insurer in subrogation claim).

Interestingly, the Kentucky court relied heavily upon a case which addressed only the unauthorized practice issue and not the conflict issue per se. Gardner v. North Carolina State Bar, 341 S.E.2d 517 (N.C. 1986).
the court has created a troubling, overbroad yet underinclusive rule. The assumption underlying the rule may be the same as that underlying the unauthorized practice stance of the court: that employee attorneys are somehow unable to conduct themselves in accordance with the rules governing all attorney conduct. The view seems to be that counsel in these banned arrangements are somehow ethically flawed, incapable of distinguishing improper conflict situations from permissible representations.\textsuperscript{197}

In addition, if a conflict situation were to arise involving an employee attorney, the\textit{American Insurance Association} opinion prevents the representation. Yet, other attorneys who receive all or almost all of their work from an insurer and thus who might face significant multi-directional pulls but who are compensated in a traditional manner may continue with the understanding that when the conflict is too great and patent, the attorney will recognize it and act appropriately. Such a set of results cannot be the result of principled law.

\textbf{B. The Appearance of Impropriety}

The court justifies any possible overbreadth of the\textit{American Insurance Association} opinion by stating that the stance prevents the "appearance of impropriety."\textsuperscript{198} The "appearance of impropriety" standard has been roundly criticized.\textsuperscript{199} For example, Professor Charles W. Wolfram has stated:

A tantalizing way out [of the difficult conflict of interest problems] is to seize upon a simple and soulful rubric that seems to make intuitive sense. Such has been the allure of the "appearance of impropriety" standard for resolving

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{197} The fact that the American Insurance Association opinion also prevents representation by attorneys who are not employees but who receive compensation under non-traditional schemes suggests that the court is wedded not simply to an assumption about employee attorneys but also a view about how attorneys ought to be paid, a view based on the historical and traditional notions of an outside attorney billable hour compensation scheme. Those attorneys who are paid in a manner that resembles a salary are analogized to employee attorneys and are branded with all of the assumptions that accompany employee attorneys. Those attorneys not paid in a manner resembling a salary are "true" traditional outside attorneys and enjoy the assumptions of independence often accorded outside counsel.
\item \textsuperscript{198} American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 573 (Ky. 1996).
\end{enumerate}
\end{footnotesize}
conflict of interest issues. It charms, however, are only surface. Use of the phrase in decisions has both obscured the process by which courts formulate their decisions and, in some instances has lead to seriously erroneous results.\textsuperscript{200}

The "appearance of impropriety" standard was a creature of the American Bar Association Model Code of Professional Responsibility.\textsuperscript{201} In 1990, however, the Supreme Court of Kentucky replaced the ABA Code-based standards of attorney conduct with a set of standards based on the American Bar Association Model Rules of Professional Conduct and also accepted most of the comments to the ABA Rules.\textsuperscript{202} The ABA Rules attempted to delineate ethical from unethical lawyer behavior and do not, even as modified for Kentucky, refer to an "appearance of impropriety" standard of conduct. In fact, a comment to Kentucky Supreme Court Rule 3.130(1.10), the rule of professional conduct dealing with imputed disqualification, states:

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.\textsuperscript{203}

The "appearance of impropriety" is not mentioned in any other

\textsuperscript{200} WOLFRAM, supra note 56, § 7.1.4, at 319.
\textsuperscript{201} Canon 9 of the Code of Professional Responsibility states that "a lawyer should avoid even the appearance of impropriety."
\textsuperscript{202} Kentucky's rules based on the Model Code were withdrawn and replaced by rules based on the Model Rules by Supreme Court Order 89-1, effective Jan. 1, 1990.
\textsuperscript{203} KY. SUP. CT. R. 3.130(1.10), comment 9 (Banks-Baldwin 1997).
current Kentucky rule or comment dealing with lawyer conduct. Thus, the "appearance of impropriety" standard's only mention in the entire set of rules governing lawyer conduct is a statement that it is a flawed standard and has been replaced.

There is no doubt that the drafters of the ABA Rules sought to eliminate the standard from discourse. The Kutak Commission which developed the ABA Rules recognized that the test was vague, subjective and created unpredictable, inconsistent results. The Commission stated that "in the context of private practice, the test has no apparent limits except what a particular tribunal might regard as an impropriety" and that "such a standard is too vague and could cause judgments about the propriety of conduct to be made on instinctive, ad hoc or ad hominem" bases.

Of the states, like Kentucky, who have adopted the ABA Rules, only New Jersey modified them, perhaps unwisely, to retain the impropriety standard. The President of the New Jersey State Bar Association, in an article calling for an elimination of the standard from the New Jersey rules, termed the "appearance of impropriety" standard "an archaic rule bottomed in vagueness and arbitrariness, which promotes 'rampant ad hocery' and defies rational definition."

Yet, the American Insurance Association opinion, by stating that "the mere appearance of impropriety is just as egregious as any actual or real conflict may be interpreted as setting forth a standard of conduct that supplements the standards of professional conduct for attorneys contained in the Kentucky Supreme Court Rules by providing a penumbra for discipline.

---

204. The standard remains a part of the ethical principles governing the behavior of judges. See KY. SUP. CT. R. 4.300 (Banks-Baldwin 1996), MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 2 & 6.


206. Jacob, supra note 205.

207. Id. (Jacob was also a member of the New Jersey Supreme Court Advisory Committee on Professional Ethics and the Court's Civil Charge Committee).

208. American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 573 (Ky. 1996).

209. An earlier mention of the "appearance of impropriety" occurred in In re Advisory Opinion of the Kentucky Bar Ass'n, 847 S.W.2d 723 (Ky. 1993). In that opinion, the
Did the court intend that even if the situation did not violate Kentucky Supreme Court Rule 3.130(1.7(b)), for example, the "appearance of impropriety" would ban the conduct? Or rather, was the court simply using the term as an inartful synonym for a violation of Kentucky Supreme Court Rule 3.130(1.7(b))? If, by court opinion and ethics advisory opinion, the Kentucky Supreme Court can preventively ban conduct on the basis that such conduct would violate the "appearance of impropriety," even though no violation of the rules governing attorney conduct exists, can an attorney be disciplined on the basis of that standard? If, indeed, the Kentucky Supreme Court intends the "appearance of impropriety" to be a standard of attorney behavior, perhaps the court should modify the rules of conduct applicable to attorneys indicate as much. However, before so doing, the court should consider the reasons that the standard has fallen from general use. As it stands, the Kentucky Supreme Court has recently cited, although in a disqualification context, the American Insurance Association opinion for the principle that "the mere appearance of impropriety is just as egregious as any actual or real conflict." A

Supreme Court reviewed KBA Ethics Opinion E-349, which prohibited criminal defense work by a city attorney if city police were involved. Id. at 723. After quoting Kentucky Supreme Court Rule 3.130(1.7) and noting the unique nature of criminal defense work including a particular need for professional independence, the court quoted a case decided before the adoption of rule 1.7, stating:

The point is not whether impropriety exists, but that any appearance of impropriety is to be avoided. We are of the opinion that such association carries with it an appearance of impropriety so that it should not be permitted. Id. at 724 (quoting O'Hara v. Kentucky Bar Ass'n, 535 S.W.2d 83 (Ky. 1975)).

210. KY. SUP. CT. R. 3.130(1.7(b)) (Banks-Baldwin 1997).
211. Lovell v. Winchester, 941 S.W.2d 466, 468 (Ky. 1997). While acknowledging that the Model Rules reject the standard and that the standard is "vague and leads to uncertain results," the Lovell Court stated:

[The standard] nonetheless serves the useful function of stressing that disqualification properly may be imposed to protect the reasonable expectations of former and present clients. The impropriety standard also promotes the public's confidence in the integrity of the legal profession. For these reasons, courts still retain the appearance of impropriety standard as an independent basis of assessment. Id. at 468-69. The comment to Rule 1.9 which the Lovell court says "specifically rejects the 'appearance of impropriety' standard" is actually a comment to Kentucky Supreme Court Rule 3.130(1.10) and is quoted in pertinent part supra in the text accompanying note 203. But see Whitaker v. Commonwealth, 896 S.W.2d 953, 955-56 (Ky. 1995) (court refused to allow appearance of impropriety to be the deciding standard in a disqualification case governed with particularity by Kentucky Supreme Court Rule 3.130(1.11), holding that 1.11 controlled). See also Brown v. Commonwealth, 892 S.W.2d 289, 291 (Ky. 1995) (applying KY. REV. STAT. ANN. § 15.733(2) (Banks-Baldwin 1997)
valid interpretation of the situation in Kentucky is that Kentucky attorneys must not only abide by the rules of conduct set forth in the Kentucky Supreme Court Rules, but also must be wary of a penumbra for discipline defined by the "appearance of impropriety" even when the rules are not violated.

IV. CONCLUSION

The American Insurance Association opinion shows great respect for history and precedent and such respect is of vital importance in law. Yet, the opinion, in its treatment of the unauthorized practice issue, only looks back without also taking note of the ever-changing nature of the practice of law and the provision of legal services in Kentucky and elsewhere. In particular, the court failed to note the movement that has occurred within the area of unauthorized practice regulation. While Kentucky may certainly choose rules of unauthorized practice or even conflict of interest positions divergent from other states, such rules must be based on a principled rationale that can survive challenge in the world of the 1990s. The unauthorized practice stance of the American Insurance Association opinion cannot survive. The conflict of interest position, not well-grounded in fact or rule-based analysis, does not rise to this level, either. Finally, the opinion seems to assert that the conduct of attorneys is governed not only by the rules contained in the Kentucky Supreme Court Rules, but also by an "appearance of impropriety" standard independent of those rules. If Kentucky desires that lawyer conduct be governed by an "appearance of impropriety" standard independent of the standards set out in the rules governing attorney conduct in Kentucky, perhaps the Supreme Court should amend the rules of conduct for attorneys to so state, recognizing the problems that such a vague standard may create.

which deals with disqualification of prosecutors yet finding "no personal and substantial relationship" and "no appearance of impropriety").
During 1997, three cases were decided by the Kentucky Supreme Court which dealt with areas of interest to the Kentucky real property lawyer: the adverse possession of mineral interests\(^2\) and mechanics' liens.\(^3\) Significant changes were also made to the Internal Revenue Code affecting residential property.\(^4\) Finally, a proposed Kentucky Bar Association ruling regarding the use of non-lawyers as closing agents created a tempest.\(^5\) This article will review the foregoing.\(^6\)

It also should be noted that during 1997, the real estate

---

1. Professor of Law, Northern Kentucky University.
2. Great W. Land Management, Inc. v. Slusher, 939 S.W.2d 865 (Ky. 1996). The opinion was modified and published March 27, 1997.
5. The unpublished opinion concerning the proposed August 1997 ruling is on file with the Kentucky Bar Association. This opinion was not adopted in 1997.
6. Brief mention should be made, however, of five court of appeals decisions. In Commonwealth v. Cooksey, 948 S.W.2d 122 (Ky. Ct. App. 1997), the court held that all claims regarding the right of the Commonwealth to take private property are to be resolved before a jury trial on the issue of damages and the Commonwealth's alleged bad faith negotiations affected only the right to take and not the damage portion of the trial. In Dennis v. Bird, 941 S.W.2d 486 (Ky. Ct. App. 1997), the court held that a deed containing an option to repurchase was valid even though the deed was not signed by the purchaser; nor did it violate the Rule Against Perpetuities; and the transaction was not a restraint of alienation. This author recommends the rationale of the concurring opinion. The court reiterated the view that mere inadequacy of price is insufficient to set aside a judicial sale in Sterling Grace Municipal Securities Corp. v. Central Bank & Trust Co., 926 S.W.2d 670, 673 (Ky. Ct. App. 1996). In Ralston v. Thacker, 932 S.W.2d 384, 387 (Ky. Ct. App. 1996), the court reaffirmed the traditional approach that knowledge of the grantor's defective title is not a bar in an action on a title covenant. In Illinois Central Railroad Co. v. Roberts, 928 S.W.2d 822, 825 (Ky. Ct. App. 1996), the court determined that the railroad owned a right of way easement rather than a fee interest and thus, on abandonment of use by the railroad, the easement was extinguished and the land was acquired by the servient fee. Although this ruling is consistent with many courts, other courts have found to the contrary. See ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY, § 8.3 (2nd ed. 1993).
agency disclosure requirements for real estate brokers were explicitly made applicable only to residential transactions. The disclosure is to note for whom the broker or sales associate is acting as principal; be it the seller, buyer, lender, or investor. Additional changes require the Agency Disclosure Form to note that the agent owes a fiduciary duty to the client, including a duty of loyalty, honesty and fair dealing. This duty also requires the agent to give the client all information which the agent knows about the property and to negotiate in the best interest of the client. The payment of the commission or fee to an agent does not necessarily create a fiduciary duty to the person so paying. Other states have enacted disclosure statutes to deal with these agency relationships.

I. THE ADVERSE POSSESSION OF A MINERAL ESTATE

It is a well established maxim that the ownership of the surface of land carries with it the ownership of the property below the surface as well as the air above. However, such

7. 201 KY. ADMIN. REGS. 11:400 §§ 1(1), 2(3) (1997). These regulations were first effective in 1995 and were enacted pursuant to KY. REV. STAT. ANN. § 324.160(1)(e) (Michie 1993 & Supp. 1996) which allows the Real Estate Commission to take disciplinary action if a licensee acts for more than one party in a transaction without the prior knowledge of all the parties.

8. 201 KY. ADMIN. REGS. 11:400 § 3(3) (1997). Of particular concern is the "dual agency" which arises when the agent is the agent of both the seller and buyer. KY. REV. STAT. ANN. § 324.160(1)(3) (Michie 1993 & Supp. 1996) requires knowledge of all parties for this agency to exist. A dual agency has the potential for significant conflicts of interest. See THOMPSON ON REAL PROPERTY, § 95.07(f)(3) (David A. Thomas ed. 1994). After full disclosure and consent, a dual agent usually does not owe either party the full range of fiduciary duties.

9. 201 KY. ADMIN. REGS. 11:400 § 3(e)(1) & (2) (1997).

10. 201 KY. ADMIN. REGS. 11:400 (e)(3) (1997). Thus, an agent may be the principal of the buyer and owe the buyer those fiduciary duties and not to the seller who, in fact, pays the commission.


12. The Latin phrase is "Cujus est solum, ejus est usque ad coelum et ad infernos" or
ownership can be divided and, of particular interest to this article, the surface ownership can be separated from the ownership of the mineral interests.\textsuperscript{13} What does this mean for the concept of the adverse possession of real estate? Adverse possession is, of course, the ability of an occupier to acquire the title of the owner who has failed to timely bring an action to recover it.\textsuperscript{14} The possession also must be hostile, actual, open and notorious, and exclusive and continuous.\textsuperscript{15} Color of title may add to the actual possession by the adverse possessor.\textsuperscript{16}

If no severance has occurred, an adverse possessor on the surface, who satisfies the elements required by the doctrine, can acquire the title of the surface owner, which then includes the mineral interests.\textsuperscript{17} If the adverse possessor's actions on the surface have started the statute of limitations to run, a subsequent severance of the surface and mineral estates will not by itself affect the running of the statute, and the continued possession on the surface will allow the possessor of the surface to acquire title to the surface estate as well as the mineral "to whomever the soil belongs, owns the sky and to the depths." BLACK'S LAW DICTIONARY, 341 (5th Ed. 1979). The navigational servitude has modified such ownership to the heavens. See CUNNINGHAM, supra note 6 at 27.

\textsuperscript{13} See Akers v. Baldwin, 736 S.W.2d 294, 297 (Ky. 1987) (stating that surface and mineral rights can be separate and distinct legal estates in land); Porter v. Justice, 242 S.W.2d 863 (Ky. 1951) (mineral rights separately conveyed). See also Paul N. Bowles, Adverse Possession of Subsurface Minerals, 71 KY. L.J. 83 (1982-83) and Bruce Stephens, Jr., Historical and Practical Comments on Abstracting Land and Mineral Titles in Kentucky, 9 N. KY. L. REV. 445 (1982).

\textsuperscript{14} The time period being fifteen years after the right thereof first arose. KY. REV. STAT. ANN. § 413.010 (Michie 1993 & Supp. 1996). See also KY. REV. STAT. ANN. § 413.020 (Michie 1993 & Supp. 1996) (person under a disability granted an additional three years after the disability is removed) and KY. REV. STAT. ANN. § 413.030 (Michie 1993 & Supp. 1996) (no extension for a disability past thirty years). See Pendleton v. Centre College of Kentucky, 818 S.W.2d 616 (Ky. Ct. App. 1990) (statute begins to run when the right to sue first arose, and if the owner is under a disability, KY. REV. STAT. ANN. § 413.020 (Michie 1993 & Supp. 1996) may be used; however, a minimum of fifteen years is required).


\textsuperscript{16} See Appalachian Reg'l Healthcare, 824 S.W.2d at 880.

\textsuperscript{17} Thus in Thompson v. Ratcliff, 245 S.W.2d 592 (Ky. Ct. App. 1952) the adverse possession of the surface included the coal and minerals lying under the land when there had been no severance of the title. See also Hellier Coal & Coke Co., Inc. v. Bowling, 272 S.W.2d 651 (Ky. 1954). But see Brennan v. Pine Hill Collieries, Co., 167 A. 776. 777 (1933) (holding that adverse possession of the surface estate which had not been severed did not include the mineral estate when the record title holder was mining the coal by means of a tunnel from other property).
estate. It is also possible for an adverse possessor, who is actively claiming the mineral estate by adverse possession, to so acquire the mineral estate along with that portion of the surface which is incidental to such possession.

On the other hand, if there has been a severance of the surface ownership and the mineral interest, can the interests still be acquired by adverse possession? Certainly, the surface estate alone can be acquired by meeting the requisite elements of adverse possession. The mineral estate alone also can be acquired by adverse possession if the requisite elements are present. A mineral owner may be able to acquire the title of the surface owner by adverse possession so long as the possession is properly adverse.

Additional elements are necessary, however, for the surface owner to acquire the mineral estate by adverse possession in the Commonwealth of Kentucky if there has been a severance of the title. Kentucky Revised Statute section 381.430 provides that if the mineral title has been severed, the owner of the surface thereafter holds the possession of the mineral estate as a trustee for the benefit of the owner of the mineral interest. A trustee,

18. See Hellier Coal & Coke Co., 272 S.W.2d 651; Wallace v. Neal, 11 S.W.2d 1002 (Ky. 1918).
19. See Diederich v. Ware, 288 S.W.2d 643 (Ky. 1956).
20. But that adverse possession will be of the surface only. See Coleman v. Republic Steel Corp., 280 S.W.2d 171, 174 (Ky. 1955) (stating that once severance has occurred, adverse possession of the surface alone will not suffice to acquire the mineral interest).
21. See Brockman v. Jones, 610 S.W.2d 943, 944 (Ky. Ct. App. 1980) (noting that though possible to acquire the mineral interest by adverse possession, the requirements are very strenuous). See also East Ky. Energy Corp. v. Niece, 774 S.W.2d 458, 462 (Ky. Ct. App. 1989) (stating that actions of the surface owner pursuing an adverse possession claim must be continuous and be uninterrupted for the statutory period or else the statute stops running); Letcher County Coal & Improvement Co. v. Marlowe, 398 S.W.2d 870 (Ky. 1965) (elements noted).
23. The statute reads:

Whenever the mineral or other interests in or rights appurtenant to land in this state have passed, or shall hereafter pass, in any way, from a claimant in possession of the surface of the land, the continuity of the possession of such mineral, interests and rights shall not be deemed thereby to have been broken; but the possession of the surface by the original claimant thereof, from whom such mineral, interests or rights passed, or by those claiming through or under him, or by virtue of a judgment against him in an action to which the holder of the mineral, interests or rights is not a party, shall be deemed to be for the benefit of the person, his heirs and assigns, to whom the mineral, interests or rights have passed.

See also Brockman v. Jones, 610 S.W.2d 943, 945 (Ky. Ct. App. 1980) (finding surface
in turn, cannot acquire the beneficiary's title to the land held in trust by adverse possession unless the trustee repudiates the trust.24

The requirement of repudiation of the trust in order to start the statute of limitations running has long been recognized in the Commonwealth.25 Concerns have been raised, however, as to whether the requisite elements of adverse possession by themselves are enough for such repudiation, or whether a separate act of repudiation is required to commence the running of the statute.26 In 1997, the Kentucky Supreme Court, in *Great Western Land Management, Inc. v. Slusher*, held that a clear and unequivocal repudiation is required first. That act of repudiation starts the running of the statute.28 Thereafter, the traditional elements of adverse possession are required.29

The facts of Slusher indicate that the unsevered title was held by a common grantor.30 The common grantor and his wife conveyed the property to a certain Grant Taylor in 1899 who did not record his deed until July 8, 1909.31 This is the deed from which the appellees claimed their surface interest.32 Thereafter, in 1903, the common grantor conveyed the mineral interest by a

owner held the mineral in trust and occasional mining for domestic use was not a sufficient repudiation); *Kentucky River Coal Corp. v. Singleton*, 36 F. Supp. 123, 125 (E.D. Ky. 1941) (stating once severance has occurred, the holder of the surface holds the mineral estate in trust and the rights of the mineral owner are not extinguished merely by nonuse).

24. Compare *Diederich v. Ware*, 288 S.W.2d. 643 (Ky. 1956) (finding surface owner's operation of oil wells was a sufficient repudiation for the statute and that the elements of adverse possession were also met) with *Ward v. Woods*, 310 S.W.2d 63, 65 (Ky. 1958) (finding no repudiation by the surface owner and thus the surface owner's occasional taking of coal for domestic use did not constitute adverse possession of the severed mineral estate).

25. See id.

26. Thus, in *Letcher County Coal & Improvement Co. v. Marlowe*, 398 S.W.2d 870, 873 (Ky. 1965), the court noted that although possession of the surface alone was not enough to acquire the title to the mineral estate and that there had to be the elements of adverse possession met as to the mineral estate, no note was made of a requirement of separate repudiation. But in *Diederich v. Ware*, the court noted that the repudiation and the elements of adverse possession both must be present. *Diedrich*, 288 S.W.2d at 643. Clarification was urged in M. Gabrielle Hils, *Breaking the Trust: Adverse Possession of Subsurface Minerals Under Kentucky Law*, 71 Ky. L.J. 235 (1982-83).

27. 939 S.W.2d 865 (Ky. 1996).

28. Id. at 868.

29. Id.

30. Id. at 865.

31. Id. at 867.

32. Id.
deed which was recorded in 1904.33 This is the deed from which the appellants claimed their mineral estate.34 The surface claim of the appellees was not in dispute. As noted by the Kentucky Supreme Court, the trial court found that the appellants were the record title owners of the mineral estate, which issue was not appealed.35 The surface owners, however, claimed that they had acquired the mineral estate by adverse possession.36 Both owners had leased their mineral interests.37 The only evidence of any contact between the parties occurred in 1982 when the lessees of the mineral owners learned that their lease included the subject property.38 This information was conveyed to the lessee of the surface owner; however, the lessee of the surface owner did not cease mining nor did it give possession of the mineral estate to the lessee of the mineral estate.39

The Court held that before the statute of limitations could commence to run, there first had to be a repudiation of the trust by the surface owner.40 That repudiation, although it may not need to be a formal notice of repudiation, must be given by such acts or words which "clearly and unmistakably bring notice [of the repudiation] to the owner of the mineral estate."41 That was not done in this case; thus, the statute of limitation had not started to run.42

Although not at issue in the Slusher case, other limitations

---

33. Id.
34. Id.
35. Note that though the deed from whom the surface owners trace their claim was conveyed first, it was not recorded until after the mineral estate was conveyed to another. There was then no constructive notice given. Ky. Rev. Stat. Ann. § 382.270 (Michie 1993 & Supp. 1996); Rouse v. Craig Realty Co., 262 S.W. 1083 (Ky. 1924).
36. Slusher, 939 S.W.2d at 867.
37. Id.
38. Id. at 868.
39. Id. In addition, the court noted that there was some evidence that in 1910 an affidavit had been attached to a deed, however, it was not signed by the holders of the mineral estate and thus could not give rise to the requisite notice of repudiation. Id.
40. Slusher, 939 S.W.2d at 868.
41. Id.
42. The court noted that the only possible act of repudiation would have been the actions of the lessees in 1982, however, even if sufficient, the fifteen year time period required by Ky. Rev. Stat. Ann. § 413.010 (Michie 1993 & Supp. 1996) had not run. Id. at 865. The court also held that the attornment statute, Ky. Rev. Stat. Ann. § 383.100 (Michie 1993 & Supp. 1996) did not prevent the lessee from denying the owners' title to the mineral estate and that the champerty statute, Ky. Rev. Stat. Ann. § 372.070 (Michie 1993 & Supp. 1996), did not preclude the holders from claiming title to the mineral estate. Slusher, 939 S.W.2d at 868-69.
regarding the adverse possession of the mineral estate include the fact that there must be commercial exploitation of the minerals.43 In addition, the interest acquired by the adverse possession may be limited to the type of mineral estate acquired. Thus, a mineral estate acquired by the actions of adversely possessing coal may not include oil and gas interests.44 Finally, the presence or absence of "color of title" also may limit the amount of the interest acquired.45

II. MECHANICS' LIENS

During 1997, the Kentucky Supreme Court decided two cases involving mechanics' liens: Bee Spring Lumber Company v. Pucossi46 and Tile House, Inc. v. Cumberland Federal Savings Bank.47 Kentucky first adopted the mechanics' lien statute in 1839.48 Since that time, numerous amendments have been made to the statute.49

Mechanics' lien statutes basically allow a person who has performed labor or furnished materials to have their work product protected. It allows such an individual to have a lien

43. See Diederich v. Ware, 288 S.W.2d 643 (Ky. 1956) (requiring commercial exploitation); Brockman v. Jones, 610 S.W.2d 943, 945 (Ky. Ct. App. 1980) (holding that the mining of coal for domestic use was not sufficient to constitute a repudiation of the trust).
44. See Kentucky Block Canal Coal Co. v. Sewell, 249 F. 840, 847 (6th Cir. 1918) (holding that mining of coal did not grant right to the oil and gas rights). See also East Ky. Energy Corp. v Niece, 774 S.W.2d 458, 461 (Ky. Ct. App. 1989) (finding conveyance of only a fractional interest in the mineral estate possible).
45. See Diederich, 288 S.W.2d at 646. See also discussion in Thompson, supra note 8, § 48.12.
46. 943 S.W.2d 622 (Ky. 1997). The court noted that this was a case of first impression regarding KY. REV. STAT. ANN. § 446.080(4) (Michie 1993 & Supp. 1996). Id. at 623.
47. 942 S.W.2d 904 (Ky. 1997).
49. The current statute may be found in KY. REV. STAT. ANN. § 376.010 (Michie 1993 & Supp. 1996). The most recent amendments were effective on July 15, 1994 (adding subsection six to the statute dealing with supplies). See also Marion W. Benfield, Jr., The Uniform Construction Lien Act: What, Whither, and Why, 27 WAKE FOREST L. REV. 527, 530 (1992) (indicating that since 1986 at least twenty-six jurisdictions have amended their respective mechanic lien laws and that these amendments often have been concerned with increased consumer protection for residential owners). This article discusses many of the homeowner's concerns and in particular reviewed The Uniform Construction Lien Act. See also RICHARD POWELL, POWELL ON REAL PROPERTY, § 38.14[2] (1949). The case of Bee Spring Lumber Co., 943 S.W.2d 622 (Ky. 1997), which will be discussed herein, was concerned with the 1988 amendments, 1988, ch. 259, § 1, effective July 15, 1988.
placed against the property after the work has been performed or the materials furnished. The fact that the owner of the property may not have had any direct connection with the lienholder or even knew who furnished the labor or materials is irrelevant, as is the fact that the lienholder may not have known whom the owner of the property was at the time. In order to perfect the lien, the provisions of the statute must be followed. However, the statutes also will be liberally construed to protect the lienholder in that after the materials or labor have been furnished, there is not an effective means, absent the lien, for the provider to recover the goods or labor. It also should be noted, that the mechanics' lien statute is not the sole remedy if, in fact, unjust enrichment has occurred.

Although the mechanics' lien laws were enacted to provide a mechanism to help the furnishers of materials or labor, they also can work an injustice on a property owner who has paid a contractor who now has defaulted to his subcontractors, or has filed bankruptcy. As a consequence, subsection four of the Kentucky mechanics' lien statute was enacted to provide some protection for the property owner. It requires the potential lienholder to give notice in writing to the owner-occupant, not

---

50. See Bee Spring Lumber Co., 943 S.W.2d at 624. After the materials or labor have been expended, there is no effective way for the furnisher to recover either the materials or the labor. The homeowner, on the other hand, generally has had the property value of the premises increased.

51. See, e.g., Middletown Eng'g Co. v. Main St. Realty, Inc., 839 S.W.2d 274, 275 (Ky. 1992) (requiring subcontractor hired by general contractor to give notice to the owner); Kinzer Sheet Metal, Inc. v. Morse, 566 S.W.2d 179, 180 (Ky. Ct. App. 1978) (indicating statute not predicated on any concept of credit reliance); Campbell & Summerhayes, Inc. v. Greene, 381 S.W.2d 531, 532 (Ky. 1964).

52. See Middletown Eng'g Co., 839 S.W.2d at 276 ("The lien law confers a right in derogation of common law and all steps prescribed . . . must be followed, and in that respect, the statutes are to be strictly construed and applied."); Laferty v. Wickes Lumber Co., 708 S.W.2d 107 (Ky. Ct. App. 1986).

53. See Bee Spring Lumber Co., 943 S.W.2d at 624; Smith v. Magruder, 566 S.W.2d 430 (Ky. Ct. App. 1978); Campbell & Summerhayes, 381 S.W.2d at 533.

54. See Guarantee Elec. Co. v. Big Rivers Elec. Corp., 669 F. Supp. 1371 (W.D. Ky. 1987). The court noted that KY. REV. STAT. ANN. § 376.010 did not expressly note that its remedy was to be the sole and exclusive remedy nor was the doctrine of unjust enrichment abrogated by its enactment. Id. at 1378. The court further felt that this was in keeping with the general rule that the mechanic's lien statute was to be liberally construed. Id. See cases cited supra note 50. See also Perkins v. Daugherty, 722 S.W.2d 907 (Ky. Ct. App. 1987) (allowing a recovery in quantum meruit for another's unjust enrichment).

55. See Benfield, supra note 49. See also THOMPSON, supra note 8, § 102(a)(1).

more than forty-five days after the last item of material or labor is furnished, of the holder's intent to hold the property liable for the amount stated. The notice provided in this subsection is in lieu of the notice required in subsection three. Not only must the notice be so given, but the lien will not be effective to the extent that the owner-occupant has paid the contractor prior to the receipt of the notice.

In the Bee Spring Lumber Company case, the court had to decide the legal effect of the 1988 amendments. The owners of the property in question had an oral contract with a builder to construct a house on a lake for a total price of $20,400. The owners paid the contractor $16,050; at which time the contractor abandoned the project. Thereafter, Bee Spring Lumber, who had supplied lumber and materials to the builder in the amount of $8,292.68, sought to file a mechanic's lien on the property. At issue was which subsection of the statute applied: subsection three of the statute, with its longer notice time, or subsection four, with its shorter notice time as well as its allowance of credit for the amount paid to the contractor prior to the receipt of the notice.

The court reviewed the purpose of the statute. It reiterated its concern that a proper balance be maintained between the small homeowner and the small vendor, both of whom had been defrauded by a defaulting contractor, as well as its position that a liberal view ought to be taken toward promoting the legislative intent of protecting those who furnish labor and materials.

As noted by the court in Bee Spring Lumber Co., 943 S.W.2d at 623, the apparent legislative intent for this subsection was to provide some protection and relief to homeowners who intended to use the property as their dwelling when construction was complete. The last sentence of subsection four, which was added in 1988, reads: "This subsection shall apply to the construction of single or double family homes constructed pursuant to a construction contract with a property owner and intended for use as the property owner's dwelling". KY. REV. STAT. ANN. § 376.010(4). The 1988 amendments also changed the time from ten to forty-five days and changed the date from when the notice was to be given from the first day when material or labor were furnished to the last day.

Thus, if the homeowner has paid the general contractor, the subcontractor will not be able to receive a lien up to that amount. The court in Bee Spring Lumber Co., 943 S.W.2d 622, called this a "dollar for dollar" credit.

943 S.W.2d 622 (Ky. 1997).
Id.
Id. at 623.
Id.

See also supra note 53 and accompanying text. Justice Wintersheimer wrote the opinions in both the Bee Spring Lumber Co. case and the Smith v. Magruder case.
The property involved was a lakefront home. It was never completed. It was not occupied. As a result, the court concluded that the "dollar for dollar credit" provided by the owner-occupied subsection four did not apply to this second or vacation home.64

The second case involving mechanics' liens decided in 1997 was Tile House, Inc. v. Cumberland Fed. Savings Bank.65 At issue was the priority of various liens: an equitable, but unrecorded lien of the homeowners, the construction lender's recorded lien, and the mechanic lienholders' liens. The homeowners had paid $3,000 as a downpayment to the developer of the subdivision for the lot (the total cost of which was $43,750).66 Their agreement was not recorded.67 The homeowners then entered into an agreement with the builder for the construction of the house on the lot for a total cost of $252,363 (which price included the cost of the lot, though a credit allowance was made for the $3,000 already paid).68 This contract was not recorded.69

Thereafter, the builder applied for a construction loan, furnishing the bank with a copy of the two agreements made by...
the homeowners.\footnote{Id.} After the title was checked, the lot was conveyed directly from the developer to the builder without any reference to the homeowners.\footnote{Id.} Likewise, the construction mortgage did not refer to their interest.\footnote{Id.} Several mechanics' liens were then filed.\footnote{Id.} These lienholders did not know of the interest of the homeowners.\footnote{Id.} The construction lender then commenced foreclosure proceedings.\footnote{Id. at 904.}

The circuit court gave first priority for the foreclosure sale proceeds to the homeowners (based on their equitable lien which was not recorded).\footnote{Id. at 905.} Second priority went to the construction lender as its mortgage was recorded first.\footnote{Id.} Last priority was given to the mechanic lienholders.\footnote{Id. at 906.} The court of appeals affirmed.\footnote{Id. at 907.} The supreme court reversed.\footnote{Id. at 907.} It determined that the homeowners had an equitable lien.\footnote{Id. at 906-07.} However, since that lien was not recorded, it could not take priority over the interest of the lienholders who had no notice of their interest.\footnote{Id.} The construction lender, who had actual notice of the interest of the homeowners, had second priority.\footnote{Id.} Remaining funds would then be used to pay the mechanic lienholders to the extent their claims still were not satisfied.\footnote{Id. at 907.} If any funds remained, they were to be paid to the homeowners.\footnote{Id. at 907.}

\footnote{70. Id.}
\footnote{71. Id.}
\footnote{72. Id.}
\footnote{73. Id.}
\footnote{74. Id.}
\footnote{75. Id. at 904.}
\footnote{76. Id. at 905.}
\footnote{77. Id.}
\footnote{78. Id.}
\footnote{79. Id.}
\footnote{80. Id. at 907.}
\footnote{81. Id.}
\footnote{82. Id. Thus, the equitable lien, amounting to $28,236.00, was to be divided pro rata among the mechanic lienholders. Id. at 907.}
\footnote{83. Id.}
\footnote{84. Id. at 907.}
\footnote{85. Id. at 906-07. After the equitable lien was distributed pro rata among the mechanic lienholders, the construction lender was to be paid. Id. Second was the construction lender who recorded first but also had actual notice of the homeowners' interest. See KY. REV. STAT. ANN. § 382.070 (Michie 1993 & Supp. 1996). The knowledge of the construction lender, however, could not be imputed to the mechanic lienholders. Id. at 907. The construction lender could have protected itself if it had subrogated the interest of the homeowner to their mortgage. See Akers v. Cushman Constr. Co., Inc., 487 S.W.2d. 60 (Ky. 1972).}
III. FEDERAL INCOME TAX TREATMENT OF RESIDENTIAL PROPERTY

Any discussion of real property for 1997 would be incomplete without including a brief review of those provisions of the Taxpayer Relief Act of 1997 which affect real property. In addition, the Act changed the unified credit for gift and estate taxes, authorized the indexing of the annual gift tax exclusion and made other significant changes.

Prior to May 6, 1997, if a taxpayer sold his or her principal residence at a gain, tax liability would be incurred. If the residence sold for a loss, no deduction was or is allowed. If, however, the residence was sold and another residence purchased at a greater price, such gain was deferred. A taxpayer who was fifty-five years of age or older on the date of sale of the residence was permitted to exclude up to $125,000 of gain. The election could be made only once by the taxpayer or

87. The unified credit will be raised from $600,000 to $1,000,000 in the year 2006. See 26 U.S.C. § 2010(c) (1998).
89. Other affected areas include a child care credit, changes with IRA accounts and education credits. For a good but brief review of the changes from a layperson's perspective see Leonard Wiener, News You Can Use, U.S. NEWS AND WORLD REPORT, Aug. 11, 1997, at 52.
90. The gain was taxed as capital gain and was recognized and taxed only if the residence was not replaced, or if the replacement residence did not cost as much as the adjusted sales price for the prior residence. See also 26 U.S.C. § 1001 (1998) and 26 U.S.C. § 1016(7) (1998) regarding the calculation of the basis of the residence.
91. 26 U.S.C. § 165(c) (1998); Treas. Reg. §§ 1.165-9(a) (as amended in 1964) and 1.262-10(b)(4) (as amended in 1965); Koehn v. Commissioner, 16 T.C. 1378 (1951). The 1997 Reform Act does not affect or change the rules for residential property sold at a loss.
92. 26 U.S.C. § 1034(a) (1998) and Treas. Reg. § 1.1034-1(a) (as amended in 1979). The new residence had to be purchased within a two year time frame. The application of § 1034 was mandatory. See CARYL A. VZENBAARD, RESIDENTIAL REAL ESTATE TRANSACTIONS, §§ 8.9-8.12 (1991) for a discussion of how to calculate the gain. See also Schlicher v. Commissioner, T.C. Memo 1997-37 to the effect that even though the taxpayer used only one acre of a fifty-one acre tract for residential purposes, most of the tract qualified for § 1034 (all but seven and one half acres used for business purposes). But see Allied Marine Systems, Inc. v. Comm'r, T.C. Memo 1997-101 in which case the Tax Court disallowed the use of § 1034 when the residence sold was held in a partnership name rather than in the name of the taxpayer.
93. 26 U.S.C. § 121 (1998). A new home did not need to be purchased to make this election. The age requirement was met so long as the age of fifty-five was attained on or before the date of the sale or exchange of the principal residence (first moment of the day before the fifty-fifth birthday). See Rev. Rul. 77-382, 1977-2 C.B. 51.
the taxpayer's spouse. 94 Spouses who held title jointly qualified even if only one spouse was fifty-five. 95 In order to make the election, the taxpayer not only had to be fifty-five, but the residence must have been the taxpayer's principal residence and occupied by the taxpayer for at least three of the last five years. 96

The Taxpayer Relief Act of 1997 significantly changed the provisions regarding gains on the sale of residential property which is the taxpayer's principal residence. 97 Under the new law, which became effective on May 7, 1997, taxpayers who sell their principal residence may exclude from their taxable income the gain realized on the sale up to $500,000 if married and filing jointly (or $250,000 for single taxpayers). 98 To qualify, the taxpayer must have owned and used the premises as a principal residence for at least two of the five years preceding the sale 99 and the exclusion can be used only once every two years. 100 A taxpayer may elect not to have the section apply. 101 Finally, the exclusion is determined on an individual basis so that if one spouse takes the exclusion and then marries, it will not automatically disqualify the other spouse from claiming the single person exclusion. 102

For example, if Mary Doe having sold her residence using the

---

94. If the election was not made, the benefits are denied. See 26 U.S.C. § 121 (c) (1998); Treas. Reg. § 1.121-4(b). The election may be made only once unless an earlier election had been revoked. See Treas. Reg. § 1.121-4(a) (as amended in 1983). If one spouse has made the election, it is binding even if the spouse remarries someone who has not made the election.

95. See 26 U.S.C. §§ 121(d)(1)(A) to (C) (1998); Treas. Reg. § 1.121-5(a)(1)(i) to (iii) (as amended in 1979). Thus, this provision may have affected the way title was taken to the property.

96. See 26 U.S.C. § 121(d)(9) (1998). The period need not be continuous. See Rev. Rul. 80-172, 1980-2 C.B. 56. The Technical & Miscellaneous Revenue Act of 1988 added a provision to § 121 so that if the taxpayer had been in a nursing home for over two of the last five years, the election could still be made so long as the taxpayer spent at least one year in residence.

97. 26 U.S.C. § 1034 (1998) was repealed as were the portions of 26 U.S.C. § 121 (1998) regarding the one-time exclusion of $125,000 for a taxpayer over fifty-five.


99. 26 U.S.C. § 121(a) (1998). See also 26 U.S.C. § 121(d)(7) (1998) which changes the time period for a taxpayer who becomes physically or mentally incapable of self care if the taxpayer used the property as the principal residence during the five year period for periods aggregating one year. See 26 U.S.C. § 121 (c) and (d) (1998) for other exclusions and special rules.


$250,000 exclusion, then marries Richard Roe who has not used his exclusion, after their marriage, Richard Roe would still be able to use his $250,000 exclusion. After two years, they jointly will be eligible for the $500,000 exclusion.

If the gain on sale exceeds the new exclusion amount, such excess gain must be recognized as capital gains. Under the Taxpayer Relief Act of 1997, however, that gain will be taxed at a twenty percent maximum rate if it is long term.\textsuperscript{103} The new Act also extends the time period to more than eighteen months for assets which qualify for long-term status.\textsuperscript{104}

The Taxpayer Relief Act also made changes in the rules for taking a home office deduction. Previously, deductions were allowed only if the home qualified as the taxpayer's "principal place of business" or a place where the taxpayer regularly brought clients, customers, or patients.\textsuperscript{105} The new law broadens the definition of a principal place of business as a place used for "administration" or "management" of business.\textsuperscript{106} These new rules, however, will not be effective until 1999.\textsuperscript{107}

IV. THE CLOSING

The term "closing" or "settlement" in the real estate transaction denotes the time when the executory time period of the contract has ended, the title is transferred, the purchase

\textsuperscript{103} 26 U.S.C. § 1(h)(1)(E) (1998). For those taxpayers in the 15% income tax bracket, the maximum rate on the long-term capital gain is now 10%. 26 U.S.C. § 1(h)(1)(D) (1998). It also should be noted that if the capital asset was sold after May 6, but before July 29, 1997, the new rates apply only if the asset was held for more than twelve months, and if the asset was sold on July 29, 1997 or later, the lower rates apply if the asset was held for more than eighteen months and the 28% rate continues to apply for assets sold after July 28, 1997 that were held more than twelve but less than eighteen months. 26 U.S.C. § 1(h)(8) (1998). By January 1, 2001 the general maximum rate will be 18% for taxpayers in the 20% tax bracket (and 8% for those in the 15% bracket) if held for more than five years. 26 U.S.C. § 1 (h)(2)(B) (1998).


\textsuperscript{106} 26 U.S.C. § 280A(c)(1) (1998). Thus a taxpayer may claim the deduction if the taxpayer uses the home office for administrative or management activities and there is no other fixed location where those activities are conducted. See id.

\textsuperscript{107} Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 11 Stat. 836 (approved Aug. 5, 1997). The effective date is "uncodified."
price paid, and all other attendant duties satisfied.\textsuperscript{108} Closing practices vary: the parties may never meet but rather all documents and payments are exchanged by use of an escrow agent, or the principal parties may meet and the appropriate exchanges made.\textsuperscript{109} If the parties meet, the participants at the closing also may vary. Certainly the seller and purchaser will be present (unless one is represented by an agent). Either one of them may be (and probably should be) represented by an attorney.\textsuperscript{110} There will be a closing agent. The lender, title examiner or real estate broker also may be present. Often the principal participants view the closing as "anticlimactic" or "mechanical".\textsuperscript{111} They may be correct but only if in fact all documents have been properly prepared and no additional issues arise.

What happens at a closing?\textsuperscript{112} The number of documents and items which must occur at the closing can be significant. All documents must be properly prepared (e.g. deed, note, mortgage, etc.). The documents must be in proper form. Thus, the deed is to conform to the contract of sale and the mortgage to the commitment letter.\textsuperscript{113} The documents probably will be executed at the closing. Some will need to be recorded.\textsuperscript{114} The contract of

\textsuperscript{108} \textit{See} YZENBAARD, supra note 92, § 7.1. At a typical residential closing the buyer receives the deed (which will be recorded prior to the buyer taking it home) and the seller receives the purchase price. \textit{Id.} If an outside lender is used, the note and mortgage are executed (and the mortgage recorded). \textit{Id.} If an installment land contract is used, no deed will be given until the entire purchase price has been paid; however, a closing still may be held to execute the contract or a deed may be executed and placed into escrow at that time. \textit{See} McEnroe v. Morgan, 678 P.2d 595 (Idaho Ct. App. 1994).

\textsuperscript{109} Escrows are commonly used in large cities as well as in the Pacific West and the Southwest. In the mid-west, including Kentucky and Southern Ohio, the parties usually meet either at an attorney’s office or at the lender’s or title company’s office. \textit{See} D. Barlow Burke, Jr., REAL ESTATE TRANSACTIONS 115 (1993)(noting that in Massachusetts the closing may occur at the public records office so that the deed can be recorded immediately).


\textsuperscript{111} \textit{See} YZENBAARD, supra note 92, at 121.

\textsuperscript{112} For an overview of the process, \textit{see} YZENBAARD, supra note 92, Chapter 7.

\textsuperscript{113} If they do not conform, the party can so insist. \textit{See} Hoskins v. Walker, 255 S.W.2d 480 (Ky. 1953); United Coop. Realty v. Hawkins, 108 S.W.2d 507 (Ky. 1937). Thus, it is wise to review all documents prior to the closing.

\textsuperscript{114} The documents must be executed so that they in fact can be recorded. For example, in Kentucky, the document must include the prior source of title; must be signed before a notary or the clerk of courts; the amount of consideration must be given as well as the mailing addresses of the grantor and grantee; and the name, address and signature of the drafter must be included. \textit{See} KY. REV. STAT. ANN. §§ 382.110, 382.130,
sale, commitment letter and the title binder should be reviewed to ascertain that all documents in fact have been given, executed, and received.

All transfer taxes are paid at that time. Prorations of items such as real estate taxes will occur. If an institutional lender is involved the Settlement Sheet for the Real Estate Settlement and Procedures Act must be signed. Form 1099-B must be completed.

All checks must be delivered. Appropriate insurance policies should be present. Keys must be present if possession is to occur on the date of closing.

The above list may be expanded or contracted depending on the transaction. It is recommended that the buyer and seller each have their respective attorneys present to represent their interests. Often this does not occur. Whether they are present or not, someone must "run" the closing. That person is the closing agent (though if an escrow is used, it will be the escrow agent). The closing agent may or may not have written instructions. The closing agent is to represent the transaction rather than any one particular participant (be it the title company, lender, seller, or buyer).

---

382.135, 382.385 (Michie 1993 & Supp. 1996). A recording fee will be assessed, which is usually paid by the party for whose benefit the document is recorded (thus the buyer will pay for the recordation of the deed and the seller for a release of a mortgage).


118. The buyer, in particular, should be cognizant of the amount of money needed to complete the transaction and should ascertain whether any of the checks are to be certified or not. See Colonial Diversified, Inc. v. Assured Holding Corp., 71 A.D.2d 1011, 420 N.Y.S.2d 419 (2d Dept. 1979) (holding that Small Business Administration check did not satisfy the requirement for a certified check).

119. For a review of the role of the closing agent in North and South New Jersey the case of Sears Mortg. Corp. v. Rose, 607 A.2d 1327 (N.J. 1992) should be read. For a discussion regarding the two varying forms of closing practice (with and without attorneys present), see In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995).

120. See Kaarela v. Birkhead, 600 N.E.2d 608, 610 (Mass. App. Ct. 1992) (concluding that the holder was not the agent of either party, but rather the fiduciary of both; thus, the agent was bound to return deposit if express condition of sales contract was not met);
doubt as to what action should be taken, the closing agent must seek the mutual instructions of the parties or seek a court order.\textsuperscript{121} The closing agent can be liable for negligence.\textsuperscript{122} If the closing agent absconds with the funds, the loss generally falls on the party entitled to the funds at that time.\textsuperscript{123}

Who can act as the closing agent? It may be an attorney. It may be a layperson acting under the supervision of an attorney. It may be a layperson. If the closing agent is not an attorney, the closing agent in Kentucky cannot draft any documents for the participants.\textsuperscript{124} Likewise, if any provision of the contract of sale remains outstanding, the parties should not continue with the closing and rely on the contract of sale due to the doctrine of merger.\textsuperscript{125} A closing agent who is not an attorney may not give legal advice nor explain the meaning of various legal terms.\textsuperscript{126} If legal questions arise, the closing agent is to discontinue the closing until legal advice is sought. However, if no attorney is present, the parties may not realize that there is an issue to be


\textsuperscript{122} See Meerhoff v. Huntington Mortgage Co., 658 N.E.2d 1109 (Ohio Ct. App. 1995) (finding negligence for failure to record deed for six days where lien was recorded on the property in the meantime).


\textsuperscript{124} See KY. SUP. CT. R. 3.020. See also Federal Intermediate Credit Bank of Louisville v. Kentucky Bar Ass'n, 540 S.W.2d 14, 15 (Ky. 1976) (holding that lay employee of lending institution can complete forms only if no charge to the parties is made and a licensed attorney either prepared or reviewed the documents involved).

\textsuperscript{125} The doctrine of merger still is applicable in Kentucky and thus, even if an item is contained as a representation or warranty in the contract of sale, if the deed is accepted at the closing, that provision may well be "merged" and can no longer be sued on. See Bordon v. Litchford, 619 S.W.2d 715, 717 (Ky. Ct. App. 1981) (holding merger prevented a suit based on the express representations contained in the contract of sale, but did not apply to the implied warranty of habitability). Thus, if something in the contract of sale has not been satisfied (e.g., landscaping) or if a new issue arises (e.g., some repair work), a new agreement must be prepared which, in turn, requires the use of an attorney.

\textsuperscript{126} See U-31 (1981), UNIVERSITY OF KENTUCKY COLLEGE OF LAW, OFFICE OF CONTINUING EDUCATION, KENTUCKY LEGAL ETHICS OPINIONS AND PROFESSIONAL RESPONSIBILITY DESKBOOK (Richard Underwood, ed. 1993) (hereinafter "DESKBOOK"). But see Seigle v. Jasper, 867 S.W.2d 476 (Ky. Ct. App. 1993) (holding that an abstractor's duty of care, which includes the duty to communicate any information that may reasonably be viewed as a defect or restriction on the title, runs not only to his or her customer, but to the purchasers and others who are involved, or are reasonably foreseeable as relying on the search).
resolved.127

These considerations led the Kentucky Bar Association to propose an opinion which would limit who could serve as the closing agent when institutional lenders were involved.128 To the questions posed as to whether a "Title Insurance Company,"129 Title Companies, or non-attorneys may conduct real estate closing for the general public without the direct supervision and control of a licensed attorney, the answer was no. After reviewing prior Kentucky Bar Association opinions and cases in the Commonwealth, the determination was made that due to the complex nature of closings involving institutional lenders, the unique services of an attorney were required as the closing agent.130 Nonetheless, the opinion was not adopted.131

Prior opinions and caselaw support the position taken by the Kentucky Bar Association in 1997. In March of 1981, the Kentucky Bar Association adopted an opinion which stated that a real estate mortgage lender or title company, on behalf of a real estate mortgage lender, could perform the ministerial acts associated with the real estate closing.132 The closing agent, however, was not to give legal advice; and, if questions arose, the agent was to discontinue the closing until legal advice could be sought.133 In 1997 the Bar Association reviewed this opinion and noted that banking conditions had become far more complex since 1981 and thus the opinion should be changed. Other Kentucky Bar Association opinions in this area had held that a title insurance company, using a layperson to examine the title,
was engaged in the authorized practice of law, and that an engineering company could not provide title opinions for real estate involved in road building projects.

Recent Kentucky cases dealing with the unauthorized practice of law include American Insurance Association v. Kentucky Bar Association in which the supreme court approved the Ethics Opinion which held that a lawyer may not enter into a contract with a liability insurer by which the lawyer or the firm agreed to do all of the insurer's defense work for a set fee. Laypersons are not to prepare deeds or mortgages. Corporations are not to practice law.

In the past few years, other jurisdictions have discussed whether non-lawyers may or should serve as the closing agent in residential sales. Many do not permit it, or if they do, restrictions are placed on the practice. Virginia adopted the Consumer Real Estate Settlement Protection Act in 1997. This Act applies to residential sales and requires that the settlement or closing agent be an attorney, a title company, real estate broker or financial institution authorized to do business in the Commonwealth. Notice is to be given of the choice of settlement agent in all contracts for the sale of residential property. The agent is to use reasonable care and to carry appropriate insurance.

The Illinois Bar Association has taken a pro-active stance to have attorneys serve as closing agent in residential closings.

---

135. U-16 (1976), DESKBOOK supra note 126. This was the unauthorized practice of law even if the opinions themselves were prepared by licensed attorneys. Id.
136. 917 S.W.2d 568 (Ky. 1996).
137. See Federal Intermediate Credit Bank of Louisville v. Kentucky Bar Ass'n, 540 S.W.2d 14 (Ky. 1976); Kentucky Bar Ass'n v. Tussey, 476 S.W.2d 177, 179 (Ky. 1972) (holding that lay officer of bank may not prepare mortgage even though no separate fee was assessed).
138. Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1974); Kentucky State Bar Ass'n v. First Federal Savings & Loan Ass'n, 342 S.W.2d 397, 398 (Ky. 1961) (holding corporation may not give an opinion on the title even if an attorney is on the staff).
140. These individuals or companies are all regulated in some fashion by the Commonwealth. See VA. CODE ANN. § 6.1-2.21 (Michie 1997).
141. Id. § 6.1-2.22.
142. Id. § 6.1.2.21.
143. See Peter J. Birnbaum, Illinois Real Estate Lawyers and the Battle to Control Residential Closings, 84 ILL. B.J. 132 (March 1996). The article notes that non-lawyers
An opinion was adopted which provides that a lawyer aids in the unauthorized practice of law and may violate professional conduct by limiting his or her role in residential closings to drafting documents and by delegating other legal matters to real estate brokers.¹⁴⁴

South Carolina will not allow non-lawyers to conduct residential closings. In State of South Carolina v. Buyers Service Company, Inc., the South Carolina Supreme Court held, in a case involving the sale of a residence, that a commercial title company may not (1) give opinions of title; (2) prepare documents; (3) mail documents as part of the transfer; or (4) conduct closings.¹⁴⁵

After significant debate and review of the varying practices in the state,¹⁴⁶ the New Jersey Supreme Court decided that the practice of conducting a residential real estate closing by a non-lawyer was not the unauthorized practice of law so long as notice was given to the seller and to the buyer not only of the conflicting interests of brokers and title companies, but also of the general risk involved by failing to have separate legal representation.¹⁴⁷ Thus, lawyers are not required for the closing; however, notice must be given.¹⁴⁸

¹⁴⁴ ISBA Opinion No. 94-1. See also Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 214 N.E.2d 771 (Ill. 1966).
¹⁴⁶ In In Re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344, 1345 (N.J. 1995), the court reviewed the closing practices in the North where attorneys usually were present and in the South where they were not. The court noted that about sixty percent of buyers and sixty-five percent of sellers in the South were not represented by counsel; whereas in the North only one half of one percent of buyers and fourteen percent of sellers did not have counsel. Id. at 1349. The court also noted that the seller in the North spent an average of $750 in attorney fees and the buyer an average of $1,000. Id.
¹⁴⁷ Id. at 1346 (noting, however, "[W]e believe that parties to the sale of a family home, both seller and buyer, would be better served if each were represented by counsel from the beginning to the end of the transaction, from contract signing through closing.") If the notice is not given, such conduct will be the unauthorized practice of law. Id. at 1361. The court also noted that the brokers may order a title search and abstract; that the attorney retained by the broker or title company may not draft documents except by the specific written request of the party for whose benefit it was prepared; and that a title company may participate in the clearing of minor title objections. Id. at 1361-62.
¹⁴⁸ New Jersey also requires that the parties have three days to cancel any contract
Other jurisdictions have stated that if a non-lawyer conducts a closing, legal advice is not to be given. If questions arise, the closing agent is to discontinue the closing. Such an agent is not to draft documents.

The purchase and sale of the family home is probably the greatest investment made by the average family. Their interests should be protected throughout the transaction but, at a minimum, at the closing. Without an attorney present, they may not know that a legal issue has arisen. They may not know

---

149. See In re First Escrow, Inc., 840 S.W.2d 839 (Mo. 1992). This opinion reviews many of the decisions in the area. The court allowed the escrow company to complete simple forms; however, they were not to charge separate fees and may not provide legal services. Id. at 848-49. The court felt that this was permitted so long as the agent was under the supervision of either a broker, lender or title insurer who had a direct financial interest in the transaction. Id.

150. Note the discussion in State of South Carolina v. Buyers Serv. Co. Inc., 357 S.E.2d 15, 19 (1987) that if legal questions arise, the agent is to stop the proceedings and have the parties consult their attorneys; however, as a practical matter there is "no way of assuring that lay persons conducting a closing will adhere to the restrictions." The court went on to note:

[W]e are convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court. Again, protection of the public is of paramount concern.

The Kentucky Bar Opinion U-31 (1981) notes that

[i]t is the rub which frequently arises in real estate closing situation is that often questions of a legal nature are posed to the layman who is closing the transaction. Any response would constitute legal advice and would be the unauthorized practice of law by the person answering the questions. In such an instance, the lay person should discontinue the closing and seek proper legal advice."

Id.

151. See Bowers v. Transamerica Title Ins. Co., 675 P.2d 193 (1983) (drafting of documents not permitted). In Bowers, the agent also failed to inform the sellers of the advisability of separate legal representation which was especially pertinent as the note was not secured. Id. In Oregon State Bar v. Security Escrows, Inc., 377 P.2d 334, 340 (Or. 1962) the agent could fill in forms prepared by an attorney and selected by the client, but could not advise or select such a form. But see Cardinal v. Merrill Lynch Realty/Burnet, 433 N.W.2d 864 (Minn. 1988) (holding that broker not engaged in unauthorized practice of law by collecting a drafting fee for closing services). See also Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778, 784 (Ky. Ct. App. 1964) (holding that neither a bank nor another lay person may draft deeds or mortgages for other people).

152. See Yzenbaard, Drafting the Residential Sales Contract, supra note 110; Walter A. Rausenbush, Who Helps the Home Buyer, 1979 ARIZ. ST. L.J. 203.

153. See Yzenbaard, supra note 92, §§ 1.1 and 7.1 (indicating that representation should be throughout. If such representation has not occurred prior to closing, the closing probably is the last opportunity for such protection).
that they should consult an attorney. They may not know that a
document needs to be drafted. Other jurisdictions provide at
least some minimal protection. The issue is not about
"protecting the Bar from competition but [rather] to protect the
public from being advised or represented in legal matters by
incompetent or unreliable persons."\textsuperscript{154} Nonetheless, the
Kentucky Bar did not enact the proposed opinion, which would
have provided some protection.\textsuperscript{155}

There is no indication that closings will become less complex
in the future. The purchase of the family home is too important
not to provide protection. Perhaps in 1998, or thereafter, the
Kentucky Bar Association will reconsider their actions of 1997,
or perhaps a proposal for notice such as New Jersey provides or
a Consumer Protection Act similar to that adopted in Virginia
should be considered.

\textsuperscript{154} See \textit{In re Escrow}, 840 S.W.2d 839, 840 (Mo. 1992). What one
does not know, can in
fact, hurt.

\textsuperscript{155} See supra note 5.
Recent revisions of the Uniform Probate Code (UPC) and the adoption of these or similar provisions in many states raise questions about the statutory share of the surviving spouse under Kentucky law. Current Kentucky provisions appear quite out of harmony with contemporary developments elsewhere in statutory enactments and discussions of theory and policy.

Provisions for the surviving spouse in Kentucky have remained remarkably stable over time. In the past century, there have been only two substantial changes. Kentucky's version of the Married Woman's Property Act (called the Weissinger Act) was adopted by the 1894 General Assembly. That Act abolished the estate by marital right, equalized the rights of husband or wife as surviving spouse, and set the survivor's share at "a life estate in one-third of the real estate of which the other was seized and an absolute interest in one-half of the surplus personalty."4

The amount of the surviving spouse's share remained constant until 1956, when the General Assembly changed the share in real estate held by an intestate spouse at death from one-third for life to one-half surplus real estate in fee. A life estate in one-third of the real estate was retained for real estate of which the deceased spouse was seized during coverture but not at the time of death, and for spouses who chose to renounce provisions made for them in the their spouse's will. At the same time the location of the

1. Professor of Law, Louis D. Brandeis School of Law at the University of Louisville.


3. 1894 Ky. Acts 76 (codified at KY. REV. STAT. ANN. § 404 (Michie 1984)).

4. JAMES R. MERRITT, 1 KY. PRACTICE 97 (1994).

5. 1956 Ky. Acts 117 (codified at KY. REV. STAT. ANN. § 392.020 (Michie 1984)).

surviving spouse among all recipients of intestate property was changed from after all paternal or maternal kindred to fourth place after children and their descendants, parents, brothers, sisters and their descendants. In 1972, the General Assembly changed the share of real estate received by a spouse who renounced a spouse's will from one-third for life to one-third in fee (for property owned at the spouse's death).

I. INTESTATE SHARE

If one reads Kentucky Revised Statute section 392.020 with section 391.0109 and section 391.030, a surviving spouse will take one-half of the surplus realty and personalty when a spouse dies intestate and is also survived by a child or descendant of a child, a parent or parents, or a sibling, or descendant of a sibling. Only in the absence of all of these will the surviving spouse take the entire intestate estate. According to Kentucky Revised Statutes section 392.080, in cases of testacy including partial intestacy, the surviving spouse must first renounce the will and whatever is taken thereunder in order to receive an intestate share (with the share of real estate limited to one-third rather than one-half).

When one compares the Kentucky statutes to the UPC, a number of striking differences appear. Some of these existed in the original UPC text of 1969, while others appeared in the substantial revisions of 1990. The rationale for the most recent revisions included three factors which prompted the changes: (1) decline of formalism in favor of intent-serving policies; (2) recognition of will substitutes as a major form of wealth transmission; and (3) the advent of the multiple-marriage society

8. 1972 Ky. Acts 168 (codified at KY. REV. STAT. ANN. § 392.080 (Michie 1984)).
10. Distribution of personalty.
11. Hedden v. Hedden, 312 S.W.2d 891 (Ky. 1958). The court found that the addition of "intestate" to Kentucky Revised Statutes section 392.020 made that statute applicable only to intestate estates. Id. Kentucky Revised Statutes section 392.080 would apply to all testate estates, whether the surviving spouse appeared in the will or not. Id. at 893. The court could find no reason to penalize the renouncing spouse by reducing the share from one-half to one-third, but the statute was clear. Id. That the surviving spouse can claim a share under Kentucky Revised Statutes section 392.080 only by renouncing the will was reiterated by Hannah v. Hannah, 824 S.W.2d 866 (Ky. 1992).
along with the acceptance of a partnership theory of marriage. 12
The impact of a multiple-marriage society and of viewing marriage
as a partnership was articulated by Lawrence Waggoner, who
noted that the current understanding of spouses was that their
marriage was a pooling of lives, assets and acquisitions (a
partnership) and that property received by a surviving spouse
would eventually pass to children (the spouse serving as a
conduit).13

With respect to the share of a surviving spouse, four
differences can be noted between the UPC and Kentucky law.
First, with respect to takers, under the UPC, if there are no
descendants of the deceased, only a parent would share an estate
with the surviving spouse,14 while Kentucky would go beyond
parents to include siblings and their descendants.15

Second, with respect to the size of the spouse's share (which is
especially significant in smaller estates), Kentucky limits the
surviving spouse to one-half the surplus estate whenever the
deceased spouse is survived by descendants, parents, or siblings,
or their descendants.16 The UPC, in cases where the surviving
spouse does not receive the entire estate, suggests that such a
surviving spouse receive the first $200,000 plus three-fourths of
any balance if there is a surviving parent or parents, the first
$150,000 plus one-half of any balance where the decedent and
surviving spouse have common descendants and the surviving
spouse has other descendants, or the first $100,000 plus one-half
the balance where the deceased spouse has descendants who are
not also descendants of the surviving spouse.17

Third, while earlier versions of the UPC provided different
shares only when there were descendants of the deceased who
were not also descendants of the surviving spouse (stepchildren of
the surviving spouse), the 1990 version also recognizes the

---

13. Lawrence W. Waggoner, The Multiple-Marriage Society and Spousal Rights Under
15. KY. REV. STAT. ANN. § 391.010(3) (Michie 1984).
17. UNIF. PROBATE CODE § 2-102(2),(3),(4) (amended 1993). Waggoner had noted, see
generally supra note 13 at 229-235, that provisions for surviving spouses must reflect the
reality of high divorce rates and corresponding increases in stepparent relationships in
families in which one or both spouses had children from prior relationships.
situation where there are descendants of the surviving spouse who are not descendants of the deceased (stepchildren of the deceased). The theory underlying this distinction also shaped the provision for a child omitted from the will (the pretermitted child): the estate should go to such child's surviving parent who, in turn, will provide for the child when that parent dies. The same theory undergirds the unlimited marital deduction for the estate tax. Because one could assume that a parent will be more concerned for a child than a stepchild, there are different provisions for a surviving spouse's stepchild (who is decedent's child by a former spouse) and a decedent's stepchild (who is the surviving spouse's child by a former spouse).

Finally, the UPC continues to employ the concept of the augmented estate to provide a more realistic assessment of property arrangements between spouses at the time of the first spouse's death. The augmented estate includes not only the probate estate of the deceased spouse, but also the decedent's nonprobate transfers to others and to the surviving spouse as well as the surviving spouse's property and nonprobate transfers to others. The 1990 amendments to the UPC added the duration of the marriage to the computation of the elective share amount from the augmented estate: the surviving spouse's share would increase from three percent of the augmented estate for those married one to two years to fifty percent for those married fifteen years or more. Without such a graduated scale, there could be a "windfall" for surviving spouses in short marriages who would be entitled to a large share of the estate, even though very little of that estate had been acquired during the marriage and perhaps very little was acquired through the surviving spouse's contribution. This would conform probate to dissolutions, when

---

18. UNIF. PROBATE CODE § 2-102(3).
22. Id. Calculation of the augmented estate requires an inventory of property ownership and transfers by each spouse during the entire duration of the marriage. It includes nonprobate transfers in which the decedent retained an interest or held a power of appointment and insurance proceeds if the decedent owned the policy or could designate its beneficiary. Id.
the court, in making a "just distribution" of marital property, is
directed to consider the duration of the marriage.24

Several questions arise when one compares the UPC and
Kentucky law concerning the surviving spouse. In Kentucky, the
surviving spouse must share the estate with the deceased's kin
even though such kin may be only a sibling, niece or nephew, or
even grandniece or grandnephew.25 In Kentucky, the surviving
spouse gets one-half the probate estate with no consideration of
the duration of the marriage, the size and contents of the probate
estate, or inter vivos property arrangements by the spouses.26 Any
of these factors can result in substantial inequities whereby the
survivor receives "too much" or "too little."

When the legislature establishes a surviving spouse's share in
an estate, it is making policy determinations. The UPC attempted
to base policy decisions on testators' actual preferences.27 The
UPC amendments were developed partly by a joint editorial board
which included members from the Real Property, Probate and
Trust Law Section of the American Bar Association.28 A
legislature in modifying existing probate laws will affect parties'
expectations, existing drafts of wills and trusts, and
understandings of marriage and family in society. At the same
time, legislators should realize that failure to act imposes current
law and its choices upon those who fail to take the initiative by
creating enforceable alternatives via antenuptial or postnuptial
contracts or wills. Who in society should bear the burden of
inertia?

A brief survey of other states reveals how Kentucky has not
followed current developments elsewhere. States may be divided
into three categories with respect to surviving spouses' shares of
estates: (1) all to surviving spouse and/or issue; (2) all to surviving
spouse and/or issue or parent(s); and (3) inclusion of relatives
beyond parents when there are no surviving descendants.
Nineteen states divide the entire estate between the surviving
spouse and descendants of the deceased spouse. Eight of these

24. Cf. KY. REV. STAT. ANN. § 403.190(1)(a) and (c) (Michie 1984).
25. See supra notes 9, 10 and accompanying text.
26. See supra note 11 and accompanying text.
27. Cf. UNIF. PROBATE CODE § 2-102 (amended 1993), Comment: References to
empirical studies.
provide that the surviving spouse takes the entire estate when the
deceased spouse leaves no descendants or all descendants are also
descendants of the surviving spouse; otherwise the surviving
spouse takes half. 29 Eleven states award a surviving spouse the
entire estate if the deceased spouse leaves no descendants; if there
are descendants, the estate is divided between descendants and
the surviving spouse who takes between one-fourth and $20,000 to
$100,000, plus one-half. 30

Twenty-one states include with the surviving spouse a
surviving parent or parents when the deceased leaves no issue.
Seven of these follow the pre-1990 version of UPC 2-102: the
surviving spouse takes the entire estate if there are no surviving
descendants or parents, the first $50,000 plus one-half the balance
if there are any surviving parents or issue who are also
descendants of the surviving spouse, and one-half if one or more
descendants are not also descendants of the surviving spouse. 31

Two states have adopted the 1990 version of the UPC: if there are
no issue or parents or all issue are also issue of the surviving
spouse, the surviving spouse takes the entire estate; if there is a
parent and no issue, the surviving spouse takes the first $200,000
and three-fourths of the balance; if the surviving issue are also all
issue of the surviving spouse who also has issue not from the
decedent, the spouse takes the first $150,000 and one-half the
balance; if the deceased has issue, not all of whom are from the
surviving spouse, the surviving spouse takes $100,000 and one-
half the balance. 32 The remaining twelve award the surviving
spouse when there is a surviving parent but no descendants,
anywhere from one-half to some dollar amount (first $15,000 to

29. ARIZ. REV. STAT. § 14-2102 (1991); COLO. REV. STAT. § 15-11-102 (1997); IOWA CODE
§ 633.211 (1992); OR. REV. STAT. § 122.025 (1993); UTAH CODE ANN. § 75-2-102 (1993); VA.
CODE ANN. § 64.1-1 (Michie 1991); W. VA. CODE § 42-1-3 (1994); WIS. STAT. ANN. § 852.01
(West 1991).

30. FLA STAT. ANN. § 732.102 (West 1991); GA. CODE ANN. § 53-2-1 (1991); ILL. COMP.
STAT. ANN. 5/2-1 (West 1992); KAN. STAT. ANN. § 59-504 (1983); MINN. STAT. ANN. § 524.2-
102 (West 1996); MISS. CODE ANN. § 91-1-7 (1991); N.M. STAT. ANN. § 45-2-102 (Michie

31. DEL. CODE ANN. tit. XII, § 502 (1991); IDAHO CODE § 15-2-102 (1991); ME. REV.
STAT. ANN. tit. 18-A § 2-102 (West 1991); N.H. REV. STAT. ANN. § 561:1 (1990); N.J. STAT.
ANN. § 3B:5-3 (West 1991); NEB. REV. STAT. § 30-2302 (1996); N.D. CENT. CODE § 30.1-04-

$100,000) plus one-half to three-fourths of the balance.\(^{33}\)

The almost even split between the nineteen states which exclude parents from inheriting when there is a surviving spouse and no descendants\(^{34}\) and the twenty-one states which include parents\(^{35}\) raises a question about expectations within families. When there are no surviving descendants, would most people wish parents to share in the estate with the surviving spouse? That appears to be a difficult question to answer in the abstract, for any adequate reply should include the duration of the marriage, the size of the estate and the property and needs of the surviving spouse and parent(s).

Of the remaining ten states, several award most of the estate to a surviving spouse when the deceased has no surviving descendants. If there are no issue, Arkansas awards the entire estate to the surviving spouse unless the marriage was less than three years, then the award is half.\(^{36}\) Oklahoma likewise focuses upon the duration of the marriage, for the survivor takes all of the property acquired by joint effort during the marriage (which in a long marriage could be all the property) plus one-third of the remainder.\(^{37}\) Washington provides the deceased's share of the community estate and three-quarters of the deceased's separate estate to the surviving spouse,\(^{38}\) while California and Nevada award one-half of the separate estate.\(^{39}\) Massachusetts gives the surviving spouse the first $200,000 plus one-half the remainder.\(^{40}\) South Dakota gives the surviving spouse the first $100,000 and one-half the remainder.\(^{41}\) Vermont gives the surviving spouse all household goods and furniture, the first $25,000 and one-half the

---


34. See supra notes 26, 27 and accompanying text.

35. See supra notes 28-30 and accompanying text.


40. MASS. GEN. LAWS ANN. ch. 190, § 1 (West 1994).

remainder. Rhode Island gives the surviving spouse $75,000 in real estate and the first $50,000 in personalty, plus one-half the remainder.

Kentucky thus appears to provide a significantly smaller statutory share for the surviving spouse when there are no surviving issue and appears to be almost alone in awarding up to half the estate to descendants of parents of a deceased spouse who is not survived by issue or parents. It has also failed to relate the surviving spouse's share to the duration of the marriage or to recognize the differences which exist when surviving issue are not also issue of the surviving spouse or when the surviving spouse has issue with someone other than the decedent.

II. ELECTION AGAINST A SPOUSE'S WILL AND NON-PROBATE TRANSFERS

In addition to the intestate share of the surviving spouse, all states also provide some remedy for a spouse who is omitted from, or inadequately provided for, in a spouse's will, whether intentionally or otherwise. In Kentucky, it is the survivor's right to renounce the will and take an intestate share (with the share of surplus realty reduced from one-half to one-third). Kentucky also reversed the common law presumption that provisions in the will were in addition to dower by providing that the survivor may take under Kentucky Revised Statutes section 392.020 and the will only "if such is the intention of the testator, plainly expressed in the will or necessarily inferable from the will." The UPC employed the notion of augmented estate to prevent disinheretance of the surviving spouse by inter vivos transactions which had the effect of reducing the probate estate from which the survivor could elect. The rationale for the "forced share" for the surviving spouse could be found in marital property law:

It is essential to understand that American forced-share law is entirely a consequence of the separate property regime

44. KY. REV. STAT. ANN. §§ 391.010(3), 392.020 (Michie 1984).
45. KY. REV. STAT. ANN. § 402.080 (Michie 1984).
46. KY. REV. STAT. ANN. § 392.080(2) (Michie 1984).
for marital property . . . . Forced share law is the law of the second best. It undertakes upon death to correct the failure of a separate property state to create the appropriate lifetime rights for spouses in each other's earnings.48

The augmented estate, in which the forced share is calculated by the inclusion of certain lifetime transfers by the deceased and the surviving spouse's property and transfers, is found in some states which have enacted the UPC.49 Other states, however, which enacted the UPC did not include the augmented estate.50 Some states created their own definitions of augmented estates.51 The remaining states allow the survivor to elect some share of the probate estate from one-third to one-half, except for Connecticut, which allows the survivor to elect only a life estate in one-third of the probate estate52 and Georgia. Georgia, somewhat like the Inheritance (Provision for Family and Dependents) Act 1975, originally enacted as Inheritance (Family Provision) Act 1938, in the United Kingdom which allows the court to make reasonable financial provision for a spouse or child or other dependent not provided for adequately in a will, cautions spouses who disinherit a spouse or child:

Testators may bequeath the entire estate to strangers to the exclusion of surviving spouse and children, but in such case the will should be closely scrutinized and upon the slightest evidence of aberration of intellect, collusion, fraud, undue influence or unfair dealing, probate should be refused.53

The Kentucky provision for renunciation of the will and election of a share of the probate estate does not address the situation where a spouse reduces the probate estate by inter vivos transfers. While the survivor retains under Kentucky Revised Statutes section 392.080 the right to elect one-third of the surplus
realty and one-half of the surplus personalty, the diminished estate may leave little from which to elect.

One classic solution to the disinherition of a spouse by nonprobate transfers was provided in *Newman v. Dore,*\(^54\) where a court in New York held that transfers by a husband who retained interests in the trust property were "illusory transfers" with respect to his wife, whose elective share should be calculated by including the amounts of the illusory transfers.\(^55\) A court in Illinois used the terms "sham" and "colorable" as well as "illusory" to describe a purported transfer which was without actual donative intent when it was employed to defeat a spouse's share.\(^56\)

Kentucky has traditionally gone beyond the sham or illusory transfer analysis to include any transfer of real or personal property which results in a surviving spouses asserting marital rights in the property in the hands of the donee.\(^57\) The rule originated from *Manikee's Administratix v. Beard,*\(^58\) *Murray v. Murray,*\(^59\) *Gibson v. Gibson*\(^60\) and *Wilson v. Wilson.*\(^61\) The transfer of the bulk or a substantial portion of the spouse's property which would have the effect of destroying or seriously diminishing the surviving spouse's share would be considered fraud upon the survivor.

The presumption of fraud could be rebutted. In *Rowe v. Ratliff,*\(^62\) it was suggested that when a husband bought real estate in his mother's name it may not have been fraudulent with respect to his spouse if his mother had been poor and needy, and the husband had other estate which could provide for his wife.\(^63\) In *Benge v. Barnett,*\(^64\) there was a suggestion that gifts to one's dependent children (perhaps by a former spouse) would be upheld if the amounts were reasonable.\(^65\) There is no need for the surviving spouse to prove that the deceased spouse had an

---

54. 9 N.E.2d 966 (N.Y. 1937).
55. *Id.* at 969.
57. Martin v. Martin, 138 S.W.2d 509 (Ky. 1940).
58. 2 S.W. 545 (Ky. 1887).
59. 13 S.W. 244 (Ky. 1890).
60. 12 Ky. L. Rptr. 636 (1890).
61. 64 S.W. 981 (Ky. 1901).
62. 104 S.W.2d 437 (Ky. 1937).
63. *Id.*
64. 217 S.W.2d 782 (Ky. 1949).
65. *Id.*
intention to defraud, however, for

[a] man is presumed to intend the natural consequences of his acts, and where the effect of his acts is to disinherit his wife from such a substantial portion of his estate as was the case here, it would be unreasonable to infer that the gift to the children was made without the intention to disinherit the wife.66

The Kentucky Supreme Court underscored its commitment to the existing rule that transfers would be deemed a fraud upon spousal rights when its election statute was set against a provision taken from the Uniform Multiple-Person Accounts Act.67 In Harris v. Rock,68 the decedent, who had had ten children with his first wife, remarried after her death.69 He divided his assets so that at his death he had joint accounts of $20,000 each with his seven surviving children and his second wife.70 The children claimed their accounts on the basis of Kentucky Revised Statutes section 391.315, which provides that amounts in a survivorship account go to the survivor unless there is a different intent expressed when the account is opened.71 When the widow asserted her spousal rights, the trial court ruled in her favor but the court of appeals reversed.72 The Kentucky Supreme Court held that a second exception, in addition to the expressed intent of the parties, must be read into Kentucky Revised Statutes section 391.315.73 The funds do not belong to the survivor named on the account "if the depositor was not legally entitled to make such a disposition of funds."74 Analogizing the right to a share of personalty to dower, the court stated "a husband has no legal right to dispose of more than one-half of his property with intent to defeat a dower claim.

---

66. Anderson v. Anderson, 583 S.W.2d 504, 505 (Ky. Ct. App. 1979). In Anderson, the deceased spouse attempted to exclude his spouse from three-fourths of his estate. Id.
67. The election statute, KY. REV. STAT. ANN. § 392.080 (Michie 1984), seemed to conflict with KY. REV. STAT. ANN. § 391.515 (Michie 1984), which was taken from the Uniform Multiple-Person Accounts Act and which had been incorporated in the UNIF. PROBATE CODE § 6-212 (amended 1993), 8 U.L.A. 401 (Supp. 1997).
68. 799 S.W.2d 10 (Ky. 1990).
69. Id. at 13.
70. Id. at 11.
72. Id.
73. Id. at 13.
74. Id. at 12.
by his widow."  

It further analogized the situation to one in which someone attempted to open an account with stolen funds: "[t]he depositor simply had no legal right to dispose of the money so deposited."  

Justices Leibson and Lambert in dissent claimed that the "inchoate dower interest" which the majority had created was unjustified and "would put in jeopardy any financial transaction with a married person and all property jointly held except where such property is jointly held with one's spouse."  

Their point seems well taken, for the majority's "solution" to the problem created by disinheritance of a spouse could create more problems than it solves. Of course, if the deceased spouse held funds in a joint account with the surviving spouse, the survivor would own such funds as surviving joint tenant and, in addition, could file a claim against the estate for a spousal share.

One method for avoiding the claims of a surviving spouse against the estate is for the spouses to execute an antenuptial or postnuptial agreement which waives any claim against the other's estate. Kentucky has long recognized the validity of such contractual property settlements which are to take effect at death. In Herron v. Cochran, the parties had the following agreement: the wife waived any dower or other interest in her husband's property at his death in lieu of receiving a life interest in his home place and one-fourth of any monies left in his estate, which husband promised to devise to her. The husband left no will so the court read the agreement as a contract to make a will and awarded the surviving wife what was therein provided. The wife wanted to take her intestate share, which would have been much more, but the court found she had relinquished her statutory rights; if she could not take under the agreement, she would get nothing.

Antenuptial agreements with respect to the disposition of property at divorce were first recognized in Kentucky in Gentry v.
However, in the accompanying case of *Edwardson v. Edwardson* the court noted that there were some limitations upon the parties' freedom to contract: the contract must be free of any material omission or misrepresentation and it must not be unconscionable at the time enforcement is sought. The personal representative who wishes to enforce the agreement bears the burden of showing that there was full and adequate disclosure of assets, that the signing of the agreement was voluntary, that there had been no duress, fraud, mistake or misrepresentation, and that the enforcement of the agreement in the present circumstances would be conscionable.

The Kentucky Supreme Court recently reaffirmed that the party relying on the contract bears the burden of proof regarding full disclosure and then found that the burden had been met where the widow was an educated woman who had been previously married and divorced, and who had served as a bookkeeper in one of her husband's companies. She had agreed to accept $1,000 in settlement of any claims for dower or maintenance; at the time of her husband's death she had assets of $1 million with monthly income of $6,300 while her husband's estate was valued between $2.5 million and $4 million. In that case the trial court found the agreement valid, the court of appeals reversed and the supreme court reinstated the circuit court's judgment. Thus, the apparent warning by one Kentucky court to those executing agreements which alter marital property rights is qualified by the assumptions and level of scrutiny which courts bring to evaluating it later. "The ingenuity of persons contemplating marriage to fashion unusual agreements, particularly with the assistance of counsel, cannot be overestimated. . . . It should be recognized, however, that trial courts have been vested with broad discretion to modify or invalidate antenuptial agreements." Waivers of statutory forced shares may not provide the escape their language suggests.

83. 798 S.W.2d 928 (Ky. 1990).
84. 798 S.W.2d 941 (Ky. 1990).
85. *Id* at 945.
86. *See id.* at 945.
88. *Id.* at 2.
89. *Id.* at 1-2.
90. *Edwardson,* 798 S.W.2d at 946.
III. CONCLUSION

When one puts together the comparatively smaller intestate share which Kentucky provides to the surviving spouse and the even smaller share for the survivor renouncing a spouse's will, with its failure to relate the share to the duration of the marriage, its severe case law concerning inter vivos transfers by a spouse (or even one contemplating marriage), and the potential arguments against the enforceability of an antenuptial or postnuptial agreement, the position of a surviving spouse becomes problematic. That position is even more difficult when the meager provisions for homestead, exempt property and family allowance are brought into the picture. The surviving spouse may choose the homestead allowance, which is $5,000 or $7,500 from surplus personalty. There is no separate family allowance. The UPC, in contrast, now provides to the surviving spouse a recommended homestead allowance of $15,000, $10,000 in exempt personalty, plus a family allowance of up to $18,000, for a total of $43,000. As Professor Bratt concluded, "Kentucky's statutorily created family protection devices . . . do not protect the decedent's family from the economic hardships caused by the death of a spouse or parent."

In adopting the Uniform Marriage and Divorce Act in 1972, Kentucky placed itself in the forefront of change. Dissolution based upon irretrievable breakdown and equitable distribution of property came to be universally accepted in the following two decades. The underlying theory of marriage as an economic partnership and recognition of multiple marriages with relationships of children to parents and step-parents should now be carried over into the statutory provisions for the ending of marriage by the death of one spouse. Kentucky's contemporary

93. KY. REV. STAT. ANN. § 391.030(2) (Michie 1984). This section allows the court to award $1,000 upon request of the family as an advancement against the $7,500 exempt property. Id.
95. Id. § 2-403.
96. Id. §§ 2-404, 2-405.
98. KY. REV. STAT. ANN. § 403.110 (Michie 1984).
dissolution law and its antiquated inheritance law combine to produce glaring inequities between spouses whose marriages end in dissolution and those whose marriages end with death. The existing spousal share provisions are especially burdensome for those with multiple marriages, for spouses who marry while young and remain married may well have ownership in survivorship form. Placing the burden upon the spouses to avoid such inequities by the careful drafting and execution of antenuptial or postnuptial agreements and related testamentary instruments rewards people who frequent lawyers and formally commit their expectations to paper. Because such behavior is not yet the norm in Kentucky or elsewhere, it is time for the General Assembly to take the initiative by developing a consistent inheritance scheme which would incorporate the expectations of spouses and at the same time express as public policy a commitment to fairness and equity. One particular facet of fairness would be gender equity, for most often it is the wife who is the victim of schemes to defeat the surviving spouse's share of an estate. This article has focused only upon items which affect fairness between spouses; further study must be done to attempt to ensure fairness to children.
NOTES

GIULIANI V. GIULER:
STEALING THE GENERAL ASSEMBLY'S THUNDER

by Jamie M. Ramsey

"There are few constitutional principles more sacred than
the doctrine of Separation of Powers."¹

I. INTRODUCTION

In the case of Giuliani v. Guiler,² the Supreme Court of
Kentucky recognized the claim of minor children for loss of
parental consortium when a parent is killed.³ Writing for a
majority of four,⁴ Justice Wintersheimer rejected the argument
that a claim of this type is a wrongful death action which may only
be recognized by the legislature under section 241 of the Kentucky
Constitution.⁵ Relying on what it claims to be a trend towards
recognition of the claim, the majority reasoned that loss of
consortium is a common law cause of action and that recognition of
a child's independent claim for loss of parental consortium as a

---

¹. Giuliani v. Guiler, 951 S.W.2d 318, 325 (Ky. 1997) (Cooper, J., dissenting). Section
27 of the Kentucky Constitution provides:
The powers of the government of the Commonwealth of Kentucky shall
be divided into three distinct departments, and each of them be confined
to a separate body of magistracy, to wit: Those which are legislative, to
one; those which are executive, to another; and those which are judicial,
to another.
KY. CONST. of 1891, § 27.
². 951 S.W.2d 318 (Ky. 1997).
³. Id. at 323. The court stated:
It is the holding of this Court that Kentucky recognizes the claim of minor children
for loss of parental consortium. The proof of such loss and the necessary proof of
monetary loss resulting therefrom are factors to be considered by the trier of fact
separate from any wrongful death claim pursued under the wrongful death
statute. A claim for loss of consortium arises from a recognition of the common law
as distinguished from statutory law.
Id.
⁴. F. Thomas Conway, Special Justice, concurred with the majority. Justice
Johnstone did not participate. Id.
⁵. Id. at 322-23.
proper development of the common law does not invade the province of the legislature. This note examines the supreme court's reasoning, focusing primarily on the court's usurpation of a legislative right and its reliance on a "trend" that does not exist.

II. BACKGROUND

A. Facts

Mary K. Giuliani died at the age of thirty-three during the birth of her fourth child. Dr. Guiler, the defendant-appellee, was her obstetrician but was not present at the time of delivery. He instructed the nurses at the hospital to induce labor and, after seeing Mary at six p.m., he decided he was not needed and left for dinner at the home of a friend. The record indicated that the nurses became more concerned about Mary's medical condition and attempted unsuccessfully to reach the doctor. Ultimately, two resident doctors who had no familiarity with the case attempted to aid the mother. Shortly after the birth, Mary Giuliani suffered a cardiac and respiratory collapse and died.

Mary's other children were nine, seven and three years of age. Their father filed a claim for wrongful death as administrator of his wife's estate, his own claim for loss of consortium, and a claim for loss of parental consortium as next friend for each of the four minor children. In a one-page summary judgment, the trial court dismissed the children's loss of consortium claim. The court of appeals affirmed the dismissal but invited the Kentucky Supreme Court to revisit the question of parental consortium. Both the circuit court and the court of

6. Id. at 318.
7. Other defendant-appellees included Baptist Health Care Systems, Inc., d/b/a Central Baptist Hospital, Richard Bennett, M.D., Velma M. Taormina, M.D., and University of Kentucky Medical Center Residents Training Program.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id. at 318.
14. Id. At the time the opinion of the court was rendered, the principal wrongful death case was still in discovery stage at the circuit court level. Id. at 319.
15. Id.
16. Id.
appeals indicated a constraint on them as a result of Brooks v. Burkeen, a supreme court decision denying the cause of action. In its opinion denying the claim, the court of appeals stated that "[w]e can only encourage our [s]upreme [c]ourt to revisit this issue in light of modern developments in this area of the law." The Kentucky Supreme Court accepted discretionary review.

B. Loss Of Consortium Claims In Kentucky Prior To The Decision In Giuliani v. Guiler

Until 1970 only a husband could maintain a cause of action in Kentucky for loss of consortium. Following the then majority of jurisdictions, Kentucky adhered to the ancient common law rule that the wife has no such cause of action. However, in 1970 the Kentucky Court of Appeals in Kotsiris v. Ling held that "a wife has a cause of action for loss of consortium of her husband resulting from an injury to the husband due to the negligent act of another." Andrew Kotsiris asserted a claim for damages against George Ling for personal injuries sustained as a result of Ling's

17. 549 S.W.2d 91 (Ky. 1977).
18. Giuliani, 951 S.W.2d at 319.
19. Id.
20. Id.
21. DAVID J. LEIBSON, KENTUCKY PRACTICE: TORT LAW § 20.4 (West 1996). While a complete historical analysis of the right to recover loss of consortium damages is beyond the scope of this note, the following is a concise history of the cause of action. Early common law recognized a cause of action in the master for the loss of a servant's services when the servant was injured by the negligence of a third party. By 1619, the Common Law Courts extended the right to a husband allowing him to recover for loss of marital services from a tortfeasor who had injured his wife. Until comparatively recently, however, there was no similar action in favor of a wife when her husband was injured. Gregg A. Guthrie, Note, Should Pennsylvania Recognize a Cause of Action for Loss of Parental Consortium?, 28 DUQ. L. REV. 697, 698 (1990). For a complete historical analysis of loss of consortium see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125, at 931-36 (5th ed. 1984).
22. 451 S.W.2d 411 (Ky. 1970).
23. Id. Before 1976, the Court of Appeals was the highest court in Kentucky.
24. Id. at 412. The first court to repudiate this ancient common law rule was the District of Columbia Circuit in Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950). Today, a majority of states have established a claim for loss of consortium for either spouse as a matter of reform in the common law or as a matter of equal protection under constitutional or statutory provisions. Currently all but three jurisdictions allow such a claim: VA. CODE ANN. §§ 55-36 (Michie 1994) (abolishing a husband's right to sue for loss of consortium); Schmeck v. City of Shawnee, 647 P.2d 1263, 1266-67 (Kan. 1982) (holding that a wife has no separate cause of action for loss of consortium); Cozart v. Chapin, 241 S.E.2d 144, 145-46 (N.C. 1978) (holding a husband has no cause of action for loss of consortium).
negligence.\textsuperscript{25} Shortly after the claim was settled, Mrs. Kotsiris brought an action against Ling seeking to recover for loss of her husband's consortium.\textsuperscript{26} While the majority of jurisdictions at the time would have denied such a claim, the Kentucky Court of Appeals felt that the considerations militating in favor of the wife's cause of action outweighed the considerations upon which the doctrine of stare decisis rests.\textsuperscript{27} Thus, the court recognized Mrs. Kotsiris' claim for loss of consortium, allowing her to recover for "loss of society, companionship, conjugal affections, and physical assistance.\textsuperscript{28}\]

In the same year, the General Assembly codified the philosophy of \textit{Kotsiris} by enacting section 411.145 of the Kentucky Revised Statutes.\textsuperscript{29} The statute provides:

(1) As used in this section "consortium" means the right to the services, assistance, aid, society, companionship and conjugal relationship between husband and wife, or wife and husband.

(2) Either a wife or husband may recover damages against a third person for loss of consortium, resulting from a negligent or wrongful act of such third person.\textsuperscript{30}

While the statute does not expressly preclude damages for loss of consortium after the death of the injured spouse, Kentucky case law decided prior to \textit{Giuliani} did.\textsuperscript{31} In \textit{Brooks v. Burkeen},\textsuperscript{32} a wife

\begin{itemize}
\item \textit{Kotsiris}, 451 S.W.2d at 411.
\item \textit{Id.}
\item \textit{Id.} at 411-12.
\item \textit{Id.} at 412. In defining the scope of the cause of action, the court stated:
In recognizing the cause of action, we feel it is necessary for us to define its scope and limitations. First, the cause does not include any right of recovery for loss of financial support by the husband. That is because the source of the wife's right to support is the husband's earning capacity, for impairment of which he is entitled to recover. Second, the cause does not include any right of recovery for nursing services rendered or to be rendered to the husband by the wife. The reason for this is that according to the general rule (which we hereby adopt) the husband is entitled to recover from the tortfeasor for the value of nursing services even though the services are rendered or to be rendered by the wife . . . . [T]he wife's recovery is limited to loss of society, companionship, conjugal affections, and physical assistance. It should be kept in mind always that the wife's recovery is for losses suffered by her.
\item \textit{Id.}
\item LEIBSON, \textit{supra} note 21, at 599.
\item KY. REV. STAT. ANN. § 411.145 (Banks-Baldwin 1996); Leibson, \textit{supra} note 21, at 599-600.
\item LEIBSON, \textit{supra} note 21, at 600.
\item 549 S.W.2d 91 (Ky. 1977).
\end{itemize}
sued for loss of consortium when her husband died as a result of the negligence of his employer and the company's foreman. The court denied the cause of action holding that well-settled law limits recovery to damages sustained before the death of the spouse. The court reasoned that "[h]is death occurred instantaneously while at work. Consequently, [the wife] lost no services, society, fellowship or affectionate relations prior to death."

In Brooks, the court also refused to recognize a child's right to recover for loss of parental consortium "because no court or legislature [at that time] in the United States ha[d] yet seen fit to recognize such an action." This principle was reaffirmed by the Kentucky Supreme Court in Adams v. Miller. In Clark v. Hauck Manufacturing Co., the supreme court again reaffirmed it's position that a loss of consortium claim ends with the death of the injured party. The court, in holding that such a claim is viable only for the period of time between the date of the injury and the date of death, stated:

The purpose is to compensate for that period of time while the injured spouse was still alive but incapable of fully participating with the other spouse in conjugal relations attendant to the marital status. To extend the damages for loss of consortium beyond the date of death would result in a double recovery for the surviving spouse beyond that which the wrongful death statute affords.

In addition to the right to sue for loss of spousal consortium in Kentucky, a surviving parent has the statutory right to recover for

---

33. Id. at 92.
34. Id.
35. Id. It was also held that the wife of the employee who was killed at work was not entitled to recover for loss of consortium because the husband and employer had elected coverage under the Workmen's Compensation Act. Id. at 92.
36. Id.
37. 908 S.W.2d 112, 116 (Ky. 1995). In addition to denying a child's right to sue for loss of parental consortium, the court also held there is no separate category for hedonic damages which are defined as "the value of the pleasure, the satisfaction, or the 'utility' that human beings derive from life, separate and apart from the labor or earnings value of life." The court recognized that there is measurable value to one's life other than his or her earning capacity, but reasoned that this value is already recoverable in the recognized category of mental suffering. Id.
38. 910 S.W.2d 247 (Ky. 1995).
39. Id. at 252.
40. Id.
loss of the child's affection and companionship in a wrongful death action even though no such right exists for the child when a parent is negligently killed.\footnote{41} Section 411.135 of the Kentucky Revised Statutes provides:

In a wrongful death action in which the decedent was a minor child, the surviving parent, or parents, may recover for loss of affection and companionship that would have been derived from such child during its minority, in addition to all other elements of the damage usually recoverable in a wrongful death action.\footnote{42}

\textbf{C. Holding By The Supreme Court Of Kentucky In Giuliani v. Guiler}

Recognizing that the right to recover for loss of parental consortium did not exist in Kentucky, the supreme court was faced with the question of whether to allow such a cause of action.\footnote{43} The court was persuaded by the Giuliani children's argument, through counsel, that the loss of a parent's love and affection is devastating to any child and, therefore, children should be permitted to bring a loss of consortium claim to recover from the negligent wrongdoer who caused the harm.\footnote{44} In reaching its decision to allow such a claim, the court reasoned that:

\begin{quote}
[L]oss of consortium is a judge-made common law doctrine which this Court has the power and duty to modify and conform to the changing conditions of our society. When the common law is out of step with the times, this Court has the responsibility to change that law. Development of the common law is a judicial function and should not be confused with the expression of public policy by the legislature.\footnote{45}

Kentucky has recognized the importance of children to the family and the changing nature of the parent-child relationship.\footnote{46} Through legislative enactment, the General Assembly has made it the express public policy of this Commonwealth to protect and care
\end{quote}
for children.\textsuperscript{47} The legislature has also recognized the individuality of children and their value to the family by providing parents a statutory right to recover for the loss of a child's affection and companionship in a wrongful death action.\textsuperscript{48} In light of this, the majority reasoned that "[i]t is a natural development of the common law to recognize the need for a remedy for those children who lose the love and affection of their parents due to the negligence of another."\textsuperscript{49} Expanding the common law to provide a remedy for this loss would end the "perpetrat[jion of] an anachronistic and sterile view of the relationship between parents and children."\textsuperscript{50}

In recognizing a child's right to recover damages for loss of parental consortium, the supreme court overruled its prior holdings in \textit{Brooks} and \textit{Adams}.\textsuperscript{51} The court understood and appreciated that the trial court and the intermediate appellate court could not have recognized a claim for loss of parental consortium because of these cases.\textsuperscript{52} However, the court stated that "[t]he premise for the \textit{Brooks} rationale no longer exists."\textsuperscript{53} Since 1977, when the court decided \textit{Brooks}, fifteen courts of last resort and two state legislatures have recognized a child's claim for loss of parental consortium.\textsuperscript{54} Therefore, the rationale that "no

\textsuperscript{47} \textit{Id.} \textit{Ky. Rev. Stat. Ann.} § 600.010 (Banks-Baldwin 1996), provides in relevant part: (2) KRS Chapters 600 to 645 shall be interpreted to effectuate the following express legislative purposes: (a) The Commonwealth shall direct its efforts to the strengthening and encouragement of family life for the protection and care of children; to strengthen and maintain the biological family unit; and to offer all available resources to any family in need of them; (b) It also shall be declared to be the policy of this Commonwealth that all efforts shall be directed toward providing each child a safe and nurturing home; (c) The court shall show that other less restrictive alternatives have been attempted or are not feasible in order to ensure that children are not removed from families except when absolutely necessary;


\textsuperscript{49} \textit{Giuliani}, 951 S.W.2d at 319.

\textsuperscript{50} \textit{Id.} (quoting Gallimore v. Children's Hospital Medical Center, 617 N.E.2d 1052 (Ohio 1993)).

\textsuperscript{51} \textit{Id.} \textit{See discussion supra Part II.B.}

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{Id.} The court cited the following as representative of the "trend" towards recognition of the claim: Hibphshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987) (father was severely injured); Villareal v. State Dept. of Transp., 774 P.2d 213
court or legislature in the United States has yet seen fit to recognize such action" no longer holds true. 55

Justice Wintersheimer began the court's analysis of the issue by stating:

The doctrine of stare decisis does not commit us to sanctification of ancient fallacy. Stare decisis does not preclude all change. The principle does not require blind imitation of the past or adherence to a rule which is not suited to present conditions. 56

The "ancient fallacy" in the present case was the idea that children have no identity as individuals and as members of the family separate from their parents. 57 Believing this view had never been true, the court stated that each child in Giuliani had suffered a loss that is separate and distinct from the loss suffered by their siblings and from the loss suffered by their father. 58 "It is long overdue that we recognize the essential personhood of each individual while giving homage and deference to their inclusion in the family." 59

The majority rejected the dissent's argument that a claim for loss of love and affection when a parent is killed should be


55. Giuliani, 951 S.W.2d at 320.
56. Id. (citing Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984)).
57. Id.
58. Id.
59. Id.
treated as an action for wrongful death, holding instead that loss of consortium is a common law cause of action.\(^{60}\) Relying on its decisions in *Dietzman v. Mullin*\(^{61}\) and *Kotsiris v. Ling*,\(^{62}\) the court stated that it had the authority and responsibility to modify the common law when necessary.\(^{63}\) "Common law grows and develops and must be adapted to meet the recognized importance of the family, and the necessity for protection by the law of the right of a child to a parent's love, care and protection so as to provide for the complete development of the child."\(^{64}\) Given the legislature has expressed a public policy of strengthening and encouraging the family,\(^{65}\) the court believed it only logical to recognize a child's right to be compensated when harmed by the wrongdoing of a third party.\(^{66}\)

Dismissing the argument that judicial recognition of a claim for loss of parental consortium is an invasion of the right of the legislature as without merit following the *Kotsiris* decision, the court stated *Kotsiris* established that changing a common law rule so as to provide for loss of consortium is fully within the competence of the judicial function.\(^{67}\) While it is beyond

---

\(^{60}\) *Giuliani*, 951 S.W.2d at 320.

\(^{61}\) 57 S.W. 247 (Ky. 1900). Originally, at early common law, the action for loss of consortium protected only the economic interest of the husband in his wife. The court in *Dietzman* expanded that concept to include the loss of a wife's companionship, security and love. *Id.*

\(^{62}\) 451 S.W.2d 411 (Ky. 1970). In *Kotsiris*, the court expanded the cause of action for loss of consortium to allow a wife to recover for the loss of her husband's consortium. See discussion supra Part II.B.

\(^{63}\) *Giuliani*, 951 S.W.2d at 320. The majority noted that after it used its authority to modify the common law in *Kotsiris*, the legislature codified the decision in Section 411.145 of the Kentucky Revised Statutes. *Id.* The court also noted that recently the legislature on its own initiative recognized a claim for loss of consortium for a parent upon the death of a child in Section 411.135 of the Kentucky Revised Statutes. *Id.*

\(^{64}\) *Id.* (citing Theama v. Kenosha, 344 S.W.2d 513 (Wisc. 1984)).

\(^{65}\) See KY. REV. STAT. ANN. § 600.010 (Banks-Baldwin 1996). See also supra text accompanying note 47.

\(^{66}\) *Giuliani*, 951 S.W.2d at 320. Relying on City of Louisville v. Louisville Seed Co., 433 S.W.2d 638 (Ky. 1968), the majority stated: "It is the purpose of all tort law to compensate one for the harm caused by another and to deter future wrongdoing." *Id.*

\(^{67}\) *Id.* The court also stated that such a responsibility has long been recognized in Kentucky.

The law is both a progressive and resourceful science, and is ever alert to accommodate itself to the constant changing circumstances and conditions of society... [W]hen it is necessary... to employ a remedy to fit alternative situations and conditions, it is not only proper, but it is also the duty of courts to do so to the end that justice may be administered.

Graham v. John R. Watts and Son, 36 S.W.2d 839 (Ky. 1931). "We do not think the
challenge that public policy is determined by the constitution and the legislature through the enactment of statutes, the court reasoned that recognition of loss of consortium is a proper development of the common law that does not invade the province of the legislature to determine public policy questions.\textsuperscript{68}

When the constitution and legislature are silent as to public policy, the decision can be made by the courts.\textsuperscript{69} "In the absence of a legislative decree, courts may adopt and apply public policy principles."\textsuperscript{70} The court reasoned that there is no conflict between the legitimate development of the common law by the courts which takes proper recognition of the primary role of the legislature in the expression of public policy.\textsuperscript{71} It was further stated that:

The common law and public policy are compatible legal principles, they complement each other . . . . Our opinion today interprets the legislatively expressed public policy and conforms the common law to the public policy. There is no usurpation of the role of the legislature.\textsuperscript{72}

The majority maintained that recognition of a child's right to recover for loss of parental consortium is not exclusively a legislative prerogative.\textsuperscript{73} Loss of consortium is a common law cause of action and "[w]hen the common law is out of step with the times, this Court has a responsibility to conform [it]."\textsuperscript{74} The court further stated that development of the common law is not

---

\textsuperscript{68} Giuliani, 951 S.W.2d at 321.
\textsuperscript{69} Id. (citing Chreste v. Louisville Ry. Co., 180 S.W. 49 (Ky. 1915); Kentucky State Fair Bd. v. Fowler, 221 S.W.2d 610 (Ky. 1949); and Commonwealth v. Wilkinson, 828 S.W.2d 610 (Ky. 1992)).
\textsuperscript{70} Id. (citing Owens v. Clemens, 408 S.W.2d 642 (Ky. 1966)).
\textsuperscript{71} Id.
\textsuperscript{72} Id. The court also stated that the language in Wilkinson, noted by the dissent, is clearly consistent with the reasoning of the majority opinion. The full text of the quote from Wilkinson states: "[J]udicially created common law must always yield to the superior policy of legislative enactment and the constitution." Id.
\textsuperscript{73} Giuliani, 951 S.W.2d at 321.
\textsuperscript{74} Id.
the exclusive province of the legislature and its failure to recognize the cause of action by statute does not render the judiciary incompetent to enact the necessary change.\textsuperscript{75}

Borrowing language from \textit{Weitl v. Moes},\textsuperscript{76} an Iowa decision, the majority recognized that a child's claim for loss of parental consortium is a reciprocal of a parent's claim under section 411.135 of the Kentucky Revised Statutes.\textsuperscript{77} Maintaining there is no legal distinction between the two claims, the court stated:

To recognize a right of recovery for a parent's loss of child's consortium and not for a child's loss of parent's consortium, runs counter to the fact that in any disruption of the parent-child relationship, it is probably the child who suffers most... Legal redress may be the child's only means of mitigating the effect of that loss.\textsuperscript{78}

In distinguishing a claim for loss of parental consortium from a claim for damages under the wrongful death statute, the majority relied upon \textit{Department of Education v. Blevins},\textsuperscript{79} which held that a parent's statutory claim for loss of a child's consortium under section 411.135 of the Kentucky Revised Statutes is independent and separate from a wrongful death action and shall not be treated as a single claim.\textsuperscript{80} "Even though a wrongful death action and a loss of consortium claim may arise from the same injury, they belong to separate legal entities and consequently should not be treated as a single claim."\textsuperscript{81} The

\textsuperscript{75} \textit{Id}. The court noted it was aware that a bill was introduced in the 1996 Kentucky General Assembly to modify section 411.145 of the Kentucky Revised Statutes so as to permit a child to recover damages for loss of consortium, but Senate Bill No. 139 never made it out of committee. \textit{See Legislative Record Vol. 22, No. 85 at 23}. The court here reasoned that the failure of the legislature to act does not negatively impact the authority of the court to adopt and conform the common law. It stated that "a somewhat similar situation involving legislative inaction existed in 1984 when Hilen v. Hays was rendered establishing comparative negligence." \textit{Guiliani, 951 S.W.2d at 321.}

\textsuperscript{76} 331 N.W.2d 259 (Iowa 1981). While the plurality opinion in \textit{Weitl} recognized an independent common law cause of action for loss of parental consortium when a parent is injured or killed, the case was overruled two years later in \textit{Audubon-Exira Ready Mix, Inc., v. Illinois Cent. Gulf R.R. Co.}, 335 N.W.2d 148 (Iowa 1983), which held that a claim for loss of consortium should be brought by the decedent's administrator under the wrongful death statute which allowed for recovery of such losses. \textit{See discussion infra Part III.C.}

\textsuperscript{77} \textit{Giuliani, 951 S.W.2d at 321. See discussion supra Part II.B.}

\textsuperscript{78} \textit{Giuliani, 951 S.W.2d at 321} (citing \textit{Weitl v. Moes, 311 N.W.2d 258 (Iowa 1981)}).

\textsuperscript{79} 707 S.W.2d 782 (Ky. 1986).

\textsuperscript{80} \textit{Giuliani, 951 S.W.2d at 322.}

\textsuperscript{81} \textit{Id}. 
court noted that damages for wrongful death are not meant to include the family's loss, as damages under that statute compensate for loss of the decedent's earning power and do not include the affliction to the family resulting from the wrongful death.82

D. The Dissenting Opinion

Writing for the dissent, Justice Cooper argued that a child's claim for loss of parental consortium when a parent is negligently killed is "neither more nor less than" an action for the wrongful death of that parent.83 Therefore, this action may only be recognized by the General Assembly as this authority is vested solely in the legislature by section 241 of the Kentucky Constitution.84 Justice Cooper's dissenting opinion is discussed further in Part III of this note.

III. ANALYSIS

In recognizing a child's right of action for loss of parental consortium, Justice Wintersheimer devotes a significant portion of the majority opinion to two main arguments: (1) loss of consortium is a common law cause of action and (2) recognition of a minor child's independent claim for loss of parental consortium as a proper development of the common law does not invade the province of the legislature. While the majority opinion is persuasive at times, Justice Cooper's dissenting opinion ultimately proves to be the better view.

A. There Has Never Been A Common Law Right Of Action For Wrongful Death In Kentucky.85

The common law of England enforced three restrictive rules concerning the death of a person in personal injury cases:

1. If the tortfeasor died before the victim recovered for the tort, the victim's right of action died with him.

---

82. See Louisville & Nashville R.R. Co. v. Eakins' Adm'r, 45 S.W. 529 (Ky. 1898).
83. Giuliani, 951 S.W.2d at 326 (Cooper, J., dissenting). Justice Lambert and Chief Justice Stephens joined with the dissent.
84. Id. at 324.
85. Id. at 323 (citing Smith's Adm'r v. National Coal & Iron Co., 117 S.W.2d 280 (Ky. 1909); Eden v. Lexington & Frankfort R.R. Co., 53 Ky. (14 B. Mon.) 204 (1859)).
2. If the victim of the tort himself died (from whatever cause) before he recovered in tort, the victim's right of action also died.

3. If the tortfeasor caused a victim's death, relatives and dependents of the victim who were deprived of financial support or who suffered emotional loss, had no cause of action of their own. 86

All three of these rules have now been changed in most American states. 87 The first two rules have been changed by acts known as "survival statutes," which permit the cause of action the victim owned at the time of the tort to survive so that it may be carried on if either the plaintiff or defendant dies. 88

The third rule has been changed by acts known as "wrongful death" statutes. 89

In 1854, the Kentucky legislature enacted a statute allowing an action for recovery, which vested in the widow, heir or personal representative of the deceased, for death arising from the neglect or misconduct of railroad companies and others. 90

This statute, as amended, ultimately became what is now section 411.130 of the Kentucky Revised Statutes. 91 In 1866, the legislature enacted a statute which permitted a widow and children to recover "for the death of their husband/parent caused by the careless or wanton or malicious use of a firearm, provided the perpetrator was not acting in self-defense." 92 This statute became what is now section 411.150 of the Kentucky Revised Statutes. 93

86. KEETON ET AL., supra note 21, § 125A, at 940. For an in-depth discussion of survival and wrongful death statutes, see §§ 125A, 126 and 127.

87. Id. at 942.

88. Id.

89. Id.

90. Giuliani, 951 S.W.2d at 323 (Cooper, J., dissenting) (citing 1 Acts 1853-54, p. 175, ch. 964). The first such "wrongful death" statute in Kentucky was adopted in 1851 granting a cause of action to a widow and minor child of one killed in a duel. Id.

91. Id. See infra note 98 and accompanying text.

92. Giuliani, 951 S.W.2d at 323.

93. Id. For a more detailed history of Kentucky's wrongful death statutes, see Sturgeon v. Baker, 227 S.W.2d 202 (Ky. 1950), Jordan's Adm'r v. Cincinnati, N.O. & T.P. Ry. Co., 11 S.W. 1013 (1889), and O'Donoghue v. Akin, 63 Ky. (2 Duv.) 478 (1866). Id. Section 411.150 of the Kentucky Revised Statutes provides:

The surviving spouse and child, under the age of eighteen (18) or either of them, of a person killed by the careless, wanton or malicious use of a deadly weapon, not in self-defense, may have an action against the person who committed the killing and all others aiding or promoting, or any one or more of them. In such actions the
B. Invading The Province Of The Legislature

Recovery for wrongful death is a constitutional right in Kentucky. 94 Section 241 of the Kentucky Constitution provides: Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person. 95

This language clearly vested in the legislature the right to "determine what causes of action would be permitted, who would be authorized to bring those actions, what damages would be recoverable, and to whom the damages would belong." 96

The General Assembly responded to this language by enacting Chapter 1, Section 6 of the Kentucky Statutes of 1903, now section 411.130 of the Kentucky Revised Statutes, which provided first that an action for wrongful death premised upon the negligence or wrongful act of another could be brought only

---

94. LEIBSON, supra note 21, § 20.1, at 588.
95. KY. CONST. of 1891, § 241 (emphasis added). Justice Cooper noted in his dissenting opinion that the majority opinion quotes only the first sentence. Giuliani, 951 S.W.2d at 324 (Cooper, J., dissenting).
96. Giuliani, 951 S.W.2d at 324 (Cooper, J., dissenting). As a result of a decision of the Jefferson Circuit Court declaring a section of the wrongful death act unconstitutional because it purportedly discriminated against railroads, the delegates to the 1890 constitutional convention had concerns as to the future viability of an action in tort for recovery for wrongful death. Id. "What is clear from the convention debates is that the delegates trusted neither the legislature nor the courts to protect the statutory cause of action for wrongful death." Id. In this atmosphere, the delegates adopted Section 241 of the present Kentucky Constitution. Id. If the legislature did not act on its authority granted to it by the provision, then:

Section 241 was self-executing, i.e., the cause of action was constitutionally created, the personal representative had sole authority to bring the action, and the damages belonged to the estate of the deceased to be distributed in accordance with his last will and testament, or, if none, in accordance with the laws of descent and distribution.

Id. (citing Thomas v. Royster, 32 S.W. 613 (Ky. 1895)).
by the personal representative of the deceased. 97 It then
provided how the damages recovered in that action would be
distributed. 98

"The damages recoverable in the wrongful death action have
been clearly defined and limited almost from its inception. 99
The measure of such damages was established as being the sum
which would fairly compensate the decedent's estate for the
destruction of his ability to earn money, and specifically not for
the affliction which had overcome the decedent's family as a
result of the wrongful death. 100 The Kentucky Supreme Court
has stated:

There is no rule of law under which the estate of a
decedent's father of a dozen children can properly recover,
on account of his death, more than the estate of such a
father of one child or none. The real question . . . is, what
was the value of the decedent's life to his estate? [a]nd
the number of his children can have no legitimate bearing
upon the action. 101

The fact that the personal representative represents only the
decedent's estate, and that the estate could recover only for the
loss of the decedent's life, not for damages personal to his
survivors, offers support for this reasoning. 102 Prior to the
decision in Giuliani, the supreme court consistently held there
could be no cause of action for loss of services or loss of
consortium as a result of a wrongful death, absent a legislative
enactment. 103

97. Id.
98. Id. Section 411.130(1) of the Kentucky Revised Statutes provides:
Whenever the death of a person results from an injury inflicted by the negligence
or wrongful act of another, damages may be recovered for the death from the
person who caused it, or whose agent or servant caused it. If the act was willful or
the negligence gross, punitive damages may be recovered. The action shall be
prosecuted by the personal representative of the deceased.
KY. REV. STAT. ANN. § 411.130 (Banks-Baldwin 1996). Section 411.130(2) then lists the
parties to whom the recovery shall be disbursed. Id.
100. Id. (citing Louisville & N.R. Co. v. Eakin's Adm'r, 45 S.W. 529 (Ky. 1898)). See
also Giuliani, 951 S.W.2d at 324-25 (Cooper, J., dissenting).
101. Giuliani, 951 S.W.2d at 325 (Cooper, J., dissenting).
102. Id. "Kentucky's wrongful death statute is not a survivor's loss statute, so it does
not provide a basis for extending a right of recovery for minor children for loss of parental
care." Id. (citing Adams v. Miller, 908 S.W.2d 112 (Ky. 1995) (Leibson, J., dissenting)).
103. Id. See Brooks v. Burkeen, 549 S.W.2d 91 (Ky. 1977); Gregory v. Illinois Cent. R.
Co., 80 S.W. 795 (1904); Harris v. Kentucky Lumber Co., 45 S.W. 94 (Ky. 1898).
In 1968, the General Assembly enacted section 411.135 of the Kentucky Revised Statutes, which, as stated above, allows a parent of a deceased child whose death resulted from the wrongful act of another to bring an action for the loss of affection and companionship that would have been derived from that child during minority. In Department of Education v. Blevins, the Kentucky Supreme Court held that by enacting section 411.135, the General Assembly created a new and separate statutory cause of action for the loss suffered by surviving parents rather than merely enhancing the damages recoverable for wrongful death under section 411.130. The constitutionality of this statute was upheld as being within the authority granted to the legislature by section 241 of the Kentucky Constitution.

The majority in Giuliani maintains that Blevins established that a "parent's claim for loss of a child's consortium is independent and separate from a wrongful death action and shall not be treated as a single claim." Relying on this statement, the majority then concludes that since a parent's statutory claim for loss of a child's consortium is treated as separate from a wrongful death action, a child's judicially created claim for loss of parental consortium should not be treated as a wrongful death claim subject to section 241 of the Kentucky Constitution. This conclusion, however, is unfounded.

Section 411.135 of the Kentucky Revised Statutes begins with the phrase, "[i]n a wrongful death action in which the decedent was a minor, the surviving parent, or parents, may recover . . . ." The supreme court in Blevins interpreted this language to mean that in a case where wrongful death of a minor child has occurred, the surviving parents have the independent statutory right to recover for the loss of affection and companionship of that child "in addition to all other elements of the damage usually recoverable in a wrongful death

104. Giuliani, 951 S.W.2d at 325. See also Blevins, 707 S.W.2d at 783.
105. 707 S.W.2d at 783.
106. Giuliani, 951 S.W.2d at 325 (Cooper, J., dissenting).
107. Giuliani, 951 S.W.2d at 322.
108. Id.
The parents' claim for loss of consortium when their child is negligently killed is a statutory cause of action which was created for the benefit of the surviving parents. While the claim is separate in that it must be brought by the parents rather than the personal representative on behalf of the decedent's estate, the language of section 411.135 provides that the claim is still an action for wrongful death. The enactment of this statute was clearly within the legislature's authority, as section 241 of the Kentucky Constitution vests the legislature with the right to determine what causes of action are permitted, who may bring those actions, what damages are recoverable, and to whom the damages will belong. It therefore follows that the Giuliani court, in allowing a common law cause of action for loss of parental consortium when a parent is killed, has clearly invaded the province of the legislature, as this authority is vested in the legislature by the Kentucky Constitution.

The General Assembly chose not to exercise this authority as recently as the 1996 regular session when it rejected Senate Bill No. 139 which would have created a cause of action for children to recover for loss of parental consortium. The majority maintained that the "failure of the legislature to act does not negatively impact the authority of [the] Court to adopt and conform the common law." However, the General Assembly's rejection of the claim was "within the legislature's constitutionally granted prerogative." Characterizing the General Assembly's action as inaction does not give the court the authority to exceed its jurisdiction by invading the province of the legislature.

110. Blevins, 707 S.W.2d at 784.
111. Id. at 785.
112. Id. at 784. The statute begins: "In a wrongful death action . . . ." KY. REV. STAT. ANN. § 411.135 (Banks-Baldwin 1996).
113. Giuliani, 951 S.W.2d at 324 (Cooper, J., dissenting).
114. See Id. Senate Bill No. 139 would have modified section 411.145 of the Kentucky Revised Statutes so as to allow a cause of action for loss of parental consortium. See Id. at 321.
115. Giuliani, 951 S.W.2d at 321.
116. Id. at 325 (Cooper, J., dissenting).
117. Id. The majority maintains that "[a] similar situation involving legislative inaction existed in 1984 when Hilen v. Hays was rendered establishing comparative negligence." Giuliani, 951 S.W.2d at 321. However, the supreme court was acting within its jurisdiction when it decided Hilen, thus making that "situation" quite different from
Until Giuliani, the supreme court has "zealously protected the constitutionally defined domains of each branch of government against intrusions by the others."118 As Justice Cooper notes in his dissenting opinion, the court has been particularly cautious when asked to invade the rights of the legislature, even when the legislature may have made a bad decision, so long as the decision was not unconstitutional.119 Our supreme court has stated:

[T]he fact that the legislature may make a wrong decision is no reason why the judiciary should invade what has been designated as the exclusive domain of another department of government . . . . With respect to this subject matter, the people have reposed that responsibility in the legislature. The courts are without jurisdiction to review its solemn determination.120

Establishing a cause of action for recovery for wrongful death, whether it be for the value of the decedent's life or for the loss of a parent's love and affection, is the exclusive domain of the legislature. While the court obviously believes the General Assembly made a poor decision in rejecting Senate Bill No. 139, which would have created a cause of action for loss of parental consortium, the court is without jurisdiction to enact it by judicial proclamation.

While the majority relies upon Kotsiris v. Ling as support for its expansion of the common law into the constitutionally granted province of the legislature, such reliance is misplaced.121 In Kotsiris, the supreme court recognized a wife's common law cause of action for loss of her husband's consortium as a result of serious, but not fatal injuries.122 "Since that action was not a claim for wrongful death, section 241 [of the Kentucky Constitution] was not implicated by [the court's] decision."123
The majority properly recognizes that loss of consortium is a common law cause of action and that the court has the "authority and responsibility to modify loss of consortium as a common law doctrine when necessary."124 Such was the case when the court decided Hilen v. Hays which established the doctrine of comparative negligence in the Commonwealth.125 However, since contributory negligence was developed as a defense at common law126 and the authority over this area of the law is not constitutionally granted to the legislature, the modification and development of that doctrine resulting from the decision in Hilen was within the court's jurisdiction. In Giuliani however, the court's expansion of the common law to allow an independent cause of action for loss of parental consortium when a parent is fatally injured is an illegitimate invasion of an exclusive province of the Kentucky General Assembly as such an action is "neither more nor less than" an action for wrongful death.127

child's claim for loss of parental consortium. These cases created a common law cause of action for a child to recover for loss of parental consortium when a parent is seriously, but not fatally injured. Additionally, none of the jurisdictions cited by the majority has a constitutional provision similar to section 241 of the Kentucky Constitution. See discussion infra Part III.C.

124. Giuliani, 951 S.W.2d at 320.
125. 673 S.W.2d 713 (Ky. 1984). The court held:

Where contributory negligence has previously been a defense, it is supplanted by the doctrine of comparative negligence. In such cases contributory negligence will not bar recovery but shall reduce the total amount of the award in the proportion that the claimant's contributory negligence bears to the total negligence that caused the damages. The trier of fact must consider both negligence and causation in arriving at the proportion that negligence and causation attributable to the claimant bears to the total negligence that was a substantial factor in causing the damages.

Id. at 720. The General Assembly later codified the doctrine of comparative negligence and allocation of fault. See KY. REV. STAT. ANN. § 411.182 (Banks-Baldwin 1996).


Id. It appears the first American case was Smith v. Smith, 1824, 19 Mass. (2 Pick.) 621. Id.

127. Giuliani, 951 S.W.2d at 326 (Cooper, J., dissenting). Section 28 of the Kentucky Constitution provides:

No person or collection of persons, being of one of those departments [legislative, executive and judicial], shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

KY. CONST. of 1891, § 28.
C. There Is No Trend Towards Expanding The Common Law To Include A Claim For Loss Of Parental Consortium When A Parent Is Negligently Killed

Particularly unpersuasive is the court's reliance on what it claims to be a national trend towards recognition of a child's claim for loss of parental consortium.\(^{128}\) Under the guise of this trend, the court created an independent common law cause of action for a child to recover for loss of consortium when a parent is negligently killed.\(^{129}\) However, every case cited by the majority as representative of this trend either (1) recognized a common law cause of action when a parent is seriously, but not fatally injured, or (2) interpreted the states existing wrongful death statute to include damages for loss of parental consortium.\(^{130}\) A closer look at a sampling of these "trend setting" cases shows that in reality, there is no trend supporting our supreme court's holding in Giuliani.

In Ferriter v. Daniel O'Connel's Sons, Inc.,\(^{131}\) which was the first\(^{132}\) court to recognize a child's right to recover for loss of parental consortium, Michael Ferriter was seriously, but not fatally injured as a result of the negligence of his employer.\(^{133}\) His children and wife brought an action to recover for loss of his consortium and society.\(^{134}\) At that time in Massachusetts, children were persons entitled by statute to recover for loss of the reasonably expected society of the decedent in a wrongful death action.\(^{135}\) However, a child could not recover such damages

\(^{128}\) Giuliani, 951 S.W.2d at 319-20. The majority states:
The premise for the Brooks rationale no longer exists. Since 1977, when Brooks was decided, 15 courts and two state legislatures have recognized the claim of children for loss of parental consortium. The trend toward recognition can be found in the following cases . . . . Id.

\(^{129}\) Id. at 323. "A claim for loss of parental consortium arises from a recognition of the common law as distinguished from statutory law." Id.

\(^{130}\) See cases cited supra note 54.

\(^{131}\) 413 N.E.2d 690 (Mass. 1980).

\(^{132}\) Actually, the Michigan Court of Appeals, in Berger v. Weber, 267 N.W.2d 124 (Mich. Ct. App. 1978), was the first court to recognize the claim. However, the Massachusetts case of Ferriter v. Daniel O'Connell's Sons, Inc., was decided before the Michigan Supreme Court affirmed the appellate court's decision. Berger v. Weber, 303 N.W.2d 424 (Mich. 1981). But as properly cited in Ferriter, Michigan was actually the first state to recognize the cause of action.

\(^{133}\) Ferriter, 413 N.E.2d at 691.

\(^{134}\) Id.

\(^{135}\) Id. at 695. See MASS. GEN. LAWS ch. 229, § 2.
if the parent was seriously, but not fatally injured.\textsuperscript{136} Since a child could already recover under the state's wrongful death statute for loss of consortium, the Supreme Court of Massachusetts expanded the common law to allow a similar cause of action if the parent was seriously, but not fatally injured.\textsuperscript{137} The court reasoned:

We think it entirely appropriate to protect the child's reasonable expectation of parental society when the parent suffers negligent injury rather than death . . . . Protecting a child's need for parental love and nurture is the express legislative policy of this Commonwealth.\textsuperscript{138}

Thus, in response to public policy as established by the legislature, the Supreme Judicial Court of Massachusetts expanded the common law which "has been nearly silent concerning a child's right to recover damages for loss of parental consortium."\textsuperscript{139}

The court's action in \textit{Ferriter} was not an invasion of a legislative right as recovery for loss of consortium for a non-fatal injury is a common law cause of action. "In a field long left to the common law, change may well come about by the same medium of development."\textsuperscript{140} The Kentucky Supreme Court, however, expanded the common law into a "field" constitutionally granted to the General Assembly by allowing the cause of action when a parent is killed.

Similarly, in \textit{Theama v. Kenosha},\textsuperscript{141} minor children brought an action for loss of care, society, companionship, protection, training and guidance when their father suffered severe injuries to the head and internal organs resulting in permanent damage to the brain.\textsuperscript{142} Under Wisconsin common law, no such cause of action existed when a parent was injured.\textsuperscript{143} At the trial level, the court reasoned that because a minor child had no independent cause of action under the wrongful death statute for the death of a parent when the other parent survives, the court

\begin{itemize}
\item \textsuperscript{136} \textit{Ferriter}, 413 N.E.2d at 691.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.} at 695.
\item \textsuperscript{139} \textit{Id.} at 694.
\item \textsuperscript{140} \textit{Id.} at 695.
\item \textsuperscript{141} 344 N.W.2d 513 (Wis. 1984).
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} \textit{Id.} at 514.
\end{itemize}
could not justify an independent common law action for loss of society and companionship when both the children's father and mother were still living, in spite of the permanency of the father's injuries.\textsuperscript{144} On appeal, the Wisconsin Supreme Court stated that it would not have been difficult for the court to deny the children a cause of action.\textsuperscript{145} It could have easily adopted the trial court's reasoning that because the children would have no action under the wrongful death statute because their mother survived, surely they should have no such claim when their injured father survives.\textsuperscript{146} However, the court reasoned that:

\[ \text{[T]his court recognize[s] that a cause of action for wrongful death is solely dependent upon the statute for its existence, the wrongful death action being a creature of the legislature. But we have also recognized that the rule denying recovery for loss of society and companionship [when a parent is negligently injured] was created by the courts and not the legislature, and it is, therefore, as much our duty as the legislature's to change the law if it no longer meets society's needs.}\textsuperscript{147} \]

The Supreme Court of Wisconsin established a common law right of action for loss of parental consortium when a parent suffers a non-fatal injury.\textsuperscript{148} In doing so, the court recognized that an action for wrongful death is a "creature of the legislature," but reasoned that recovery for non-fatal injuries developed at common law.\textsuperscript{149} The Wisconsin court did not create an independent common law cause of action for loss of parental consortium when a parent is negligently killed.\textsuperscript{150}

In \textit{Romero v. Byers},\textsuperscript{151} the Supreme Court of New Mexico interpreted the state's existing wrongful death statute to include loss of guidance and counseling by a minor child as a pecuniary

\begin{itemize}
\item \textsuperscript{144} \textit{Id.}
\item \textsuperscript{145} \textit{Id.} at 518.
\item \textsuperscript{146} \textit{Theama}, 344 N.W.2d at 518.
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} \textit{Id.} In addition, the court stated: "[w]e acknowledge that this newly created cause of action may be expanded by the legislature, or that it may abolish the right or set a ceiling on the amount recoverable, similar to the wrongful death statute." \textit{Id.} at 522.
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} 872 P.2d 840 (N.M. 1994).
\end{itemize}
injury recoverable under the statute. The court did not establish an independent common law cause of action for loss of parental consortium when a parent is fatally injured. Therefore, reference to this case by the Kentucky Supreme Court as representative of a trend towards recognition of an independent cause of action for minor children is misleading.

Similarly, in *Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Co.*, the Iowa Supreme Court overruled a prior plurality opinion which granted a child the right to bring an independent common law cause of action for loss of consortium when a parent is injured or killed. The court held that a claim for loss of parental consortium should be brought by the decedent's administrator under the wrongful death statute which allowed for recovery of such losses. Again, as in *Romero*, the court merely interpreted the state's wrongful death statute to include recovery for loss of parental consortium and expressly rejected a child's independent common law right to bring the action.

What is even more troubling about the Kentucky Supreme Court's reliance on these cases is that none of these jurisdictions has a constitutional provision similar to section 241 of the Kentucky Constitution. Therefore, even if every jurisdiction cited by the majority recognized an independent common law cause of action for loss of parental consortium when a parent is fatally injured, reference to these cases would still be unpersuasive because, in Kentucky, the authority and "responsibility for determining who may recover what damages for the wrongful death of another" is constitutionally granted to the legislature. These cases would be persuasive, however, if the Kentucky Supreme Court attempted to either expand the common law to include a loss of parental consortium claim in a non-fatal injury case or interpret the Kentucky wrongful death statute as allowing recovery for such loss. However, the

152. *Id.* at 846.
153. 335 N.W.2d 148 (Iowa 1983).
154. *Id.* at 152. The court stated: "This disposition requires a retraction of the child's independent claim for parental consortium, granted in *Weitl.*" *Id.*
155. *Id.*
156. *Id.*
157. *See Giuliani*, 951 S.W.2d at 326 (Cooper, J., dissenting).
158. *Id.* at 325-26.
supreme court attempted neither in Giuliani. It therefore follows that any reference by the court to these cases as representative of the "trend towards recognition" is misleading and suspect.

D. Questions Left Unanswered

The recognition of this new common law cause of action, which allows a child to recover for loss of parental consortium when a parent is fatally injured, raises a number of questions. Since the Kentucky Supreme Court found cases from other jurisdictions allowing such a claim when a parent is seriously, but not fatally injured, to be more persuasive than the Kentucky Constitution and Kentucky precedent, perhaps those cases could shed some light on some of the questions raised.

1. What factors are to be considered by the trier of fact in determining the amount of damages?

In Reagan v. Vaughn,\textsuperscript{159} the Texas Supreme Court held that children may recover for loss of consortium when a third party causes serious, permanent, and disabling injuries to their parent.\textsuperscript{160} The court stated that in order to successfully maintain a claim for loss of consortium resulting from injury to the parent-child relationship, the plaintiff must show that the defendant physically injured the child's parent in a manner that would subject the defendant to liability.\textsuperscript{161} In Texas, the child may recover for such non-pecuniary damages as loss of the parent's love, affection, protection, emotional support, services, companionship, care, and society.\textsuperscript{162} Factors that the jury may consider in determining the amount of damages include, but are not limited to

the severity of the injury to the parent and its actual effect upon the parent-child relationship, the child's age, the nature of the child's relationship with the parent, the child's emotional and physical characteristics, and whether other consortium giving relationships are available to the child.\textsuperscript{163}

\textsuperscript{159} 804 S.W.2d 463 (Tex. 1991).
\textsuperscript{160} Id. at 467.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id. See also Villareal v. State Dept. of Transportation, 774 P.2d 213, 220-21 (Ariz.)
The majority opinion in *Giuliani* is unclear as to how damages should be measured. The court simply stated that "[i]t remains to be seen how the courts and triers of fact will evaluate such loss in monetary terms."164

2. *Must a claim for loss of parental consortium be joined with the parent's action against the alleged tortfeasor? Does a child's minority toll the statute of limitations?*

The Arizona Supreme Court, in *Villareal v. State Department of Transportation*,165 held that ordinarily, children's minority tolls the statute of limitations.166 The court stated that minor children suffering injury may wait to bring an action until after they become eighteen years old, and the applicable statute of limitations runs from their eighteenth birthday.167 However, because the child's claim for loss of parental consortium is derivative of the parent's personal injury claim, the court held that the defendants may require joinder of claims by appropriate motion to the trial court.168 This procedure, the court reasoned, would avoid duplicate litigation and would allow for "settlement or finalization of all claims resulting from the defendant's conduct at the same time."169


In *Belcher v. Goins*,170 the West Virginia Supreme Court held that "any minor child, or a physically or mentally handicapped

164. *Giuliani*, 951 S.W.2d at 322. Section 411.135 of the Kentucky Revised Statutes, the statute creating a surviving parent's right to recover when a child is killed, allows recovery "for loss of affection and companionship that would have been derived from such child during its minority." *Blevins*, 707 S.W.2d at 783.

166. Id. at 220.
167. Id.
168. Id. The court further stated that if joinder is not requested by the defendant, or if joinder is not feasible, the normal statute of limitations rules would apply. *Id.*
169. *Id. See also Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171, 1176 (Wyo. 1990) (holding the independent claim should be joined with the injured parent's claim whenever feasible); *Belcher v. Goins*, 400 S.E.2d 830, 843 (W. Va. 1990) (holding a claim for parental consortium ordinarily must be joined with the injured parent's action against the alleged tortfeasor); *Hay v. Medical Ctr. Hosp. of Vt.*, 496 A.2d 939, 943 (Vt. 1985) (holding that a minor child's claim for loss of parental consortium must be joined with the injured parent's claim whenever feasible).

child of any age who is dependent upon his or her natural or adoptive parent physically, emotionally and financially," may maintain a cause of action for loss or impairment of parental consortium against a third person who seriously injures that child's parent.\textsuperscript{171} It would appear that dependency is the controlling factor in determining a claimant's standing to assert the cause of action.\textsuperscript{172} As noted by the Supreme Judicial Court of Massachusetts in \textit{Ferriter v. Daniel O'Connell's Sons, Inc.},\textsuperscript{173} such dependence must be rooted not only in economic needs, but also in the need for closeness, guidance and nurture.\textsuperscript{174}

4. \textit{Will the percentage of comparative fault attributable to the parent reduce the amount of the child's recovery of parental consortium damages?}

This issue was also addressed by the West Virginia Supreme Court in \textit{Belcher v. Goins}.

\textit{[B]ecause a minor or handicapped child's claim for loss or impairment of parental consortium and the parent's claim for physical injuries are based upon the same conduct of the alleged tortfeasor, and because the child's claim is secondary to the parent's primary claim, any percentage of comparative contributory negligence attributable to the parent will reduce the amount of the child's recovery of parental consortium damages.}\textsuperscript{176}

Similarly, the Arizona Supreme Court in \textit{Villareal}, reasoning that both the child's claim and the parent's claim are based upon the same conduct of the defendant, stated that defenses good against the parent will be good against the child.\textsuperscript{177} In addition, any percentage of negligence attributable against the parent under the state's comparative negligence statute will reduce the amount of the child's recovery.\textsuperscript{178}

\begin{itemize}
  \item \textsuperscript{171} \textit{Id. at 841.}
  \item \textsuperscript{172} \textit{Id.}
  \item \textsuperscript{173} 413 N.E.2d at 696.
  \item \textsuperscript{174} \textit{In so holding, the court stated it was not abandoning its determination to "proceed from case to case with discerning caution" in this area. Id.}
  \item \textsuperscript{175} 400 S.E.2d at 842.
  \item \textsuperscript{176} \textit{Id. at 842. In Kentucky, allocation of fault in tort actions is governed by section 411.182 of the Kentucky Revised Statutes.}
  \item \textsuperscript{177} \textit{Villareal v. State Dept. of Transp., 774 P.2d 213, 220 (Ariz. 1989).}
  \item \textsuperscript{178} \textit{Id. See also Reagan v. Vaughn, 804 S.W.2d 463, 468 (Tex. 1990). In Vaughn, the court held}
\end{itemize}
IV. CONCLUSION

It is beyond challenge that the parent-child relationship is vitally important. Thus, when this relationship is impaired, the child loses something that is indeed valuable and precious.\textsuperscript{179} The reality is that a child suffers greatly when the negligent acts of another force that child to forfeit the love, guidance and affection of a parent. Whether the child's loss is caused by a severe and permanent injury to the parent or by wrongful death, no one can seriously contend that a child does not deserve a remedy. The real question is whether the Kentucky Supreme Court has the authority to create such a remedy by expanding the common law to allow a child's claim for loss of parental consortium when a parent is fatally injured. In light of section 241 of the Kentucky Constitution, which vests this authority exclusively in the General Assembly, the answer must be that the supreme court, in recognizing this cause of action, has exceeded its jurisdiction.\textsuperscript{180}

the cause of action for loss of parental consortium, like the cause of action for loss of spousal consortium is a derivative cause of action. As such, the defenses which bar all or part of the injured parent's recovery have the same effect on the child's recovery. Any percentage of negligence attributable against the parent under Texas' comparative negligence statute will reduce the amount of the child's recovery.

\textit{Id.} 179. \textit{See} Johnny Parker, Parental Consortium: Assessing the Contours of the New Tort in Town, 64 Miss. L.J. 37 (Fall 1994). Parker's article discusses loss of parental consortium when a parent is negligently, but not fatally injured. Interestingly, the majority also cited this article as representative of the trend towards recognition of a claim for loss of parental consortium when a parent is fatally injured. \textit{See Giuliani}, 951 S.W.2d at 320.

180. \textit{See Giuliani}, 951 S.W.2d at 323 (Cooper, J., dissenting). In his dissenting opinion, Justice Cooper stated:

Respectfully, I must dissent, not because the notion of awarding damages to children for loss of parental consortium is without merit, but because the Constitution of Kentucky has removed the issue from the jurisdiction of this Court.

\textit{Id.}
LANE V. COMMONWEALTH:  
THE KENTUCKY SUPREME COURT DOESN'T TURN THE OTHER CHEEK

by Paige L. Bendel

The question of how states should treat a passive parent in a child abuse situation has perplexed lawmakers and state supreme courts across the country. "Historically, civil child protective court actions have outnumbered criminal prosecutions of parents for child abuse."1 Decisions have traditionally focused on the termination of the parental rights of parents who fail to protect their children from abuse.2 Recently, homicide prosecutions against parents have increased, and the result has been that non-abusive parents have been charged as accessories to the crimes committed by their abusive partners.3 Increasingly, courts and legislatures have extended criminal liability for child abuse to those parents who condone or passively allow their children to be abused.4 The trend has been toward enlarging the scope of criminal liability for failure to act in situations where the common law or statutes impose a responsibility for the safety and well being of others.5 Kentucky is now among the states to follow this trend with its decision in Lane v. Commonwealth.6

I. THE FACTS BEFORE THE COURT IN LANE V. COMMONWEALTH

Kimberly Lane (Lane) and her companion, Bryan Tubbs (Tubbs), were prosecuted for physical injuries suffered by Lane's two-year-old daughter.7 The evidence presented by the

2. Id. at 367.
3. Id.
5. Id. at 526.
6. 949 S.W.2d 604 (Ky. 1997).
7. Id. at 605.
Commonwealth consisted of the testimony of three physicians who treated the child at an emergency room and later at a Louisville hospital. The doctors' testimony revealed that the child suffered numerous bruises, abrasions, and contusions, including a skull fracture. The story given by Lane and Tubbs was that the child's injuries were the result of a recent fall down a flight of stairs. The doctors testified that many of the injuries were linear, appearing to have resulted from the child being struck with a linear object, not possibly the result of an accidental fall down a flight of stairs. In fact, they testified that the injuries were of an inflicted nature.

Tubbs was charged with assault in the first degree and Lane was charged with complicity to commit assault in the first degree. They were tried together, using the defense that the child's injuries were the result of a fall down the stairs. "The indictment charged that Lane 'aided, counseled, or attempted to aid Bryan Tubbs in the offense of assault in the first degree when he intentionally caused serious physical injury to the child' with a dangerous instrument, manifesting extreme indifference to the value of human life." A jury found Lane guilty of complicity to commit assault in the first degree and Tubbs was found guilty of assault in the first degree.

On Lane's motion, the trial judge set aside her conviction and sustained her motion for a new trial, reasoning that no legal duty existed which required Lane to prevent the assault on her child pursuant to the Kentucky Supreme Court's holding in Knox v. Commonwealth. Lane argued that her conduct was insufficient to support an indictment and conviction for complicity to commit assault under the legal duty theory contained in Kentucky Revised Statute section 502.020(1)(c), which was relied upon by the court.

8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. 735 S.W.2d 711 (Ky. 1987), overruled by Lane v. Commonwealth, 949 S.W.2d 604 (Ky. 1997).
in *Knox.* The court of appeals reversed the ruling of the trial judge and the Supreme Court of Kentucky granted discretionary review.

II. RECENT KENTUCKY CASE LAW REGARDING THE PROTECTION OF ABUSED CHILDREN AND THE CRIMINAL LIABILITY OF THE NON-ABUSIVE PARENT

Complicity is defined as an "association or participation in a criminal act; the act or state of being an accomplice." *Kentucky Revised Statute* section 502.020 set forth the law defining liability for complicity as criminal liability imposed on one person for the conduct of another. Under this statute, a person is guilty of an offense committed by another person when he or she has the intention of promoting or facilitating the offense and either:

(a) [s]olicits, commands, or engages in a conspiracy with such other person to commit the offense; or (b) [a]ids, counsels, or attempts to aid such person in planning or committing the offense; or (c) [h]aving a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

Kentucky has attempted to use this statute to hold a parent criminally liable for passively allowing their child to become a victim of abuse, but the State has failed. Since the 1987 decision in *Knox v. Commonwealth,* there has not been a legal duty imposed upon a parent to prevent the abuse of his or her child, thus, the complicity statute has not been used to hold parents criminally liable for passively allowing their children to be abused. The law in Kentucky has, however, held a parent criminally liable under the same complicity statute for actively

---

18. *Lane,* 949 S.W.2d at 605. *KY. REV. STAT. ANN.* § 502.020(1)(c) (Banks-Baldwin 1996) states as follows: (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he: (c) [h]aving a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.
21. *Id.*
22. See *Knox,* 735 S.W.2d at 712.
23. *Id.*
aiding another person in the abuse of his or her child.\textsuperscript{24}

In \textit{Knox v. Commonwealth}, Charles and Mary Knox were convicted, respectively, of first degree rape and complicity to commit the first degree rape of Mary Knox's minor daughter.\textsuperscript{25} The evidence presented at the \textit{Knox} trial indicated that Mary Knox (Knox) was aware of the sexual relationship between her husband and her daughter.\textsuperscript{26} In fact, her daughter testified that she told her mother that Charles Knox was "messing" with her, and that she pleaded for her mother to make him stop.\textsuperscript{27} Knox did not intervene on her daughter's behalf and took no action whatsoever for her child's protection.\textsuperscript{28}

The question before the court was whether a legal duty existed in Kentucky that required Knox to make an effort to prevent Charles Knox from raping her daughter.\textsuperscript{29} Knox was charged and convicted at the trial level under Kentucky Revised Statute section 502.020(1)(c) for complicity to commit the rape.\textsuperscript{30} The statute states that a person is guilty of complicity when he has a legal duty to prevent the commission of the offense and fails to make a proper effort to stop its commission.\textsuperscript{31}

The trial court found that Knox had an affirmative legal duty to prevent the rape, and Knox asserted that the trial court erred in its determination that a duty to prevent the offense was imposed by Kentucky law.\textsuperscript{32} The Kentucky Supreme Court agreed with Knox, finding that no statute or common law imposed such a legal duty on a parent.\textsuperscript{33} The court noted the moral duty of a parent to prevent a crime against his or her child, and that the failure to do so was reprehensible, but found that a moral duty to act is not enough to impose a legal duty to

\begin{footnotes}
\footnotetext[25]{\textit{Knox}, 735 S.W.2d at 711.}
\footnotetext[26]{\textit{Id}.}
\footnotetext[27]{\textit{Id}.}
\footnotetext[28]{\textit{Id}.}
\footnotetext[29]{\textit{Id}.}
\footnotetext[30]{\textit{Id}.}
\footnotetext[31]{\textit{See KY. REV. STAT. ANN.} § 502.020 (Banks-Baldwin 1996).}
\footnotetext[32]{\textit{Knox}, 755 S.W.2d at 711.}
\footnotetext[33]{\textit{Id}.}
\end{footnotes}
do so.\textsuperscript{34} The court searched Kentucky child abuse statutes for the existence of a legal duty, and were left with Kentucky Revised Statute section 199.335 which only requires child abuse to be reported in order to prevent further abuse and for services of the State to be utilised to the benefit of abuse victims.\textsuperscript{35} This reporting requirement, according to the majority, fell short of meeting the legal duty requirement of Kentucky Revised Statute section 502.020(1)(c), making the court unable to sustain the conviction of Knox under the complicity statute.\textsuperscript{36}

The dissenting opinion in \textit{Knox}, written by Justice Wintersheimer, argued to uphold the conviction of Knox based on the complicity statute, Kentucky Revised Statute section 502.020(1)(c), and the existence of a legal duty which demands that a parent, such as Knox, protect her child from further abuse.\textsuperscript{37} The dissent analyzed Kentucky Revised Statute section 199.335(2), just as the majority had done, yet it found the existence of this duty in the wording of the statute which provided that any person who knew a child was an abused child had a duty to report such abuse, and upon such report would be immune from any civil or criminal liability.\textsuperscript{38} The dissent believed that this statutory provision clearly imposed a duty on any person, including a parent, to report child abuse.\textsuperscript{39} In furtherance of this argument, Justice Wintersheimer wrote "[i]t is absolutely illogical to legislate a duty to report and prevent child abuse for many other named professionals who are in 'loco parentis' and hold in this opinion that the parent has no duty whatsoever to prevent abuse."\textsuperscript{40} The dissent disagreed with the majority's opinion that the obligation of reporting child abuse does not require that a parent attempt to prevent the commission of the crime.\textsuperscript{41}

In addition, the dissent cited a newly adopted section of the

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 712 (citing 1 W. LAFAYE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW 284 (1986)).
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.} (Wintersheimer, J., dissenting).
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{Id.} at 713.
\item \textsuperscript{41} \textit{Id.}
\end{itemize}
Kentucky Revised Statutes dealing with dependency, abuse, and neglect, as also establishing this duty.\textsuperscript{42} Chapter 620 provided in its legislative purpose, set out in section 620.010, certain fundamental rights of children, including the right to be protected and to be free from sexual and physical injury and exploitation.\textsuperscript{43} Kentucky Revised Statute sections 508.100 through 508.120 were cited to further illustrate the establishment of this duty and as allowing the offense of criminal abuse to be charged against a person who permits another person of age twelve or under, of whom he has custody, to be abused.\textsuperscript{44}

The dissenting opinion cited three separate Kentucky statutes as sources for imposing a legal duty upon a parent to prevent child abuse.\textsuperscript{45} It argued that the best method of prevention would be reporting abuse to the proper authorities, and stated that there is no call for a parent to be a "hero in prevention."\textsuperscript{46} The requirement of parents, Justice Wintersheimer stated, is to take reasonable measures to prevent the abuse of their child.\textsuperscript{47} The dissent felt that the motion to dismiss the complicity charge based on the absence of a legal duty was properly overruled by the trial judge.\textsuperscript{48}

In 1991, the Kentucky Supreme Court imposed criminal

\begin{itemize}
\item \textsuperscript{42} Justice Wintersheimer cited KY. REV. STAT. ANN. Ch. 620 (Banks-Baldwin 1996), which took effect on July 1, 1987. The decision in Knox v. Commonwealth was decided on July 2, 1987.
\item \textsuperscript{43} Knox, 735 S.W.2d at 713 (Wintersheimer, J., dissenting). KY. REV. STAT. ANN. § 620.010 (Banks-Baldwin 1996) states in part:
\begin{quote}
Children have certain fundamental rights which must be protected and preserved, including but not limited to, the rights to adequate food, clothing and shelter; the right to be free from physical, sexual or emotional injury or exploitation; the right to develop physically, mentally, and emotionally to their potential; and the right to educational instruction and the right to a secure, stable family.
\end{quote}

\item \textsuperscript{44} Knox, 735 S.W.2d at 713 (Wintersheimer, J., dissenting). KY. REV. STAT. ANN. § 508.120 (Banks-Baldwin 1996) states as follows:

\begin{quote}
(1) A person is guilty of criminal abuse in the third degree when he recklessly abuses another person or permits another person of whom he has actual custody to be abused and thereby: (a) [c]auses serious physical injury; or (b) [p]laces him in a situation that may cause him serious physical injury; or (c) [c]auses torture, cruel confinement or cruel punishment; to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.
\end{quote}

\item \textsuperscript{45} Knox, 735 S.W.2d at 713 (Wintersheimer, J., dissenting).
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id.
\end{itemize}
liability upon a parent who actively participated in the abuse of her children under the complicity statute.\textsuperscript{49} The court upheld the conviction of Arletha Rose Gilbert (Gilbert) for wanton endangerment by complicity, one count of criminal attempt to commit rape in the first degree, and nine counts of the use of a minor in a sexual performance by complicity, for the sexual exploitation of her three teenage daughters by her husband, Johnny Gilbert.\textsuperscript{50} Johnny Gilbert was convicted of wanton endangerment in the first degree, two counts of rape in the first degree, two counts of criminal intent to commit rape in the first degree, and nine counts of use of a minor in a sexual performance.\textsuperscript{51} Each was sentenced to ten years in prison.\textsuperscript{52}

The evidence presented at trial clearly indicated that Gilbert was fully aware of the criminal relationship that was taking place between her husband and her daughters, that she did not intervene on behalf of her children, and that she took no action to protect them from further abuse.\textsuperscript{53} Gilbert argued that she was guilty only of neglect and could not be held legally responsible for the acts of her husband under \textit{Knox}.\textsuperscript{54} The court distinguished the facts in the Gilbert case from those in Knox.\textsuperscript{55} The facts showed that Gilbert encouraged her children to engage in sexual intercourse with Johnny Gilbert and that she intentionally aided her husband in the commission of rape, in violation of Kentucky Revised Statute section 502.020(1)(b).\textsuperscript{56} The evidence indicated that Gilbert instructed her daughters to go to the bedroom with her husband stating, "you can trust your dad. He's not going to hurt you."\textsuperscript{57}

The court reasoned the distinguishing feature between Knox and Gilbert was that Gilbert was not passive, but actively aided her husband in attempting to rape two of her children, falling

\begin{itemize}
\item \textsuperscript{49} Gilbert v. Commonwealth, 838 S.W.2d 366, 377 (Ky. 1991).
\item \textsuperscript{50} \textit{Id.} at 381.
\item \textsuperscript{51} \textit{Id.} at 377.
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.} at 379.
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.} (citing KY. REV. STAT. ANN. § 502.020(1)(b) (Banks-Baldwin 1996)). Section 502.020 (1)(b) reads: (1) [a] person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he: (b) [a]ids, counsels, or attempts to aid such person in planning or committing the offense.
\item \textsuperscript{57} \textit{Id.}
\end{itemize}
within subsection (1)(b) of the complicity statute. The court held that the evidence was sufficient to convict Gilbert of complicity because she took an active role in forcing her daughters to engage in sexual activities with her husband and that this was not a failure to act, as was the case in Knox. This was active participation by the mother in the crimes against her children.

Thus, the law in Kentucky has held a parent criminally liable for complicity when that parent actively aids in child abuse. Yet, the Kentucky Supreme Court has clearly distinguished this type of "active" behavior from a situation where a parent has knowledge of the ongoing abuse of his or her child, sexually or physically, and passively allows the abuse to continue. In this type of situation, the Kentucky Supreme Court has failed to impose criminal liability on a parent for his or her omission under the state's complicity statutes, because, until now, Kentucky has not recognized a legal duty for parents to prevent the abuse of their children. The law has changed with the decision of the court in Lane v. Commonwealth, and the rule set forth in Knox v. Commonwealth has been overruled.

III. THE PLURALITY'S REASONING: THE DISSENTING OPINION OF KNOX?

The sole issue before the court in Lane was whether Kentucky recognized the legal duty of a parent to take some affirmative action to prevent the commission of an assault, resulting from abuse, on his or her child. More narrowly stated, the issue was "whether the trial judge correctly determined that the defendant did not have a legal duty to take some affirmative action to prevent the commission of an assault upon her infant daughter" by her domestic companion.

58. Id.
59. Id. at 380.
60. Id.
61. Id.
62. See Knox v. Commonwealth, 735 S.W.2d 711 (Ky. 1987).
63. Id.
64. Lane v. Commonwealth, 949 S.W.2d 604, 606 (Ky. 1997).
65. Id. at 605.
66. Id.
In its decision, the plurality relied heavily on Kentucky's statutory provisions involving the protection of children. The court cited Kentucky Revised Statute section 620.010, which specifically states that children have a fundamental right to be free from physical injury, as well as other types of injury. The statute reads, in part:

In addition to the purposes set forth in KRS 620.010, this chapter shall be interpreted to effectuate the following express legislative purposes regarding the treatment of dependent, neglected and abused children. Children have certain fundamental rights which must be protected and preserved, including but not limited to, the rights to adequate food, clothing and shelter; the right to be free from physical, sexual or emotional injury or exploitation.

This chapter of the Kentucky Revised Statutes replaced section 199.335(2) and the other sections of the law in 1987. The plurality did not find much difference between the statute prior to 1987 and today, except, since the adoption of Chapter 620 there exists a clear legislative intent to protect children from physical, sexual, and emotional injury. This slight clarification enabled the court to find that section 620.010 creates an affirmative duty for parents and guardians to prevent physical injury to the children in their custody.

Under Kentucky law, conduct based on a failure to act where there exists a legal duty to act is punishable pursuant to section 502.020(1)(c), the complicity statute. The court reasoned that Chapter 620 of the Kentucky Revised Statutes expresses a clear legislative intent to punish those, who, through their passive conduct, allow children to be physically abused. The court held that this legislative intent establishes an affirmative legal duty for the parent of a child to prevent physical injury that results in an assault on a child.

67. Id.
68. KY. REV. STAT. ANN. § 620.010 (Banks-Baldwin 1996).
69. Id.
70. Lane, 949 S.W.2d at 606.
71. Id.
72. Id.
73. Id.
74. Id. at 605.
In its analysis, the court noted that Kentucky Revised Statute section 405.020 provides that parents of a child shall nurture that child.\textsuperscript{75} The plurality interpreted the word "nurture" as an act of taking care of children which does not involve the tolerance of physical injury.\textsuperscript{76} Additionally, the court noted Kentucky Revised Statute section 508.100 "provides that a person is guilty of criminal abuse in the first degree when he intentionally permits a person of whom he has actual custody to be abused and thereby places him in a situation that may cause him serious physical injury."\textsuperscript{77}

The court addressed Lane's argument that criminal abuse, rather than complicity to commit assault, was the proper charge in the case.\textsuperscript{78} It concluded that Lane's contentions were without merit and that it is within the discretion of the prosecutor to choose which crime the defendant will be charged.\textsuperscript{79} The decision of the prosecutor to charge Lane with complicity to assault, rather than complicity to abuse, was not held to be reversible error.\textsuperscript{80}

Finally, the plurality concluded that, to the degree that Knox \textit{v. Commonwealth} conflicted with its decision, Knox was overruled.\textsuperscript{81} The court found that the legislative intent in Chapter 620 of the Kentucky Revised Code was clear that the Commonwealth recognizes an affirmative duty to prevent physical injury to children.\textsuperscript{82} This legal duty allowed the court to uphold the decision of the Court of Appeals and to affirm the conviction of Lane for complicity to commit assault in the first degree against her two-year-old daughter.\textsuperscript{83}

\begin{itemize}
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} \textit{Id. at 606.}
\item \textsuperscript{79} \textit{Id.} (citing Wombles \textit{v. Commonwealth}, 831 S.W.2d 172 (Ky. 1992); Morris \textit{v. Commonwealth}, 783 S.W.2d 889 (Ky. Ct. App. 1990)).
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.}
\end{itemize}
IV. THE CONCURRENCE'S REASONING: THE EXISTENCE OF A COMMON LAW DUTY FOR PARENTS TO PROTECT THEIR CHILDREN

Justice Cooper and Justice Johnstone agreed with the plurality opinion insofar as it overruled *Knox* and agreed that the mother in *Knox* was charged with a unique legal duty to protect her child from the assault suffered at the hands of her domestic companion. However, the concurrence did not find the existence of this legal duty in Kentucky Revised Statute Chapter 620. The concurrence found the existence of this duty was a common law duty by virtue of the "special relationship" which exists between any custodian and the person within his or her custody.

Justice Cooper, who wrote the concurrence, argued that Chapter 620 only confirms that children have the same rights as adults, and that it does not establish a new and unique parental duty to protect a child from forces outside the parent-child relationship. The purpose of Chapter 620, according to the concurrence, was "to establish the basis for removing a neglected or abused child from the custody of his abusive parents." Moreover, the statute goes on to note that in order to protect and preserve those rights, it is necessary to "remove a child from his or her parents," clearly establishing the statute's purpose.

Additionally, the concurrence found that the application of this statute as proposed by the plurality opinion would be too far-reaching. In fact, Kentucky Revised Statute section 620.030, the "reporting statute," does not specify parents as being among those who have a duty to report known or suspected abuse. The concurrence concluded that if this statute is the source of the legal duty supporting accomplice liability for failure to report known or suspected child abuse, then

---

84. *Id.* at 607 (Cooper, J., concurring).
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* (Cooper, J., concurring) (quoting KY. REV. STAT. ANN. § 620.010 (Banks-Baldwin 1996)).
90. *Id.*
91. *Id.* (citing KY. REV. STAT. ANN. § 620.030 (Banks-Baldwin 1996)).
any doctor, teacher, social worker, etc., who is found to 'know or have reasonable cause to believe' that a child was being abused by his parents and to have failed to report that knowledge or belief would be subject to indictment and conviction as an accomplice to that abuse.\textsuperscript{92}

The concurrence did not believe that the legislature intended this result.\textsuperscript{93}

In establishing the existence of a "special relationship" between a parent and child as the foundation for this legal duty to protect from abuse, the concurrence examined the history of civil liability and the recognition of a "special relationship" that gives rise to a legal duty to protect a person from harm inflicted by another.\textsuperscript{94} In many instances, a "special relationship" has been recognized between the state and persons in its custody.\textsuperscript{95} This duty is derived from a United States Supreme Court case, \textit{DeShaney v. Winnebago Department of Social Services},\textsuperscript{96} where a mother brought a civil rights action against social workers and local officials who had received complaints that her child was being abused by his father but had not removed him from his father's custody.\textsuperscript{97} In \textit{DeShaney}, it was held that a special relationship did not exist between the child and the state because the failure of the state to protect an individual against private violence does not amount to a constitutional violation.\textsuperscript{98} "[T]he State cannot be held liable . . . for injuries that could have been averted had it chosen to provide" its services.\textsuperscript{99} Yet, \textit{DeShaney} did recognize that when a state takes a person into its custody and holds him there against his will, the Constitution imposes upon it a duty to assume some responsibility for his safety and general well-being, and an affirmative duty to protect which arises from the limitation imposed on his freedom and

\textsuperscript{92} \textit{Id.}

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} \textit{Id.}

\textsuperscript{95} \textit{Id.}

\textsuperscript{96} 489 U.S. 189 (1989).

\textsuperscript{97} \textit{Id.} This case was also cited in \textit{Lane v. Commonwealth}, 949 S.W.2d 604, 607 (Ky. 1997) (Cooper, J., concurring).

\textsuperscript{98} \textit{DeShaney}, 489 U.S. at 196.

\textsuperscript{99} \textit{Id.} at 197.
ability to act on his own behalf. This special relationship between the state and its prisoners was reaffirmed in Youngberg v. Romeo, where the Court held that "[w]hen a person is institutionalized — and wholly dependent on the State, . . . a duty to provide certain services and care does exist. . . ."101

The Lane concurrence recognized that this special relationship has not been confined to governmental entities, but has also been found to exist in relationships between private individuals.102 There are "special circumstances," which trigger a duty to protect against the intentional criminal conduct of a third person, that arise out of knowledge of a dangerous situation which imperils the victim's ability to prevent the attack.103 Courts have held that when one entrusts themselves to the protection of another and reasonably relies on the other to provide a place of safety, there is a special relationship sufficient to trigger a duty to protect against the criminal conduct of another.104 (For example, innkeeper-guest, common carrier-passenger, school-student.)105

The concurrence found "[t]hese cases hold that the existence of a 'special relationship' can subject a person to civil liability for failure to protect another from harm."106 Its analysis then turned to whether "the violation of that duty will support a criminal conviction in the absence of explicit statutory language creating such a duty."107

The concurrence noted that there is a general rule that "one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself."108 However, there is an exception to this general rule based on special relationships.109 Criminal liability premised on

100. Id. at 199.
102. Id.
104. Lane, 949 S.W.2d at 608 (citing Reed v. Hercules Constr. Co., 693 S.W.2d 280, 282 (Mo. Ct. App. 1985)) (Cooper, J., concurring).
105. Id.
106. Id.
107. Id.
108. Id. (citing 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.3 at 284-85 (1986)).
109. Id.
a person's failure to act has been exacted in situations where a special relationship is established.\textsuperscript{110} Thus, liability has been imposed on a parent for failing to call a doctor to treat his sick child and on a husband for failing to aid his imperiled wife.\textsuperscript{111} Additionally, a growing number of state courts have extended this "special relationship" exception to include the parent-child relationship.\textsuperscript{112} Many states have accepted this "special relationship" between a parent and child as establishing the legal duty of a custodial parent to protect his or her child from abuse at the hands of the parent's domestic companion, and have imposed criminal liability on a parent for failure to protect the child from such abuse.\textsuperscript{113}

The concurrence cited \textit{Palmer v. State},\textsuperscript{114} a 1960 decision by the Maryland Court of Appeals, the highest court in that state, as the first case to directly impose a duty upon a parent to prevent the abuse of his or her child.\textsuperscript{115} In \textit{Palmer}, a mother was charged with involuntary manslaughter for the death of her twenty-month-old child.\textsuperscript{116} The state argued that Palmer, the mother, was guilty of gross, or criminal, negligence for permitting her paramour to inflict upon her child "prolonged and brutal beatings that finally resulted in the child's death."\textsuperscript{117} The evidence showed that the blows received by the infant ripped her liver in two and tore the mesentery, the fatty, vascular tissue supporting the colon.\textsuperscript{118} Hemorrhaging into the peritoneal cavity ensued and the baby began to vomit.\textsuperscript{119} The mother attempted to treat her child for these injuries by giving her milk, and finally sought the medical attention of a doctor after the child began to vomit blood.\textsuperscript{120}

According to the Maryland Code in effect in 1957, the father and mother of minor children were jointly and severally charged

\begin{itemize}
  \item \textsuperscript{110} Id.
  \item \textsuperscript{111} Id. at 608-09 (citing 1 W. LAFAYE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW §3.3 at 284-85 (1986)).
  \item \textsuperscript{112} Id. at 609.
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} 164 A.2d 467 (Md. 1960).
  \item \textsuperscript{115} Lane, 949 S.W.2d at 609.
  \item \textsuperscript{116} Palmer, 164 A.2d at 468.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Id. at 471.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id.
\end{itemize}
with their children's support, care, nurture, welfare, and education.\textsuperscript{121} There was no evidence that the mother had ever personally inflicted injury upon the child.\textsuperscript{122} The court premised the mother's special duty primarily on the nurturing statute, following the trial judge's reasoning that "the obligation placed upon a parent by Article 72A . . . to provide for the care and welfare of a minor is not a perfunctory one, to be performed at the voluntary pleasure or whimsical desire of the parent."\textsuperscript{123} The court concluded that it was clear that the obligation to protect a child is an affirmative one, not to be dealt with lightly, and upheld the conviction of Palmer.\textsuperscript{124}

Looking at more recent case law, the concurrence cited the North Carolina case of \textit{State v. Walden},\textsuperscript{125} in which a mother was convicted of aiding and abetting an assault solely on the basis that she was present when her child was assaulted, but failed to take reasonable steps to prevent the assault.\textsuperscript{126} The evidence presented in \textit{Walden} showed that the mother of a one-year-old child was present in the room when the child was repeatedly beaten with a leather belt and metal buckle by the mother's boyfriend which resulted in bruises on the infant's chest, red marks on his cheek, and cuts on his back resulting in a substantial loss of blood and the need for a blood transfusion.\textsuperscript{127} The \textit{Walden} court addressed the issue of duty by comparing it to a person's mere presence at the scene of a crime.\textsuperscript{128} According to the court, presence at the time of a crime's commission, by itself, does not make a person a principal to the crime.\textsuperscript{129} However, the court cited some exceptions to this general rule, including "[w]here the common law has imposed affirmative duties upon persons standing in certain personal relationships to others, such as the duty of parents to care for their small children, one may be guilty of criminal conduct by failure to act or, stated

\begin{itemize}
\item \textsuperscript{121} \textit{Id.} at 468.
\item \textsuperscript{122} \textit{Id.} at 472.
\item \textsuperscript{123} \textit{Id.} at 473.
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} 293 S.E.2d 780 (N.C. 1982).
\item \textsuperscript{126} \textit{Lane v. Commonwealth}, 949 S.W.2d 604, 609 (Ky. 1997).
\item \textsuperscript{127} \textit{Walden}, 293 S.E.2d at 783.
\item \textsuperscript{128} \textit{Id.} at 784.
\item \textsuperscript{129} \textit{Id.}
\end{itemize}
otherwise, by an act of omission."\textsuperscript{130} Therefore, under the North Carolina aiding and abetting statute, Walden was guilty of aiding and abetting her boyfriend in the assault on her child and was found guilty, as a principal, to the offenses of assault with a deadly weapon and infliction of a serious injury.\textsuperscript{131}

The \textit{Walden} court did not go so far as to say that parents have the legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children.\textsuperscript{132} But, in North Carolina, the law recognizes that parents do have the duty to take every step reasonably possible under the circumstances of a given situation to prevent harm to their children.\textsuperscript{133}

Further, the concurrence in \textit{Lane} looked to decisions of numerous other state courts, including a 1991 Alaska decision convicting a father of second-degree assault for failing to prevent his wife from injuring their daughter.\textsuperscript{134} The basis that the court used to convict was "that both the common law and Alaska's [nurturing] statutes established a clear duty upon a parent to protect his child" from harm.\textsuperscript{135} In \textit{P.S. v. State}, an Alabama case, the court held that knowledge of ongoing abuse was an element of the offense and affirmed the conviction of willful abuse of a mother for failing to protect her child from being attacked by her live-in-boyfriend.\textsuperscript{136} Finally, the State of Illinois has established that a person who knowingly fails to protect his or her child from abuse may be prosecuted under the Illinois accountability statutes, becoming legally liable for the conduct of the abuse.\textsuperscript{137} Illinois recognizes this liability as a result of the common law duty of a parent to protect his or her child from abuse.\textsuperscript{138}

The \textit{Knox} court rejected the notion relied on by the

\begin{itemize}
  \item \textsuperscript{130} \textit{Id.} at 785 (citing \textit{W. LAFAVE \& SCOTT, HANDBOOK ON CRIMINAL LAW, \$ 26 at 184 (1972))}.
  \item \textsuperscript{131} \textit{Id.} at 788.
  \item \textsuperscript{132} \textit{Id.} at 786.
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} \textit{Lane v. Commonwealth, 949 S.W.2d 604, 609 (Ky. 1997) (citing Michael v. State, 767 P.2d 193 (Alaska Ct. App. 1991)) (Cooper, J., concurring)}.
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{136} \textit{P.S. v. State, 565 So.2d 1209 (Ala. Crim. App. 1990)}.
  \item \textsuperscript{137} \textit{Lane, 949 S.W.2d at 609 (citing People v. Peters, 586 N.E.2d 469 (Ill. App. Ct. 1991))}.
  \item \textsuperscript{138} \textit{Id.}
\end{itemize}
concernece, that a parent has a legal duty, under the common law, to protect a child from bodily harm.\textsuperscript{139} The \textit{Knox} majority could not distinguish between the legal duty imposed upon a state to protect a person in its custody and imposing the same legal duty upon a parent to protect his or her child from harm inflicted by a person whom the parent has invited into the custodial environment.\textsuperscript{140} This characteristic was distinguished by the concurrence based on the discussion above.\textsuperscript{141}

However, the \textit{Lane} concurrence also found the existence of this duty within the statutory law of the Commonwealth.\textsuperscript{142} Similar to Maryland and Alaska, which derived this duty from their "nurture" statutes, the concurrence focused on the Kentucky statute that charges parents with "joint custody, nurture, and education of their children."\textsuperscript{143} Several other Kentucky statutes, including section 508.100\textsuperscript{144} which defines criminal abuse as intentionally permitting a person of whom you have custody to be abused or placed in a situation which may cause serious physical injury, show that the legislature has recognized the existence of the "special relationship" between custodial parents and the children in their care.\textsuperscript{145}

It was clear to the \textit{Lane} concurrence that Kentucky did not need to decide whether a parent who leaves his child home alone with someone whom he knows has abused the child in the past is guilty of promoting or facilitating further abuse.\textsuperscript{146} The issue before the court in \textit{Lane} was complicity to commit the criminal result, not to the act.\textsuperscript{147} The significant difference between these two crimes, according to Justice Cooper, is that the intent does not need to be proven to obtain a conviction under the complicity statute section 501.020.\textsuperscript{148} The concurrence found it sufficient that Lane failed to perceive the substantial risk of leaving her child alone with Tubbs, or that she had knowledge and

\textsuperscript{139} \textit{Id.} at 610 (citing \textit{Knox v. Commonwealth}, 735 S.W.2d 711 (Ky. 1987)).
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{See supra} note 134 and accompanying text.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} KY. REV. STAT. ANN. § 508.100 (Banks-Baldwin 1996)
\textsuperscript{145} \textit{Lane}, 949 S.W.2d at 611 (Cooper, J., concurring).
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
consciously disregarded the substantial risk of leaving her child alone with Tubbs. 149 Finally, the concurrence stated that heroism and courage are not required on the part of the parent to protect a child from abuse, only an effort deemed reasonable under the circumstances. 150

Therefore, the concurrence would overrule Knox, not based on Chapter 620 of the Kentucky Revised Statutes, but based on the common law and the Commonwealth's nurturing and penal statutes that recognize a special duty for a parent to protect a child from being assaulted by another person. 151 In short, to the extent that a parent acts recklessly or wantonly with respect to a risk that harm will occur to the child and fails to make a reasonable effort to prevent it, the concurrence would find that he or she is guilty of complicity under Kentucky Revised Statute section 502.020(2). 152 If the parent is present and fails to act, actual intent to promote or facilitate the offense may be inferred from his or her failure to act and he or she can be convicted of complicity under section 502.020(1). 153

V. THE DISSENT'S REASONING: WHAT HAS CHANGED? WHY DO NOW WHAT WE REFUSED TO DO IN KNOX?

The dissent in Lane argued that the court has "twisted the words of the legislature and reshaped them into a form to its liking, in order to impose a legal duty that did not previously exist." 154 The dissent argued that the rationale used to impose this duty would undoubtedly create uncertainty in the prosecution of these types of cases. 155

149. Id.
150. Id.
151. Id.
152. Id. KY. REV. STAT. ANN. § 502.020(2) (Banks-Baldwin 1996) states:
   (2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he: (a) [s]olicits or engages in a conspiracy with another person to engage in the conduct causing such result; or (b) [a]ids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or (c) [h]aving a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.
153. Id.
154. Id. at 612 (Stumbo, J., dissenting).
155. Id.
The simplest way to solve this problem, according to the dissent, would have been for the Commonwealth to have prosecuted this case as criminal abuse in the first degree under Kentucky Revised Statute section 508.100, instead of prosecuting it as a complicity case under section 502.020. The dissent believed that the only reason the Commonwealth prosecuted the case under the complicity statute was its dissatisfaction with the lesser penalty imposed for criminal abuse in the first degree. Otherwise, the elements of the two crimes are the same. The dissent observed that the plurality combined the duty of Kentucky Revised Statute Chapter 508 and the general duty toward children set out in section 620.010 to find a legal duty upon which to base criminal liability. The duty imposed by section 620.030 is the duty to report dependency, neglect, or abuse; "this duty is simply one of reporting, not preventing." This was the same rationale this court rejected in Knox for imposing a duty to prevent abuse.

In addition, the dissent cited the concurring opinion's establishment of this duty based on the common law "special relationship" between parents and children. The dissent found it to be a tremendous leap from the imposition of civil liability on the state for failing to protect someone in its control to imposing criminal liability upon a parent for failing to protect his or her child from abuse.

The dissent was afraid that the court's opinion would put educators and medical personnel at risk of being charged criminally for possible signs of abuse they should have noticed during their contact with children. The dissent firmly stated that it is the job of the Kentucky legislature, not that of the Kentucky Supreme Court, to set forth and define behavior which

156. Id.
157. Id. citing KY. REV. STAT. ANN. § 508.100 (Banks-Baldwin 1996). Criminal abuse in the first degree, under section 508.100 of the Kentucky Revised Statutes, is a Class C Felony. KY. REV. STAT. ANN. § 508.100(2) (Banks-Baldwin 1996).
158. Id.
159. Id.
160. Id.
161. Id.
162. Id.
163. Id. (citing DeShaney v. Winnebago County Dept. of Social Serv., 489 U.S. 189 (1989)).
164. Id. at 613 (Stumbo, J., dissenting).
constitutes criminal conduct. 165

VI. ANALYSIS OF THE PLURALITY'S STATUTORY INTERPRETATION

Legislatures in several states have enacted statutes that specifically criminalize the failure to protect a child from abuse. 166 However, general child abuse statutes are in effect in every state, including the Commonwealth of Kentucky. 167 Yet, many of these statutes do not specifically define the scope of criminal liability of a passive parent in child abuse situations. 168 Therefore, many courts have expanded the general child abuse statutes to include the conduct of passive parents through broad statutory interpretation. 169

In *State v. Williquette*, 170 the Supreme Court of Wisconsin broadly interpreted its statute dealing with abuse of children. 171 The court concluded that a parent who knowingly permits another person to abuse the parent's own child subjects the child to abuse within the meaning of the statute. 172 Thus, a parent who fails to act to protect their child is a direct participant in the crime of child abuse. 173 Section 940.201 of the Wisconsin Statute stated at the time of the decision

whoever tortures a child or subjects a child to cruel maltreatment, including, but not limited to, severe bruising, lacerations, fractured bones, burns, internal injuries or any injury constituting great bodily harm under section 939.22(14) is guilty of a Class E felony. In this section, "child" means a person under 16 years of age. 174

In the complaint, Terri Williquette ("Williquette"), the

---

165. Id.
166. Adams, *supra* note 4, at 524. The author cites statutes in 27 states that were in effect at the time.
167. Id. at 528.
168. Id.
169. Id.
170. 385 N.W.2d 145 (Wis. 1986).
171. Id.
172. Id. *See* Adams, *supra* note 4, at 524.
173. Id.
174. *Williquette*, 385 N.W.2d at 147 (citing WIS. STAT. § 940.201 (1983)).
children's mother, was charged with two counts of child abuse.\textsuperscript{175} Count one was based on her failure to take any action to prevent her husband, Bert Williquette, from repeatedly "sexually abusing, beating, and otherwise mistreating" her seven year old son.\textsuperscript{176} Count two was based on her failure to take any action to prevent her husband from committing like acts against her eight year old daughter.\textsuperscript{177} The evidence presented at trial indicated that the children had made the mother aware of the physical and sexual abuse, and that she never did anything about it.\textsuperscript{178} In fact, she told her son "not to worry about it."\textsuperscript{179}

The trial court ordered Williquette "bound over on the two counts of child abuse in violation of section 940.201."\textsuperscript{180} She then filed a motion to dismiss the information, arguing that she could not be charged with child abuse under the statute because she did not directly commit the abuse.\textsuperscript{181} The circuit court granted her motion to dismiss, concluding that the statute only applied to the intentional acts of a defendant who directly abused a child.\textsuperscript{182}

The state appealed the circuit court's dismissal, arguing that Williquette's actions, by leaving her children in her husband's sole custody after being notified of the beatings and molestations, subjected the children to abuse within the meaning of the statute.\textsuperscript{183} The court of appeals reversed the trial court's order of dismissal, reasoning that Williquette "could have been bound over for aiding and abetting her husband's abuse of the children, even though the state had not argued that theory."\textsuperscript{184} The court of appeals, however, did agree with the trial court's reasoning that Williquette could not be tried for directly committing child abuse based on her failure to protect her children.\textsuperscript{185}

\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 147.
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 148.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 148-49.
\textsuperscript{183} Id. at 149.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
The Supreme Court of Wisconsin reviewed this question of the statutory interpretation of section 940.201 and whether it required Williquette to directly inflict abuse to be prosecuted under the statute.\footnote{186} The court concluded that the meaning of the word "subjects," as used in the statute, did not limit its application only to persons who actively participate in abusing children.\footnote{187} The court broadly interpreted the common meaning of "subjects" as including more than directly inflicting abuse on children, covering situations in which a person with a duty toward a child exposes the child to a foreseeable risk of abuse.\footnote{188} The court found the existence of this duty in the "special relationship" between parent and child, where the duty to protect is imposed.\footnote{189} Therefore, the Supreme Court of Wisconsin held that a parent who fails to take any action to stop instances of child abuse could be prosecuted under section 940.201 when the parent knowingly acts in disregard of the knowledge of abuse.\footnote{190}

This broad approach to statutory language was applied by the plurality in \textit{Lane v. Commonwealth}, which is exactly what the court refused to do in \textit{Knox v. Commonwealth}. In \textit{Knox}, the issue before the court was whether Kentucky Revised Statute section 502.020(1)(c) imposed a legal duty upon Mary Knox to prevent the rape of her daughter by her husband.\footnote{191} The majority of the court strictly construed the statutes protecting children, particularly section 199.335, and concluded that "we know of no statute or common law which imposes such a 'legal duty'" upon Mary Knox.\footnote{192} The majority concluded that the legal duties imposed by Kentucky's reporting statutes and the statutes imposing criminal liability for abuse fell short of the legal duty necessary for imposing liability under section 502.020, the complicity statute.\footnote{193}

However, Justice Wintersheimer, who wrote the dissenting opinion in \textit{Knox}, found the existence of a legal duty requiring

\begin{footnotes}
\item[186] Id.
\item[187] Id. at 150.
\item[188] Id.
\item[189] Id. at 152.
\item[190] Id.
\item[191] Knox v. Commonwealth, 735 S.W.2d 711 (Ky. 1987).
\item[192] Id.
\item[193] Id. at 712.
\end{footnotes}
Mary Knox to protect her child in the exact statutory language rejected by the majority. The dissent found the existence of a legal duty in Kentucky Revised Statute section 199.335(2), which provided that any person who knows a child is an abused child has a legal duty to report such abuse. The dissent broadly interpreted the words "any person" to include the parent of a child who is aware of abuse. Further, the dissent in Knox cited the newer version of section 199.335, which was repealed on July 1, 1987, as another source of a statutory duty. The newer section, 620.010, set forth a legislative purpose of establishing that children have certain fundamental rights which include protection from sexual or physical injury and exploitation.

From these two statutory provisions, the dissent found it "illogical" to legislate a duty to report and a duty to prevent child abuse for non-parents, without imposing the same legal duty upon a parent. Therefore, the dissenting opinion of Knox broadly interpreted these and other Kentucky statutes as establishing a duty upon a parent to take reasonable measures to prevent the abuse of their child.

This broad interpretation of statutory language, applied by Justice Wintersheimer in the Knox dissent, is the source of the plurality's opinion in Lane. In Lane, Justice Wintersheimer again relied heavily upon Kentucky Revised Statute section 620.010 as establishing an affirmative duty for any person, including a parent or guardian, to prevent physical injury to a

194. Id. (Wintersheimer, J., dissenting).
195. Id.
196. Id.
197. Id. at 713. The "newer" version of section 199.335 is the current section 620.010. KY. REV. STAT. ANN. § 620.010 (Banks-Baldwin 1996) states in part: [T]his chapter shall be interpreted to effectuate the following express legislative purposes regarding the treatment of dependent, neglected, and abused children. Children have certain fundamental rights which must be protected and preserved, including but not limited to, the rights to adequate food, clothing and shelter; the right to be free from physical, sexual or emotional injury or exploitation; the right to develop physically, mentally, and emotionally to their potential; and the right to educational instruction and the right to a secure, stable family.
198. Knox, 735 S.W.2d at 713 (Wintersheimer, J., dissenting) (citing KY. REV. STAT. ANN. § 620.010 (Banks-Baldwin 1996)).
199. Id.
200. Id.
child.\textsuperscript{201} The source of this duty is not found within the statutory language, but is interpreted from the legislative intent.\textsuperscript{202} The plurality asserted that section 620.010 provides clear legislative intent to protect children from physical harm, thus imposing a duty upon parents to protect their children from abuse.\textsuperscript{203} Therefore, under the complicity statute, Lane was guilty of complicity to commit first degree assault on her infant daughter, by breaching her legal duty to protect her daughter from injury and for failing to make a proper effort to prevent the commission of the assault by her boyfriend.\textsuperscript{204}

This broad statutory interpretation mirrors that of the court in \textit{Williquette}.\textsuperscript{205} In \textit{Williquette}, the Wisconsin statute did not specifically impose a duty upon a parent to protect a child from abuse, yet the court interpreted this duty to exist based on the common law rule that requires parents to protect their children from abuse and a liberal interpretation of Wisconsin's child abuse statute.\textsuperscript{206} Although the Wisconsin statute explicitly stated that "whoever tortures a child or subjects a child to cruel maltreatment ... is guilty of a Class E felony," the court held that the statute is broader than applying only to persons who directly inflict abuse on children.\textsuperscript{207} The court held this because it found that its interpretation was "consistent with the purpose of the statute."\textsuperscript{208} This is the rationale applied by the plurality in \textit{Lane}, holding that the "intent" of the Kentucky legislature in passing Chapter 620 of the Kentucky Revised Statutes was to impose an affirmative duty upon parents to protect children from abuse, although this is not expressly stated within the statute.\textsuperscript{209}

Alternatively, Massachusetts has recently interpreted its aiding and abetting statute as failing to establish a parental duty of care and protection toward the parent's minor child and has refused to impose criminal liability upon a parent who acts

\begin{thebibliography}{99}
\bibitem{201} Lane v. Commonwealth, 949 S.W.2d 604, 605 (Ky. 1997).
\bibitem{202} Id. at 606.
\bibitem{203} Id.
\bibitem{204} Id. at 604.
\bibitem{205} State v. Williquette, 385 N.W.2d 145 (Wis. 1986).
\bibitem{206} Id. at 150.
\bibitem{207} Id.
\bibitem{208} Id.
\bibitem{209} Lane v. Commonwealth, 949 S.W.2d 604, 606 (Ky. 1997).
\end{thebibliography}
passively toward child abuse. The issue before the Massachusetts Supreme Court in Commonwealth v. Raposo was whether a parent can be found guilty as an accessory before the fact to rape and to indecent assault and battery of his or her minor child when the parent fails to take reasonable steps to prevent the sexual attacks by a third person. The defendant, Maria Raposo (Raposo), was the mother of a mildly retarded child who was seventeen at the time of the abuse. Raposo's boyfriend, Manuel F. Matos, Jr. (Matos), lived with Raposo and her daughter for two months. On one occasion, Matos told Raposo that he intended to have sexual intercourse with her daughter, stating that "she needs a man." Raposo never responded to Matos' comments, but knew that her daughter did not want to have intercourse with Matos. Matos forced Raposo's daughter to have intercourse with him from two to four times. At least once, Raposo entered her daughter's bedroom and told Matos to stop, but did not enlist outside assistance to stop the abuse or take her daughter to the police station to report the attacks until May 22, 1988.

Massachusetts General Laws provides that "[w]hsoever aids in the commission of a felony, or is [an] accessory thereto before the fact by counseling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon." Citing Massachusetts case law, the court concluded that in order for a person "to be found guilty as an accessory before the fact, the evidence must prove beyond a reasonable doubt that the defendant must in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, [and] that he

212. Id. at 775.
213. Id.
214. Id.
215. Id.
216. Id.
217. Id.
218. Id.
219. Id. (citing MASS. GEN. LAWS ch. 274, § 2 (1990)).
seek by his action to make it succeed." 220 The court found that this requirement is more than just "mere acquiescence," although it does not necessarily require direct participation, "if there is association with the criminal venture and any significant participation in it." 221

The Commonwealth of Massachusetts argued that in allowing Matos to have access to her abused daughter and failing to take reasonable steps to stop his action, Raposo "aided" Matos in committing the crimes against her daughter. 222 This argument is parallel to that argued by the Commonwealth of Kentucky in *Lane*. 223 In *Lane*, it was charged that the defendant "aided, counseled, or attempted to aid Bryan Tubbs in the offense of assault in the first degree. . . ." 224 Yet, the court in *Raposo* declined to follow other jurisdictions by interpreting its accessory before the fact law as establishing the principle that an omission by a parent to take action and protect his child, without more, is the equivalent of aiding in the commission of a felony against the child. 225 The *Raposo* court determined that the Massachusetts aiding and abetting statute requires more than an omission, as supported by Massachusetts case law. 226

However, Kentucky's complicity statute specifically states that "[a] person is guilty of an offense committed by another person when . . . he [has] a legal duty to prevent the commission of the offense, [and] fails to make a proper effort to do so." 227 Therefore, Kentucky imposes liability for an omission, as long as there is a legal duty to act. 228 The plurality opinion in *Lane* does not broadly interpret the complicity statute, it expands section 620.010 of the Kentucky Revised Statutes to impose an affirmative duty on parents to act in the prevention of the abuse of their children. 229 Therefore, the plurality's opinion is

---

220. *Id.* (citing Commonwealth v. Stout, 249 N.E.2d 12 (Mass. 1969)).
221. *Id.* at 775-76 (citing Commonwealth v. Morrow, 296 N.E.2d 468 (Mass. 1973)).
222. *Id.* at 776.
223. *Lane* v. Commonwealth, 949 S.W.2d 604 (Ky. 1997).
224. *Id.*
225. *Raposo*, 595 N.E.2d at 776. The court cites to the holding of the North Carolina Supreme Court in *State v. Walden*, 293 S.E.2d 780 (1982), among other jurisdictions, in formulating this conclusion. *Id.*
226. *Id.*
228. *Id.*
229. *Lane*, 949 S.W.2d at 606.
consistent with the holding of the courts in both Williquette and Raposo.

VII. THE CONCURRING OPINION'S RECOGNITION OF THE COMMON LAW'S IMPOSITION OF A DUTY UPON A PARENT TO PROTECT AN ABUSED CHILD

It is a well-established legal principal that a parent has several legal duties to his or her child, grounded in the common law. Among these duties is the duty to provide one's child with the proper medical attention and proper care. Several courts have extended this common law duty to include the protection of one's child from the abuse of a third party. The common law is the primary source used by the concurring opinion in Lane for imposing a legal duty upon parents to protect their children from abuse.

There is a generally recognized common law rule that "one has no legal duty to aid another person in peril, even when aid can be rendered without danger or inconvenience to himself," and will not be held criminally responsible for failing to act. What the concurrence in Lane has done is recognized an exception to this general rule, and imposed a legal duty upon a parent to aid his or her child in peril, specifically when that parent knows or has reason to know that the child is being abused. Therefore, a parent who does not act upon this legal duty can be held criminally liable for complicity to commit the act of the abuser under Kentucky Revised Statute section 502.020.

As early as 1960, other states have imposed such a common law duty upon parents, and have combined this duty with statutory law to impose criminal liability upon parents who

230. Id. at 608 (citing W. LAFAVE & A. SCOTT, CRIMINAL LAW 203 (2d ed. 1986)) (Cooper, J., concurring).
231. Id.
232. See e.g., State v. Walden, 293 S.E.2d 780, 786 (N.C. 1982).
233. Lane, 949 S.W.2d at 607 (Cooper, J., concurring).
234. Id. at 608 (citing 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.3, at 284-85 (1986)).
235. Id. at 611.
236. Id.
passively allow their children to become victims of abuse. The Maryland Supreme Court recognized this duty in *Palmer v. State*, a case cited by the *Lane* concurrence. In *Palmer*, the court stated that the actions of the mother's boyfriend were "so outrageous as to put any reasonable person on guard that the child's life was in real and imminent peril." Further, the *Palmer* court concluded that the mother "should, and could, have removed [the child] from the cruelty and danger." Instead, the court felt that the mother's actions clearly supported the conclusion that she committed gross and criminal negligence by not removing her child from the dangerous environment.

Many courts have followed the *Palmer* court's lead and have imposed criminal liability upon a parent for failure to protect a child from abuse based on this "special relationship." In 1982, the North Carolina Supreme Court recognized the existence of this duty, stating that "to require a parent as a matter of law to take affirmative action to prevent harm to his or her child or be held criminally liable imposes a reasonable duty upon the parent." In *People v. Peters*, the Illinois Appellate Court convicted a mother of the murder of her infant son by reason of accountability. The mother argued that she could not be guilty of murder beyond a reasonable doubt because she was not present at the time when her boyfriend murdered her son and she did not specifically act to facilitate his murder. The court disagreed, stating: "[g]enerally, a person will not face criminal liability for failing to aid another." However, the common law has carved out an exception in the case of the parent-child relationship. "Custodial parents have an affirmative duty to protect and provide for their minor children." The court held that "[a] parent who knowingly fails to protect its child from abuse may be prosecuted under the accountability statute and, thereby, becomes legally accountable for the conduct of the

---

238. *Id.*
239. *Id.* at 473.
240. *Id.*
241. *Id.*
244. *Id.* at 470.
245. *Id.* at 476 (citing *People v. Bernard*, 500 N.E.2d 1074 (Ill. App. Ct. 1986)).
abuser."\textsuperscript{246} This was the approach taken by the concurrence in \textit{Lane}.\textsuperscript{247}

The \textit{Palmer} court interpreted the Maryland nurture statutes as legally charging parents with their minor children's care.\textsuperscript{248} The \textit{Lane} concurrence furthered its argument by asserting that the Kentucky legislature has recognized the existence of this "special relationship" through the development of statutes similar to that used by the court in \textit{Palmer}.\textsuperscript{249} Kentucky Revised Statute section 530.040 is the abandonment statute that charges the person legally responsible for the care or custody of a minor with committing a Class D felony for deserting the minor.\textsuperscript{250} Similarly, the concurrence cites section 530.060 which results in a Class A misdemeanor for a parent, guardian, or other person legally charged with the care or custody of a minor to fail or refuse to exercise reasonable diligence to prevent the child from becoming neglected, dependent, or a delinquent child.\textsuperscript{251} These types of statutes were considered by the concurrence as clearly establishing the Kentucky legislature's recognition of the "special relationship" between a custodial parent and his or her child.\textsuperscript{252} From this recognition, the concurrence believes that there arises the common law duty for parents to protect their children from abuse.\textsuperscript{253}

\textbf{VIII. CONCLUSION: WHERE DOES THE COMMONWEALTH STAND?}

The trend among states across the country has been to enlarge the scope of criminal liability for parents who fail to act to protect their children where the common law or statutes impose a legal duty on a parent.\textsuperscript{254} With its decision in \textit{Lane v. Commonwealth}, the majority of the members of the court

\textsuperscript{246} Id.
\textsuperscript{247} Lane v. Commonwealth, 949 S.W.2d 604, 609 (Ky. 1997) (Cooper, J., concurring).
\textsuperscript{248} Palmer v. State, 164 A.2d 467, 468 (Md. 1960).
\textsuperscript{249} \textit{Lane}, 949 S.W.2d at 607 (Cooper, J., concurring).
\textsuperscript{250} Id. at 611.
\textsuperscript{251} Id.
\textsuperscript{252} Id.
\textsuperscript{253} Id.
imposed this duty, but disagreed on its source.\textsuperscript{255} The plurality and concurring opinions of \textit{Lane}, in effect, reached the same result by a different means. The plurality found the source of this duty in the express statement of legislative intent in Kentucky Revised Statute 620.010.\textsuperscript{256} The concurrence used as its source the common law "special relationship" between parent and child.\textsuperscript{257}

This duty has been recognized in our country since 1960; it is now 1997, and the Commonwealth of Kentucky is recognizing the existence of this duty for the first time.\textsuperscript{258} According to the National Committee for the Prevention of Child Abuse, an estimated one million incidents of child sexual abuse occur in the United States each year.\textsuperscript{259} Further, it has been approximated that "55.6 percent of sexually abused children are abused by a parent."\textsuperscript{260} Because of these shocking statistics, which do not include the number of children who suffer from physical abuse, many states have enacted laws imposing liability for persons who passively allow this abuse to continue.\textsuperscript{261} Kentucky has such a statute, 502.010, yet, the legislature has failed to specifically define the meaning of "legal duty" as it is stated within the statute.\textsuperscript{262} This has left the Kentucky Supreme Court with the task of deciding if a legal duty exists that will allow for criminal liability to be imposed on passive parents.

A majority of the court's justices agree that this duty exists, but the court's holding in \textit{Lane} leaves many unanswered questions regarding the source of this duty and how it should be applied. The dissenting opinion felt that the decision to establish this duty is the role of the Kentucky legislature, not that of the Kentucky Supreme Court.\textsuperscript{263} The legislature is now in the position to do its part to clarify the law, the Commonwealth has been left with following the court's decision.

\textsuperscript{255} \textit{Lane}, 949 S.W.2d at 605, 611.  
\textsuperscript{256} Id. at 606.  
\textsuperscript{257} Id. at 611 (Cooper, J., concurring).  
\textsuperscript{258} Id. at 606.  
\textsuperscript{259} Mello, supra note 208 at 1103 (citing Ruth C. Blanche, \textit{The Nightmare of the Sexually Abused Child}, USA TODAY MAGAZINE, Nov. 1985, at 55).  
\textsuperscript{260} Id.  
\textsuperscript{261} Id.  
\textsuperscript{262} KY. REV. STAT. ANN. § 502.010(1)(c) (Banks-Baldwin 1996).  
\textsuperscript{263} \textit{Lane}, 949 S.W.2d at 612 (Stumbo, J., dissenting).
in *Lane.* Regardless, it is clear that *Knox v. Commonwealth* has been overruled and that the children of the Commonwealth of Kentucky have certain fundamental rights that must be protected by the State, the most basic of these rights is "to be free from sexual and physical injury..."