# KENTUCKY SURVEY ISSUE

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## FEATURE ARTICLE

**The Need to Close Kentucky's Revolving Door**
Proposal for a Movement Towards a Socially Responsible Approach to Treatment and Commitment of the Mentally Ill

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A SURVEY OF KENTUCKY ENVIRONMENTAL LAW

by David C. Short1 and Peter Schmid2

I. INTRODUCTION

The purpose of this survey is to provide a practitioner’s guide to current environmental issues that have arisen in Kentucky in the past several years.

The term “environmental law” is an umbrella term, which includes common law, administrative, and statutory issues bearing upon land, air, and water, and society’s interests therein. Categorization of environmental law is still in its infancy.3 The issues we discuss in this survey of Kentucky Environmental Law are therefore organized into two basic categories: First, issues in legal process, and second, substantive issues. The substantive section is further divided

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a survey of Kentucky environmental law according to three simple categories, which refer to the objects acted upon by environmental law: water, air, and land.

There are a few controversial substantive issues, such as the regulation of nitrous oxides ($\text{NO}_2$), and the Martin County coal slurry spill, which though of tremendous legal importance, have not produced enough ripe litigation at present to fall within the scope of this survey.

II. CURRENT ISSUES IN LEGAL PROCESS

A. The Metes and Bounds of Administrative Remedies

1. Exhaustion of Administrative Remedies

The general rule is that administrative remedies must be exhausted before judicial relief can be sought. There are, however, two exceptions to this requirement. One exception is that a party is not required to exhaust its administrative remedies when to do so would be an exercise in futility. A second exception is that a party is not required to exhaust its administrative remedies when attacking the facial constitutionality of a statute or regulation. The second exception is part and parcel of the first, since an administrative agency cannot decide constitutional issues, and therefore any such consideration is futile.

In *Commonwealth v. DLX, Inc.*, decided in April of 2001, DLX, Inc., a mining company, sued the Commonwealth of Kentucky alleging an unconstitutional taking by Kentucky's Natural Resources and Environmental Protection Cabinet (NREPC). When DLX sought to extend its coal mining permit with the Cabinet to mine land underneath a national landmark, the Cabinet's Department for Surface Mining Reclamation and Enforcement (DSM) refused to issue DLX a permit, whereupon DLX filed an administrative appeal with the Secretary for Natural Resources and Environmental Protection who upheld DSM's denial of a permit. DLX then brought an action in the Franklin Circuit Court. The Franklin Circuit Court granted the Cabinet's motion for judgment on the pleadings on the basis that DLX had not exhausted its administrative remedies. DLX could have done so by making an administrative appeal of the Secretary's final order. The Court of Appeals reversed, reasoning

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5 See, e.g., *Goodwin v. City of Louisville*, 215 S.W.2d 557, 559 (Ky. 1948).  
6 See *Harrison's Sanitarium v. Commonwealth*, 417 S.W.2d 137, 139 (Ky. 1967).  
7 See *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001) (citing *Goodwin*, 215 S.W.2d at 559).  
8 Id.  
9 42 S.W.3d 624 (Ky. 2001).  
10 See id. at 624-25.  
11 Id. at 625.  
12 Id.  
13 Id.  
14 Id. at 627.
that the issue of unconstitutional taking raised by DLX could not be raised at the administrative level, and was therefore futile.15

The Kentucky Supreme Court granted review, and reversed the Court of Appeals, holding that the case was unripe because administrative remedies must be exhausted before judicial remedy can be had, and that the constitutional challenge exception was inapplicable because the challenge was not to the facial validity of the regulation, but to the regulation as applied.16 The Court reasoned that a further administrative appeal of the Secretary's final decision, which was available under the statute in question,17 would allow a further determination as to the amount of injury, and was therefore not futile.18

In a dissenting opinion, Justice Wintersheimer, joined by Chief Justice Lambert, opined that since DLX's constitutional claim was initially struck during the administrative action, an appeal of the administrative decision would have permitted DLX to raise the constitutional issue and would therefore have been futile as to that issue.19

2. Location of Appeal

In Shewmaker v. Commonwealth,20 Curtiss Shewmaker was the owner of an underground storage tank requiring site remediation.21 The NREPC found that the design and construction of Shewmaker's groundwater monitoring wells were defective, and recommended a penalty against him, citing his right to appeal under Kentucky Revised Statute Chapter 224, entitled "ENVIRONMENTAL PROTECTION,"22 and Kentucky Revised Statute Chapter 151, entitled "GEOLOGY AND WATER RESOURCES."23 Section 224.10-470(1) allows appeals to be brought in the Franklin Circuit Court,24 and section 151.186(1) allows appeals to be brought in the county where the structure or activity is located.25 Shewmaker appealed to both the circuit court in the county where his activity took place, namely Spencer Circuit Court, and in the Franklin Circuit Court.26

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15 See DLX, Inc., 42 S.W.3d at 626.
16 Id.
17 Id. (citing KY. REV. STAT. ANN. § 305.0305 (Banks-Baldwin 1992)).
18 Id.
19 Id. at 627 (Wintersheimer, J., dissenting).
21 See id. at 808.
22 Id. at 808-09 (quoting KY. REV. STAT. ANN. § 224.10-470(1) (Banks-Baldwin 1992)). Section 224.10-470(1) provides that, "appeals may be taken from all final orders of the Natural Resources and Environmental Protection Cabinet[and that] [t]he appeal shall be taken to the Franklin Circuit Court within thirty days from the entry of the final order." KY. REV. STAT. ANN. § 224.10-470(1) (Banks-Baldwin 1992).
23 See Shewmaker, 30 S.W.3d at 808 (citing KY. REV. STAT. ANN. § 151.186(1) (Banks-Baldwin 1992)). Section 151.186(1) provides that, "appeals may be taken from all final orders of the cabinet. Within thirty (30) days from entry of the final order the appeal shall be taken to the Circuit Court of the county where the structure or activity which is the subject of the order is located." KY. REV. STAT. ANN. § 151.186(1) (Banks-Baldwin 1992).
24 See Shewmaker, 30 S.W.3d at 808 (quoting KY. REV. STAT. ANN. § 224.10-470(1) (Banks-Baldwin 1992)).
25 Id. (quoting KY. REV. STAT. ANN. § 151.186(1) (Banks-Baldwin 1992)).
26 Id.
This conflict arose because the Spencer circuit court dismissed his appeal for lack of jurisdiction. Upon appeal to the Kentucky Court of Appeals, Shewmaker argued that section 151 was applicable because the violation related to groundwater contamination, and that because he made the appeal in the circuit court where his activity was located, the claim in that court should not have been dismissed. The Cabinet argued that since the violations in question pertained to section 224, the only appropriate appeal was to the Franklin Circuit Court.

The Kentucky Court of Appeals, presuming that the Legislature was cognizant of preexisting statutes at the time it enacted a later statute on the same subject matter, resolved the latent ambiguity in the statutes by applying legislative intent, and gave both statutes effect in their entirety. Citing Senate Bill 330, the Court concluded that amendments to the statutes implied that section 224.10-470 applies to violations under Chapter 224, and section 151.186 applies to violations under Chapter 151. On the basis of its statutory analysis, the Court affirmed the dismissal by the Spencer Circuit Court, holding that appeals of cabinet actions under the "ENVIRONMENTAL PROTECTION" statute, Chapter 224, are appealable only to the Franklin Circuit Court, and not the court where the activity took place.


Administrative decisions are reviewed de novo, rather than under a clearly erroneous standard. However, de novo review does not preclude the appellate court from adopting in large part the point of view of an administrative agency that prevails in the trial court.

In Rockwell International Corp. v. Commonwealth, NREPC sued a manufacturer to enforce clean-up of the by-product waste chemical polychlorinated biphenyl (PCB), which had contaminated soil and water. The Kentucky Court of Appeals affirmed a trial court finding for the NREPC, ordering Rockwell to pay the Cabinet its costs in responding to the violation.

Rockwell argued upon appeal that: (1) the trial court’s finding that the Cabinet’s determinations were "not unreasonable" indicated application of the wrong legal standard; (2) as a result the trial Court accepted the Cabinet’s determinations without clearly erroneous review.
expert exposure assumptions, even when they conflicted with Rockwell's;\textsuperscript{42} and (3) the cost and other factors relating to the impact and feasibility of cleanup would outweigh the advantages to the environment.\textsuperscript{43}

The Kentucky Court of Appeals, affirming, first held that, merely because the trial court accepted the Cabinet's view did not indicate that the Court failed to take de novo determination of the administrative decision.\textsuperscript{44} Even the fact that the trial court adopted language from the Cabinet's brief in its judgment was not alone enough to show any undue deference to the Cabinet.\textsuperscript{45} Second, the Court of Appeals held that it is the province of the trial court to weigh the credibility of evidence, and such determination may be overruled only if clearly erroneous.\textsuperscript{46} Finally, the Court held that, "'[t]he trial court was within its right to 'balance [the] inconvenience' to Rockwell with the benefit to the environment.'"\textsuperscript{47} Discretionary review of the decision by the Kentucky Court of Appeals was denied by the Kentucky Supreme Court.\textsuperscript{48}

4. \textit{Administrative Piercing of the Corporate Veil}

At common law, piercing the corporate veil allows an individual to be liable for the acts of a corporation.\textsuperscript{49} The propriety of piercing the corporate veil to reach a shareholder depends upon whether three elements are established, "(1) that the corporation was a mere instrumentality of the shareholder; (2) that the shareholder exercised control over the corporation in such a way as to defraud or to harm the plaintiff; and (3) that a refusal to disregard the corporate entity would subject the plaintiff to unjust loss."\textsuperscript{50}

Piercing of the corporate veil in the context of environmental law has been at issue in two recent Kentucky cases which involve coal mining: \textit{Commonwealth v. Neace}\textsuperscript{51} and \textit{Commonwealth v. Evans}.\textsuperscript{52} Some background information on surface mining is given as follows as a prelude to these cases.

Surface Mining in Kentucky is regulated by the Kentucky Division of Surface Mining, which is situated within the Kentucky Cabinet for Natural Resources and Environmental Protection, pursuant to approval, of the State Program for the regulation of surface coal mining and reclamation, by the United States Secretary of the Interior as provided for in the Federal Surface Coal Mining and Reclamation Act ("SMCRA").\textsuperscript{53} The requirements for which the State Program must meet must be at least as stringent as those requirements required by SMCRA.\textsuperscript{54}

\textsuperscript{42} Id. at 319.
\textsuperscript{43} Id. at 320.
\textsuperscript{44} See Rockwell, 16 S.W.3d at 320.
\textsuperscript{45} Id. (citing Bingham v. Bingham, 628 S.W.2d 628, 629 (Ky. 1982); Prater v. Cab. for Human Resources, 954 S.W.954, 956 (Ky. 1997)).
\textsuperscript{46} Id. at 319.
\textsuperscript{47} Id. at 320 (citing Bartman v. Shobe, 353 S.W.2d 550, 554 (Ky. 1962)).
\textsuperscript{48} Id. at 316.
\textsuperscript{49} See, e.g., White v. Winchester Land Dev. Corp., 584 S.W.2d 56 (Ky. Ct. App. 1979).
\textsuperscript{50} Id. at 61.
\textsuperscript{51} 14 S.W.3d 15 (Ky. 2000).
\textsuperscript{52} 45 S.W.3d 442 (Ky. 2001).
\textsuperscript{53} See 30 U.S.C. § 1253 (1994). Section II, C, 2 of this article discusses in more detail a case having specifically to do with SMCRA.
\textsuperscript{54} Id. at § 1253(a) (stating that the state program must demonstrate that, "such State has the capability of carrying out the provisions of this chapter").
These requirements are lengthy, comprehensive and detailed, setting out minimum standards that a State Program must meet, including, but not limited to providing “for the regulation of surface coal mining and reclamation operations in accordance with the requirements” of SMCRA.55 State Programs must include requirements for “sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which sanctions shall meet the . . . requirements” set out in SMCRA.56 Also required are the following: (1) “a State regulatory authority with sufficient administrative and technical personnel, and sufficient funding to enable the state to regulate surface coal mining and reclamation operations in accordance with” SMCRA provisions;57 (2) “a State law which provides for the effective implementations, maintenance, and enforcement of a permit system, meeting . . . [SMCRA’s requirements] for the regulation of surface coal mining and reclamation operations for coal on lands within the State . . . [;]”;58 (3) a comprehensive processes for the designation of lands unsuitable for surface coal mining;59 (4) an “establishment for the purposes of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations . . . [;]”;60 and (5) “rules and regulations consistent with regulations issued by the Secretary pursuant” to SMCRA.61

Kentucky’s approved State Program was in existence at the time the events set out in Commonwealth v. Neace62 occurred. In Neace, defendant Neace was the sole officer, director, and shareholder of N.W. Coal, until he sold the enterprise to Gulf Southland Corporation.63 Following the sale, NREPC filed complaints for regulatory and statutory violations against N.W. Coal, which were later amended to include Neace individually.64 The trial court granted summary judgment in favor of NREPC, reasoning that Neace was the alter ego of N.W. Coal and that it was proper to pierce the corporate veil.65 The Court of Appeals vacated the summary judgment, holding that “common law veil piercing had been superseded by statute.”66

The Kentucky Supreme Court granted review, and in an opinion written by Justice Wintersheimer, reversed the Court of Appeals and held in favor of NREPC.67 The Court stated that there was not an effective transfer of permit from Neace to Gulf Southland because: (1) Neace and Gulf Southland did not comply with Kentucky Revised Statute section 350.135, requiring Cabinet approval for permit transfers by sale;68 and (2) Neace could be individually liable

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55 Id. at § 1253(a)(1).
56 Id. at § 1253(a)(2).
57 Id. at § 1253(a)(3).
58 Id. at § 1253(a)(4).
60 Id. at 1253(a)(6).
61 Id. at § 1253(a)(7).
62 14 S.W.3d 15 (Ky. 2000).
63 See id. at 17.
64 Id.
65 Id. at 17-18.
66 Id. at 18.
67 Id. at 20.
68 See Neace, 14 S.W.3d at 18 (quoting KY. REV. STAT. ANN. § 350.135(1) (Banks-Baldwin 1992)).
because the common law doctrine of piercing the corporate veil was not superseded by Kentucky Revised Statute section 350.990(9). Each holding is discussed in turn.

First, the Court held that under section 350.135, both Neace (the transferor) and Gulf Southland (the transferee) were required to file an application for transfer of the permit. Additionally, the statute prohibits a transfer to any person ineligible to obtain a new permit; effectively preventing the issuance of new permits to parties "who have evaded direct enforcement," or otherwise allowed unabated violations to occur in operations under their control. The Supreme Court held that the sale by Neace was a mere sham that subverted public policy, and that there was an adequate basis for Neace's individual liability under either common law veil piercing, or statute.

Second, the Court stated that KRS 350.990(9) does not repeal the common law, but emphasized nonetheless that nothing in their analysis limits the judicial branch in its future interpretation and development of the common law. The Supreme Court noted the Court of Appeals erroneously cited Triple M Mining Co. v. NREPC in support of the proposition that the common law is superseded by the statute.

Justice Keller, joined by Justice Cooper, concurred in part and dissented in part, opining that there were still factual issues unresolved as to whether Neace had relinquished control of N.W. Coal to Gulf prior to the Cabinet's final orders, and that since this issue of fact might preclude common law piercing, summary judgment for Cabinet was inappropriate.

The Kentucky Supreme Court, in another coal case with similar facts, Commonwealth v. Evans, involving individual liability for a corporation, examined the timing governing assessment of damages to the individual. In this case, NREPC had taken administrative action against certain coal companies for failure to secure statutorily mandated performance bonds. The defendants appealed the administrative action and assessment of civil liability to the Franklin Circuit Court.

Cabinet of a joint application submitted by both the transferor and the transferee. See Neace, 14 S.W.3d at 20. "Clearly, statutory liability under KRS 350.990(9) and common law piercing liability complement each other . . . [For example,] 'shareholders may be liable for a corporate debt either by piercing the corporate veil or by statutory authorization.' [On the other hand, liability may be imposed] pursuant to KRS 350.990(9) . . . [and] that both remedies are available." Id. at 19 (citing Morgan v. O'Neil, 65 S.W.2d 83 (Ky. 1983); Natural Resources and Environmental Protection Cabinet v. Williams, 768 S.W.2d 47 (Ky. 1989)).

Id. at 18 (citing KY. REV. STAT. ANN. § 350.135(5) (Banks-Baldwin 1992)).

Id. at 19-20. Id. at 19. "Any repeal of the common law must be clear and expressed." See Neace, 14 S.W.3d at 19 (citing Benjamin v. Goff, 236 S.W.2d 905 (Ky. 1951)).

Id. (citing City of Louisville v. Chapman, 413 S.W.2d 74 (Ky. 1967)).

Id. (citing 906 S.W.2d 364 (Ky. Ct. App. 1995)).

Id. (stating that Triple M Mining Co. does not reach the issue of whether common law piercing is superseded by a statute).

Id. at 20 (Keller, J., dissenting).

45 S.W.3d 442 (Ky. 2001).

See generally id.

Id. at 443 (citing KY. REV. STAT. ANN. § 350 (Banks-Baldwin 1992).

Id.
The Franklin Circuit Court affirmed the administrative orders with respect to the coal companies, "but vacated the orders to the extent that they imposed any individual liability on [the officers]." The Court of Appeals affirmed, reasoning that KRS 350.990(9) allowed assessment of individual liability "after the corporation has failed to comply with a final order of the secretary." The Supreme Court reversed both lower courts and held that individual civil penalties can be imposed against shareholders, directors, or agents of corporation during administrative review, and that such penalties need not await enforcement action against the corporation in circuit court, because Kentucky Revised Statute Section 350.990 allows individual liability to be assessed as soon as a "corporate permittee violates any provision of [the] chapter or administrative regulation issued pursuant thereto."

5. Construing Administrative Regulations in the Sixth Circuit

*Chevron U.S.A., Inc. v. Natural Resources Defense Council* remains the essential opinion addressing a federal agency's discretion in the interpretation of a federal statute. This case established a deferential judicial approach to the agency's interpretation of law when Congress has been silent.

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82 Id.
83 Id. at 443 (citing Ky. REV. STAT. ANN. § 350.990(9) (Banks-Baldwin 1992)). Section 350.990(9) provides that:

> When a corporate permittee violates any provision of this chapter or administrative regulation promulgated pursuant thereto or fails or refuses to comply with any final order issued by the secretary, any director, officer, or agent of the corporation who willfully and knowingly authorized, ordered, or carried out the violation, failure or refusal shall be subject to the same civil penalties, fines, and imprisonment as may be imposed upon a person pursuant to this section.

84 See Evans, 45 S.W.3d at 444 (interpreting Ky. REV. STAT. ANN. § 350.990 (Banks-Baldwin 1992)).
85 See generally id. at 442.
86 Id. at 444. An interpretation of Kentucky Revised Statute Section 350.990(9) to imply a restriction of penalty assessment until after a final order of the secretary would contradict other provisions in the statute. Id. (citing KY. REV. STAT. ANN. § 350.990 (Banks-Baldwin 1992)).
89 See Chevron, 467 U.S. at 843.

If . . . Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

Id. See also Hagan v. Farris, 807 S.W.2d 488, 490 (Ky. 1991) (holding that agencies are usually entitled to great deference in interpreting their own regulations).
In *Help Alert Western Kentucky, Inc. v. TVA,* three environmental organizations brought an action in the U.S. District Court, Western District of Kentucky, to enjoin the Tennessee Valley Authority ("TVA") from carrying out timber harvesting in the Land Between the Lakes, alleging a violation of the National Environmental Policy Act ("NEPA"). NEPA requires that federal agencies take a "hard look" at the environmental consequences of any major federal action they are considering in order to determine whether the action will significantly affect the environment. If there may be a significant effect, NEPA requires the agency to prepare an environmental impact statement (EIS). The agency may also adopt a "categorical exclusion" for specific activities, allowing those activities to be deemed always of insignificant environmental impact. This case involved a categorical exclusion created by TVA, which TVA had applied to the timber harvesting activities of several logging companies in Land Between the Lakes.

The district court denied Help Alert's motion for preliminary injunction and a subsequent motion for reconsideration, whereupon Help Alert appealed to the Sixth Circuit Court of Appeals, which affirmed. The Sixth Circuit, in a majority opinion by Judge Nelson, first held that even though the TVA's assessment that the logging activity was "minor" was problematic, as long as an "agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly

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91 See id. at **1.
92 Id.
93 Id.
94 Id. (quoting Council on Environmental Quality, 40 C.F.R. § 1508.4 (2001)). Section 1508.4 defines "categorical exclusion" as:

[A] category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal Agency in implementation of these regulations ... and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

96 Id. at **2.
97 Id. at **3.
erroneous or inconsistent with the regulation.”

Second, the Court held that the plaintiffs failed to meet their high burden in appealing the denial of a preliminary injunction.

The dissent, authored by Circuit Judge Moore, agreed with the majority “that the district court owed substantial deference to the agency’s interpretation of its own regulation.” However, the dissent opined that TVA should be required to conduct site-specific impact statements because the agency’s interpretation of “minor non-TVA activities” to include large-scale timber harvesting operations was an unreasonable interpretation of the regulation.

II. ONGOING SUBSTANTIVE REGULATORY ISSUES

A. Water

1. Citizen Enforcement under the Clean Water Act ("CWA")

In *Friends of the Earth, Inc. v. Laidlaw Environmental Serv, Inc.*, the environmental group Friends of the Earth ("FOE") brought a citizen suit under the CWA against Laidlaw, the holder of National Pollutant Discharge Elimination System ("NPDES") permit, for violating the permit by discharging impermissible levels of mercury into waterways.

The CWA provides for the issuance of NPDES permits, which "impose limitations on the discharge of pollutants, and establish related monitoring and reporting requirements, in order to improve the cleanliness and safety of the Nation’s waters.” Prior to the citizen suit, the South Carolina Department of Health and Environmental Control ("DHEC") was petitioned to file a lawsuit against Laidlaw for the permit violation. The DHEC commenced litigation, eventually settling with Laidlaw for $100,000 in penalties plus an agreement by Laidlaw to desist.

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100 Id.

101 Id. (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)).

102 Id. at **4 (citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment)); Pettibone Corp. v. United States, 34 F.3d 536, 541 (7th Cir. 1994)).


105 See id. at 173 (citing 33 U.S.C. §§ 1365(a)(g) (1994 & Supp. IV 1998)).

106 See generally id. at 176.

107 Id. at 174. The Court goes on to explain that citizen enforcement actions are permitted under the CWA, and that citizen actions are only precluded when either the violations have ceased by the time the complaint was filed. (citations omitted).

108 Id. at 176-77.
The trial court denied Laidlaw’s Motion for Summary Judgment in favor of FOE, and found numerous violations, finding Laidlaw liable for $405,800 in damages and attorney fees. However, the Court denied declaratory and injunctive relief, reasoning that the “total deterrent effect,” including attorney fees, would adequately prevent future violations.

Upon appeal by FOE as to damages, the Fourth Circuit Court of Appeals vacated the entire decision and remanded with instructions to dismiss, reasoning that even if FOE had standing, the case had become moot once Laidlaw complied with the terms of the permit. Furthermore, the Court of Appeals stated that the plaintiffs failed to appeal the denial of equitable relief because the only remedy available to FOE was civil penalties payable to the government; such a remedy would not redress any injury FOE had suffered.

The Supreme Court of the United States, Justice Ginsberg writing for the majority, reversed the Fourth Circuit, holding that (1) even though the Fourth Circuit only assumed there was initial standing, the Plaintiffs indeed had standing because of their recreational, aesthetic, and economic interests; and (2) FOE’s claim was not moot because the Fourth Circuit erred by conflating the law on initial standing with the law on post-commencement mootness.

The Supreme Court stated that the action was rendered non-moot because “a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” Also, it is the burden of the party seeking mootness, to show that the challenged conduct cannot be reasonably expected to start up again. The Court further held that civil penalties might serve, as an alternate to injunction, “to deter future violations and thereby redress the injuries that prompted” the citizen action initially.

Justice Stevens, concurring, opined that “even if it were absolutely clear that [Laidlaw] had gone out of business and posed no threat of future violations[,] the case would still not be moot.

In a dissent joined by Justice Thomas, Justice Scalia opined that, though he did not disagree with the majority on the mootness issue, there was no standing at all because, (1) the plaintiffs’ mere ongoing “concerns” about the environment were not enough to establish injury in fact; and (2) statutory penalties payable to the Treasury did not redress any specific harm to the environment.
plaintiff. Scalia also criticized what he called a "revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests."  

The U.S. Sixth Circuit Court of Appeals further analyzed the citizen enforcement wing of the CWA several months after Friends of the Earth, Inc., was decided. The citizen suit provision of the CWA has an exception prohibiting citizen enforcement when a state agency is currently involved in a State or Federal court enforcement proceeding on the matter. In Jones v. City of Lakeland, the Sixth Circuit Court of Appeals held that a Tennessee citizen enforcement action under the Clean Water Act ("CWA") was a viable claim even though an enforcement action by the state was in progress.

In Jones, three riparian landowners sued the City of Lakeland ("City"), alleging that the City violated its NPDES permit and Tennessee law. The trial court granted the City's motion to dismiss, and the Sixth Circuit Court of Appeals affirmed, on the basis that prior state agency action to compel City compliance precluded a citizen enforcement action under the CWA. Upon rehearing en banc, the Sixth Circuit vacated its prior decision, holding that a state administrative agency charged with supervising water quality cannot be construed to be a "court" of the United States or a state; therefore, citizen actions were not precluded.

The Court of Appeals also held that even if the administrative agency were a "court," the administrative efforts undertaken by the state did not amount to "diligent prosecution" under the CWA because the agency permitted the discharge of impermissible levels of pollutants and waste into a creek over an extended period of time.

Finally, the Court stated that since citizens were denied a meaningful opportunity to participate significantly in the administrative decision-making process under Tennessee law, they should be allowed to bring civil enforcement actions to protect their interests.

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122 See Friends of the Earth, Inc., 528 U.S. at 202 (Scalia, J., dissenting) (citing Steel Co., 523 U.S. at 106)). Scalia argued that there is no precedent to the proposition that a penalty payable to the public "remedies" a private harm. Id. (Scalia, J., dissenting).
123 Id. at 209 (Scalia, J., dissenting).
124 See generally Jones v. City of Lakeland, 224 F.3d 518 (6th Cir. 2000) (en banc).
126 224 F.3d 518 (6th Cir. 2000) (en banc).
127 See, e.g., id.
128 Id. at 520 (citations omitted).
129 See Jones v. City of Lakeland, 175 F.3d 410, 414 (6th Cir. 1999) vacated, 224 F.3d 518 (6th Cir. 2000) (en banc).
130 See Jones, 224 F.3d at 521.
131 Id. at 522.
132 Id. at 523 (stating that Tennessee law does not require "public notice of hearings, nor does it require the state to extend third parties an opportunity to initiate or join mandatory controversial issues seeking justiciable resolution").
2. Industrial Run-Off and Slurry Ponds

In Morgan v. Natural Resources and Environmental Protection Cabinet,\textsuperscript{133} NREPC brought an administrative action against an oil well operator ("Morgan"), for allowing brine water to run off into natural drainage without a permit.\textsuperscript{134} Morgan had acquired "a portion of the working interest in an oil and gas lease on a tract of land in Daviess County."\textsuperscript{135} There was an oil well on the land that began to produce brine water, which ran off into a holding berm, and then overflowed from the berm.\textsuperscript{136} The Cabinet issued Morgan a notice of violation ("NOV").\textsuperscript{137} Upon Morgan's failure to comply, NREPC brought an administrative complaint against Morgan charging Morgan with violating several state statutes and regulations, including again 401 Kentucky Administrative Regulation 5:055 §1,\textsuperscript{138} as well as Kentucky Revised Statute Section 224.70-110,\textsuperscript{139} 401 Kentucky Administrative Regulation 5:065,\textsuperscript{140} and 401 Kentucky Administrative Regulation 5: 090.\textsuperscript{141} Morgan was charged specifically with: "(1) discharging a pollutant in excess of permit standards promulgated by the Kentucky Pollutant Discharge Elimination System (KPDES); (2) improperly disposing of produced water; and, (3) failing to report the spill of produced water."\textsuperscript{142}

Upon completion of the administrative hearing, the Secretary of NREPC adopted the hearing officer’s finding in favor of NREPC, holding that Morgan had violated 224.70-110's prohibition against discharging pollutants into the waters of the Commonwealth, and also violated several administrative regulations; therefore, Morgan was fined $6,500.\textsuperscript{143} Morgan then filed an appeal to the Franklin Circuit Court and after hearing the appeal, Franklin Circuit Court affirmed the Secretary's finding in favor of Cabinet.\textsuperscript{144}

Morgan appealed then to the Kentucky Court of Appeals, arguing that: (1) the trial court improperly placed the burden on Morgan to produce

\textsuperscript{133} 6 S.W.3d 833 (Ky. Ct. App. 1999).
\textsuperscript{134} See id. at 836.
\textsuperscript{135} Id. at 835.
\textsuperscript{136} Id. at 836 (stating that brine water would overflow into a dike and a garden hose was used to move the brine water from the dike into a natural drainage ditch).
\textsuperscript{137} Id. (citing 401 KY. ADMIN. REGS. 5:055 § 1 (1999)). Section 5:055 § 1 requires a permit for the drainage of pollutants into waters of the Commonwealth.
\textsuperscript{138} See Morgan, 6 S.W.3d at 836 (citing 401 KY. ADMIN. REGS. 5:055 § 1 (1999)).
\textsuperscript{139} Id. (citing KY. REV. STAT. ANN. § 224.70-110 (Banks-Baldwin 1999)).

No person shall, directly or indirectly, throw, drain, run or otherwise discharge into any of the waters of the Commonwealth, or cause, permit or suffer to be thrown, drained, run or otherwise discharged into such waters any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth in contravention of the standards adopted by the cabinet or in contravention of any of the rules, regulations, permits, or orders of the cabinet or in contravention of any of the provisions of this chapter.

\textsuperscript{140} See Morgan, 6 S.W.3d at 836 (citing 401 KY. ADMIN. REGS. 5:065 (2001)).
\textsuperscript{141} Id. (citing 401 KY. ADMIN. REGS. 5:090 (2001)).
overwhelming evidence to compel a decision in his favor;\textsuperscript{145} (2) he was not charged with a NOV pursuant to Kentucky Administrative Regulation 5:090 § 5 for "on site" disposal, and that he correctly hauled the brine water "off site" in the manner required by Kentucky Administrative Regulation 5:090 § 6;\textsuperscript{146} (3) he had no knowledge of the brine spill into the dike, and was therefore under no duty to report it;\textsuperscript{147} (4) he had a contractual right under the original lease to dispose of the brine water in the manner he did;\textsuperscript{148} and (5) the brine waters flowed into a dry ditch and therefore could not have entered the "Waters of the Commonwealth" under Kentucky Revised Statute Section 224.01-010(33).\textsuperscript{149} The Court of Appeals of Kentucky unanimously affirmed the decision of the trial court.\textsuperscript{150} The court began its reasoning by outlining the applicable standard of review.\textsuperscript{151} The Court of Appeals then held: (1) there was no indication that the trial court applied any test other than the correct "substantial evidence" test to Morgan's appeal;\textsuperscript{152} and (2) the overflow of the dike was in fact the means by which the water was being disposed of,\textsuperscript{153} and that, (3) Morgan was therefore in violation of Kentucky Administrative Regulation 5:090 § 5 for "on-site" disposal violations.\textsuperscript{154} The court also stated that Morgan had knowledge of the spill because he should have discovered it in the interval between 1987 and the assessment of the violation.\textsuperscript{155} The court then stated that the contractual privilege was void because private parties cannot by private contract avoid their duty to follow the requirements of law enacted for the state's legitimate police power such as those enacted for the prevention of water pollution.\textsuperscript{156}

\textsuperscript{145} Id. at 837. According to the "proper manner in which to review a decision by a board or agency ... the adverse party appealing the order of the agency must demonstrate the agency's decision was not supported by substantial evidence in the record ... ." \textit{See Morgan}, 6 S.W.3d at 836-37 (citing Bourbon County Bd. of Adjustment v. Currans, 873 S.W.2d 836 (Ky. 1994)).

\textsuperscript{146} Id. at 837 (stating that Moran argued that he had the brine water hauled off-site pursuant to the inspector's orders).

\textsuperscript{147} Id. at 838.

\textsuperscript{148} Id. at 840.

\textsuperscript{149} Id. at 841.

\textsuperscript{150} Id. at 843.

\textsuperscript{151} \textit{See Morgan}, 6 S.W.3d at 836 (citing KY. REV. STAT. ANN. § 13B.150(2) (Banks-Baldwin 1999)). Section 13B.150(2) stating in part, "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." \textit{Id.} (citing KY. REV. STAT. ANN. § 13B.150(2) (Banks-Baldwin 1999)). Section 13B.150(2) also sets out a list of criteria for which the court may reverse and remand the final order. \textit{See id.} (citing KY. REV. STAT. ANN. § 13B.150(2) (Banks-Baldwin 1999)).

\textsuperscript{152} Id. at 837 (citing Ky. State Racing Comm'n v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972). "Substantial evidence has been defined as evidence which 'when taken alone or in the light of all the evidence ... has sufficient probative value to induce conviction in the minds of reasonable men.' \textit{Id.} (citing Ky. State Racing Comm'n v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972))).

\textsuperscript{153} Id. at 838 (citing KY. REV. STAT. ANN. § 224.01-110(10) (Banks-Baldwin 1999)). Section 224.01-110(10) defines "disposal" as the "spilling of any waste onto land so as to enter the environment. \textit{See Morgan}, 6 S.W.3d at 838 (citing KY. REV. STAT. ANN. § 224.01-110(10) (Banks-Baldwin 1999)).

\textsuperscript{154} Id.

\textsuperscript{155} Id.

\textsuperscript{156} Id. at 840 (quoting Beacon Ins. Co. v. State Farm, 795 S.W.2d 62 (Ky. 1990). "Reasonable exercise of the police power to protect the people and the natural resources of the Commonwealth may constitutionally impact existing contracts." \textit{Id.} (quoting City of Covington v. Sanitation District No. 1, 301 S.W.2d 885 (Ky. 1957)).
Finally, the Court adopted the hearing officer and trial court's analysis of the term "waters of the Commonwealth." Citing with approval the reasoning of *Quivira Mining Co. v. United States EPA*, the Court of Appeals found that the trial court's interpretation was consistent with the term "waters of the United States" as used in Federal law. The Court of Appeals agreed with the trial court when it stated, "waters of the Commonwealth" would apply to a "ditch which, even though dry at the time a pollutant is discharged into it, is nonetheless a channel which, when flowing, leads directly to a blue line stream such as Two Mile Creek."

3. *Concentrated Animal Feeding Operations*

Concentrated Animal Feeding Operations ("CAFOs") have emerged as a major social and environmental issue in Kentucky. Estimates by the U.S. Department of Agriculture indicate there are some 12,600 CAFOs in the United States, with about 250 CAFOs located in Kentucky. Nearly ninety (90) percent of the Kentucky CAFOs are operating in the western region of the State. McLeand County, Kentucky, with thirty-six (36) CAFOs has the largest single number of CAFOs in Kentucky. CAFOs raise many legal issues because of the large amounts of animal waste they produce and the potential that waste has to impact, pollute, and contaminate public waters, including underground and surface waters.

In an attempt to address environmental concerns flowing from the CAFOs, NREPC filed its first CAFO regulations in 1997, focusing on swine operations. Those regulations expired in April 2000. Contemporaneously, 

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157 Id. at 841-42 (citing KY. REV. STAT. ANN. § 224.01-010(33) (Banks-Baldwin 1999)). Section 224.01-010(33) defines "waters of the commonwealth" as, "any and all rivers, streams, creeks, lakes, ponds, impounding reservoirs, springs, wells, marshes, and all other bodies of surface or underground water, natural or artificial, situated wholly or partly within or bordering upon the Commonwealth or within its jurisdiction." See Morgan, 6 S.W.3d at 841 (quoting KY. REV. STAT. ANN. § 224.01-010(33) (Banks-Baldwin 1999)).

158 Id. (citing 765 F.2d 126 (10th Cir. 1985)). The CWA is to be interpreted, "to regulate the discharge of pollutants into an intermittent gully, dry at the time of discharge, . . . because] during periods of heavy rainfall, the gully flowed and, thus, had a hydrologic connection to larger bodies of water, rendering the gully 'waters of the United States.'" Id. (citing 765 F.2d 126 (10th Cir. 1985)). "Waters of the United States" also include normally dry arroyos, which may, at times of heavy rainfall, gain a surface connection with navigable waters. Id. at 842 (citing United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975)). Finally, it was Congress' intent that the term "navigable waters" extended to coverage as far as permissible under the commerce clause. Id. (citing United States v. Texas Pipe Line Co., 611 F.2d 345 (1979)).

159 See supra text accompanying note 158.

160 Id., 6 S.W.3d at 842.


163 See id.

164 Id.


166 See STATE OF KENTUCKY'S ENVIRONMENT 2000-2001, supra note 162, at 106.
NREPC issued a second set of regulations in February 2000, which were intended to “address poultry, swine and cattle CAFOs and establish CAFO permit conditions for water pollution discharge permits as specified in the United States Department of Agriculture and the EPA’s joint ‘United National Strategy for Animal Feeding Operations’ directive [which had been] issued on March 9, 1999.” These regulations included siting standards for new CAFOs as well as provisions that held both the producer and the integrator responsible for the management of animal waste. Less than 250 operations in the state were expected to be affected by the regulations. After the filing of the regulations, the Kentucky Farm Bureau challenged the regulations; however, the regulations expired in April 2001.

The increase in the number of CAFOs in Kentucky is largely “due to the siting of poultry houses brought on by demand from three chicken processing plants that located in Kentucky [within] the past several years.” The scale of production has increased from 22 million chickens, in the early 1990’s, to 188 million chickens in 1999. Associated with the chickens are significant amounts of waste. For example, 100,000 chickens can produce 600 tons of litter per year and one can do the math on 188 million chickens and understand the magnitude of the problem and its impact on the environment and waters of the Commonwealth. Swine operations also generate significant amounts of concentrated waste and “a CAFO with 2,500 swine may produce 1.25 million gallons of waste per year.” The data included in the report indicates that there were over 400,000 hogs produced in 1999.

Despite the magnitude of the problem, the Kentucky Legislature has to date failed at two attempts to pass bills to replace the expired regulation 401 Kentucky Administrative Regulation 5:072 on CAFOs. In the wake of those failed bills, in March 2001, Governor Paul E. Patton signed emergency regulation 401 Kentucky Administrative Regulation 5:074E, promulgated by the NREPC to replace the expired regulation.

In Kentucky Farm Bureau Federation v. Commonwealth, the Kentucky Farm Bureau (“KFB”) brought action challenging the legality of the regulation on the basis that the new regulation was “substantially similar” to an expired regulation, and was therefore void under Kentucky statutory law. The NREPC argued that the two regulations were substantially different because the...
emergency regulation contained a provision for determining whether an integrator has "substantial control" of CAFOs, and the older regulation did not. The Franklin Circuit Judge agreed with the KFB, holding that the emergency regulation was void pursuant to Kentucky Revised Statute Section 13A.333 because the two regulations were substantially the same, and some sections were virtually identical.

At present, there is a constitutional challenge pending with regard to the process for legislative review of Executive Branch regulations. NREPC challenges the constitutionality of the legislative review process outlined in Kentucky Revised Statute Chapter 13A, and requests that the CAFO regulation remains in effect pending the decision by the Franklin Circuit Court. An additional cause of action that may come to bear upon CAFOs in the future is nuisance.

B. Air

1. EPA Designation of Ozone Standards

The 1970 Clean Air Act ("CAA"), as amended in 1977, requires the United States EPA to establish National Ambient Air Quality Standards ("NAAQS") for certain airborne pollutants, including ozone, as necessary for public welfare. After duly ascertaining whether the specific geographic area meets the NAAQS for a particular pollutant, each Air Quality Control Region ("AQCR") designates such area as "attainment," "nonattainment," or "unclassifiable."

"Nonattainment" areas under the CAA are subject to more stringent air pollution control requirements than are "attainment" areas. "Attainment" is a

\[\text{[If an administrative regulation is found deficient by a legislative subcommittee under the provisions of KRS Chapter 13A during a regular session of the General Assembly, it shall expire on adjournment of that regular session of the General Assembly . . . . An administrative body shall be prohibited from promulgating an administrative regulation that is identical to or substantially the same as an administrative regulation which has expired . . . .]}

\[\text{Id.}\]

\[\text{Id. at 6 (comparing 401 KAR 5:074E (3), entitled "Best Management Practices," to 401 KAR 5:072, entitled "Siting Criteria," and stating that other than the titles the two provisions are identical).}\]

\[\text{See supra note 161, at 4.}\]

\[\text{See id.}\]

\[\text{See, e.g., Hank Graddy, Zoning and the Smell of Money, KY. BENCH & B., July 2001 at 5, 5 (stating that chicken houses produce a "terrible stench").}\]

\[\text{42 U.S.C. §§ 7401 et seq. (2001).}\]

\[\text{See id. at § 7409(b)(1).}\]

\[\text{Id. at §§ 7407(d)(1)(A)(i)-(iii).}\]

\[\text{See generally Ferrey, supra note 88, at 166-72 (stating that, in nonattainment areas, a pre-construction permitting process, also known as New Source Review ("NSR"), is required for various sources of pollution whereby NSR requires a very high standard called the Lowest Achievable Emission Rate ("LAER"); however, in "attainment" areas, Prevention of Significant Deterioration ("PSD") applies and there is no additional requirement of LAER, rather only the Best}\]
"level of a specific criteria pollutant in ambient air in a region that is below the uniform federal NAAQS requirement." On the other hand, "nonattainment" is a "concentration of a pollutant [in ambient air] that is above the federal [standard set out in the CAA]." Under the CAA, states must: (1) comply with the NAAQS; and (2) draft a State Implementation Plan ("SIP") containing specific pollution control measures for each pollutant. Specific NAAQS attainment deadlines for marginal, moderate, serious, severe, and extreme ozone "nonattainment" areas are specified as well.

A consequence of designation of an area as "severe" or "extreme" is that the state receives more time, but must regulate new air pollution sources more strictly than less "extreme" areas are regulated. To meet the CAA goals, the states are generally required to impose Reasonably Available Control Technology ("RACT"). By 1982, "and as late as 1987 for the ozone and carbon monoxide criteria pollutants," states that were affected were required to adopt RACT for existing sources as expeditiously as possible if the area fell into "nonattainment" status. RACT is distinguishable from other [EPA] technology standards, as it applies to already existing sources. The states are required to include in their State Implementation Plan ("SIP") a comprehensive accurate current inventory of actual emissions from all sources. The level of RACT is dependent upon the level of nonattainment with marginal areas treated more leniently than moderate to extreme nonattainment areas. This abbreviated explication sets the stage for the discussion of some of the CAA cases that follow.

In Whitman v. American Trucking Associations, private companies and several states brought suit in the Court of Appeals for the District of Columbia Circuit challenging the revised NAAQS. The Court of Appeals held that section 109(b)(1) of the CAA unconstitutionally delegates legislative power to the Administrator, because the statute provided no "intelligible principle" to guide the agency's exercise of authority. The Court of Appeals, pursuant to its decision, remanded the case to the agency on the theory that the "EPA could perhaps avoid the unconstitutional delegation by adopting a restrictive construction of § 109(b)(1)." The Court of Appeals also held that the EPA

Available Control Technology ("BACT") applies). "LAER is more stringent than BACT." Id. at 173.

192 Id. at 166.
193 Id.
194 See generally id. at 157-58 (stating that SIPs must be designed to achieve the NAAQS).
195 Id. at 179.
196 See Ferrey, supra note 88, at 179.
197 Id. at 167, 181.
198 Id. at 167.
199 Id.
200 Id. at 167-68.
201 See generally id. at 181 (stating that "marginal" areas are treated more leniently than those areas that are designated "moderate" to "extreme").
203 See Whitman, 121 S. Ct. at 907.
204 Id. at 911. "Section 109(b)(1) of the CAA instructs the EPA to set 'ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health.'" Id. at 911-12 (alterations in original).
205 Id. at 907 (citing American Trucking Ass'n. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999)).
206 Id.
may not consider the cost of implementing a NAAQS in setting the initial standard.  

Finally, the Court held that the EPA had the power to revise the ozone standard set out in Part D, Subpart 2, of Title I of the CAA.  

The Court of Appeals denied EPA’s petition for rehearing en banc, with five judges dissenting. Upon petition, the United States Supreme Court granted certiorari. The Supreme Court, in an opinion delivered by Justice Scalia, set forth four issues to be decided by that Court: (1) whether section 109(b)(1) of the CAA delegates legislative power to the Administrator of the EPA; (2) whether, under section 109(b)(1), the Administrator may consider the costs of implementation in setting NAAQS; (3) whether the Court of Appeals had jurisdiction to review the EPA’s interpretation of Part D of Title I of the CAA with respect to implementing the revised ozone NAAQS ... [;] and (4) if the Court of Appeals did have jurisdiction, whether the EPA’s interpretation of Part D of Title I of the CAA was permissible.  

First, the Supreme Court affirmed the Court of Appeals on the issue of cost consideration, holding, “the text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA.”  

Second, the Supreme Court reversed the Court of Appeals on the issue of unconstitutional delegation, stating, “[t]he scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents.” The Court disagreed with the remanding of the case back to the EPA, reasoning that if there were an unconstitutional delegation “[w]e have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.”  

Third, the Supreme Court rejected Administrator’s argument that there was no “final” agency action, and held that Court of Appeals had jurisdiction to review the EPA’s implementation policy with regard to Part D, Subpart 2, of Title I of the CAA. The Supreme Court also affirmed that the case was ripe.  

Fourth, having found the Court of Appeals had jurisdiction and that the case was ripe, the Supreme Court held that 1990 amendments to the CAA  

\[207\] Id. (citing Lead Industries Ass’n v. EPA, 647 F.2d 1130, 1148 (D.C. Cir. 1980)).  

\[208\] See Whitman, 121 S. Ct. at 907 (citing 42 U.S.C. §§ 7511-7511(f) (2001)).  

\[209\] Id. at 907-08 (citing American Trucking Ass’n v. EPA, 195 F.3d 4, 13 (D.C. Cir. 1999)).  

\[210\] Id. at 908.  

\[211\] Id. at 907.  

\[212\] Id. at 911.  

\[213\] Id. at 913.  

In the history of the Court we have found the requisite ‘intelligible principle’ lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring “‘fair competition”.

\[214\] Id. (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)); see also J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (stating that delegation of legislative power is permissible when Congress provides an “intelligible principle” to direct the execution of power).  

\[215\] Whitman, 121 S. Ct. at 912.  

\[216\] See id. at 915.  

\[217\] Id.
regarding ozone in nonattainment areas were ambiguous, requiring deference to
EPA’s reasonable interpretation. Nevertheless, the Supreme Court held the
EPA’s interpretation was unreasonable, because the EPA had created revised
ozone NAAQS in such a way as to nullify textually applicable provisions meant
to limit its discretion. The Supreme Court remanded the case for the EPA to
develop a reasonable interpretation of the nonattainment implementation
provisions. Concurring opinions were written by Justice Thomas; Justice
Stevens, joined by Justice Souter; and Justice Breyer.

Following close upon Whitman was Wall v. EPA, where the EPA
redesignated the greater Cincinnati metropolitan area "from "nonattainment" to
"attainment" for ground-level ozone," and approved "a clean air maintenance
plan for the area." Several residents of Ohio brought an action in the Sixth
Circuit requesting the EPA’s order be vacated, arguing that: (1) both Kentucky
and Ohio’s maintenance plans, required under CAA §175A, were deficient;
(2) the EPA had no authority to determine that the transportation-conformity
requirements of CAA did not apply to the state’s redesignation requests when the
States had not adopted transportation-conformity requirements of the CAA, and
(3) the EPA had no authority to redesignate the area to attainment status
before the States had adopted all of the RACT rules of the CAA.

The Sixth Circuit Court of Appeals, in an opinion written by Judge
Gilman, held that the EPA had abused its discretion when it determined that it
could redesignate the Cincinnati metropolitan area as "attainment." As to the
petitioner’s first argument, the Court upheld the EPA’s decision that Kentucky
and Ohio’s maintenance fulfilled the requirements of CAA under CAA §
175A. As to the second argument, the Court gave deference to the EPA’s
decision to redesignate the area as attainment in spite of Kentucky’s failure to
submit a revision to its State Implementation Plan (SIP) that meets the
transportation conformity requirements. As to the third argument, the Court
held that since Ohio had failed to implement RACT requirements, it had
abused its discretion in redesignating the area as attainment because the EPA’s
interpretation of the requirement was contrary to the clear intention of

218 Id. at 918-19.
219 Id. at 919.
220 See Whitman, 121 S. Ct. at 919 (Thomas, J., concurring).
221 Id. at 920 (Stevens, J., concurring).
222 Id. at 921 (Breyer, J., concurring).
223 265 F.3d 426 (6th Cir. 2001).
224 See Whitman, 121 S. Ct. at 927.
226 See Wall, 265 F.3d at 434.
227 Id.
228 Id.
229 See Wall, 265 F.3d at 442.
230 Id. at 435-37.
231 Id. at 440 (giving deference to the EPA’s determination that, “Kentucky’s failure to submit a
revision to its SIP that meets the . . . transportation-conformity requirements is not a basis to deny
the redesignation”).
232 See Wall, 265 F.3d at 440. “The State shall submit a revision to the applicable implementation
plan to include provisions to require the implementation of [RACT].” Id. (quoting CAA § 182 (b)(2)).
2. Power Plant Permits

Between 1999 and 2001, there were approximately twenty-four (24) applications received by Kentucky for new power plant permits, sixteen of which were granted. However, an executive order of June 19, 2001 from Governor Patton established a 180 day moratorium on future issuance of power plant permits. This moratorium was extended to July 11, 2002. During the moratorium period, the Kentucky Environmental Quality Commission (EQC) was required to make an assessment of the cumulative environmental impacts of the proposed power plants in Kentucky. According to the EQC, power plant siting was scheduled to be on the agenda in the 2002 legislative session.

Currently two bills have been filed in the Kentucky Legislature; House Bill 24 - an Act relating to electricity generation, and Senate Bill 37 - an Act relating to Electric power suppliers.

Even if a power company obtains a permit, community reactions and economic considerations may hinder the decision to go forward with construction of new power plants. Cinergy obtained approval to build a power plant in

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233 See generally id. (stating that Congress clearly “intended for SIPs submitted in redesignation requests to include ‘provisions to require the implementation of’ RACT”).

234 Id.; see also Chevron U.S.A., 467 U.S. at 843 n.9 (stating that, “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect”).


236 See A Cumulative Assessment of the Environmental Impacts Caused by Kentucky Electric Generating Units (Kentucky NREPC, 2001), at 4. The EQC reports that there are currently there are thirty-four (34) power plants operating in Kentucky who produce 18,000-megawatts (“MW”) of electrical power. Id. at 4. Since October 1999, twenty-two (22) applications for new or expanded power plants were proposed and if these are constructed, they will generate 11,000-MW of electrical power. Id. Twelve of the twenty-two (22) plants are peaking plants, which will operate in times of high demand. Id. Most of the electricity in Kentucky is generated by twenty-two (22) coal-fired power plants (16,000-MW) and most of Kentucky’s power plants were built more than twenty (20) years ago. Id. at 17. Only four (4) power plants have been built since 1980. See A Cumulative Assessment of the Environmental Impacts Caused by Kentucky Electric Generating Units, supra note 236, at 17. Fourteen (14) of the proposed twenty-two (22) merchant plants “will burn natural gas, four will burn waste coal, three will burn... coal, and one will burn a combination of gasified coal and residential garbage. Id. at 4. Currently, Kentucky’s power plants create approximately nine million tons of ash per year. Id. at 5. The proposed plants will create another fifteen (15) million tons of ash. Id. The proposed power plants will add seventy-four (74) tons of nitrous oxide emissions per day. Id. at 7. In 1995, the existing power plants emitted 1,155 tons of nitrous oxide per day. Id.


238 See A Cumulative Assessment of the Environmental Impacts Caused by Kentucky Electric Generating Units, supra note 236, at 4.

239 See Kentucky’s Environment, supra note 235, at 2.

Northern Kentucky, but opted to postpone building of the plant in order to do further evaluation of the need for, location of, and community reaction to the plant. 241 There has been vigorous opposition from the surrounding municipalities to construction of the plant. 242

C. Land

1. Hazardous Waste and CERCLA

The Comprehensive Environmental Response Compensation Liability Act ("CERCLA") is codified in 42 United States Code sections 9601 et seq. 243 The complex act requires close examination to become familiar with its particulars. Some of its provisions and requirements are set out below to demonstrate the novel approach taken in CERCLA. CERCLA's approach is fundamentally retroactive in efforts "to address and remediate demonstrated problems from past [waste management] practices." 244 "CERCLA requirements do not attach until a [regulated] substance is released [in]to the environment and becomes a problem." 245 The CERCLA universe includes RCRA hazardous wastes, CWA toxics, the CAA pollutants, and Toxic Substance Control Act ("TSCA") hazardous substances. 246 Petroleum is exempt from coverage for political reasons. 247 Nuclear materials are also exempt from CERCLA coverage. 248

CERCLA regulates places in contrast with other acts that regulate persons. 249 CERCLA is therefore fundamentally different from these other acts. 250 It is multimedia in its scope and any substance that is hazardous - whether as a land contaminant, water contaminant, or air contaminant - falls within the scope of CERCLA. 251 CERCLA, unlike CWA, CAA, and RCRA, "creates private rights of action for individual[s] . . . to seek financial redress for their clean-up costs." 252 Although these other acts permit citizens suits, they do not allow private recovery. 253

Many well established principles of common law are impliedly countermanded by CERCLA, including: (1) the common law tort principle of negligence; (2) contracts that shift liability through indemnity provisions; (3) concepts of the corporate veil and insulation from personal liability for corporate acts; (4) the mens rea requirements of criminal law; and (5) elements of the federal bankruptcy law. 254 States are subject to liability for releases from a state

242 Id. at 2.
244 Ferrey, supra note 88, at 333.
245 Id.
246 See id. at 334.
247 Id.
248 Id.
249 Id. at 335.
250 See Ferrey, supra note 88, at 335.
251 Id.
252 Id.
253 Id.
254 Id. at 336.
facility as are local governments that have hazardous releases from local government facilities.255

*United States v. Commonwealth,*256 was a lawsuit that arose concerning the state permitting of the Paducah Gaseous Diffusion Plant ("Plant").257 Plant is an active uranium enrichment facility which is owned by the U.S. Department of Energy ("DOE"), but is regulated by the NREPC.258 In 1994, the NREPC granted the DOE a permit to construct a solid waste landfill at the Plant, but limited the operating permit by prohibiting "[s]olid waste that exhibits radioactivity above de minimis levels"259 and "solid waste that contains radionuclides ... until a Waste Characterization Plan for radionuclides has been submitted to the Division of Waste Management for review and approval."260

DOE appealed the permit conditions through Kentucky administrative channels, and was ultimately dismissed by the Secretary.261 DOE filed a petition for judicial review in Kentucky’s state court in order to preserve its rights under state law, and also filed an action in the United States District Court for the Western District of Kentucky.262 In the Federal action, DOE challenged the permit conditions, arguing that: (1) "the Atomic Energy Act of 1954 ("AEA")263 ... preempts state regulations relating to the disposal of radioactive materials; (2) the conditions violate the federal government’s sovereign immunity;" and (3) the conditions violated Kentucky’s own statutes and regulations.264 In response, NREPC argued that: (1) the district court should have no jurisdiction under the *Burford* abstention doctrine;265 (2) DOE fails to state a claim for which relief can be granted; and (3) the challenged permit conditions are consistent with Kentucky law.266 The district court denied NREPC's motion to dismiss and entered judgment for DOE on the basis of Federal preemption.267

NREPC appealed to the Sixth Circuit Court of Appeals, disputed the federal preemption, and argued that the district court should have abstained from hearing the case.268 First, the Court of Appeals held that Kentucky law was preempted269 even though the Resource Conservation and Recovery Act (RCRA) contemplates that state and local governments will play a lead role in solid waste

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256 252 F.3d 816 (6th Cir. 2001).
257 See id. at 819.
258 See generally id. at 820 (stating that NREPC “regulates disposal of solid waste at the Plant through the issuance of permits”).
259 Id. at 820 (alterations in original).
260 Id.
261 Id.
262 See *Commonwealth,* 252 F.3d at 820.
263 Id. (citing 42 U.S.C. §§ 2011-2297g-4 (1954)).
264 Id.
265 Id. (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)).
266 Id.
267 Id.
268 See *Commonwealth,* 252 F.3d at 821.
269 Id. at 822 (citing *McCulloch v. Maryland,* 17 U.S. 316, 427 (1819)). “It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.” Id. (quoting *McCulloch,* 17 U.S. at 427). Furthermore, state law can be preempted in one of two ways, (1) if Congress evidences an intent to occupy a given field; or (2) if there is a conflict between state and federal law, state law is preempted to the extent that it conflicts with federal law. Id. (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).
regulation.  The court stated that, “the federal government has occupied the entire field of nuclear safety concerns,” and placed those concerns under the auspices of DOE by way of the AEA. Second, the court held that the federal government is entitled to sovereign immunity, because the AEA does not waive immunity with respect to materials covered by the AEA. Third, the court held that abstention was inappropriate on the basis of the court’s first holding because abstention is not required where there is a facially conclusive claim of federal preemption, which is uncomplicated by ambiguous language.

Several cases have arisen in the Sixth Circuit in the past several years with regard to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In United States v. 150 Acres of Land, the EPA brought an action against the Glidden County, ("Glidden") and against certain land in rem, belonging to the Bohaty family ("Bohatys"), to recover clean-up costs pertaining to removal of environmental waste. Glidden settled with the EPA, and the Bohatys and the EPA both moved for summary judgment, whereupon the district court granted summary judgment in favor of the EPA.

Upon appeal to the Sixth Circuit Court of Appeals, the Bohatys argued that they were entitled to the “innocent landowner defense.” As this defense has subcategories, the Bohatys argued that: (1) they did not “dispose” of or “release” hazardous substances; and (2) that they exercised the required degree of care under this defense. The Bohatys also argued the the EPA’s decision to remove drums from the property created unnecessary costs. Finally, the Bohatys argued that they were deprived of due process.

The opinion, delivered by Judge Boggs, agreed with the Bohatys that a final order of summary judgment was inappropriate because the Bohatys raised genuine issues of material fact as to each element of the landowner defense, each of which the court held to be dispositive, standing alone, to justify reversal of the district court. The Bohatys raised issues as to: (1) whether the Bohatys “took precautions against foreseeable acts or omissions of [third parties] and the foreseeable consequences that could result from such acts or omissions,” (2)
whether they “exercised due care with respect to the hazardous substance[s] concerned, taking into consideration the characteristics of such hazardous substance[s], in light of all relevant facts and circumstances;” and (3) whether they released hazardous substances on the land. The Court held that the Bohatys did not “dispose” of hazardous substances on the land.

The Court also held that the EPA’s decision to remove drums from the land was reasonable because the National Contingency Plan (NCP) under CERCLA grants wide latitude to the EPA in determining the reasonableness of removal. The Court further held that the Bohatys’ due process rights were respected because the need to file the lawsuit before the statute of limitations expired was an “exigent circumstance” sufficient to excuse the timing of the government’s action.

In Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc., a sublessee brought action under CERCLA against the successor of a railroad; for cleanup costs incurred in remediating environmental contamination due to a buried wooden box containing creosote and benzene. The box had apparently been used at one time to soak railroad ties and bridge beams in wood preservative.

The Franklin County Convention Facilities Authority (“CFA”), the sublessee, brought action in the United States District Court for the Southern District of Ohio, to recover cleanup costs. Judgment was entered for CFA. American Premier Underwriters’ (“APU”) appealed to the Sixth Circuit, making eight arguments, which included: (1) the material was never identified as a hazardous substance; (2) CFA did not incur response costs consistent with the National Oil and Hazardous Substances Contingency Plan (“NCP”); (3) the material was not placed on the property while it was owned by APU’s predecessor; (4) CFA is not an innocent land owner under CERCLA because it split open the box and failed to erect a barrier; (5) the district court abused its

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286 Id.
287 See 150 Acres of Land, 204 F.3d at 706.
288 Id. (citing 42 U.S.C. § 9607(a)(2) (2000)); see also 42 U.S.C. § 6903(3) (1994) (defining “disposal” as, “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water.”). “[T]wo circuits have recently limited ‘disposal’ to spills occurring by human intervention.” 150 Acres of Land, 204 F.3d at 705 (citing United States v. CDMG Realty Co., 96 F.3d 706 (3rd Cir. 1996); ABB Indus., Sys., Inc. v. Prime Tech. Inc., 120 F.3d 351, 358 (2d Cir. 1997)).
289 Id. at 709-10.

At any release ... where the lead agency makes the determination ... that there is a threat to public health or welfare of the United States or the environment, the lead agency may take any appropriate removal action to abate, prevent, minimize, stabilize, mitigate, or eliminate the release or the threat of release.

Id. at 709 (quoting 40 C.F.R. § 300.415(b)(1) (2000)).
291 Id. at 711.
292 240 F.3d 534 (6th Cir. 2000).
293 See generally id. at 538-39.
294 Id. at 539.
295 Id. at 541.
296 See Franklin County Convention Facilities Auth., 240 F.3d at 541.
297 See id. at 543.
298 Id. at 546.
299 Id. at 547.
discretion in allocation 100% of the liability to APU;\textsuperscript{300} (6) the district court erred
to allow CFA a contribution action when it only pleaded a response cost recovery action;\textsuperscript{301} (7) the attorney fee award for CFA was not recoverable as a necessary response cost;\textsuperscript{302} and (8) retroactive application of CERCLA violates the Due Process and Takings Clause.\textsuperscript{303}

The court laid out the prima facie elements for a successful cost recovery action: "(1) the site is a ‘facility’; (2) a release or threatened release of hazardous substance[s] has occurred; (3) the release has caused the plaintiff to incur ‘necessary costs of response’ consistent with the NPC; and (4) the defendant falls within one of the four categories of potentially responsible parties."\textsuperscript{304}

The court then proceeded to analyze each of APU’s claims on appeal. First, the court rejected APU’s argument that the substance was not in fact hazardous because the weighing of testimony was the province of the trial court and more importantly, benzene was present in a quantity “sufficient to require treatment as a hazardous substance under CERCLA.”\textsuperscript{305} Second, the court found that CFA was entitled to recover the cleanup costs because CFA substantially complied with the NCP.\textsuperscript{306} Third, the court found that the district court’s inference from circumstantial evidence that APU’s predecessor corporation was an owner or operator or the property at the time the hazardous substance was deposited, was to be accorded deference.\textsuperscript{307} Fourth, the court agreed with APU’s claim that CFA was not entitled to innocent land owner exception under CERCLA because CFA failed to exercise due care after discovering the box by allowing creosote to migrate through an open sewer trench.\textsuperscript{308} Fifth, the court, mindful of the broad discretion given the district court, gave deference to the district court’s alternative finding that, in the event their determination as to whether CFA was an innocent land owner was incorrect, it would still allocate 100% responsibility to APU.\textsuperscript{309} Sixth, the court held that it was proper to consider contribution, even though the complaint only pleaded a cost recovery action, “because an order entered after a pretrial conference supersedes the pleadings.”\textsuperscript{310} Seventh, the court agreed with the district court’s assessment that the recovered attorney fees were not litigation-related, but were closely tied to

\textsuperscript{300} Id. at 548.
\textsuperscript{301} Id. at 549.
\textsuperscript{302} See Franklin County Convention Facilities Auth., 240 F.3d at 549.
\textsuperscript{303} Id. at 550.
\textsuperscript{304} Id. at 541 (citing Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 347-48 (6th Cir. 1998)).
\textsuperscript{305} Franklin County Convention Facilities Auth., 240 F.3d at 542-43.
\textsuperscript{306} Id. at 543.

A “CERCLA-quality cleanup” is a response action that (1) protects human health and the environment, (2) utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable, (3) is cost-effective, (4) satisfies Applicable and Relevant or Appropriate Requirements (“ARARS”) for the site, and (5) provides opportunity for meaningful public participation."

\textit{Id.} (quoting National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666-01, 8793 (Mar. 9, 1990)).
\textsuperscript{307} Id. at 547.
\textsuperscript{308} Id. at 548.
\textsuperscript{309} Id. at 549.
\textsuperscript{310} Id. at 549 (citing 3 Moore’s Federal Practice (MB) § 16.78(3) (1999)).
the actual cleanup and were therefore recoverable by CFA.\textsuperscript{311} Eighth, the court reviewed \textit{de novo} the issue of whether retroactive application of CERCLA violates substantive due process and held that there was no due process violation, in spite of \textit{Eastern Enterprises v. Apfel},\textsuperscript{312} because numerous courts have continued in its wake to uphold retroactive application of CERCLA.\textsuperscript{313} Also, the court found that Congress intended CERCLA to function retroactively\textsuperscript{314} and to spread costs of cleaning hazardous waste sites to those who were responsible.\textsuperscript{315}

Finally, the court held that there was no unconstitutional taking because: (1) retroactive application of CERCLA was directly proportional to APU's prior acts of pollution; and (2) liability was directly related to the acts of APU's predecessors, "who expressly assumed liability for any claims concerning the land and who reasonably could have anticipated liability for environmental harms."\textsuperscript{316}

A caveat to \textit{Franklin County Convention Facilities Auth., Inc. v. Acme, Inc.}\textsuperscript{317} In \textit{Bob's Beverage}, the predecessor was found not liable for CERCLA violations due to problems with proof of causation in the plaintiff's case.\textsuperscript{318} Defendant Acme, Inc., ("Acme"), was an automobile air conditioner repair shop whose manufacturing processes used several chlorinated solvents ("CVOCs"), and was one of the predecessors to Bob's Beverage ("Bob's") ownership of the land in question.\textsuperscript{319} Acme allowed solvents to drain into the septic system and ultimately into the subsurface soil and water.\textsuperscript{320} Acme also dumped the contents of the septic system onto the surface of the property and stored waste oil and sludge in leaking drums.\textsuperscript{321} Subsequently, Huntington Bank purchased the property and then sold it to Merkel, who in turn sold the property to Bob's.\textsuperscript{322} Although Bob's did not conduct an environmental assessment of the property, the Ohio EPA eventually discovered CVOCs in the soil.\textsuperscript{323} Bob's brought a CERCLA action against Merkel in the District Court for the Northern District of Ohio.\textsuperscript{324} Merkel subsequently filed a cross claim against Acme.\textsuperscript{325} Although the district court entered judgment against Acme, it found Merkel not liable.\textsuperscript{326}

\textsuperscript{311} Id. at 550.
\textsuperscript{314} \textit{Id.} at 552. "CERCLA's chief liability provision uses the past tense." \textit{Id.} (citing 42 U.S.C. § 9607(a)(2) (2000)).
\textsuperscript{315} \textit{Id.} at 552 (citing United States v. Northeastern Pharm. and Chem. Co., 810 F.2d 786, 733-34 (8th Cir. 1986)).
\textsuperscript{316} \textit{Id.} at 553.
\textsuperscript{317} \textit{264 F.3d 692} (6th Cir. 2001).
\textsuperscript{318} \textit{See generally id.}
\textsuperscript{319} \textit{See generally id.} at 694 (stating that CVOCs are hazardous substances).
\textsuperscript{320} \textit{Id.}
\textsuperscript{321} \textit{Id.}
\textsuperscript{322} \textit{Id.} at 694-95.
\textsuperscript{323} \textit{Bob's Beverage Inc., 264 F.3d at 695.}
\textsuperscript{324} \textit{See id.} at 695.
\textsuperscript{325} \textit{Id.}
\textsuperscript{326} \textit{Id.}
Upon appeal, as to Merkel's liability on his cost recovery claim, the Sixth Circuit Court of Appeals affirmed the district court holding for two reasons. First, the court stated that CERCLA focuses on whether the defendant's release or threatened release caused harm to the plaintiff in the form of response costs. Second, the court held that there was no evidence that any release occurring during Merkel's ownership caused any increase in the response costs incurred by Bob's.

A pair of recent Sixth Circuit cases treated constitutional Commerce Clause limitations on interstate trash disposal. In Huish Detergents v. Warren County, defendant Warren County ("County") had a franchise agreement, which gave exclusive contractor rights to an in-state processor ("Monarch") and required that all waste be disposed of in "a landfill approved and permitted by the State of Kentucky." The franchise agreement was incorporated by reference into a County ordinance. Huish, a Kentucky factory operator, sought to challenge the ordinance as violative of the Commerce Clause.

The district court dismissed Huish's complaint for failure to state a claim upon which relief can be granted and held that the County did not act as a market participant in awarding exclusive franchise fees to Monarch.

Upon appeal, the Sixth Circuit began its analysis with the issue of standing, laying out the standard articulated by Justice Scalia in Lujan v.

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327 Id. at 695-96. To establish a prima facia cost recovery claim under CERCLA:

[A] plaintiff must prove: (1) a release or threatened release has occurred at a "facility;" (2) the release or threatened release caused the incurrence of the Plaintiffs' response costs; (3) the response costs were necessary and consistent with the National Contingency Plan ("NCP"); and (4) that the defendant falls within one of the four categories of covered person who may be held liable, i.e., a potentially responsible party ("PRP").

328 Id. at 696.

329 Id. at 696. "CERCLA does not require the plaintiff to prove that the defendant caused actual harm to the environment at the liability stage[,] . . . [however, it] focuses on whether the defendant's release or threatened release caused harm to the plaintiff in the form of response costs." Id. (citing Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935 (8th Cir. 1995)).

330 Bob's Beverage, 240 F.3d at 696.

The term "release" is broader than Disposal . . . . A Disposal requires evidence of "active human conduct," and addresses "activity that precedes the entry of a substance into the environment" . . . . In addition, cross contamination (causing the spread of contamination "into or on" previously uncontaminated "soil and water") by a former owner/operator constitutes a Disposal.

331 Id. at 697 (citing 150 Acres of Land, 204 F.3d at 705-06; CDMG Realty Co., 96 F.3d at 719 (3d Cir. 1996); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988)).

332 214 F.3d 707 (6th Cir. 2000).

333 Id. at 708-09.

334 Id. at 709.

335 See generally id. (stating that Huish filed the lawsuit claiming that the ordinance violated the "Commerce Clause, 42 U.S.C. § 1983, and section 164 of the Kentucky Constitution.").

336 Id. (stating that the County was subject to the Commerce Clause but that the County's action did not violate the Commerce Clause).
After finding that there was standing, the court obliquely made reference to the issue of interstate commerce by commenting that:

Huish alleged an actual injury as a result of the County's ordinance and agreement with Monarch, in consequence of which Huish is forced to pay Monarch more to collect, process, and dispose of its waste than Huish would spend if it could purchase one or more of these services from a company operating out-of-state or perform the work itself.

The court, as the final part of its standing analysis, found that the interest Huish sought to protect "fall[s] within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." Here, Huish sought to protect his right as a consumer "to purchase waste processing and disposal services across State boundaries, an interest that [the Court held fell] squarely within the zone of interests protected by the Commerce Clause."

Next, the court turned to the Commerce Clause analysis itself, and addressed the issue of whether Huish's claim adequately pleaded a valid "dormant" Commerce Clause claim. The Court noted that there is "no [specific] 'dormant' clause to be found in the text of clause 3 of section 8 of article I," but that there is a negative implication which "prohibit[s] States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.'"

On appeal, Huish argued that three actions on the County’s part were violative of the Commerce clause: "(1) the designation of a single in-state processing station for municipal waste; (2) the prohibition on out-of-state waste disposal; and (3) the award of an 'exclusive franchise' to Monarch for waste collection and processing." The court considered each claim to decide whether any one of the claims would survive a 12(b)(6) motion by stating a valid Commerce Clause claim.

In addressing each challenge individually, the Sixth Circuit held first, that the district court was incorrect when it stated that designation of a single in-state processing station was acceptable because the County was a market share participant. The County was not a market share participant because it forced all city residents to purchase the processing services from Monarch; therefore,

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336 Huish Detergents, 214 F.3d at 710 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555) (1992)). To meet Article III standing, one must establish that: "(1) an injury in fact that is actual or threatened; (2) a causal connection between the defendants' conduct and the alleged injury will be redressed by a favorable decision.” Id. (citing Lujan, 504 U.S. at 560-61; Coyne v. American Tobacco Co., 183 F.3d 488, 494 (6th Cir. 1999)).
337 Id. at 710.
338 Id. (citing Bennett v. Spear, 520 U.S. 154, 162 (1997)) (alterations in original).
339 Id. at 711.
340 Id. at 712.
341 Id. at 712 (quoting Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Resources, 504 U.S. 353, 359 (1992) (alterations in original)).
342 Id. at 715.
343 See generally id. at 715 (stating that "Huish's lawsuit can survive the Rule 12(b)(6) motion if anyone of these three challenges states a valid Commerce Clause claim").
344 Huish Detergents, 214 F.3d at 715.
the County's action "far exceeded that which a private entity could accomplish on the free market."\textsuperscript{345} Furthermore, the County's action was "a \textit{per se} violation of the dormant aspect of the Commerce Clause, 'absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem.'\textsuperscript{346} Second, the court held that the prohibition of out-of-state waste disposal did not fall under the market participant exception "because the County neither bought nor sold disposal services with taxpayer funds."\textsuperscript{347} Finally, the court held that the "exclusive franchise" award did not fall under the market participant exception because "the County used its regulatory power to grant an exclusive [processing] right, . . . a result that no private party could accomplish on an open market."\textsuperscript{348} Having decided that all three actions withstood the motion for failure to state a claim upon which relief can be granted, the Court reversed and remanded.\textsuperscript{349}

In another waste disposal case, \textit{Maharg, Inc. v. Van Wert Solid Waste Management District},\textsuperscript{350} Van Wert County's ("County") waste management authority, located in Ohio, designated eight specific landfills as the only landfills for which the County waste could be disposed.\textsuperscript{351} The County was sued by Maharg, a solid waste hauler who wanted to dispose County waste in an undesignated facility.\textsuperscript{352} The County had originally approved six solid waste facilities, two of which were in Indiana; however, the County subsequently rescinded approval of the Jay County, Indiana, landfill because of the landfill's decision not to participate in the County's second designation agreement.\textsuperscript{353} Although the Jay County facility did not submit a bid for the second resolution, Maharg sued, arguing that by authorizing only one facility outside of Ohio, the County's designation violated the Commerce Clause.\textsuperscript{354} Upon the granting the County's motion to dismiss, Maharg appealed to the Sixth Circuit Court of Appeals.\textsuperscript{355}

Upon appeal, Maharg first argued that the County's scheme was unconstitutional because it was a direct, and not merely incidental, regulation of interstate commerce.\textsuperscript{356} Second, Maharg argued that the scheme adopted by the County discriminated against interstate commerce, and that even if the resolution was not discriminatory on its face, it had the practical effect of discriminating.\textsuperscript{357} Maharg's final argument was that the scheme imposed a burden on interstate commerce.

\textsuperscript{345} \textit{id}. at 715-16 (citing SSC Corp. v. Town of Smithtown, 66 F.3d 502, 512-13 (2d Cir. 1995); Atlantic Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atlantic City, 48 F.3d 701, 717 (3d Cir. 1995)).

\textsuperscript{346} \textit{id}. at 716 (quoting C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 393 (1994)).

\textsuperscript{347} \textit{id}. at 717.

\textsuperscript{348} \textit{id}. at 717.

\textsuperscript{349} \textit{id}. at 717.

\textsuperscript{350} 249 F.3d 544 (6th Cir. 2001).

\textsuperscript{351} See \textit{id}. at 548. The County resolution provided that no person could deliver solid waste produced in the County to a facility that was not one of the eight designated facilities. \textit{id}. at 548.

\textsuperscript{352} See \textit{id}. at 548.

\textsuperscript{353} \textit{id}. at 547-48. The County had adopted a second resolution whereby eight landfills, only one of which was located in Indiana, became designated facilities. \textit{id}. at 548.

\textsuperscript{354} See \textit{Maharg Inc.}, 249 F.3d at 548.

\textsuperscript{355} \textit{id}. at 549.

\textsuperscript{356} \textit{id}. (citing Edgar v. MITE Corp., 457 U.S. 624 (1982)).

\textsuperscript{357} \textit{id}. at 551-52 (citing Eastern Ky. Resources v. Fiscal Court of Magoffin Co., 127 F.3d 532, 540 (Ky. 1997)).
commerce that was "clearly excessive in relation to the putative local benefits."358

In addressing Maharg’s first argument, the court held that interstate commerce no longer depends upon whether the regulation was direct or indirect, but only upon the two lines of analysis that follow: (1) “whether the ordinance discriminates against interstate commerce,”339 and (2) “whether the ordinance imposes a burden . . . that is ‘clearly excessive in relation to the putative local benefits.’”360

As for Maharg’s second argument, the Court held that the County was not engaged in “simple economic protectionism” because the reason for the decision to forbid disposal of waste at the Jay County facility was not that the facility was located outside of Ohio, but rather, the facility operator declined to sign a designation agreement.361 Therefore, the court held that there was no facial discrimination.362 The court also stated that there was no practical effect of discrimination against interstate commerce since the scheme did “not automatically prevent locally generated waste from being taken to facilities outside the [C]ounty, . . . and [because the County’s approval process] assured that any out-of-state facility that wanted access to the [County’s] waste would get it.”363 The court also rejected Maharg’s claim it was effectively divested of competitive advantages over other Ohio competitors that had always operated intra-state.364

Finally, the court resolved Maharg’s third argument by holding that the burden on interstate commerce was not “clearly excessive in relation to the putative local benefits”365 because the scheme was devised as a means of providing for the safe and sanitary management of the County’s solid wastes; therefore, the burden on interstate commerce was in line with the cost of ensuring such safe and sanitary measures.366

1. Mining, Mountaintop Removal, and the Surface Mining Control and Reclamation Act ("SMCRA")367

In Bragg v. West Virginia Coal Ass’n,368 the plaintiffs brought a citizen suit enforcement action for injunctive relief under SMCRA against the Director

358 Id. at 555 (citing C & A Carbone, 511 U.S. at 390).
339 Id. at 550 (citing Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).
360 Maharg, Inc., 249 F.3d at 550 (quoting C & A Carbone, 511 U.S. at 290).
361 See id. at 551.
362 Id.
363 Id. at 552.
364 Id. at 553. “[T]he fact that the burden of the divestiture requirements falls solely on interstate companies, . . . does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level.” Id. at 553-54 (quoting Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 125 (1978)).
365 See Maharg Inc., 249 F.3d at 555 (citing C & A Carbone, 511 U.S. at 390).
366 Id. at 555.
367 30 U.S.C. §§ 1201 et seq. (1994 & Supp. V 1999). SMCRA directs the Secretary of the Interior to establish minimum standards for regulating surface coal mining, and allowing states to implement their own exclusive regulatory laws incorporating the minimum national standards, which laws then replace federal regulatory authority subject to approval by the Secretary. See generally id. State jurisdiction can however be revoked if the State fails to enforce the program. Id. Revocation is not effective automatically upon failure to enforce, but requires a finding to that effect by the Secretary pursuant to an oversight proceeding. Id.
368 248 F.3d 275 (4th Cir. 2001).
of the West Virginia Division of Environmental Protection ("Director"), alleging that the Director "ha[d] routinely approved surface coal mining permits which decapitate[d] the State's mountains and dump[ed] the resulting waste in nearby valleys, burying hundreds of miles of headwaters of West Virginia's streams...".\(^{369}\) The plaintiffs, with the support of the United States Environmental Protection Agency,\(^{370}\) sought to enjoin the issuance of permits for mountaintop removal coal mining, which the State had been issuing pursuant to its federally approved state mining law.\(^{371}\)

The defendants argued that the State Director was immune from suit in federal court under the Eleventh Amendment because the suit falls under an exception to the doctrine of \textit{Ex Parte Young}.\(^{372}\) The Director argued that the exception was controlling and therefore, the \textit{Young} doctrine is inapplicable to situations where a suit is brought against a State official to compel his compliance with State law.\(^{373}\)

The plaintiffs, in contrast, argued that there was no immunity because: (1) SMCRA permits citizens to bring \textit{Ex Parte Young} suits against State officials in order to enforce the statute;\(^{374}\) (2) the lawsuit sought to enforce federal and not state law, because the state was obligated to follow federal statutory guidelines;\(^{375}\) and (3) the state waived its Eleventh Amendment privilege by participating in a federal program under SMCRA.\(^{376}\)

The district court issued an injunction,\(^{377}\) on the basis that, (1) SMCRA gives "'implicit authorization' to citizens to bring \textit{Ex Parte Young} actions against State officials;"\(^{378}\) and (2) this was a matter of federal law.\(^{379}\)

The United States Court of Appeals for the Fourth Circuit affirmed in part, vacated in part, and remanded the case first, because West Virginia law was at issue since SMCRA encourages exclusive state regulation of coal mining;\(^{380}\) to hold otherwise would "undermine the federalism established by the Act."\(^{381}\) Second, since the citizen lawsuit sought to compel the Director to act in accordance with West Virginia law rather than federal law, the claim did not fall under the \textit{Ex Parte Young} exception; therefore, the Eleventh Amendment barred the claim.\(^{382}\) Finally, the Court held that there was no waiver of sovereign immunity because Congress was not unequivocal in its intent to require State

\(^{369}\) Bragg v. West Virginia Coal Ass'n, 248 F.3d 275, 285 (4th Cir. 2001).

\(^{370}\) See \textit{id}. at 285-86.

\(^{371}\) See generally \textit{id}. at 285-86.

\(^{372}\) \textit{id}. at 290 (citing 209 U.S. 123 (1909)). When a citizen of a state sues a state officer to enjoin actions that violate federal law, the state officer is stripped of his official character, thereby losing the protections of state immunity and of the Eleventh Amendment. \textit{See generally Ex Parte Young}, 209 U.S. 123, 159-60 (1909).

\(^{373}\) \textit{See Bragg}, 248 F.3d at 290 (citing Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 (1984)).

\(^{374}\) \textit{id}. at 290.

\(^{375}\) \textit{id}. at 290-91.

\(^{376}\) \textit{id}. at 291.

\(^{377}\) \textit{id}. at 288.

\(^{378}\) \textit{See Bragg}, 248 F.3d at 291.

\(^{379}\) \textit{id}.

\(^{380}\) \textit{id}. at 294.

\(^{381}\) \textit{id}. at 295. Upon approval of the state law, under SMCRA, federal law governing coal mining "drops out" as operative law. \textit{id}. (citing Nat'l. Wildlife Fed'n. v. Lujan, 298 F.2d 453, 464 n.1 (D.C. Cir. 1991)).

\(^{382}\) \textit{See Bragg}, 248 F.3d at 296-97.
waiver of its sovereign immunity, thus, the Director did not waive their immunity.\textsuperscript{383}

\textsuperscript{383} Id. at 298 (citing Bell Atl. Md., Inc. v. MCI Worldcom, Inc., 240 F.3d 279, 292 (4th Cir. 2001)).
I. INTRODUCTION

This survey of professional responsibility covers decisions from 1998 to 2001, and follows upon a survey through December 1997 by Professor William H. Fortune of the University of Kentucky College of Law. We will follow the approach of commenting on selected non-disciplinary cases, followed by rule changes, then ethics and unauthorized practice opinions, and finally disciplinary cases.

The highlights of the survey period are the Kentucky Supreme Court’s continued use of the “appearance-of-impropriety” concept to resolve issues of legal ethics in both litigation and disciplinary matters, and the manifestation of significant deficiencies in the writ of mandamus for resolving ethics problems in litigation. The authors respectfully regard the former, earlier noted as a potential problem discussed by Professor Fortune, to warrant upgrading to an immediate and significant concern that the Kentucky Supreme Court and the Kentucky Bar Association (“KBA”) should examine closely. The latter is less problematic since it derives from the traditional scope of mandamus. But a statute or rule permitting the trial courts to certify doubtful ethical questions for interlocutory review would permit the appellate courts to engage in plenary review of questions of law without the limitation of immediate and irreparable injury, and would permit better guidance in confidentiality and conflict-of-interest cases.

This survey will not address national developments in professional responsibility. The most important are: (1) the initial actions by the Board of Governors on the Ethics 2000 Commission’s proposals for changes to the Model Rules of Professional Conduct; (2) the American Bar Association’s (“ABA”) and state bar associations’ actions on multidisciplinary practice; (3) the publication of the final version of the Restatement (Third) of the Law Governing

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4 See id. at 859.
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Lawyers; and (4) the United States's acceptance of provisions of the General Agreement on Trade in Services, which may significantly affect the traditional authority of state supreme courts over the rules of legal ethics.

II. Non-Disciplinary Cases

A. Conflict of Interest

In Jaggers v. Shake, the court addressed a conflict of interest where two partners of a law firm simultaneously represented the plaintiffs in a legal malpractice action and a defense witness, who was an attorney-defendant in an unrelated legal malpractice action. The attorney-witness had formerly worked for one of the defendants, and after leaving that employment, had prepared appellate documents on the matter at issue in the plaintiffs' malpractice action.

The trial court refused to disqualify the plaintiffs' law firm because the two malpractice actions "had no common issues or parties and no confidential information" had passed between the two defense attorneys. That analysis was improper for two reasons. First, current-client conflicts involve not only confidentiality but also loyalty obligations. Second, principles of former-client conflict under Rule 1.9(a), which requires that the two matters be "substantially related," only apply in former-client conflicts. The Court of Appeals denied the motion for a writ of mandamus on the ground, consistent with University of Louisville v. Shake, that the defendants had failed to show the "immediate and irreparable harm necessary for issuance" of the writ because of the attorney-witness's potential testimony.

The Kentucky Supreme Court affirmed, relying solely upon Rule 1.7 and one of its comments, and rejected the conflict-of-interest argument in a broad-gauged ruling on the scope of Rules 1.7 and 1.10. The Court also rejected

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9 37 S.W.3d 737 (Ky. 2001).
10 See id.
11 Id.
12 Id.
14 Ky. Sup. Ct. R. 3.130-1.9(a) (Michie 2001). Rule 1.9(a) provides that a lawyer who formerly represented a client in a matter shall not represent "another person in the same or a substantially related matter whose interests are materially adverse . . . ." Id.
15 See, e.g., Wilburn v. State, 56 S.W.3d 365, 369 (Ark. 2001)
16 5 S.W.3d 107 (Ky. 1999). See discussion infra Part I.B.
17 See Jaggers, 37 S.W.3d at 740.
18 Id. (citing Ky. Sup. Ct. R. 3.130-1.7 (Michie 2001)). Rule 1.7 provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client . . . .

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests . . . .
disqualification under the appearance-of-impropriety standard of Lovell v. Winchester. The Court held that there was no "direct adversity" under Rule 1.7(a) because the attorney-witness was not a party to the plaintiffs' legal malpractice action, and therefore the partner of the attorney-witness's lawyer was not acting as an advocate against him.

The Court relied on the general commentary to Rule 1.7, that simultaneous representation in unrelated matters, where the client's interests are only generally adverse, does not require disqualification of an attorney. In its rationale, the Court did not mention the litigation-specific observation of Comment 7 that "ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated." The Court did not discuss whether "the situation create[d] a perception of betrayal and disloyalty which cannot be condoned," that was significant in Lovell. The Court held that there was no "material limitation" of either representation under Rule 1.7(b) because the two malpractice actions were "completely unrelated matters," and reasoned that the defendants had failed to show that the representation of the attorney-witness would be hindered by the partner's representation of the plaintiffs. Finally, the Court observed that Lovell establishes the appearance of impropriety as "a separate standard for disqualification," but held that the plaintiffs' and the attorney-witness's representation by two attorneys in the same firm was "too attenuated" to create such an appearance.

The Court's treatment of the Rule 1.7 issue, in Jaggers, is, without substantial explanation, contrary to numerous: (1) court decisions; (2) ethics opinions from the ABA; and (3) a number of state ethics authorities that all

KY. SUP. CT. R. 3.130-1.7 (Michie 2001).
19 See Jaggers, 37 S.W.3d at 740 (citing KY. SUP. CT. R. 3.130-1.10 (Michie 2001)). Rule 1.10(a) provides that, "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2." KY. SUP. CT. R. 3.130-1.10 (Michie 2001).
20 See Jaggers, 37 S.W.3d at 740 (citing 941 S.W.2d 466 (Ky. 1997)).
21 Id. But cf Commonwealth v. Maricle, 10 S.W.3d 117 (Ky. 2000) (holding that a victim-witness had an interest in a conflict of interest created when a prosecutor joined a defense firm, but noting that any conflict under Rule 1.7 would have been imputed to the other partners of the firm under Rule 1.10).
22 See KY. SUP. CT. R. 3.130-1.7 cmt. 1 (Michie 2001).
23 See Jaggers, 37 S.W.3d at 740.
24 KY. SUP. CT. R. 3.130-1.7 cmt. 7 (Michie 2001) (emphasis added).
25 See Jaggers, 37 S.W.3d at 740 (citing Lovell, 941 S.W.2d at 468).
26 See id.
27 Id. The appearance of impropriety concept is typically pressed into service where the attorney's conduct has "too attenuated" a connection to the proscription of an express rule of ethics. See infra text accompanying notes 360-81. The difficulties of the appearance of impropriety concept are considered in the disciplinary cases, where the Kentucky Supreme Court came as close as it ever has to disciplining an attorney for engaging in conduct having the appearance of impropriety. See infra text accompanying notes 349-59.
hold that an attorney or firm may not represent both a party and an adverse non-party witness under Rule 1.7(a) or (b). 30

In its Formal Opinion No. 92-367, the ABA Committee on Ethics and Professional Responsibility advised that "a lawyer's examining the lawyer's client as an adverse witness . . . will ordinarily present a conflict of interest that is disqualifying absent consent of one or both of the clients involved . . . and that the individual lawyer's disqualification will . . . be imputed to all other lawyers in the lawyer's firm as well." 31 The Committee reasoned that cross-examination of the adverse witness-client is likely "to pit the duty of loyalty to each client against the duty of loyalty to the other" and "to risk breaching the duty of confidentiality to the client-witness" both of which would involve direct adversity under Rule 1.7(a). 32 Furthermore, the Committee stated that cross-examination of the adverse witness-client would "present a tension between the lawyer's own pecuniary interest in continued employment by the client-witness and the lawyer's ability to effectively represent the litigation client," which would raise material-limitation concerns under Rule 1.7(b). 33

The state ethics opinions noted above are similar to the ABA opinion. 34 Both Connecticut and Michigan have held that the conflict created by the need to cross-examine the witness-client is non-waivable. 35 Others, including the ABA opinion, suggest that the conflict may be waivable, and indeed the bright-line rule against suing one's own client under Rule 1.7(a) has come under fire as both practically and historically unjustified. 36 Rule 1.7(a), however, has been adopted by the court as the ethics rule on current-client conflicts of interest, and its application in a manner contrary to that in other jurisdictions would have borne further explanation than the court provided.

At least two situations are not resolved by the Jaggers decision. First, if the defendant had shown a real possibility of a material limitation in either representation, the court might have resolved the Rule 1.7(b) issue differently. 37 Second, neither the plaintiffs nor the attorney-witness objected to the conflict of interest. 38 If the attorney-witness had objected, the Court might have been expected to analyze the matter differently, although perhaps under the Rule 1.7(b) material-limitation standard only and not under the Rule 1.7(a) direct-adversity standard.

30 See supra notes 28-29 and accompanying text.
32 See generally KY. SUP. CT. R. 3.130-1.7(a) (Michie 2001).
33 See id.
34 See supra text accompanying notes 31-33.
37 See generally id. (implying that the defendant did not show a real possibility of a material limitation).
38 See generally Jaggers, 37 S.W.3d at 740.
The Court's Rule 1.7(b) "material limitation" holding turned on the facts of the case, making it possible to distinguish Jaggers where sufficient proof is adduced.\textsuperscript{39} The decision does not mention any proof or determination on what the attorney-witness's testimony was likely to be about, its importance in the case, or the degree of adversity that the attorney-witness's testimony would have presented.\textsuperscript{40} Thus, one reading of the decision is that the defendants simply failed to adduce sufficient proof of a material limitation resulting from the simultaneous representation, and that a later party could attempt to choose that the adverse witness's testimony would be detrimental and require vigorous cross-examination that would run afoul of the "material limitation" standard.

That neither the plaintiffs nor the attorney-witness in Jaggers objected to the concurrent representation raises a third ground of decision that would have been available to the Court. Some courts have held that only a client has standing to object to a conflict of interest, while non-clients, such as the defendants in Jaggers, do not.\textsuperscript{41} The comments to Rule 1.7 state that opposing counsel may raise a conflict of interest where the fair or efficient administration of justice is clearly called into question.\textsuperscript{42} In addition, other courts have recognized that requests for disqualification are disfavored because they can be "tactically motivated, cause delay and add expense to the litigation."\textsuperscript{43} No court in Jaggers suggested that the disqualification motion was wrongly motivated, and the motion does not appear to have been an issue since there was no objection by the plaintiffs or the attorney-witness. Whether a standing analysis would have produced a narrower holding is open to question, but a holding based in fairness or efficiency might have avoided the more difficult problems presented by the Court's treatment of the witness-client conflict issue.

There are, finally, the problems created by the writ of mandamus for the determination of ethical issues. Considerable analytical difficulty arises from the immediate-and-irreparable-harm requirement and from the unsettled standard of review.


\textsuperscript{40} See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-367 (1992) (ruling that the degree of adverseness is important for both Rule 1.7(a) and (b)); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1425 (1978) (ruling that representation of a witness-client is permissible where the testimony is consistent with the party-client's position).


\textsuperscript{42} See KY. SUP. CT. R. 3.130-1.7 cmt. 14 (Michie 2001).

Ordinarily, actual prejudice is not a required element for relief from an ethical violation. Yet among the requirements for mandamus is “immediate and irreparable harm” from another party’s conduct. The Court, in *Jaggers*, did not have to parse the elusive, but significant, differences between a material limitation under Rule 1.7(b) and the immediate and irreparable harm necessary for a writ of mandamus, since it found that the former did not exist. Sooner or later, that may prove to be a problem in a conflict-of-interest case. In *In re American Airlines, Inc.*, the Fifth Circuit Court of Appeals noted that some courts require that the party objecting to the attorney’s conduct in the litigation, must show that the conduct “threatens to taint the trial.” One possible resolution of the ethics-mandamus quandary might be to hold that the threat of taint, without getting into whether actual prejudice will occur, would be an irreparable and immediate harm sufficient to support the writ.

The scope of mandamus review is narrower than that on an appeal from a final judgment or interlocutory order, since the writ lies to correct only a trial-court ruling that is either a violation of law, or an abuse of discretion rising either to a “gross abuse” or “a distortion of the legal rule.” Later decisions by both the Supreme Court and the Court of Appeals may suggest that the scope of “gross abuse” review is being limited to the violation-of-law or rule-distortion standard. The problem created by the narrower standard of review, whatever it may be, is that by declining to issue the writ because the violation is simply not egregious enough to render the error an obvious one, the appellate court may inadvertently give the impression that some ethics violations are not serious enough to justify action by the trial court in a litigation matter.

44 See Commonwealth v. Maricle, 10 S.W.2d 117 (Ky. 2000) (side-switching attorney); Sullivan County Regional Refuse Disposal Dist. v. Town of Acworth, 686 A.2d 755 (N.H. 1996) (stating majority rule); Comm. on Legal Ethics v. Frame, 433 S.W.2d 579 (W. Va. 1993) (holding that actual prejudice is not required for direct adversity to exist). This was less of a problem in *Jaggers* than it was in *Univ. of Louisville*. See infra text accompanying notes 73-78.

45 See *Jaggers*, 37 S.W.2d at 739.

46 See *Jaggers*, 37 S.W.3d at 739.

47 972 F.2d 605 (5th Cir. 1992).

48 Id. at 610-11 (rejecting the approach in favor of “remain[ing] ‘sensitive to preventing conflicts of interest’”).

49 For all cases other than those in the final pretrial stages, this suggestion might eliminate the necessity for the Court of Appeals’ observation in *Jaggers*, that the defendants could have asked the trial court to reconsider the motion based on later developments in the litigation. See *Jaggers*, 37 S.W.3d at 739.

50 See, e.g., Shelton v. Simpron, 441 S.W.2d 421 (Ky. 1969) (noting simple abuse of discretion standard on appeal); City of St. Matthews v. Smith, 266 S.W.2d 347 (Ky. 1954) (noting gross abuse on mandamus).


52 See Southeastern United Medigroup v. Hughes, 952 S.W.2d 195, 199-200 (Ky. 1997).

53 Although Smith employed a “gross abuse” standard, the decision in *Hughes* may be fairly read as an effort to narrow that standard to an abuse of discretion that ignores the law. See generally *Hughes*, 952 S.W.2d at 199-200. The Court of Appeals has referred to an “abuse of discretion” standard, but indicated in the same passage that where the issue is one of fact or the application of law to fact, the abuse must amount to “a distortion of the legal rule.” See Metropolitan Prop. & Cas. Indem. Co. v. Overstreet, No. 2001-CA-001909-OA, 2001 Ky. App. LEXIS 1261 (Ky. Ct. App. Dec. 21, 2001) (holding that there are two standards of review on mandamus, legal error and abuse of discretion).

54 See Sullivan County Regional Refuse Disposal Dist. v. Town of Acworth, 686 A.2d 755 (N.H. 1996) (noting that pursuant to the majority rule, actual prejudice is not required). This was less of a
The prerequisites for the writ of mandamus could be avoided if the Kentucky Supreme Court were to exercise its authority under Kentucky law by providing for interlocutory review of trial court decisions by the Court of Appeals. In an appeal, the Court reviews questions of fact under a clearly erroneous standard and reviews questions of law under a de novo standard. There is no requirement of immediate and irreparable harm, as on a writ of mandamus, or "extraordinary cause," as on a motion for a preliminary injunction. That approach might permit appellate courts to provide better guidance on ethics issues arising in litigation than does the writ of mandamus.

In Commonwealth v. Maricle, the Kentucky Supreme Court held that two defense attorneys would be disqualified from representing a criminal defendant where the lead prosecutor on the case had joined their firm just prior to trial. An assistant Commonwealth attorney was lead counsel in the prosecution when the attorney began discussing possible employment with the defense lawyers. Six months into the case, the attorney accepted employment with the defense firm, but did not tell her employer until about a month later. About one month before trial, the attorney left. The trial court, in a ruling that leaves no doubt as to the practical significance of Lovell v. Winchester, determined that the appearance of impropriety prevented the defense attorneys' continued representation of the defendant. The Court of Appeals denied the Commonwealth's petition for a writ of prohibition or mandamus.

The Supreme Court granted the writ of mandamus. The Court held that the defense attorneys' continued representation violated Rule 1.11 because: (1) the former prosecutor had participated substantially and personally in the case; (2) continued to participate after having negotiated employment; and (3) was not
screened from the defense attorneys in her firm. The Court relied, by analogy, on *Whitaker v. Commonwealth*, which had disqualified both a new assistant and the entire Commonwealth Attorney's office where the assistant had formerly represented the defendant. The Court also relied on KBA Ethics Opinion E-399, which involved an attorney moving between private firms. In drawing its analogies, the Court described the dealings that occurred between the prosecutor and one of the victims, and reasoned that, although the victim is not the prosecutor's client, "[t]he potential chilling effect to communications between victims and witnesses and the Commonwealth is as real and substantial a consequence to the Commonwealth as it is to criminal defendants."  

B. Communications with Represented Persons

In *University of Louisville v. Shake*, the Kentucky Supreme Court held that it would not issue a writ of mandamus to compel disqualification of the plaintiffs' attorney where the attorney spoke with the former head of the University's board of trustees about a matter that had occurred during that person's tenure on the board. The defendant University had argued that the contact violated Rule 4.2. The court refused to reach that issue. Distinguishing *Shoney's, Inc. v. Lewis*, in which the opposing attorney had communicated directly with currently employed senior managers about a litigation matter, the Court denied the writ because: (1) the discussion with the former board member was about collateral matters; (2) it did not involve confidential or privileged information; and (3) the plaintiffs agreed not to use the collateral matter at trial.

In *Humco, Inc. v. Noble*, the Kentucky Supreme Court held that the former managerial employees of a defendant employer were not "adverse parties" for purposes of the Rule 4.2 prohibition on ex-parte contacts with a

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68 *Id.* at 120-21.
69 895 S.W.2d 953 (Ky. 1995).
70 *See id.*
72 *Maricle*, 10 S.W.3d at 120.
73 5 S.W.3d 107 (Ky. 1999).
74 *See id.* at 109.
75 *See Ky. Sup. Ct. R. 3.130-4.2 (Michie 2001).* Rule 4.2 provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." *Id.*
76 *See Shake*, 5 S.W.3d at 107.
77 875 S.W.2d 514 (Ky. 1994).
78 *See id.* at 110. Query whether the plaintiff's agreement not to use the matter at trial should have had any legal significance under Rule 4.2. *Cf.* Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997) (noting attorney did not remember conversation with prospective client). But cf. text accompanying notes 44-49 (actual prejudice, immediate and irreparable injury, and suggested taint-of-trial requirements).
79 31 S.W.3d 916 (Ky. 2000).
The Court stated that a letter copied to in-house counsel, that did not explicitly advise that the defendant was represented by counsel, was insufficient to establish that the attorney “knew” that the defendant was represented.

With regard to contact between present and former employees, the Court noted that the comments to Rule 4.2 speak only to managerial employees and employees whose acts may be imputed to or whose statements are admissions by the employer are within the prohibited group. The Court observed that “[t]he rule does not distinguish between current and former employees of the organization,” and that communications with former employees were not prohibited by either Kentucky Ethics Opinion E-381 or ABA Formal Opinion 91-359. The court declined to extend the appearance-of-impropriety concept of Lovell v. Winchester to situations involving non-client communications.

The Humco decision resolves the question left partly open by University of Louisville, whether communications with a former managerial employee are within the prohibition of Rule 4.2. They are not. The strictures of mandamus, unfortunately, again left other questions unanswered. It is unclear after Humco, for example, how the Court will deal with an opposing attorney who attempts to obtain confidential or privileged communications from a former president or vice president of the organization. Rule 4.4 prohibits “knowingly us[ing] methods of obtaining evidence that violate the legal rights of such a person,” and might be applied if the organization were considered a “third party” for purposes of communications with the former employee. The Restatement similarly requires that the opposing attorney who contacts such a former employee must not invade information that the lawyer reasonably should know is protected by a duty of confidentiality. Otherwise the court may find it necessary to fall back on the appearance-of-impropriety concept.

Courts have taken three general approaches to former-employee problems. The majority, as followed by Kentucky, hold that the rule does not apply to former employees. Some courts have applied Rule 4.2 by its terms to

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81 See Humco, 31 S.W.3d at 920. See also Judith Hoge, Attorney Contact with Organizational Employees—The Evolving Caselaw, KY. BENCH & B., May 2000, at 22.
82 See Humco, 31 S.W.3d at 919 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995)).
83 See id. at 922 (citing KY. SUP. CT. R. 3.130-4.2, cmt. 2 (Michie 2001)).
86 See infra text accompanying notes 356-74.
87 Id.
88 See generally Humco, 31 S.W.3d at 920.
89 Id.
91 KY. SUP. CT. R. 44 (Michie 2001).
92 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 102 (2002).
93 See infra text accompanying notes 360-81.
former employees who are within any of the three categories in comment 2. 96
Other courts have required certain safeguards where the former employee is a
control-group member or a key employee who may have confidential or
privileged information that could be invaded by an opposing attorney’s
communications. 97 It would be prudent to observe some of the practices
mentioned in those cases, such as advising the witness that the attorney is not
seeking confidential or privileged information or notice to the attorney for
the organization, to avoid the receipt of such information. The Court might be
expected to impose, for an invasion of privilege under Rule 4.4, sanctions similar
to those imposed for a violation of Rule 4.2, in Shoney’s, Inc. v. Lewis, 98 which
included both disqualification 99 and “suppression” of the statements. 100

C. Non-Solicitation of Accident or Disaster Victims

The Sixth Circuit Court of Appeals requested certification from the
Kentucky Supreme Court, in Chambers v. Stengel, 101 on a constitutional
challenge to Kentucky Revised Statutes sections 21A.300 102 and 21A.310(1). 103
The statutes impose criminal sanctions on lawyers who solicit accident or
disaster victims by mail within 30 days of the event. 104 Chambers, a personal
injury attorney, brought a civil action in federal court requesting an injunction
and declaratory relief from the two statutes as violative of the separation of
powers between the General Assembly and the Kentucky Supreme Court. 105
Chambers argued that the Kentucky Constitution gives the Supreme Court
exclusive jurisdiction over members of the bar. 106 He also argued that the
statutes violated the First and Fourteenth Amendments. 107

The Kentucky Supreme Court, in its certification, held that the Kentucky
Constitution provides the Supreme Court with sole authority to regulate and
discipline bar members, 108 but does not grant the Supreme Court authority to
criminalize attorney conduct. 109 The Court drew a distinction between the

96 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. 2 (2000).
98 875 S.W.2d 514 (Ky. 1994).
99 See Brewer, Internal Investigations, supra note 95, at 803.
100 See Shoney’s, 875 S.W.2d at 516.
101 37 S.W.3d 741 (Ky. 2001).
102 KY. REV. STAT. ANN. § 21A.300 (Michie 2001).
103 KY. REV. STAT. ANN. § 21A.310(1) (Michie 2001).
104 See Chambers, 37 S.W.3d at 742. The corresponding Supreme Court rule is discussed infra in
text accompanying notes 138-40.
105 Id.
106 Id.
107 Id. The Kentucky Attorney General conceded that the statutes did infringe upon protected
speech. The court entered a partial agreed order regarding those segments of the statutes. Id.
108 Id. at 742-43. See KY. CONST. § 116. (Michie 2001); see also KY. SUP. CT. R. 3.130.760
(Michie 2001).
109 See Chambers, 37 S.W.3d at 742-43.
authority to govern admissions and ethical conduct of the bar with the legislature's authority to criminalize conduct pursuant to their police powers.\textsuperscript{110}

The Court noted that the Kentucky legislature currently criminalizes the unauthorized practice of law.\textsuperscript{111} Rationally, the legislature should be the body to impose criminal sanctions in order to protect its citizens from the conduct of both in and out-of-state attorneys. The legislature responded to the public's outcry against solicitations of victims within thirty days of the event due to the additional trauma, emotional harm, and invasion into their privacy imposed by attorneys sending these mailings.\textsuperscript{112} The Kentucky Supreme Court certified to the Sixth Circuit that the Kentucky Legislature exercised its police powers validly and therefore the statutes were constitutional under Kentucky law.\textsuperscript{113}

In dissent, Justice Johnstone disagreed with the majority's distinction between the power to discipline members of the bar and the police powers of the legislature.\textsuperscript{114} Justice Johnstone opined that the Kentucky Constitution clearly granted the Supreme Court the power to govern all matters pertaining to discipline of the members of the bar.\textsuperscript{115} The Sixth Circuit upheld the statutes, finding that they passed constitutional muster.\textsuperscript{116}

\textsuperscript{110} See id. at 742.
\textsuperscript{111} KY. REV. STAT. ANN. § 524.130 (Michie 2001).
\textsuperscript{112} See Chambers, 37 S.W.3d at 743.
\textsuperscript{113} Id. at 743-44.
\textsuperscript{114} Id. at 744.
\textsuperscript{115} Id. at 745. "Experience teaches that a boundary not guarded will in time be lost." Id (quoting Ex Parte Auditor of Public Accounts, 609 S.W.2d 682, 687 (Ky. 1980)).
\textsuperscript{116} Chambers v. Stengel, 256 F.3d 397 (6th Cir. 2001).
D. Ethics in Criminal Appeals on the Merits

The rules of ethics frequently figure in appeals on the merits in criminal cases, but infrequently result in reversals of criminal convictions. In *Jackson v. Commonwealth*, the Kentucky Supreme Court affirmed a drug trafficking conviction where the appellee argued that his attorney at arraignment also represented a co-defendant, creating a conflict of interest and therefore possible prejudice. The appellee based his arguments on Kentucky Rule of Criminal Procedure 8.30(1). However, the Court held that because the appellee had independent counsel at his trial, no conflict or prejudice affected the proceedings.

E. Insurance Defense and Identity of the Client

In *American Continental Insurance Co. v. Weber & Rose, P.S.C.*, the Court of Appeals held that an excess insurer could not maintain a legal malpractice action against the primary insurer’s attorneys. The Court of Appeals reasoned that the attorneys did not have an attorney-client relationship with the excess insurer nor did they owe that insurer any legal duty; therefore, the insurer could not sue them on a theory of equitable subrogation.

II. RULE CHANGES AND ETHICS OPINIONS


118 3 S.W.3d 718 (Ky. 1999).

119 See *id.* at 719.

120 See *id.* (citing KY. R. CRIM. P. 8.30(1) (Michie 2001)). Rule 8.30(1) states:

If the crime of which the defendant is charged is punishable by a fine of more than $500, or by confinement, no attorney shall be permitted at any stage of the proceedings to act as counsel for the defendant while at the same time engaged as counsel for another person or persons accused of the same offense or of offenses arising out of the same incident or series of related incidents unless (a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interests on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and (b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant by the court and that the defendant nevertheless desires to be represented by the same attorney.

121 See *Jackson*, 3 S.W.3d at 721.


123 See *id.*

124 *Id.* at 14.
The Kentucky Supreme Court recently adopted amendments to the rules governing lawyer advertising, in effect as of January 1, 2002. Some of the changes are minor, some are non-controversial, and still others may contain the seeds of constitutional litigation.

The definitions provisions of Rule 7.02(a) and (f) have been updated to permit the inclusion of fax numbers and e-mail addresses on professional cards and letterheads. The professional card provision states that “no other information may be included.” The rules were not updated to specify whether a law-firm website may be referenced on the firm’s letterhead, but this may not be done on a professional card. Presumably an e-mail address that contained the firm’s website URL, such as “attorney@lawfirm.com” where the firm’s URL was “www.lawfirm.com,” would comply with both rules. Rule 7.02(d) now refers to “[a] regularly published professional directory,” which appears intended to include the formerly referenced “telephone book listings” as well as directories in other media.

The exclusion of Rule 7.02(g) for a third party’s further distribution of a lawyer’s communication where the third party is not controlled or compensated by the lawyer, as published in the Kentucky Bench & Bar, contains a cross-reference to Rule 7.10. Prior to the recent amendments, Rule 7.10 referred to false and deceptive miscommunications. Those provisions have been moved to Rule 7.15. Now Rule 7.10 provides for waiver and forfeiture of fees for prohibited solicitation; however, the amended Rule 7.02(g) continues to refer to Rule 7.10. That rule probably will be amended in due course to make the correct cross-reference.

Also, Rule 7.04 now provides that “[n]o advertisement shall describe a fee or fees as ‘reasonable.’” However, if the statement that a lawyer’s fees are “reasonable” is true and if the First Amendment protects truthful speech by lawyers, then this provision may face a constitutional challenge in short order.

126 See KY. SUP. CT. R. 3.130-7.02 (Michie 2001).
128 See generally id.
129 See generally id.
132 See, e.g., KY. RULES OF COURT 299 (West 2000).
137 See Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988), cited with approval, In re Hughes & Coleman, 2001 Ky. Lexis 192 (Ky. 2001); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Since Ky. Sup. Ct. Rule 3.130-1.5(a) (Michie 2001) requires that all attorneys’ fees be reasonable, the assertion that the fee is reasonable is an assertion that the attorney is complying with the rule. If that is true, the attorney may be entitled to say so. If that is not true, it would seem that Rule
A new provision, Rule 7.09(4), has been added to provide that any communication soliciting professional employment from a prospective client involved in a disaster as defined in the Kentucky Disaster Response Plan may be sent “only after thirty (30) days have elapsed from the occurrence of the disaster.” This rule, which follows on the heels of the United State Supreme Court’s retrenchment on lawyers’ commercial speech in *Florida Bar v. Went for It, Inc.* may be instructively compared to the new provisions of the Ohio Disciplinary Rules requiring that any communications to persons involved in a disaster include a Statement of Client Rights and Responsibilities.

Rule 7.09 has been expanded from written and recorded communications to include “electronic communications,” which must contain the language “THIS IS AN ADVERTISEMENT” all in capital letters. The provision for telephonic communications has been expanded to include radio communications, with similar requirements appropriate to the medium.

Rule 7.25 now provides that the Attorney Advertising Commission may require the “THIS IS AN ADVERTISEMENT” slogan for “any advertisement that may not be perceived as a quest for clients because of the format, manner of presentation or medium.” This will have to be done either pursuant to the preclearance provisions of Rule 7.05(2), which requires prior submission of “any advertisement that does not qualify under Rule 7.05(1),” or pursuant to the Commission’s new charge to “[s]eek out violations of these Rules and resolve the violations under Rule 7.06(4).” The preclearance provisions provide that the Commission may refer any intentional violations to the Inquiry Commission, which includes nearly any violation of the advertising rules: “(1) failure to follow these Rules, (2) a manifest indifference to these Rules, or (3) a pattern of repeated disregard for these rules.”

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142 See id.

143 See KY. SUP. CT. R. 3.130-7.09 (Michie 2001) reprinted in Amendments to Rules of the Supreme Court, KY. BENCH & B., Nov. 2001, at 2a, 14a. It is not entirely clear how either the Commission or the attorneys it regulates are expected to know that something is an advertisement where that something is not so perceived.

144 See KY. SUP. CT. R. 3.130-7.05(2) (Michie 2001) reprinted in Amendments to Rules of the Supreme Court, KY. BENCH & B., Nov. 2001, at 2a, 15a. This may not be so, however, since although the preclearance provisions require submission of “any [non-7.05(1)] advertisement,” the rule does not explain how it is that an attorney should know that something not intended to get clients, is an advertisement. See generally id.


A likely application of Rule 7.25 will be to law-firm websites, which some jurisdictions are treating as advertisements. The amendments to the rules, though, do not address the question of the form in which the attorney should send the website to the Advertising Commission, nor do the amendments address how such issues as updates and links are to be handled.

The Court has updated the comments to Rule 7.40 on communication of fields of practice, in light of Peel v. Attorney Registration & Disciplinary Comm'n of Illinois, which held that advertisements of an attorney's specialty certification that are "descriptive and accurate" may not be prohibited under the commercial speech doctrine. The 1989 commentary had made reference to the "secondary meaning implying formal recognition as a specialist" of words such as "specialist," "practice limited to," or "practice concentrated in." The Court changed the commentary to read as follows:

[t]his Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services; for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist" is not permitted. Use of that term may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice.

Thus, the rule no longer restricts the phrases "practice limited to" or "practice concentrated in."

There remains a problem of enforcement under Rule 7.40 since the amended commentary defines a frontier that seems to remain open after Peel. Rule 7.40 provides that:

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who concentrates in, limits his or her practice to, or wishes to announce a willingness to accept cases in a particular field may so advertise or publicly state in any

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149 496 U.S. 91 (1990) (noting "the disclosure of truthful, relevant information is more likely to make a positive contribution to decision making than is concealment of such information").

150 Id. at 92.

151 See id. at 93.

152 KY. RULES OF COURT 300 (West 2000).

manner otherwise permitted by these Rules. Any such advertisement or statement shall be strictly factual and shall not contain any form of the words "certified," "specialist," "expert," or "authority." A lawyer shall not state or imply that the lawyer is a specialist except as follows: [exceptions for patent attorneys, admiralty lawyers, and lawyers holding a national certificate under an organization identified in Peel].

The Attorney Advertising Commission and the Inquiry Commission need look no further than their local yellow pages for arguable violations of the above rule. For example, the 2001-2002 Cincinnati Bell Real Yellow Pages, Northern Kentucky Edition, contains a section of listings under the page heading "LAWYER GUIDE BY SPECIALTY," with a single box in small print at the beginning of the section that states that "[l]awyers listed below are willing to accept cases in the fields of law shown. However, these listing do not imply that the lawyers have limited their practice, have special competence or experience, or are otherwise specialists in these fields of law." It is not meaningful to argue that this purported “disclaimer” undoes the work of the “LAWYER GUIDE BY SPECIALTY” header. The latter flatly contradicts the former. The former appears only once at the beginning of the category, whereas the latter appears on every page. Also, the former is in the smallest type on the page, the latter in the largest (other than that in advertisements themselves). This is a listing, as the header says, “BY SPECIALTY.” One might well imagine the prospective client with poor eyesight, among those whom the rule is intended to protect, who sees the repeated phrase, “LAWYER GUIDE BY SPECIALTY” and never sees the one-time disclaimer. Although the telephone company cannot necessarily be expected to pay attention to the rules of legal ethics in designing its Yellow Pages, Rule 8.3(a) prohibits a lawyer from violating the rules “through the acts of another.” An advertisement, in a medium that references lawyers’ specialties, is simply doing, through the telephone company’s choice of content, what lawyers cannot do themselves.

Many state ethics authorities permit Yellow Pages advertisements referencing fields of practice or under headings such as “Attorneys Guide,” but most have been careful to mention that words such as “specialty,” or “specializing,” may not be used. The enforcement of the rule could be

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156 Id. at 417. Similar provisions are contained in the 2000-2001 GREATER CINCINNATI MILLENNIUM EDITION 692-718 (2000). The first author’s best recollection is that earlier editions of the Cincinnati directory included the “disclaimer” on every, or every other page.
expected to meet with the convincing argument that the word "specialist" is not necessarily linked with certification, but truthfully denotes and connotes one who spends all his or her time in a particular area of practice. Indeed, those interested in attorney advertising may well be interested in testing the limits of Rule 7.40 after In re RMJ and Peel. It is respectfully submitted that either the rule against public claims to a "specialty" should be enforced, or Rule 7.40 should be amended to permit advertisements of the sort presented in the Yellow Pages. The current situation of a rule that apparently is not enforced, but rather is widely violated, runs a risk of misleading lawyers into a view that the advertising rules do not mean what they say, creating a public perception that lawyers do not properly regulate their own profession, and of contributing to erosion of respect for the rule of law.

III. ETHICS AND UNAUTHORIZED PRACTICE OPINIONS

The Ethics Committee issued twenty-three (23) ethics opinions that were published from 1998 to 2001. Three (3) were unauthorized practice opinions. Only those opinions on which this Article can offer potentially useful comments, will be discussed.

In KBA E-397, the Ethics Committee clarified its jurisdiction by stating that it would not decide motions for disqualification referred to it by the Kentucky courts. The committee reasoned that it could not hold hearings or resolve disputed questions of fact and that the rules provide for referral of ethics violations to the disciplinary authorities.

In KBA E-402, the Ethics Committee opined that the restrictions of the workers' compensation statute on employers' attorneys' fees did not violate the ethics rules, and that an attorney who was unable to prepare adequately and to provide competent services should not undertake, or should withdraw, from the representation. The decision came shortly after the decision in KBA U-52 held that non-lawyers may not represent parties before the Kentucky Department of Workers' Claims, relying in part on the proposition that the Supreme Court, and not the General Assembly, has jurisdiction to regulate the practice law.

The authors have no problem with attorney advertising, which informs persons about legal services who might otherwise be unable to find a lawyer to meet their needs. Their quarrel is with advertising rules, that are not enforced or, as it may be, that are kept on the books despite a conclusion that they are probably unconstitutional and should not put at risk in an enforcement proceeding.


496 U.S. 91 (1990). Kentucky is in a better position to weather this argument than are most states, since it has presciently referred only to "a lawyer certified by an appropriate governmental agency in admiralty practice," in place of the Model Rules' reference to "a lawyer engaged in admiralty practice," defusing the argument that the term "specialist" includes un-certified admiralty lawyers. See Ky. S.C.R. 3.130-7.40(2) (Michie 2001). But see MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4(b) (2000).

Several of the opinions were dated 1997, and one was published in 1997.


Id.


See Kentucky Bar Ass'n, Unauth. Prac., Op. U-52 (1997). The scenario of lawyers unwilling to practice because of fee ceilings and non-lawyers prohibited from practicing before the workers'
In KBA E-403, the Ethics Committee addressed the solicitation of new clients via a website containing information regarding an attorney and the attorney's services. The opinion states that these types of communications generally do not fall within the Prohibited Solicitation Rule or the Direct Contact with a Client Rule unless the attorney uses the Internet to contact a specific recipient. Otherwise, only the general rules regarding communications and advertising should apply. Websites are analogized to Yellow Page advertisements by the courts. The opinion also approved of Internet postings to a listserv or electronic bulletin board, if the postings are of a general nature.

The amendments appear to be in keeping with KBA E-403 for attorneys who post messages in a general fashion on Internet bulletin boards or in a chat room. However, E-403 also states that an Internet site in which attorneys dispense advice or answer legal questions to private individuals will give rise to attorney-client relationships with all the attendant responsibilities and constraints.

IV. DISCIPLINARY CASES

The Kentucky Supreme Court's decisions in disciplinary cases involved the typical categories of: (1) criminal convictions; (2) substance abuse; (3) failure to act with due diligence; and (4) failure to complete educational requirements. The Court also ruled on several noteworthy cases and discussions of these follow.

A. Retroactive Changes to Suspensions

compensation authorities seems to create a real problem for claimants. A rule permitting attorney-supervised practice by paralegals might be one way to permit necessary services to be provided on a cost-effective basis within the fee ceilings of the statute.

172 Id. On the use of the word "specialty" in a Yellow Pages advertisement, see supra text accompanying notes 155-62.
173 Id.
174 Id.
175 Id.
176 Id.
177 See, e.g., Kentucky Bar Ass'n v. Thomas, 986 S.W.2d 901 (Ky. 1999) (committing theft by deception); Kentucky Bar Ass'n v. Matthews, 24 S.W.3d 663 (Ky. 2000) (committing conspiracy to defraud a financial institution); Kentucky Bar Ass'n v. Rorrer, 28 S.W.3d 308 (Ky. 2000) (committing conspiracy to commit money laundering).
178 See, e.g., Kentucky Bar Ass'n v. Richendollar, 44 S.W.3d 375 (Ky. 2001).
179 See, e.g., Manchester v. Kentucky Bar Ass'n, 34 S.W.3d 808 (Ky. 2001) (failing to act with due diligence); Kentucky Bar Ass'n v. Yopp, 51 S.W.3d 867 (Ky. 2001) (failing to keep the client reasonably informed).
180 See, e.g., Kentucky Bar Ass'n Continuing Legal Educ. Comm'n v. Esselman, 984 S.W.2d 850 (Ky. 1999) (lacking CLE requirements); Kentucky Bar Ass'n v. Unnamed Attorney, 45 S.W.3d 448 (Ky. 2001) (failing to complete the New Lawyers Skills Program).
The Kentucky Supreme Court clarified its rule for entitlement or denial of credit for temporary suspension time in *Kentucky Bar Ass'n v. Hickey.* There the attorney, after pleading guilty to income tax evasion, received a temporary suspension. The attorney then received a four-year suspension with two years conditionally discharged upon monitoring by Lawyers Helping Lawyers. Subsequently, the trial commissioner ruled that the attorney should receive retroactive credit for the time of the temporary suspension. The KBA appealed this decision and asked for a five-year suspension instead. The Board of Governors subsequently recommended a four-year suspension without mention of the retroactive credit.

The attorney requested review, arguing that the commissioner's decision should be upheld, citing several past decisions in which the courts have evinced a willingness to conditionally discharge suspensions in conjunction with the oversight provided by Lawyers Helping Lawyers. The KBA argued that retroactive credit should not be permitted, under the rule of *Futrell v. Kentucky Bar Ass'n,* where the attorney's convictions arose from his theft from clients and the motion for retroactive credit was denied for lack of rehabilitation.

Although both cases involved criminal convictions, the Court thought much of the fact that Hickey's conduct did not affect clients and that he admitted to his substance abuse problems and would seek treatment. The Court went further by stating that denial of retroactive credit would be distinctly unfair, and furthermore, that the test for entitlement or denial of the credit "should be considered on a case by case basis, taking into account . . . as was done in *Futrell,* mitigating evidence and the attorney's progress towards rehabilitation."

In *Kentucky Bar Ass'n v. Haggard,* the Kentucky Supreme Court suspended an attorney who pled guilty to three felony counts of impersonating a Peace Officer. The attorney argued that since successful completion of a pretrial diversion program would result in dismissal of the charges, the automatic suspension provision of SCR 3.166 would not be triggered. The Court rejected that view and suspended the attorney, holding that the SCR 3.166 provides no exceptions for diversionary agreements.

**B. Use of Means with No Substantial Purpose Other than to Embarrass, Delay, or Burden a Third Person**

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181 31 S.W.3d 434 (Ky. 2000).
182 See *Kentucky Bar Ass'n v. Hickey,* 862 S.W.2d 894 (Ky. 1993); Hickey v. Kentucky Bar Ass'n, 988 S.W.2d 33 (Ky. 1999).
183 See *Hickey,* 31 S.W.3d at 434.
184 Id.
185 Id.
186 Id. at 434-35.
187 Id. at 435; see also Fortune, *supra* note 3, at 861.
188 950 S.W.2d 480 (Ky. 1997).
189 See id.
190 See *Hickey,* 31 S.W.3d at 436.
191 Id.
192 57 S.W.3d 300 (Ky. 2001).
193 Id. at 302.
194 Id. at 301.
195 Id. at 302.
In *Lile v. Kentucky Bar Ass'n*, an attorney displayed "extreme anger" in the midst of his own divorce and made threatening and hostile comments directed towards his wife and anyone who might represent her. The KBA charged the attorney with violations of Rule 4.4, Rule 8.3(b), and 8.3(c). The Court entered a consent order publicly reprimanding the attorney.

The *Lile* decision does not make clear how certain of the above rules were violated, which may be a product of an incomplete statement of facts. Rule 4.4 expressly applies only to an attorney "in representing a client, and would not seem capable of being violated by an attorney's private conduct. Anger, hostility and threats, however distasteful, would not seem to be "dishonesty, fraud, deceit or misrepresentation" under Rule 8.3(c). To the extent that the attorney's threats were crimes under Kentucky law, however, the decision describes a basis for discipline under Rule 8.3(b), which prohibits a criminal act reflecting adversely on the attorney's fitness to practice law.

In *Kentucky Bar Ass'n v. Musser*, an attorney was disciplined for conduct that involved both his own interest and that of a client. The attorney filed a lawsuit against an expert witness he was deposing in a client's case that same day. During the deposition, the attorney first informed the expert that they were being sued for the expert witness's examination of the attorney's client. The attorney then began to cross-examine the witness on matters pertaining to the new lawsuit. The opposing counsel objected that the questions were outside the purpose of the deposition, that the witness' counsel was not present, and that the attorney breached the rules of ethics by his actions.

The Kentucky Supreme Court found that the attorney's conduct served no purpose other than to intimidate the witness against providing testimony adverse to the attorney's client. The Court objected, not to the filing of the lawsuit per se, but rather to the manner in which the attorney informed the witness--during and not before the deposition. The Court reprimanded the attorney, stating that he had an obligation to inform the witness and opposing counsel of the filing of the new suit and to give them the opportunity to decide whether to proceed with the deposition.

Another attorney, in *Kentucky Bar Ass'n v. Reeves*, received a one-year suspension for violating Rule 4.4 when he used his signature as an attorney to advance himself in a personal matter unrelated to the representation of his client. The attorney wrote and signed a demand letter with the dual purpose of

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196 983 S.W.2d 511 (Ky. 1999).
197 Id.
201 See *Lile*, 983 S.W.2d at 511.
202 19 S.W.3d 87 (Ky. 2000).
203 See id. at 88.
204 Id.
205 Id.
206 Id.
207 Id. at 88.
208 See *Musser*, 19 S.W.3d at 88.
209 Id.
210 62 S.W.3d 360 (Ky. 2001).
211 See id. at 364-65.
assisting his client and also of provoking the judge assigned to the attorney’s unrelated personal case.\textsuperscript{212}

Previously, the attorney had unsuccessfully sought to have the judge assigned to his case remove himself.\textsuperscript{213} When the judge refused, the attorney sought to provoke the judge into doing so by making hostile personal references to the judge’s son in his demand letter.\textsuperscript{214} The Kentucky Supreme Court, agreeing with the trial commissioner, declared that “[n]o attorney should pervert a legitimate inquiry on behalf of a client by incorporating personal provocative language demanding remedies not available in the legal system ... to further his own ... case.”\textsuperscript{215}

C. Safekeeping of Property and Supervision of Employees

Many of the cases in the survey period, reflect basic errors in the handling of operating and escrow accounts. Some errors reflect apparent misunderstanding of how such accounts are to be handled, while others involve more serious misconduct. Other decisions reflect misconduct by employees for which the attorney was held responsible.

In Kentucky Bar Ass’n v. Trumbo,\textsuperscript{216} the attorney deposited settlement funds into his own checking account in violation of the requirement that client and attorney funds be segregated.\textsuperscript{217} The Kentucky Supreme Court suspended the respondent for 181 days after also finding that the attorney did not have a written contingency fee agreement with the client as required by Rule 1.5(c).\textsuperscript{218}

The Kentucky Supreme Court disbarred an attorney in Kentucky Bar Ass’n v. Collins,\textsuperscript{219} for failing to hold client property separate from the lawyer’s and for conduct involving fraud or deceit, when he wrote a bad check from his escrow account to the estate he represented.\textsuperscript{220}

Failure to adequately supervise an employee and failing to ensure the deposit of client funds into an escrow account resulted in a ninety (90) day suspended license in Knuckles v. Kentucky Bar Ass’n.\textsuperscript{221} There, the attorney defended her actions by claiming that her secretary embezzled two checks, a settlement, and an award without her knowledge or consent.\textsuperscript{222} The Kentucky Supreme Court found that a suspension was warranted because: (1) the second

\begin{itemize}
\item \textsuperscript{212} Id. at 365.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Id.
\item \textsuperscript{216} 14 S.W.3d 921 (Ky. 2000).
\item \textsuperscript{217} See id. at 922.
\item \textsuperscript{218} Id. See Ky. Sup. Ct. R. 3.130-1.5(c) (Michie 2001). The court subsequently suspended Trumbo for an additional ninety (90) days for failing to end his representation of a client after being suspended. See Kentucky Bar Ass’n v. Trumbo, 26 S.W.3d 792 (Ky. 2000). Trumbo’s application for reinstatement was denied due to three suspensions for ethical violations and failure to complete CLE requirements. See Trumbo v. Kentucky Bar Ass’n, 60 S.W.3d 545 (Ky. 2001).
\item \textsuperscript{219} 971 S.W.2d 291 (Ky. 1999).
\item \textsuperscript{220} See id. at 291-92.
\item \textsuperscript{221} 997 S.W.2d 460, 462 (Ky. 1999).
\item \textsuperscript{222} See id. at 461. The Court did not comment on the attorney’s having practiced law for four years after having been suspended for a CLE violation. That may have been a product of the current practice of fining, rather than suspending, attorneys for CLE violations, but at least one CLE-related suspension has been continued, there because of apparent concern over alleged alcohol-related problems. See infra text accompanying notes 315-20 (fines rather than suspensions) 425-29 (continued suspension).
\end{itemize}
incident of misappropriation occurred after the attorney had knowledge of the first incident, yet she did not discharge the employee; and (2) the attorney failed to complete her continued legal education ("CLE") requirements as required by an earlier suspension order. 223

The Knuckles decision could be read as suggesting a “one bite” rule: for law firm employees: until an employee has violated a principle stated in an ethics rule, the attorney may safely maintain his or her employment with the firm. 224 That would be an under-cautious reading, however, since Rules 5.1 and 5.3 establish mandatory systems and supervision requirements for attorneys that are designed to prevent such conduct in the first place. 225 There is no substitute for accounting and bookkeeping procedures that have been designed by accounting professionals to ensure that client funds are properly handled. 226 The Knuckles decision does raise questions about what oversight may be required where an employee has engaged in earlier wrongdoing but is retained anyway (one can read the decision as imposing strict liability in such circumstances); however, the case does not shed light on oversight of the trustworthy employee. 227

In Curtis v. Kentucky Bar Ass'n, 228 an attorney received a sixty (60) day suspension when he: (1) repeatedly advanced money to a client; (2) paid outstanding attorney's fees for a client; and (3) allowed his employee to borrow money from a trust account to buy a dog. 229 The attorney admitted violating Rule 1.15(a) 230 by failing to hold the client's property separately and for failing to safeguard the property of clients, when he deposited fees into his escrow account and did not transfer earned fees into his operating account. 231 He then wrote checks from the escrow account to individuals who had not placed funds with him for safekeeping. 232 The attorney's payment of the client's attorney's fees violated Rule 1.8(e). 233 The employee's dog purchase, despite the employee's repayment of the funds within days, placed the attorney in violation of Rule 5.3, which requires an attorney to supervise non-lawyer employees so that their conduct is consistent with the professional obligations of lawyers. 234

D. Knowledge of a Client's Impermissible Purpose

The Court publicly reprimanded an attorney for choosing the rock instead of the hard place in Kentucky Bar Ass'n v. Rankin. 235 Rankin filed a
bankruptcy petition for a client.\textsuperscript{236} After information filed in open court by the Department of Justice suggested that the client's illegal money transfers rendered the petition a fraud on the court, Rankin orally moved to have the bankruptcy petition dismissed without getting the client's consent.\textsuperscript{237}

The Kentucky Supreme Court noted that the ethics rules require a lawyer to abide by the client's decisions.\textsuperscript{238} A lawyer is also generally not permitted to reveal a client's unlawful activity, but may not further the client's improper purpose.\textsuperscript{239} The Court noted that under Rule 1.2(e),\textsuperscript{240} the lawyer in such a case should inform the client that the assistance he is seeking violates the Rules of Professional Conduct thereby limiting the lawyer's conduct.\textsuperscript{241} The KBA Board of Governors and the Court acknowledged that, had the attorney moved the court for leave to withdraw, he would have had no assurance that the motion would be granted.\textsuperscript{242} Nevertheless, the Court felt that the attorney, by not making the motion, was guilty of misconduct.\textsuperscript{243}

The first step in dealing with a client who may be violating the law is, as required by Rule 1.4(b),\textsuperscript{244} to advise the client about the matter so that the client may make an informed decision.\textsuperscript{245} The attorney in Rankin may have done that, since he at least told the client that "in continuing the bankruptcy he was subjecting himself to possible indictment."\textsuperscript{246} It is unclear, however, whether the attorney also advised the client that he would have to withdraw under Rule 1.16(a)\textsuperscript{247} if the client persisted in the unlawful conduct, and that if he was not permitted to withdraw, he might have to make disclosures under Rule 3.3\textsuperscript{248} in order to comply with his obligations to the bankruptcy court.\textsuperscript{249}

An attorney's advice about withdrawal and disclosure, can convince a client that they need to obey the law by avoiding the conduct the attorney is advising against. If the client is not so convinced and the attorney knows or has reason to know that the client will engage in wrongdoing,\textsuperscript{250} the attorney can attempt to withdraw – an attempt that, as the Board of Governors and the Court recognized, may not be successful.\textsuperscript{251} Where the attorney remains in the case, the

\textsuperscript{236} See id. at 711.
\textsuperscript{237} Id.
\textsuperscript{238} Id. (citing KY. SUP. CT. R. 3.130-1.2 (Michie 2001)).
\textsuperscript{239} Id.
\textsuperscript{240} Id. (citing KY. SUP. CT. R. 3.130-1.2(e) (Michie 2001)).
\textsuperscript{241} See Rankin, 999 S.W.2d at 711.
\textsuperscript{242} Id.
\textsuperscript{243} Id. at 712 (finding the attorney guilty of failing to use due diligence in an unrelated case).
\textsuperscript{244} KY. SUP. CT. R. 3.130-1.4(b) (Michie 2001).
\textsuperscript{245} See Charles Wolfram, Client Perjury, 50 S. CAL. L. REV. 809, 846 (1977). There is, of course, always the possibility that the attorney has something wrong, and that the client is not about to violate the law in the first place.
\textsuperscript{246} Rankin, 999 S.W.2d at 710.
\textsuperscript{247} KY. SUP. CT. R. 3.130-1.16(a) (Michie 2001).
\textsuperscript{248} KY. SUP. CT. R. 3.130-3.3 (Michie 2001). Contrary to an apparent myth among attorneys, Rule 3.3 does not govern withdrawal, Rule 1.16 does. See KY. SUP. CT. R. 3.130-1.16 (Michie 2001).
\textsuperscript{250} See Doe v. Federal Grievance Comm., 847 F.2d 57, 63 (2d Cir. 1988); Harry Subin, The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case, 1 GEO. J. LEGAL ETHICS. 125, 136-43 (1987) (discussing when a lawyer "knows"); see also United States v. Wuliger, 981 F.2d 1497, 1504-05 (6th Cir. 1992) (determining that in light of the attorney's professional duties he had a "reason to know").
\textsuperscript{251} See Rankin, 999 S.W.2d at 711; see also Carol Rieger, Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues, 70 MINN. L. REV. 121 (1985) (dealing with one method for
attorney continues to have the obligation under Rule 3.3 to make disclosure if the client is committing a fraud on the court, and not to engage in action that could constitute furthering the client’s fraud. This can become complicated where a client’s criminal case involves both true and false elements, since the client may have the right to continued assistance from the attorney in those aspects of the case that do not involve falsehood.

E. False Statement of Material Fact or Failure to Disclose on Bar Application

In a split decision, an attorney who failed to disclose information requested in his bar application for character and fitness certification, received a thirty-day suspension. In 1987, John Guidugli entered an Alford plea to a charge of endangering the welfare of a minor, his then-foster child, and received a one-year sentence. The Juvenile Court conditionally discharged the sentence for two years with stipulations such as surrendering his teaching license, not holding positions involving the supervision of juveniles, and participating in counseling through the Sexual Offender Program. The Supreme Court sealed the record, due to the jurisdiction of the Juvenile Court, but would reopen the case if Guidugli faced similar charges relating to the sexual abuse of a minor in the future.

In 1993, Guidugli graduated from law school, took the bar and subsequently became head of the Juvenile Division of the Kenton County Attorney’s office. After the former foster child/victim notified the newspapers about this employment, the KBA charged the attorney with making a false statement on his bar application, in violation of Rule 3.130-8.1, which states:

> An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: (a) Knowingly make a false statement of material fact; or (b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

The Respondent asserted that he relied upon the legal advice of his attorney and of his brother, a District Court judge, as well as on a now-repealed Kentucky statute. This statute provided that sealed records of a case are deemed never to withdraw).
have occurred and that the court's replies to inquiries about an individual shall be that "no such record exists." In reliance upon that advice, the attorney did not disclose the conviction. Since the attorney's probation had run from 1987 to 1989, his employment with the Juvenile Division did not violate the condition of probation, which had stated that he "hold no position that would involve the supervising or counseling of juveniles." Thus, the condition had no legal significance for the majority. The majority held that the attorney exerted due diligence in seeking legal advice about the matter and that his actions were reasonable, such that the thirty-day suspension sufficed.

The dissenting opinion by Justice Stumbo, joined by two other justices, protested the leniency of the majority and characterized the attorney's actions as involving a "complete lack of candor." The issue, according to the dissent, was not whether the applicant would have been admitted with the information disclosed, but that the failure to disclose it was itself an unethical and deceptive act. Acknowledging that the attorney should not "be forever damned" for failing to disclose the conviction, the dissent found that a suspension of only thirty days devalued both the seriousness of the charge he was convicted of and the gravity of his dishonesty, and would have imposed a one-year suspension.

F. Failure to Inform Clients

Rule 1.4, governing communications between lawyers and their clients, continues to be a problematic area for some practitioners. The Rule provides that "(a) [a] lawyer should keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; and] (b) [a] lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The Kentucky Supreme Court has found violations of Rule 1.4 despite the rule's use of the admonitory "should" rather than the mandatory "shall," leading Professor Fortune to argue that the Court should stop applying permissive language as though it were mandatory. Professor Fortune did note that the Court has typically found violations of other rules in addition to Rule 1.4, and thus could be said clearly to have made Rule 1.4(b) mandatory. It may be,

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261 See Guidugli, 967 S.W.2d at 589.
262 Id.
263 Id.
264 Id.
265 Id. at 590.
266 Id. (Stumbo, J., dissenting).
267 See Guidugli, S.W.2d at 590 (Stumbo, J., dissenting).
268 Id. (Stumbo, J., dissenting) (quoting In re Lane, 291 S.W.2d 19, 21 (Ky. 1956)).
269 Id.
271 See, e.g., Kentucky Bar Ass'n v. Taylor, 997 S.W.2d 464 (Ky. 1999) (failing to keep four clients informed about the status of their cases would result in disbarment); Kentucky Bar Ass'n v. Stevenson, 2 S.W.3d 789 (Ky. 1999) (holding that failure to apprise a client of the status of their claim warranted a 181 day suspension); Kentucky Bar Ass'n v. Zimmerman, 11 S.W.3d 47 (Ky. 2000) (stating that failure to immediately notify client of the dismissal of their claim is a violation).
272 KY. SUP. CT. R. 3.130-1.41 (Michie 2001).
273 See Fortune, supra note 3, 86 Ky. L.J. at 861.
274 Id.
however, that finding a violation of admonitory or permissive language amounts
to making it mandatory, even in the absence of a clear indication that additional
consequences result from the finding.

In *Eblen v. Kentucky Bar Ass'n*, 275 however, the Kentucky Supreme
Court made Rule 1.4(b) mandatory, contrary to the text of the rule. 276 The
attorney, in *Eblen*, failed to inform her clients of the dismissal of their claims and
of her decision not to appeal and also failed to explain her reasons for that
decision. 277 The attorney was publicly reprimanded. 278 The court accepted a
consent order in which the attorney stipulated to a violation of Rule 1.4(a) for
failure to inform and Rule 1.4(b) for failure to advise. 279

The problem with the *Eblen* decision is that the Kentucky Supreme Court
has clearly held that the word “should” in ethics regulation is permissive, not
mandatory, in applying the judicial nepotism rules in *Caudill v. Judicial Ethics
Commission*. 280 The need for uniformity in interpreting the word “should” arises
from attorneys’ and judges’ need to know what their obligations are under the
rules of attorney and judicial ethics. The result in *Eblen* would best be
accomplished by an amendment to Rule 1.4(b) to replace “should” with “shall.”

In *Kentucky Bar Ass'n v. Cartee*, 281 an attorney had represented a client
in a dissolution of marriage case, in which a Court of Appeals decision resulted
in her client’s owing a substantial amount of back child support. 282 Cartee failed
to communicate with her client following the ruling and the client later retained
new counsel. 283 Cartee also failed to communicate with the client’s new counsel,
to return calls or reply to correspondence, or to deliver her former client’s files
despite repeated requests. 284 In addition to violating Rule 1.4 by failing to
effectively communicate with her client, the attorney also violated Rule 1.16(d),
which requires that “[u]pon termination of representation, a lawyer shall take
steps to the extent reasonably practicable to protect a client’s interests, such as
giving reasonable notice to the client, allowing time for employment of other
counsel, surrendering papers and property to which the client is entitled . . .” 285

After failing to respond to the disciplinary proceedings, the attorney
received a thirty-day suspension. 286 An attorney’s lack of participation, in the
disciplinary proceedings, generally has been considered by the courts in
rendering a more severe penalty than would otherwise be administered for an
attorney’s failure to communicate with a client. 287

In a similar case, *Morse v. Kentucky Bar Ass’n*, 288 the Kentucky Supreme
Court found violations of Rule 1.4, failure to communicate about the status of a
case and also a violation of Rule 1.3 when the attorney failed to discover that the

275 999 S.W.2d 715 (Ky. 1999).
277 Id. at 716.
278 Id.
279 Id.
280 986 S.W.2d 435 (Ky. 1998).
281 53 S.W.3d 69 (Ky. 2000).
282 See id.
283 Id.
284 Id.
285 Id. (quoting KY. SUP. CT. R. 3.130-1.16 (Michie 2001)).
286 Id. at 70.
287 There is, however, no suggestion in *Rankin* that the discipline was enhanced for the attorney’s
failure to respond. See generally *Rankin*, 999 S.W.2d at 710.
288 961 S.W.2d 798 (Ky. 1998).
The Court took hypothetical issue with what would have been (assuming the complaint had been filed) the attorney’s failure to file for a default judgment, when the defendant did not file an answer.290

In a more egregious case, Kentucky Bar Ass’n v. Taylor,291 the Kentucky Supreme Court found unpersuasive an attorney’s arguments for a public reprimand, and suspended him for 181 days because he failed to keep his client informed and failed to explain matters adequately to her.292 The attorney violated Rule 1.4(b) by failing to explain matters pertaining to the dismissal of the client’s claim in a way that would have allowed her to make an informed decision regarding the dismissal with prejudice of her case.293 The attorney argued that his conduct, like that in Frazer v. Kentucky Bar Ass’n,294 lacked willful misconduct or moral turpitude so that a public reprimand would suffice.295

The Court disagreed, finding that the attorney’s failure to obtain his client’s consent prior to entering into an agreed dismissal with prejudice did constitute moral turpitude and misconduct.296 In Frazer, the attorney offered mitigating circumstances to explain his conduct, yet the attorney in this case did not offer any explanation.297 Furthermore, the attorney left the firm where he was employed without notifying his client.298 The presence of aggravating circumstances has been held to affect the punishment administered to an offending attorney.299

The Kentucky Supreme Court ordered a six-month suspension, in James v. Kentucky Bar Ass’n,300 on the following facts. In 1997, James filed a lawsuit on behalf of his client for damages for injuries sustained in an automobile accident.301 He then was suspended from the practice of law for thirty days in September 1998.302 Because the KBA objected to his reinstatement, representation was assumed by another attorney in the former’s office. The new

289 See id.; see also Ky. Sup. Ct. R. 3.130-1.3 (Michie 2001) (stating a lawyer shall act with reasonable diligence and promptness in representing a client); Yopp, 51 S.W.3d at 867 (noting that no written correspondence with the client amounted to a failure to keep the client informed); Leadingham v. Kentucky Bar Ass’n, 44 S.W.3d 374 (Ky. 2001) (publicly reprimanding an attorney for failing to return client calls concerning a proposal from opposing counsel, failing to answer a letter that his client wrote requesting the status of her case, and failing to inform his client that he was no longer representing her — causing her to file a pro se motion in order to protect her interests); Kentucky Bar Ass’n v. Hardy, 24 S.W.3d 667 (Ky. 2000) (stating that the attorney failed to file a brief or take action after hearing).
290 Morse, 961 S.W.2d at 798.
291 4 S.W.3d 138 (Ky. 1998).
292 See id. at 139.
293 Id.
294 860 S.W.2d 775 (Ky. 1993) (mitigating evidence due to the attorney’s new employment undertaking shortly after accepting client). In subsequent proceedings involving similar conduct, the court found a pattern of misconduct warranting six-month suspension. See Frazer v. Kentucky Bar Ass’n, 883 S.W.2d 878 (Ky. 1994); Kentucky Bar Ass’n v. Frazer, 896 S.W.2d 607 (Ky. 1995).
295 See Taylor, 4 S.W.3d at 138.
296 Id.
297 Id. (citing Frazer, 860 S.W.2d at 775).
298 Id.
299 See Frederick A. Spindell, Annotation, Failure to communicate with client as basis for disciplinary action against attorney, 80 A.L.R.3d 1240 (1975).
300 41 S.W.3d 850 (Ky. 2001).
301 See id. at 851.
302 Id.
attorney, however, was subsequently convicted of a felony, terminated, and automatically suspended from the practice of law.\textsuperscript{303}

The client was left without an attorney and remained unaware that James was suspended.\textsuperscript{304} When opposing counsel noticed a deposition, James failed to inform his client and she did not appear for the deposition.\textsuperscript{305} Opposing counsel moved to dismiss the action.\textsuperscript{306} The attorney received notice of the motion, but failed to inform his client about the hearing date.\textsuperscript{307} No one appeared in court to contest the motion and the suit was dismissed on January 26, 1998.\textsuperscript{308} The client did not learn of the dismissal until June 1998.\textsuperscript{309}

The Court suspended the attorney for six months, not solely for his failure to respond to the motion, keep his client informed, or appear at the deposition in violation of Rule 1.4,\textsuperscript{310} but rather, for the violation of 1.16(d).\textsuperscript{311} The Court held that the attorney failed to ensure that his clients' interests were protected\textsuperscript{312} once he could no longer represent her; therefore, the suspension period was justified.\textsuperscript{313} Rule 1.16(d) provides:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.\textsuperscript{314}

G. Maintaining Competence—CLE Requirements

Rule 1.1 requires that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”\textsuperscript{315} In addition, the rule imposes a duty to maintain the requisite skill and knowledge by

\begin{footnotes}
\item[303] Id.
\item[304] Id.
\item[305] Id.
\item[306] See James; 41 S.W.3d at 851.
\item[307] Id.
\item[308] Id.
\item[309] Id.
\item[310] Id. (citing Ky. Sup. Ct. R. 3.130-1.4 (Michie 2001)).
\item[311] Id. (citing Ky. Sup. Ct. R. 3.130-1.16(d) (Michie 2001)).
\item[312] See James, 41 S.W.3d at 851. See, e.g., Kentucky Bar Ass'n v. Berkebile, 971 S.W.2d 292 (Ky. 1998) (failing to diligently pursue collection of bad check and abandoning a case warranted a three-month suspension because the client's interests were not protected).
\item[313] See James, 41 S.W.3d at 852.
\item[314] Id. at 851 (quoting Ky. S.C.R. 3.130-1.16(d) (Michie 2001)). See Kentucky Bar Ass'n v. Wong, 44 S.W.3d 779 (Ky. 2001). Wong was retained to represent clients who were siblings in a will contest receiving over $1,500. Id. She filed suit in June 1997. Id. Defendant filed an answer and counterclaim but the attorney failed to file an answer to the counterclaim, failed to respond to discovery, and did not attend a deposition of one of her clients. Id. The action was ultimately dismissed for failure to prosecute. Id. She received a 181-day suspension for failing to adequately communicate and failing to advise the clients of the dismissal. Id.
\end{footnotes}
engaging in continuing study and education, otherwise known as fulfilling CLE requirements. The Kentucky Supreme Court has found excuses of: (1) interference with work duties; (2) mistaken belief that a conflicting deposition warranted an extension of time; and (3) the miscalculation of credits, not compelling enough to justify complete exculpation and has recently handed out fines rather than the traditional suspension.

H. Conflicts of Interest

The Kentucky Supreme Court published a private reprimand, in An Unnamed Attorney v. Kentucky Bar Ass’n, so that other practitioners would benefit from the holdings. The unnamed attorney initially represented both spouses in a dissolution of marriage case. The wife later met alone with the attorney to express her dissatisfaction with the property settlement agreement, which was initially agreed to and signed by both parties. After discovering that her husband had a girlfriend, the wife changed her mind and did not want the settlement agreement filed.

The attorney, explaining the legal ramifications of his representation with the two parties, agreed not to file the agreement until after speaking with both parties, and also advised the wife to seek independent counsel. The wife retained her own counsel, who notified the unnamed attorney of his representation and reiterated the request not to file the agreement. However, the attorney filed the agreement at the request of the husband. He continued representing the husband before the Domestic Relations Commissioner, claiming that he requested permission to withdraw but erroneously believed that the lower court’s response indicated he was not required to do so. When the case went before the circuit court, the judge questioned the propriety of his

316 See id. cmt. 6.
317 Id.
318 See Kentucky Bar Ass’n v. Olt, 39 S.W.3d 473 (Ky. 2001) (failing to obtain one-half credit deficit warranted leniency and resulted in a fine of $500 plus costs of $600).
319 See Kentucky Bar Ass’n v. Burnside, 50 S.W.3d 147 (Ky. 2001) (noting that leniency would be granted due to personal difficulties; no suspension but a fine of $630, including costs).
320 See Kentucky Bar Ass’n v. Esselman, 984 S.W.2d 850 (Ky. 1999) (ordering abatement of suspension and $500 penalty); see also Kentucky Bar Ass’n v. Triona, 11 S.W.3d 41 (Ky. 2000) (noting that an attorney’s forthright acknowledgment of the failure to meet the CLE requirements, and the difficult professional circumstances, justified a $750 fine instead of a suspension).
321 See, e.g., Kentucky Bar Ass’n v. Krammerer, 14 S.W.3d 919 (Ky. 2000); Kentucky Bar Ass’n v. Trumbo, 986 S.W.2d 900 (Ky. 1999); Kentucky Bar Ass’n v. Jones, 962 S.W.2d 397 (Ky. 1998); Kentucky Bar Ass’n v. Pike, 962 S.W.2d 396 (Ky. 1998); Kentucky Bar Ass’n v. Carter, 959 S.W.2d 436 (Ky. 1998); Kentucky Bar Ass’n v. Richerson, 962 S.W.2d 398 (Ky. 1998).
322 1 S.W.3d 474 (Ky. 1999).
323 See id. at 474 n.1.
324 Id. at 474
325 Id.
326 Id.
327 Id.
328 See An Unnamed Attorney, 1 S.W.3d at 475.
329 Id.
330 Id.
331 Id. (stating that the wife’s attorney moved the court to style the action a contested divorce).
representation. Subsequently the attorney withdrew. The court granted the attorney’s request for a private reprimand, citing his lack of disciplinary history and the completion of the divorce case.

In Boggs v. Kentucky Bar Ass’n, a case involving a division of property between the client’s daughters, the attorney relied on information provided by one of the daughters to prepare new deeds. After the deeds were filed, questions arose regarding the intentions of the parents, his clients. At the client’s request, the attorney prepared two corrected deeds. However, the clients ultimately sued one of the daughters, alleging that she: (1) had given information to the attorney that resulted in her receipt of a larger share of the property than was intended; and (2) refused to execute the corrected deeds. The attorney then represented the daughter despite repeated letters from the opposing counsel, who represented the parents, requesting his withdrawal from the case. Ultimately, the attorney did withdraw from the case but only after allegations of unethical conduct were made against him as a result of his violation of Rule 1.9.

The Court held that the attorney had violated Rule 1.9(a), which provides that “[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.” The Court publicly reprimanded the attorney for his failure to secure the consent of the former clients and ordered that he forfeit all fees paid by the daughter and to reimburse the parents, his original clients, with those fees.

In Clements v. Kentucky Bar Ass’n, the attorney drafted a will for her client that included a $50,000 bequest to her, and after the client’s death, notified the executrix of the estate that she would not be disclaiming the gift. The Kentucky Rules of Professional Conduct regarding conflicts of interest have a provision governing transactions with clients. Rule 1.8(c) states that “[a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.” The Court found a conflict of interest and imposed a fifty-nine (59) day suspension.

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332 Id.
333 Id.
334 See An Unnamed Attorney, 1 S.W.3d at 475.
335 999 S.W.2d 709 (Ky. 1999).
336 See id. at 709.
337 Id.
338 Id.
339 Id.
340 Id.
341 See Boggs, 999 S.W.2d at 709-10.
342 Id. at 709 (quoting KY. SUP. CT. R 3.130-1.9 (Michie 1999)).
343 Id. at 701. See RESTATEMENT (SECOND) OF AGENCY § 455 (1958) (providing that an agent forfeits that portion of the compensation relating to a breach of the agent’s duties, and in the case of a willful breach, the agent’s entire compensation).
344 983 S.W.2d 512 (Ky. 1999).
345 Id. at 512.
346 See KY. SUP. CT. R. 3.130-1.8(c) (Michie 2001).
347 Id.
348 See Clements, 983 S.W.2d at 512.
The Court found a different set of conflicting interests in *Kentucky Bar Ass'n v. Bates*, and invoked the much-discussed "appearance of impropriety" standard. The attorney filed a petition for dissolution of marriage on behalf of his client in the Circuit Court. Five days later, the client filed a domestic violence petition against his wife in the District Court. The petition asked for an emergency protective order ("EPO") based on the presence of an immediate and present danger of domestic violence and abuse. The attorney, acting in his capacity as Trial Commissioner in District Court, signed the EPO claiming that no other judge was available. A District Court judge signed a second EPO the following day giving the client custody of the children.

The Supreme Court, citing Rule 1.12(a), concluded that the attorney gave the "appearance of an unfair advantage" when he signed his client's emergency protective order as the commissioner. Rule 1.12(a) provides that "[a] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure." Finally, the Court reasoned that a public reprimand was justified because the attorney's actions involved the appearance of impropriety.

The appearance of impropriety concept, earlier a factor in non-disciplinary cases, thus has found its way into the Rules governing attorneys' ethics. The Court held in *Lovell v. Winchester*, a non-disciplinary case, that:

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 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. Although [it is] vague and leads to uncertain results, it 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

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349 26 S.W.3d 788 (Ky. 2000).
351 See Bates, 26 S.W.3d at 788.
352 Id.
353 Id.
354 Id.
355 Id.
356 Id. (citing Ky. Sup. Ct. R. 3.130-1.12(a) (Michie 2001)).
357 See Bates, 26 S.W.3d at 789.
358 Id. (quoting Ky. Sup. Ct. R. 3.130-1.12(a) (Michie 2001)).
360 Whether there may be some limited role for the appearance of impropriety standard in cases involving the public interest is beyond the scope of this survey. See Bruce A. Green, Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey - Or Revived Everywhere Else?, 28 Seton Hall L. Rev. 315, 325 (1997) (concluding that, "the 'appearance of impropriety' test, if employed at all, should be reserved for cases especially implicating the public interest.") (citations omitted). See generally Ky. Crim. P. 30(1) (Michie 2001).
361 941 S.W.2d 466 (Ky. 1997).
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.\(^{362}\)

Since Lovell, the court has dealt with other non-disciplinary cases where the "appearance of impropriety" phrase was invoked.\(^{363}\) However, those cases resulted in a finding that there was no appearance of impropriety.\(^{364}\) The Supreme Court has yet to use "an appearance of impropriety" as the sole cause for disciplinary action.\(^{365}\)

The appearance of impropriety concept was thought to have been laid to a well-deserved rest when the Code of Professional Responsibility was replaced by the Rules of Professional Conduct in 1990.\(^{366}\) There is no such provision, in either the ABA's version\(^{367}\) or the Commonwealth's version\(^{368}\) of the rules.\(^{369}\) The concept has been rejected by the Restatement (Third) of the Law Governing Lawyers,\(^{370}\) the ABA,\(^{371}\) and by a number of courts.\(^{372}\) Some courts have adopted the concept under the Rules, often more off-handedly than critically.\(^{373}\)

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362 Id. at 468-69 (emphasis added).
363 See, e.g., Jaggers, 37 S.W.3d 737.
364 Id.
365 Accord Fortune, supra note 3, at 859. See generally RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE § 1-1.2.2 (2001); Sheldon G. Gilman, On a Clear Day's View: The Appearance of Impropriety, Ky. BENCH & B., Spring 1998, at 24, 30-31 (expressing the wish that Kentucky courts will limit application of the standard to situations in which there is another basis for disqualification).
366 See Green, supra note 360, 28 SETON HALL L. REV. at 315-18.
367 See MODEL RULES OF PROFESSIONAL CONDUCT passim (1983).
369 See Conn. Bar Ass'n, Comm. on Prof'l Ethics, Informal Op. No. 98-6 (1988) (noting that since the "appearance of impropriety" standard did not appear in the applicable rules, the committee would not decide the issue on that basis).
The Kentucky Supreme Court’s adoption of the concept was certainly thoughtful, but the inconsistency of that adoption with the face of the rule is problematic. Professor Fortune has observed that to apply the appearance of impropriety concept would involve a due process violation because of the term’s vagueness.374 The Court itself suggested as much, in Lovell v. Winchester.375 And as the Court noted in In re Hughes & Coleman,376 ethics regulation should be a matter of enforcing duly promulgated rules, and not a common-law process. There are indications that the Court will use the appearance of impropriety concept as a ground for decision.377

Other instances of the appearance of impropriety concept remain. The Kentucky Code of Judicial Conduct expressly provides in Canon 2 that “a judge should avoid the appearance of impropriety.”378 In a judicial ethics case, McDonald v. Ethics Comm. of the State Judiciary,379 Justice Stumbo stated in his dissent,380 “I think it is crucial that we prohibit activity that has the appearance of impropriety. While such activity is difficult to actually define and pinpoint with accuracy, an effort to avoid it is vital to the health of the legal community.”381

I. Sexual Misconduct

In Kentucky Bar Ass’n. v. Belker,382 two former clients filed disciplinary complaints alleging improper sexual contact by Belker in the course of their representations.383 Nine more complaints came in the next six months, and four former clients filed a civil action against Belker.384 The civil action settled with an agreement that required Belker to withdraw his answer to the pending bar complaints.385 Belker thereafter withdrew his answers to the eleven pending matters.386 On March 17, 1998, the KBA Inquiry Tribunal issued eleven disciplinary charges against Belker, wherein he filed answers denying the allegations.387

The trial court hearing the civil suit ordered Belker to withdraw his answers in the disciplinary proceeding.388 Belker was held in contempt for failing to comply with the settlement, and the judge gave him the opportunity to purge himself by withdrawing his answers to the charges.389 Belker withdrew his

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374 See Fortune, supra note 3, at 859 (stating that disciplining a lawyer based on an appearance of impropriety would violate due process, however, “lawyers might assume they can be disciplined for conduct that violates no rule but doesn’t “pass the smell test”); see also CHARLES WOLFRAM, MODERN LEGAL ETHICS § 7.1.4 (1983).
375 941 S.W.2d 466, 449 (Ky. 1997), quoted supra in text accompanying note 362.
377 See Gilman, supra note 365, at 24.
379 3 S.W.3d 740 (Ky. 1999).
380 See id. at 746 (Stumbo, J., concurring in part and dissenting in part).
381 Id. (Stumbo, J., concurring in part and dissenting in part).
382 997 S.W.2d 470 (Ky. 1999).
383 Id.
384 Id.
385 Id.
386 Id.
387 Id.
388 See Belker, 997 S.W.2d at 470.
389 Id.
answers with two of the eleven charges dismissed and the remaining nine matters proceeded as default cases. The Board of Governors recommended that Belker be disbarred.

On review, Belker argued that he was coerced into withdrawing his answers, but the Court found that "the respondent's actions in this matter speak for themselves, and we do not feel the trial court's actions have any bearing on whether and how the respondent should be disciplined." The Court, in permanently disbarring Belker, pronounced:

[W]e have no sanction more extreme than permanent disbarment, and the respondent correctly characterizes it as "the ultimate disciplinary sanction." However, the respondent has failed to demonstrate good cause why the Board of Governors' report recommending permanent disbarment should not be adopted. The respondent's attempt to downplay his charges in comparison to reported suspension and disbarment cases from this jurisdiction and others not only fails to take into account the many reasons the Board felt this sanction was proper, but it also demonstrates the respondent still has no concept of the seriousness of his actions.

J. Advertising and Solicitation of Clients

The attorney in Kentucky Bar Ass'n v. Mandello encountered some nurses at a social event who described the recent death of a patient at their hospital. The circumstances suggested it was caused by gross negligence. Based on this information, Mandello wrote a letter directly to the widow of the patient to solicit her as a client in a wrongful death action, but failed to deliver a copy of her letter, thirty days in advance, to the Attorneys Advertising Commission, as required.

The letter contained a statement that was found to be misleading, as well as self-laudatory: "I would like to represent you and feel that my background provides me with a strong basis of knowledge with which to protect your interests." Mandello, however, had only been an attorney for two years and had never participated in a medical malpractice action. The Kentucky Supreme Court found that Mandello violated the rules regulating advertisements by lawyers and suspended her for six months. Rules 7.1 and following require that "[n]o attorney may advertise unless the attorney complies with either SCR 3.130, Rule 7.05 . . . [and] simultaneously with the publication of any

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390 Id. at 471-72.
391 Id. at 472.
392 Id. at 471.
393 Id. at 472.
394 32 S.W.3d 763 (Ky. 2000).
395 See id. at 763-64.
396 Id. at 764.
397 Id. See Ky. Sup. Ct. R. 7.05 (Michie 2001).
398 Mandello, 32 S.W.3d at 765.
399 See id.
400 Id. See Ky. Sup. Ct. R. 7.02 (Michie 2001).
advertisement under this subsection, the attorney shall mail to the Commission, c/o the Director of the Kentucky Bar Association, a copy of the advertisement."401

In In re Hughes & Coleman,402 the Kentucky Supreme Court reversed a decision of the Attorney’s Advertising Commission403 that had disapproved of television advertisements submitted for their approval.404 The Commission disapproved of the advertisements because they found that the phrase “injury lawyers” implied that the lawyers were specialists.405 After the KBA affirmed the Commission’s decision, the defendant’s appealed, arguing that the Commission’s decisions were arbitrary and capricious as well as a violation of the right to free speech.406

The Kentucky Supreme Court left the constitutional questions for another day.407 Acknowledging that the United States Supreme Court declared that lawyer advertising is protected commercial speech in Shapero v. Kentucky Bar Ass’n,408 the Court overruled the Commission because the ads were not misleading and did not use any specifically prohibited phrases.409

The Court contrasted the free speech issues and the arbitrary manner in which the Commission handled field-of-practice cases: permitting other firms to use terms like “international lawyers,” “corporate attorneys,” or “bankruptcy-debtor-creditor rights attorneys,” yet not “injury lawyers.”410 The Court then decided the case based merely on a literal reading of the Rule.411 Further, the Court admonished the board to avoid arbitrary and capricious distinctions in its decisions:

[w]e recognize that the Board of Governors attempted to express its opinion that such statements were equally misleading and in its opinion that such phrases should in the future be prohibited by the Commission. However, a literal reading of the rule does not include a prohibition of such phrases. The Board paints with too broad a brush. The apparent condemnation of such language by the Board produces an inconsistent and contradictory result and leads the Commission and the Board into the arbitrary and capricious morass which is unacceptable.412

401 KY. SUP. CT. R. 7.05 (Michie 2001).
402 60 S.W.3d 540 (Ky. 2001).
403 See id. at 545; see also KY. SUP. CT. R. 7.03 (Michie 2001) (stating that, “there shall be created an Attorneys’ Advertising Commission (hereafter Commission) which shall perform such functions in regulating attorney advertising as prescribed in these Rules.”).
404 See Hughes & Coleman, 60 S.W.3d at 544.
405 Id. at 543.
406 Id. at 542.
407 See Hughes & Coleman, 60 S.W.3d at 545.
408 Id. at 544 (citing 486 U.S. 466 (1988)). “Lawyer advertising is in the category of constitutionally protected commercial speech . . . ‘Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.’” Shapero, 486 U.S. at 472.
409 See Hughes & Coleman, 60 S.W.3d at 544-45.
410 Id. at 545.
411 Id.
412 Id. (emphasis added).
The Court's expression of its views in Hughes & Coleman seems to make clear that if changes are to be made to the rule, they must be done through the rulemaking process, not through decisions applicable to personal injury lawyers nor attorneys practicing in other areas.\(^{413}\)

K. Misconduct and Criminal Activity

In Kentucky Bar Ass'n v. Scalf,\(^ {414}\) the attorney accepted money from clients to perform legal tasks in six separate matters but never performed the tasks or returned the money.\(^ {415}\) The six clients lost a total of nearly $16,000.\(^ {416}\) Scalf was permanently disbarred.\(^ {417}\)

The client in Bamberger v. Kentucky Bar Ass'n,\(^ {418}\) hired Bamberger to represent her in a divorce proceeding and paid Bamberger $400 for the representation.\(^ {419}\) Bamberger filed the petition for dissolution promptly and the parties reached a settlement agreement later that month; however, Bamberger did not file the agreement until three months later.\(^ {420}\) For six (6) months following the agreement, the client had trouble reaching Bamberger regarding unresolved custody issues.\(^ {421}\)

Bamberger was ordered to attend AA meetings and to abstain from alcoholic beverages, receiving a thirty-day suspension, probated for a year\(^ {422}\) for violating Rule 1.3,\(^ {423}\) which provides that a "lawyer shall act with reasonable diligence and promptness in representing a client," and Rule 1.4(a), which provides that a "lawyer should keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."\(^ {424}\)

L. Reinstatement

In Kaler v. Kentucky Bar Ass'n,\(^ {418}\) Kaler, who was suspended in 1994 for failure to satisfy CLE requirements, reapplied for admission in 1996, but still lacked the requisite credits.\(^ {426}\) In 1997, he satisfied those requirements and his

\(^{413}\) See Amendments to Rules of the Supreme Court, Ky. BENCH & B., Nov. 2001, at 2a, 19a; supra text accompanying notes 374-81 (rulemaking on appearance-of-impropriety issue).
\(^{414}\) 42 S.W.3d 623 (Ky. 2001). See Scalf v. Kentucky Bar Ass'n, 11 S.W.3d 34 (Ky. 2000) (finding that the attorney forged a client signature, failed to inform client of settlement, failed to give client all of her share of a settlement, and failed to adequately explain a settlement offer to his client).
\(^{415}\) See id.
\(^{416}\) Id.
\(^{417}\) Id.
\(^{418}\) 36 S.W.3d 758 (Ky. 2001).
\(^{419}\) See id.
\(^{420}\) Id.
\(^{421}\) Id.
\(^{422}\) Id. at 759.
\(^{423}\) Id. (citing KY. SUP. CT. R. 3.130-1.3 (Michie 2001)).
\(^{424}\) See Bamberger, 36 S.W.3d at 758-59 (citing KY. SUP. CT. R. 3.130-1.4(a) (Michie 2001)).
\(^{426}\) No. 99-SC-0597-KB (Ky 1999).
application was submitted to the Character and Fitness Committee ("Committee") who informed him that he needed to submit to an alcohol assessment. When nothing further was heard from Kaler, the Committee issued a show cause order and Kaler's counsel advised the committee that the complete assessment could not be released because of Kaler's failure to pay for it. Nothing further was heard from Kaler so his application was denied.

In Wake v. Kentucky Bar Ass'n, the Fayette County Attorney resigned under terms of disbarment in 1993, after he had been convicted of mail fraud, misappropriation of funds, and conspiracy. The attorney engaged in those activities by granting undue and excessive pay raises to his office employees, who then returned the raises so that he could pay off the campaign debt from his election.

VI. CONCLUSION

The Kentucky Supreme Court and Court of Appeals and the Ethics Committee have provided valuable guidance to trial courts and practicing attorneys during the survey period for continued compliance with the Kentucky Rules of Professional Conduct. Cautious attorneys will want to pay heed to the Courts' and the Committee's teachings, particularly those that raise questions about interpretation and application of the rules based on policy rather than the text of the rules. In particular, the continued application of the appearance-of-impropriety concept will require close attention not only to the ethics rules but also to general principles of conduct, in order to avoid an inadvertent violation.

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420 Id.
421 Id.
422 Id.
423 36 S.W.3d 760 (Ky. 2001).
424 Id.
425 Id.
I. INTRODUCTION

In recent years, both Kentucky courts and other state and federal courts located within the Sixth Circuit have issued a number of significant opinions applying the Religion Clauses of both the United States Constitution and the Kentucky Constitution. In Parts II and III, this Survey will summarize the holdings of significant religion cases decided by courts located within the Sixth Circuit during the past four years. Then, Part IV will discuss some recent legislative developments and other controversies that may implicate the Religion Clauses, and offer some preliminary comments on how these controversies might be resolved.

Under the Establishment Clause of the First Amendment, government may neither endorse any religion or nonreligion, nor become excessively entangled therewith. Accordingly, courts frequently must decide whether a particular use

1 Assistant Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University.
2 J.D. Candidate, May 2003, Salmon P. Chase College of Law. B.S., Summa Cum Laude, Northern Kentucky University, 2000.
3 See U.S. CONST. amend. 1: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Id. Although, by its terms, the First Amendment applies only against Congress (and not against State or local governments), its prohibition against laws “respecting an establishment of religion” has been “incorporated” as a limit on State and local government power through the Due Process Clause of the Fourteenth Amendment. See Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Bd. of Educ., 330 U.S. 1 (1947).
4 See KY. CONST. § 5.
5 See U.S. CONST. amend. 1.
6 See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); accord Everson, 330 U.S. at 15-16. Although the United States Supreme Court may recently have retreated from applying some aspects of the “Lemon test,” it has continued to construe the Establishment Clause to prohibit “endorsement” of religion or religious practice. See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530
(or recognition) by a government of a religious symbol or religious practice constitutes an unconstitutional "endorsement" of religion. Exercising such judgment, federal courts in Kentucky have recently reiterated that government officials may not post the Ten Commandments in public schools, or in county courthouses, or outside the State Capitol, without running afoul of the constitutional prohibition against government "endorsement" of religion. Similarly, the United States Court of Appeals for the Sixth Circuit recently held that various Ohio cities had unconstitutionally endorsed the Christian religion by: (1) including a crucifix in a city seal; (2) including religious depictions on signs announcing Good Friday closures of public buildings; and (3) regularly opening public meetings of a local school board with a prayer.

On the other hand, the same court held that Ohio's state motto—"With God, All Things are Possible"—did not unconstitutionally endorse religion. Furthermore, an unconstitutional endorsement of religion was not created when a Tennessee city erected an allegedly Buddhist "Friendship Bell" as a token of friendship with the Japanese people. The holdings in all of these "endorsement" cases are discussed in Part II.B.1-2.

While governments in the United States are strictly prohibited from endorsing religion or nonreligion, it is not unconstitutional for governments to adopt religiously neutral policies designed to accommodate private religious practice. Not surprisingly, courts are often called upon to clarify the line between permissible government accommodation of private religious practice and impermissible government endorsement of such practice. In this context,
the United States Court of Appeals for the Sixth Circuit recently decided that
closure of government offices for Good Friday, in and of itself, did not violate
the Establishment Clause, but rather merely acknowledged that many
government employees would not want to work that day.\(^{19}\) For similar reasons, a
federal district court in Cincinnati recently upheld the constitutionality of a
federal statute declaring Christmas Day to be a legal public holiday.\(^{20}\) These
recent cases discussing the limits of permissible government accommodation of
religion are discussed later, in Part II.C.

A third, and particularly contentious, category of cases that implicate the
Establishment Clause concern the transfer of government funds to religious
institutions.\(^{21}\) In 1947, the United States Supreme Court stated that “[n]o tax in
any amount, large or small, can be levied to support any religious activities or
institutions, whatever they may be called, or whatever form they may adopt to
teach or practice religion.”\(^{22}\) More recently, however, the Supreme Court has
generally upheld government subsidies to religious institutions, so long as
equivalent subsidies are provided to similarly situated non-religious institutions,\(^{23}\)
or where payment of a particular subsidy is triggered by a genuinely independent
and private choice of an individual aid recipient.\(^{24}\)

Applying the Supreme Court’s precedents on government funding of
sectarian organizations, a federal district court in Kentucky recently held that the
Establishment Clause would be violated by the direct payment of State funds to a
“pervasively sectarian” nursing home that would use them to subsidize
“specifically religious activities.”\(^{25}\) Similarly, a federal district court in
Tennessee recently found it unconstitutional for the State to grant tax-exempt
status to bonds issued to finance capital improvements to a religious seminary.\(^{26}\)
Conversely, however, the Sixth Circuit recently upheld a Michigan city’s
decision to grant tax-exempt status to bonds issued to finance capital
improvements to a parochial elementary school.\(^{27}\) Furthermore, the Kentucky
Supreme Court recently upheld the use of public funds to pay for transportation
of students to non-public elementary schools (including religious schools).\(^{28}\)

In the context of delineating the boundaries of permissible government
financial support of religious institutions, courts located within the Sixth Circuit

\(^{19}\) See Granzeier v. Middleton, 173 F.3d 568, 574 (6th Cir. 1999).
\(^{21}\) See generally Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 392-94 (1984) (citations omitted);
\(^{22}\) Everson v. Board of Educ., 330 U.S. 1, 16 (1947).
supplementary educational funds to all public and private elementary schools, including
“pervasively sectarian” religious elementary schools).
\(^{24}\) See, e.g., Witters v. Washington Dep’t of Servs. for the Blind, 474 U.S. 481, 482 (1986)
(upholding use of state vocational rehabilitation assistance funds to pay tuition for a blind student
to be trained by a seminary as a pastor, missionary, or youth director).
defendant’s motion to dismiss and motion for summary judgment, permitting the case to go to trial
on the merits. \textit{Id.} at *22.
\(^{28}\) See Neal v. Fiscal Court, 986 S.W.2d 907, 912-13 (Ky. 1999).
have recently occupied a leading position in the emerging national debate over the constitutionality of various "public school choice" programs. In 2000, a federal district court in Michigan upheld as constitutional the use of public funds to finance a religiously-oriented "public charter school" that students in the district could voluntarily opt to attend (or not attend). Relatively, both the Ohio Supreme Court and the United States Court of Appeals for the Sixth Circuit have recently addressed the constitutionality of a Cleveland, Ohio voucher program that reimburses parents for certain full-time parochial school tuition costs, if their children opt out of the public school system. In so doing, a divided Ohio Supreme Court found that the voucher program did not violate the Establishment Clause; a divided panel of the Sixth Circuit later held that it did. The United States Supreme Court has now granted a writ of certiorari to resolve the dispute. These recent cases discussing the limits of permissible government funding of religious organizations will be discussed in Part III.A.-B.

Finally, several bills recently introduced in the Kentucky legislature may implicate the Religion Clauses of the Constitution, as may several other recent developments "on the ground" in Kentucky that have not yet been the subject of any litigation. In Part IV this Survey identifies several such bills and other developments, and suggests some possible outcomes of the constitutional disputes that may arise.

II. THE ESTABLISHMENT CLAUSE AND GOVERNMENT "ENDORSEMENT" OF RELIGION

The Establishment Clause of the First Amendment famously provides that "Congress shall make no law respecting an establishment of religion ...." While the precise meaning of "an establishment of religion" has been the subject of substantial debate, the United States Supreme Court has long given effect to Thomas Jefferson's view that the Establishment Clause of the First Amendment was intended to erect "a wall of separation between Church and State." By erecting such a wall, "[t]he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On

30 See Daugherty, 116 F. Supp. 2d at 917.
31 See Zelman, 234 F.3d at 948-49, 963; Goff, 711 N.E.2d at 207-11, 218-19.
32 See Goff, 711 N.E.2d at 207-11, 218-19.
33 See Zelman, 234 F.3d at 948, 963.
35 U.S. Const. art. I. Through the Due Process Clause of the Fourteenth Amendment, the same prohibitions apply with equal force to State governments. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Everson, 330 U.S. at 5.
the other hand, it has secured religious liberty from the invasion of the civil authority."

The classic statement of the "wall of separation" principle appears in Justice Hugo Black's, 1947, opinion for the Court in *Everson v. Board of Education*:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

During the 1970s and 1980s, courts generally enforced the requirements of the Establishment Clause by applying the tripartite "Lemon test," originally developed by the Supreme Court in *Lemon v. Kurtzman*. To pass constitutional muster under the Lemon test, a challenged government action must: (1) have a secular purpose; (2) have a principal or primary effect that neither advanced nor inhibited religion; and (3) must not foster excessive government entanglement with religious institutions. If a government action failed to satisfy any one of these three requirements, then the challenged government action was held to violate the Establishment Clause under the Lemon test.

In the 1980s and 1990s, however, several Supreme Court Justices began to express dissatisfaction with the Lemon test, which they viewed as both too indeterminate, and overly restrictive of government attempts to accommodate private religious exercise. Moreover, without formally overruling Lemon, the

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39 330 U.S. 1, 15-16 (1947).

40 403 U.S. 602 (1971).

41 *Id.* at 612-13. The Court, in *Lemon*, also suggested, in *dicta*, that state action involving religion might violate the Establishment Clause if it caused political divisiveness based on religious difference. *Id.* at 622-23. However, "political divisiveness" has not generally been recited as an element in standard formulations of the Lemon test. See *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring). "Although several of our cases have discussed political divisiveness under the entanglement prong of Lemon, we have never relied on divisiveness as an independent ground for holding a government practice unconstitutional." *Id.* (citations omitted).


43 Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas all have advocated adoption of a more accommodating test that "allows much more government aid to religion and much more of a religious presence in government." See Erwin Chemerinski, *The Future of the Establishment Clause*, INDIVIDUAL RIGHTS & RESPONSIBILITIES: HUMAN RIGHTS, Spring 2001. In the view of several of these Justices, the Establishment Clause would be violated only if the government...
Supreme Court throughout the 1980s and 1990s periodically neglected to apply the Lemon test in Establishment Clause cases in which it seemingly should have been implicated.\(^4^4\) This neglect led some commentators—including a federal district judge in Kentucky—to conclude that “[a] majority of Justices seem to have implicitly abandoned the tripartite test of Lemon v. Kurtzman.”\(^4^5\)

In 1997, the Supreme Court expressly abandoned use of the “excessive entanglement” prong of the Lemon test in the limited context of evaluating the constitutionality of government programs that provide aid to schools.\(^4^6\) However, the Court has never formally abandoned the tripartite Lemon test outside this limited context and, indeed, continues to apply the test regularly.\(^4^7\) Moreover, even in cases in which the Court has refrained from applying all three prongs of the Lemon test, the Court has continued to construe the Establishment Clause to prohibit “endorsement” of religion or religious practice.\(^4^8\) Under the abbreviated “endorsement test” (which essentially combines the “purpose” and “effect” prongs of Lemon),\(^4^9\) a state action violates the Establishment Clause if

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“literally created a church, favored one religion over others, or coerced religious participation.” \(id.\) Justice Kennedy has also advocated a “coercion test,” under which the Establishment Clause would prohibit government from “coerc[ing] anyone to support or participate in any religion or its exercise” or “giv[ing] direct benefits to religion in such a degree that it ‘establishes a religion . . . or tends to do so.’” County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); accord Lee v. Weisman, 505 U.S. 577, 587 (1992). The Sixth Circuit has echoed these Justices’ concerns about the Lemon test. See, e.g., Barnes v. Cavazos, 966 F.2d 1056, 1063 (6th Cir. 1992). “The Lemon test has received criticism from virtually every corner and we add our voices to those who profess confusion and frustration with Lemon’s analytical framework.” \(id.\) (citations omitted).


\(^4^9\) The purpose prong of the Lemon test asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid. See Lynch, 465 U.S. at 690 (1984) (O’Connor, J., concurring). The Sixth Circuit has sometimes treated the “endorsement test” as a refinement or clarification of the “effects” prong of the Lemon test. See, e.g., Americans
"an objective observer... would perceive [the action] as a state endorsement of [religion]."50

The "endorsement test" is particularly likely to be applied in Establishment Clause cases involving the use of religious symbols on government property.51 In recent years, courts located in Kentucky and elsewhere in the Sixth Circuit have had several well-known occasions to resolve precisely such disputes.52 The decisions of those courts are discussed in this Part.

A. Posting The Ten Commandments in Public Schools and Other Public Places

Since 1962, the Establishment Clause has been interpreted to prohibit essentially all forms of teacher-initiated prayer and religious ceremony from public school buildings throughout the United States.53 In 1978, perhaps seeking to test the limits of this constitutional prohibition, the Kentucky legislature enacted a statute requiring the Ten Commandments to be displayed on the wall of every public school classroom in the Commonwealth.54 The statute, which required these displays to contain an assertion of secular purpose55 and to be paid

United for Separation of Church and State, 980 F.2d at 1542-45.
50 Santa Fe Indep. Sch. Dist., 530 U.S. at 307. See County of Allegheny, 492 U.S. at 595 (adopting the "endorsement test"); Lynch, 465 U.S. at 690 (O'Connor, J., concurring) (proposing the "endorsement test"). Following the Supreme Court's lead, the Sixth Circuit has also occasionally substituted the abbreviated "endorsement test" for the full-blown tripartite Lemon test. See, e.g., Chaudhuri v. Tennessee, 130 F.3d 232, 237 (6th Cir. 1997). "If a reasonable observer would conclude that the message communicated is one of either endorsement or disapproval of religion, then the challenged practice is unlawful." Id.
52 See supra Part II.A.
53 See Engel v. Vitale, 370 U.S. 421 (1962); see also School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963). In consequence of these decisions, the Attorney General of Kentucky has determined that it would be unconstitutional for public school teachers to perform what would otherwise be their statutory duty to "read or cause to be read a portion of the Bible daily in every classroom... of the state in the presence of the pupils therein assembled..." K.Y. REV. STAT. ANN. § 158.170 (Michie 2001), declared unconstitutional in Op. Ky. Att'y Gen 79-483 (2001). See also K.Y. REV. STAT. ANN. § 158.175(1) (Michie 2001) (unconstitutionally authorizing local school district to authorize daily recitation of the Lord's Prayer). But cf. Doe v. Porter, No. 1:01-CV-115, 2002 U.S. Dist. LEXIS 2986 (E.D. Tenn. Feb. 8, 2002) (mem.) (ordering an end to Bible classes that have been taught for 51 years in public schools of the county where the "Scopes Monkey Trial" was held in 1925).
55 See K.Y. REV. STAT. ANN. § 158.178(2) (Michie 2001). This statute requires that,

[in all print below the last commandment [on the posters] shall appear a notation concerning the purpose of the display, as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.

Id.
for with private funds, was initially upheld as constitutional by the Kentucky Supreme Court. However, in a brief per curiam opinion (and over four dissents), the United States Supreme Court in Stone v. Graham summarily reversed the Kentucky Supreme Court's decision, holding that the Kentucky statute violated the Establishment Clause because it had no secular legislative purpose. Applying the Lemon test, the Court, in Stone, noted that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature," and that a display of the Commandments in schools served no secular educational function.

Twenty years later, despite the Supreme Court's seemingly decisive decision in Stone, the presence of the Ten Commandments in schoolhouses and other public buildings is still the subject of substantial litigation within the Sixth Circuit, and especially in Kentucky. Indeed, on May 5, 2000, one federal judge in the Eastern District of Kentucky issued three separate (but "virtually identical") opinions invalidating attempts by two separate local governments in Kentucky to display the Ten Commandments inside county courthouses, and one additional attempt to display the Ten Commandments in every public school classroom located within a Kentucky school district. In each of these cases (herein collectively referred to as "McCreary I"), the displays at issue originally consisted solely of the Ten Commandments. However, after lawsuits were filed, the respective Ten Commandments displays were supplemented with other documents, including an excerpt from the Declaration of Independence, the Preamble to the Kentucky Constitution, and other religiously themed congressional and presidential proclamations and declarations.

To determine whether the displays at issue violated the Establishment Clause, the McCreary I court—like the Supreme Court in Stone—applied the

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56 See KY. REV. STAT. ANN. § 158.178(3) (Michie 2001). "The copies required by this Section shall be purchased with funds made available through voluntary contributions made to the State Treasurer for the purposes of this Section." Id.
59 See id. at 40-41 (invalidating KY. REV. STAT. ANN. § 158.178).
60 Id. at 41.
61 Id. at 42.
63 See McCreary County, 96 F. Supp. 2d at 684, 691; Pulaski County, 96 F. Supp. 2d at 695-96, 702.
64 See Harlan, 96 F. Supp. 2d at 671-72, 679.
67 See supra notes 58-61 and accompanying text.
Lemon test. First, the court considered whether the government’s actual purpose in erecting the displays was to endorse or express approval of religion. Rejecting the defendants’ claims “that the Ten Commandments were posted in order to teach [residents] about American religious history and the foundations of the modern state,” the court found that, in fact, 

[T]he County narrowly tailored its selection of foundational documents to incorporate only those with specific references to Christianity and texts that, while promulgated by the federal government, were chosen solely for their religious references. The display does not appear to have been intended to educate ... residents, in a balanced or accurate manner, about the traditions and texts that were drawn upon by this nation’s founders or about the complex role religion has played in this country’s history.

Additionally, the court noted that the other documents were only added to the Ten Commandments display after suit was filed. As a result, the court found that the displays violated the first prong of Lemon, which requires a government action to have a “legitimate secular purpose.”

While noting that the lack of a legitimate secular purpose alone was a sufficient basis for holding the Ten Commandments displays unconstitutional under Lemon, the McCreary I court nonetheless elected to determine whether the displays also violated the “primary effects” prong of the Lemon test. Adopting the modern trend towards conflating the “effects” prong of the Lemon test with the alternative “endorsement test,” the court stated that the displays would fail the “effects” prong of Lemon if “an objective observer acquainted with the displays would perceive them as a governmental endorsement of religion.”

Applying this standard, the court found that the respective, aggregate collections had the “overwhelming effect of endorsing religion”—especially Christianity. First, the government entities carefully crafted the displays’ documents to include those sections that mentioned God. Second, the documents lacked an

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68 See McCreary, 96 F. Supp. 2d at 685-90; Pulaski, 96 F. Supp. 2d at 697-701; Harlan, 96 F. Supp. 2d at 673-78.
69 See McCreary, 96 F. Supp. 2d at 685-86; Pulaski, 96 F. Supp. 2d at 697-98; Harlan, 96 F. Supp. 2d at 673-74.
70 McCreary, 96 F. Supp. 2d at 686; Pulaski, 96 F. Supp. 2d at 698; Harlan, 96 F. Supp. 2d at 674.
71 McCreary, 96 F. Supp. 2d at 687; Pulaski, 96 F. Supp. 2d at 699; Harlan, 96 F. Supp. 2d at 675.
72 See McCreary, 96 F. Supp. 2d at 687; Pulaski, 96 F. Supp. 2d at 698; Harlan, 96 F. Supp. 2d at 675.
73 See McCreary, 96 F. Supp. 2d at 687; Pulaski, 96 F. Supp. 2d at 699; Harlan, 96 F. Supp. 2d at 675.
74 See McCreary, 96 F. Supp. 2d at 687; Pulaski, 96 F. Supp. 2d at 699; Harlan, 96 F. Supp. 2d at 675.
75 See McCreary, 96 F. Supp. 2d at 687; Pulaski, 96 F. Supp. 2d at 699; Harlan, 96 F. Supp. 2d at 675.
76 See McCreary, 96 F. Supp. 2d at 687; Pulaski, 96 F. Supp. 2d at 699; Harlan, 96 F. Supp. 2d at 675.
77 McCreary, 96 F. Supp. 2d at 688; Pulaski, 96 F. Supp. 2d at 699; Harlan, 96 F. Supp. 2d at 676.
78 See McCreary, 96 F. Supp. 2d at 687; Pulaski, 96 F. Supp. 2d at 699; Harlan, 96 F. Supp. 2d at 675.
explanation of their historical significance. Finally, the respective displays of the documents were not part of a long-standing tradition within the schools or courthouses. Holding that the displays were in violation of the Establishment Clause under the *Lemon* test, the court issued preliminary injunctions ordering each of the Ten Commandments displays at issue to be removed.

Although the preliminary injunctions issued in *McCreary I* remain in effect even today, the defendants from *McCreary I* reappeared before the same federal district court a year later, when, notwithstanding the pending injunctions, new displays featuring the Ten Commandments were nonetheless erected in the McCreary and Pulaski County courthouses, and in Harlan County public school classrooms. This time, along with the Ten Commandments, the displays included text from the Magna Carta, the Declaration of Independence, the Bill of Rights, the Star Spangled Banner, the Preamble to Kentucky’s Constitution, and other documents. The displays also contained explanations of each of the documents’ historical and legal significance.

As in *McCreary I*, the district court in *McCreary II* issued another preliminary injunction. Applying *Lemon*, the court held that the new Ten Commandments displays continued to lack a secular purpose, and continued to have the primary effect of endorsing religion. Specifically, the court found that the purpose for the new displays could not be characterized as secular, in light of both the United States Supreme Court’s decision in *Stone* and the actual history leading to the erection of the new displays in these counties. Similarly, the court found that the “primary effect” of the displays was religious because a reasonable observer would note the difference between the Ten Commandments and the other political and patriotic documents on display and deduce that the counties promote the religious code of the Commandments “as being on par with our nation’s most cherished secular symbols and documents.” In so holding, the court, in *McCreary II*, opined that the presence of the displays in prominent public places of great importance, such as classrooms and courthouses, had the effect of actually advancing religion.

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80 See *McCreary*, 96 F. Supp. 2d at 687; *Pulaski*, 96 F. Supp. 2d at 699; *Harlan*, 96 F. Supp. 2d at 675.
81 See *McCreary*, 96 F. Supp. 2d at 691; *Pulaski*, 96 F. Supp. 2d at 702-03; *Harlan*, 96 F. Supp. 2d at 679.
82 See ACLU v. McCreary County, 145 F. Supp. 2d 845, 846-47 (E.D. Ky. 2001) (herein referred to as *McCreary II*).
83 Id. at 846.
84 Id. at 846-47.
85 Id. at 853.
86 Id. The court, however, gleaned two permissible uses of the Ten Commandments from United States Supreme Court rulings. Id. First, the Ten Commandments can be used as a study aid in an appropriate class curriculum. See *McCreary*, 145 F. Supp. 2d at 853 (quoting *Stone*, 449 U.S. at 42). Second, the Ten Commandments can be used in a display commemorating figures, both religious and secular, who were historical lawgivers. Id. (citing *Allegheny*, 492 U.S. at 652-53).
87 Id. at 849-51.
88 Id. at 851.
89 Id. at 852.
A Ten Commandments display was also the topic of debate in *Adland v. Russ*, another federal district court decision from the Eastern District of Kentucky. At issue in *Adland* was a Kentucky Resolution authorizing relocation of:

> the monument inscribed with the Ten Commandments which was displayed on the [state] Capitol grounds for nearly three decades to a permanent site on the Capitol grounds near Kentucky’s floral clock to be made a part of a historical and cultural display which shall include the display of this resolution in order to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth.

Applying the *Lemon* test, the court held that the relocation statute violated the Establishment Clause because it failed all three prongs of *Lemon*.

First, the court held that the Ten Commandments monument display lacked any valid secular purpose. Relying on *McCreary I* and *Stone*, the court noted that government claims of a “historical” or “educational” purpose for displaying the Ten Commandments have generally been rejected where, as here, such displays are presented in a context devoid of *other* historical or educational documents or artifacts that might serve to place the Ten Commandments in a secular historical context. Moreover, the court noted that the Resolution itself, on its face, “extoll[ed] the virtues of the Christian beliefs promulgated by the Bible. By including a copy of the Resolution along with the display of the monument, the legislation’s religious intent is so clearly evident that the Resolution is unable to pass muster under the first prong of Lemon.”

Second, the *Adland* court held that the monument’s primary effect was to advance the Judeo-Christian religion. Specifically, the court held that the language of the resolution, the large size of the monument, and the prominent placement on Capitol grounds would cause a reasonable observer to interpret the display as an endorsement of Christianity.

Finally, the court held that the display caused an excessive government entanglement with religion because the Commonwealth would incur costs in the relocation and upkeep of the monument.

Despite these decisions, the Ten Commandments are still routinely displayed in government buildings throughout the Commonwealth of Kentucky. Indeed,
a recent survey conducted within the state discovered that the Ten Commandments continue to be displayed in public buildings in nearly one fourth of the counties in the Commonwealth. Furthermore, in November, 2001, the ACLU filed lawsuits against four other Kentucky counties for posting the Ten Commandments in public buildings.

B. Other Cases Involving Alleged Government Endorsement of Religion

While cases involving displays of the Ten Commandments, in Kentucky, may have occupied a disproportionate share of the Federal Supplement (and the newspaper headlines) in recent years, courts located within the Sixth Circuit have also adjudicated a number of other cases involving claims that various governments had impermissibly "endorsed" religion through public displays or other symbolic acts or gestures. Subpart B.1 discusses recent cases in which symbolic government actions were held to unconstitutionally endorse religion. Subpart B.2, in contrast, discusses recent cases in which government actions involving religious symbolism were held not to constitute impermissible endorsements of religion.

11. Unconstitutional Endorsements of Religion

In ACLU v. City of Stow, a federal judge in the Northern District of Ohio was called upon to decide whether the municipal seal of the City of Stow, Ohio, ("City"), violated the Establishment Clause by incorporating Christian religious symbolism into its design. The seal, which was designed in 1966, was divided into four quadrants; the upper left quadrant displayed an image of a large cross over an open book. While the plaintiff's contention that this image amounted to an endorsement of Christianity, the City maintained that the cross-and-book image did nothing more than acknowledge that the citizens in the city each had an "Ultimate Concern," whether it was a religious, a philosophical, or a social justice concern.

Applying the Lemon test, the Stow court held that the use of the cross in the city seal violated the Establishment Clause. With respect to "purpose," the court accepted the City's contention that the four quadrants of the seal, taken as a whole, were not intended to endorse Christianity, but rather "to represent the important facets of the Stow community, religion being one of them." Accordingly, the court found that the City had a legitimate secular purpose "in

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102 See id.
104 See infra Part II.B.1-2.
106 See id. at 847.
107 Id. In addition, the lower left quadrant contained a sketch of a factory, the upper right quadrant contained a sketch of a home, and the lower right quadrant contained a scroll with a quill and ink bottle. Id.
108 Id.
109 Id. at 852.
110 See Stow, 29 F. Supp. 2d at 851.
creating and promulgating an official seal" to represent its people and its
government.\textsuperscript{111}

The seal, however, failed the "effect" prong of the \textit{Lemon} test.\textsuperscript{112} Utilizing
Justice O'Connor's "endorsement test" to determine the effect of the seal, the
court held that "[a] 'reasonable observer,' when looking at the Stow seal on
official documents, vehicles, etc., would conclude that there is some official
connection between the city and Christianity[...]. . . precisely what the
Constitution of the United States prohibits."\textsuperscript{113}

In so holding, the court, in \textit{Stow}, acknowledged that nonsectarian
government usages of religious symbolism have not been held to be \textit{per se}
unconstitutional.\textsuperscript{114} However, the court also noted that city seals containing
crosses generally have been held to violate the Establishment Clause.\textsuperscript{115} Seeking
to explain the distinction, the court opined that:

\begin{quote}
[T]he guiding principle running through the cases appears to
be that, if done carefully, a governmental body may use a
religious, but not a sectarian, concept or symbol on a daily basis.
. . . On the other hand, clearly sectarian symbols, which
unmistakably refer to one faith's religious beliefs and practices,
generally violate the Establishment Clause when used by a
governmental entity on a \textit{daily} basis.\textsuperscript{116}
\end{quote}

Implicitly invoking \textit{Lemon}'s alternative "political divisiveness" rationale as a
basis for this distinction, the \textit{Stow} court directed that,

\begin{quote}
[I]f there is to be use of a religious symbol in a regular,
daily context (as opposed to a onetime seasonal display), the
governmental entity must take care that the symbol draws people
together, and does not create a wedge among them. The symbol
must therefore be non-denominational, in the sense that it may
not be clearly linked to a particular faith.\textsuperscript{117}
\end{quote}

Here, the city seal did not conform with this directive because the cross was
clearly linked to the Christian faith.\textsuperscript{118} Furthermore, it was seen daily on, among

\begin{footnotes}
\footnotetext[111]{Id.}
\footnotetext[112]{Id. at 850.}
\footnotetext[113] {Id.}
\footnotetext[114] {Id. (stating that, "Our money says 'In God We Trust.' While an atheist might take offense at this
motto on our money, or the recognition of Thanksgiving as a national holiday, \textit{general references}
to a higher, spiritual authority must be permissible . . . ") (emphasis added).}
\footnotetext[115]{Id. at 849-50 (discussing Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir. 1985)
en banc); Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991); Kuhn v. City of Rolling Meadows,
927 F.2d 1401 (7th Cir. 1991). The \textit{Stow} court noted that the presence of a cross on a city seal was
upheld only once, in a case where the cross appeared, within the seal, in the coat of arms of the
city's founding father. \textit{See Stow}, 29 F. Supp. 2d at 850 (citing Murray v. City of Austin, 974 F.2d
147 (5th Cir. 1991)).}
\footnotetext[116]{Id.}
\footnotetext[117]{Id. at 852.}
\footnotetext[118]{Id.}
\end{footnotes}
other things, the city's stationary and police cars. Construing the Stow city seal to display a permanent, sectarian, and potentially religiously divisive symbol, the court held that the seal violated the Establishment Clause.

Another dispute over government use of religious symbols arose when a court official in Kenton County, Kentucky, posted signs at courthouse entrances which bore an image of the Crucifixion to announce that the County Courthouse building and its administrative offices would be closed "for observance of Good Friday." The dispute was short-lived, however: when the county was sued, it immediately admitted that the offending signs violated the Establishment Clause, removed them, and replaced them with new signs simply announcing that the building would be closed on April 5. The officials also "stated on the record that no such signs would be posted in the future." However, while the dispute over the religious symbolism in the signs was thus resolved, a related dispute concerning the underlying constitutional propriety of closing public buildings on Good Friday was eventually litigated to appellate judgment.

In another case involving a different type of alleged government endorsement of religion, Coles v. Cleveland Bd. of Educ., the United States Court of Appeals for the Sixth Circuit had occasion to consider whether the Establishment Clause prohibits an Ohio local school board from calling for prayer recitation at the beginning of its public meetings, which were open to parents, students, teachers, and the general public, and were held on school grounds. Although the Lemon test was invoked, the issue in Coles was largely reduced to whether, for Establishment Clause purposes, the school board's public meetings were more analogous to public school functions (in which official prayer is generally prohibited), or, alternatively, to legislative sessions (in which brief nondenominational prayers have been held not to violate the Establishment Clause). Ultimately analogizing the open school board meetings at issue to high school graduation ceremonies, a divided Sixth Circuit panel held that the challenged prayers violated the Establishment Clause.

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119 Id. at 847.
120 Id. at 849-52.
121 See Stow, 29 F. Supp. 2d at 853.
122 Granzeier, 173 F.3d at 571.
123 See id.
124 Id.
125 See Granzie, 173 F.3d at 568.
126 171 F.3d 369 (6th Cir. 1999).
127 See id. at 372-73.
128 Id. at 383-85.
129 Id. at 374. See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (prohibiting official school prayer at official, but noncompulsory, school athletic events taking place outside regular school hours).
131 In Lee v. Weisman, 505 U.S. 577, 599 (1992), the United States Supreme Court specifically held the Establishment Clause to prohibit prayer recitation by an invited clergy member at a high school graduation ceremony.
132 See Coles, 171 F.3d at 385, 386. The school board's petition to rehear the panel decision en banc was later denied, based on a 7-7 tie vote of full Sixth Circuit court. See Coles v. Cleveland Bd. of Educ., 183 F.3d 538, 539 (6th Cir. 1999) (order denying rehearing).
The Sixth Circuit’s analysis proceeded from “two overriding principles” that it discerned from the Supreme Court’s Establishment Clause precedents concerning religious activities at public schools. “The first is that ‘coercion’ of impressionable young minds is to be avoided, and the second is that the endorsement of religion is prohibited in the public schools context.”

Applying the first of these “overriding principles,” the court found that, while school board meetings are primarily attended by adults, some impressionable young students must attend and participate in the meetings. Specifically, in this regard, the court drew special significance from the facts “that the board regularly presents honors and awards to students at its meetings” and that “students who wish to challenge their suspension or expulsion from school are required by statute to air their grievances at a school board meeting[, thus, f]or such students, attendance at a board meeting is not a matter of choice, but a matter of necessity.” The court also found that unlike other legislative officials, school board members must communicate directly with students as part of their job, and should therefore be subject to the same Establishment Clause restrictions that apply to teachers and principals. Accordingly, the court found that the Establishment Clause principle requiring the avoidance of “coercion” of impressionable young minds militated against prayer at school board meetings.

Second, in order to determine whether the prayers had a legitimate secular purpose and primary effect, the Coles court considered whether the prayers constituted a forbidden “endorsement of religion.” In this regard, the school board asserted that the secular purpose of the prayer was to solemnize the meetings. The court, however, cited contrary statements of the board members, the content of the prayer itself, and the lack of necessity of prayer to achieve the board’s desired goal of solemnity, and concluded that the prayers failed to satisfy Lemon’s purpose requirement. School board prayer was also held to violate Lemon’s prohibition against sectarian effects, on the ground that a reasonable objective observer would view the prayer’s sectarian references to Jesus and the Bible as an endorsement of Christianity. Finally, the court held that the school board’s prayers violated the “excessive entanglement” prong of Lemon, by placing government officials in position either to determine part of the content of the opening prayer, or, alternatively, to choose which member of the local religious community would lead the prayers.

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133 See Coles, 171 F.3d at 379.
134 Id. In addition to reasoning from these two “overriding principles,” the Coles court also rested its conclusion—that, for Establishment Clause purposes, prayer at an open public school board meeting was more akin to prayer at a high school graduation ceremony than to prayer at the opening of a legislative session—in part on the court’s belief that the Supreme Court’s decision upholding prayer at the opening of a legislative session was “one-of-a-kind.” Id. at 380-81 (citing Marsh, 463 U.S. at 783).
135 Id. at 382.
136 Id.
137 Id.
138 See Coles, 171 F.3d at 383-84.
139 Id. at 384-85.
140 Id. at 384.
141 Id.
142 Id. at 384-85.
143 Id. at 385.
Even while holding official prayers at school board meetings unconstitutional under the Establishment Clause, however, the court clarified that there is no prohibition against private, non-official student prayer on school grounds, which retains protection under the Free Exercise Clause. Specifically, the court concluded:

[W]e do not mean to imply that religion must be kept entirely out of the public school system. Certainly students might themselves wish to pray during the time they spend at school. It is only when the government, through its school officials, chooses to introduce and exhort religion in the school system that Establishment Clause concerns take shape.

2. Constitutionally Acceptable Uses of Religious Symbols or Gestures

Subpart B.1, supra, surveyed recent cases decided within the Sixth Circuit, in which state and local government actions were held to have had an unconstitutional purpose or effect of "endorsing" religion in violation of the Establishment Clause. However, not every such claim was successful. Accordingly, this Subpart surveys recent cases decided inside the Sixth Circuit in which state and local government actions involving religion survived Establishment Clause challenges.

In a recent en banc decision, ACLU v. Capitol Square Review and Advisory Bd., the United States Court of Appeals for the Sixth Circuit upheld the constitutionality of Ohio's official state motto, "With God, All Things are Possible," against an Establishment Clause challenge. In so holding, the court noted that it was not clear whether the Marsh standard (as articulated in Marsh v. Chambers), the endorsement test, or the Lemon test best applied to the case. Accordingly, the court opted to apply all three tests.

In Marsh v. Chambers, the United States Supreme Court upheld, as constitutional, Nebraska's practice of paying the salary of a clergyman employed to serve as chaplain to the state legislature, and to offer a public prayer at the opening of each legislative day. The Court did not, however, apply either the "Lemon test" or the (not yet extant) "endorsement test" to resolve the
Establishment Clause issues presented. Instead, the Court upheld Nebraska’s practice primarily on “specific intentionalist” grounds, reasoning that because “the men who wrote the First Amendment Religion Clauses” paid a chaplain to deliver prayers at the First Congress, those men apparently “did not view paid legislative chaplains and opening prayers as violative of that Amendment . . .”

Applying the “specific intentionalist” approach applied in Marsh, the Sixth Circuit, in Capitol Square, concluded that, as believers in a supreme being, “[t]he drafters of the First Amendment could not reasonably be thought to have intended to prohibit the government from adopting a motto such as Ohio’s just because the motto has ‘God’ at its center.” However, because “the men who wrote the First Amendment Religion Clause” (and who paid the salaries of the legislative chaplains at issue in Marsh) did not actually adopt any theistic state or national mottos, the court’s analogy to Marsh appears somewhat strained. Moreover, the “specific intentionalist” methodology of constitutional interpretation embraced in Marsh apparently enjoys no adherents on today’s Supreme Court. Accordingly, the discussion and application of Marsh in the Capitol Square opinion is probably best understood as dicta.

Next, and more significantly, the court applied the endorsement test to Ohio’s state motto. As a threshold matter, the court noted that only two percent of Ohioans could even “come reasonably close to recalling the content of Ohio’s motto,” raising the question of whether the “reasonable observer” should be presumed capable of “observing” the state motto in the first place. Moreover, the court found it “most unlikely” that even a reasonable observer familiar with the New Testament and with the role that religion and philosophy played in the heritage of Ohio “could discern an endorsement of Christianity in the words of Ohio’s motto. There is, after all, nothing uniquely Christian about the thought that all things are possible with God.” After finding that the state motto was not inconsistent with the teachings of any known organized theistic religion, the court concluded that “no well informed observer could reasonably take Ohio’s motto to be an official endorsement of the Christian religion.”

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157 Id. at 788.
158 Id. 790-91.
159 Id.
160 Capitol Square Review and Advisory Bd., 243 F.3d at 301. But see id. at 314 (Merritt, J., dissenting) (providing countervailing historical evidence of certain Framers’ specific intentions regarding the scope of the Establishment Clause).
163 See Capitol Square Review & Advisory Bd., 243 F.3d at 301-10.
164 Id. at 301-04.
165 Id. at 303 n.13 (emphasis in original) (citing a poll conducted in Summit County, Ohio).
166 Id.
167 Id. at 303-05.
168 Id. at 305. In the dissent, Judge Merritt noted that the Supreme Court has invalidated public school “moment of silence” laws on the ground that such laws can be reasonably understood to endorse religion over irreligion. See Capitol Square Review and Advisory Bd., 243 F.3d at 314.
Accordingly, over Judge Merritt's virulent dissent, the court, in *Capitol Square*, held that the motto passed Establishment Clause muster under the "endorsement test."\(^{170}\)

Finally, the court analyzed the constitutionality of the Ohio state motto under the tripartite *Lemon* test.\(^{171}\) The court began its *Lemon* analysis by accepting as valid Ohio's explanation of the secular purpose for the motto stating that "[i]t inculcates hope, makes Ohio unique, solemnizes occasions, and acknowledges the humility that government leaders frequently feel in grappling with difficult public policy issues."\(^{172}\) In addition, the court found that "the Ohio motto legitimately serves a secular purpose in boosting morale, instilling confidence and optimism, and exhorting the listener or reader not to give up and to continue to strive," and in reinforcing a sense of membership among the state's citizens.\(^{173}\) Again, over Judge Merritt's dissent, these purposes all were held to satisfy *Lemon* 's requirement of a legitimate secular purpose.\(^{176}\)

Similarly, the court found that the Ohio state motto did not have as its primary effect the advancement of religion, because it "provide[d] no financial relief to any church, but [rather merely] pays lip service to the puissance of God."\(^{177}\) In addition, the court drew a comparison to the United States' national motto, "In God We Trust," holding that "[t]he primary effect of the national motto is not to advance religion, we take it, and we think it clearly follows that the primary effect of the state motto is not to advance religion either."\(^{178}\)

Finally, applying the third prong of the *Lemon* test, the court found that there was no excessive government entanglement with religion.\(^{179}\) The motto, in and of itself, did not involve religious *institutions* in the administration of any government program, nor did it involve the government in the administration of

\(^{169}\) *Id.* at 318-19 (Merritt, J., dissenting) (stating that, "[t]urning Christ's unique message of salvation through grace into a public bumper sticker . . . says to [non-Christians] that their beliefs are inferior and hence turns Christian doctrine into an official state advertising label that discriminates against nonbelievers and other religions that do not accept Christ as their savior.").

\(^{170}\) *Id.* at 306-08.

\(^{171}\) *Id.* at 307 (citations omitted).

\(^{172}\) *Id.*

\(^{173}\) *Id.*

\(^{174}\) *Id.*

\(^{175}\) *Id.* at 317 (Merritt, J., dissenting) (stating that "[t]o say that Christ's words 'with God, all things are possible' is merely a symbol of hope, inspiration and good luck, like the buckeye, is as plausible as saying that the Cross, the symbol of Christ's death and resurrection to save mankind, is not uniquely Christian because crucifixion was a common means of execution in Rome or that the Star of David is not uniquely Jewish because the hexagram also appeared in Islamic art during the Middle Ages.").

\(^{176}\) *See Capitol Square Review & Advisory Bd.*, 243 F.3d at 306.

\(^{177}\) *Id.*

\(^{178}\) *Id.*

\(^{179}\) *Id.*
any religious institutions. Accordingly, the motto was held to pass constitutional muster under the Lemon test.

At issue, in a somewhat less controversial, recent Sixth Circuit case, arising out of Tennessee, Brooks v. City of Oak Ridge, was a “Friendship Bell” erected in a public park to commemorate the City of Oak Ridge’s fiftieth anniversary. The large Bell, made to resemble those that are in Buddhist temples, contained inscriptions related to Tennessee, Japan, and World War II. The City had historical ties to Japan, and, in fact, was founded in connection with the Manhattan Project in World War II, which led to the bombing of Hiroshima. Beside the Bell was a plaque stating that the Bell was intended:

TO SERVE AS A SYMBOL OF THE BONDS OF FRIENDSHIP AND MUTUAL REGARD THAT HAVE DEVELOPED BETWEEN OAK RIDGE AND JAPAN OVER THE PAST FIFTY YEARS . . . . FRIENDSHIP MADE SO MUCH MORE MEANINGFUL BECAUSE OF THE TERRIBLE CONFLICT OF WORLD WAR II WHICH OAK RIDGE PLAYED SUCH A SIGNIFICANT ROLE IN ENDING. THIS BELL FURTHER SERVES AS A SYMBOL OF OUR MUTUAL LONGING AND PLEDGE TO WORK FOR FREEDOM, WELL-BEING, JUSTICE, AND PEACE FOR ALL THE PEOPLE OF THE WORLD IN THE YEARS TO COME.

In Brooks, the plaintiff claimed that the Friendship Bell was a Buddhist religious symbol, and that its erection in the city park violated the Establishment Clause. Over the objection of Judge Norris, a Sixth Circuit panel agreed with the plaintiff that the Friendship Bell was a Buddhist religious symbol, because “bells such as the one in this case are used in Buddhist monasteries . . . to regulate the lives of Buddhist monks, marking the time for prayer, meals, and other daily activities.” Accordingly, the court applied the Lemon test, to determine whether the Bell’s erection violated the Establishment Clause.

First, the court found that the Bell was erected for three legitimate secular purposes: (1) “to celebrate the past fifty years of growing friendship and peace with Japan;” (2) “to express for the future the profound longing and commitment to work for freedom, well-being, justice, and peace for all the

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180 Id. “The entanglement prong of the Lemon test . . . is properly limited to institutional entanglement. No such entanglement is evident here.” Id. (quoting Lynch, 465 U.S. at 689 (O’Connor, J., concurring) (emphasis added).
181 Id.
183 See id. at 262.
184 Id.
185 Id. n.1.
186 Id. at 263.
187 Id. at 262.
188 See Brooks, 222 F.3d at 264. But cf. id. at 267 (Norris, J., concurring) (denying “that the Oak Ridge bell is, in fact, a Buddhist religious symbol” on the ground that “[t]he conflicting evidence in the record also supports a conclusion that the bell is a Japanese cultural object, or that any resemblance to a Buddhist bell is not substantial enough to give the Oak Ridge bell itself religious significance.”).
189 See Brooks, 222 F.3d at 264-67.
people of the world;'" and (3) "to symbolize atonement to Japan for Oak Ridge's role in World War II." In so finding, the court held that the Establishment Clause "regulates governmental conduct involving religion only." Accordingly, the court specifically rejected the plaintiff's claim that the Establishment Clause might prohibit "the official expression of sentiments that may have religious counterparts, such as sorrow and repentance, toward historical events like the bombing of Hiroshima and Nagasaki." 

Second, the court held that the Bell did not have the impermissible effect of endorsing religion, because "a reasonable observer would not understand the Friendship Bell display, in context, to convey the message that the government of Oak Ridge endorses Buddhism." Specifically, the plaque that accompanied the display along with images carved on the outside of the Bell and the history of the Bell's adoption helped to negate any notions of endorsement.

Finally, there was no governmental entanglement with religion because Oak Ridge did not interact with a religious group to adopt the Bell. Addressing Lemon's "political divisiveness" dicta, the Brooks court concluded that although the erection of the Friendship Bell was politically controversial, the controversy was caused by the Bell's political message, and not its religious message. Accordingly, the City's erection of the Friendship Bell was held not to violate the Establishment Clause, notwithstanding the court's characterization of the Bell as a religious symbol.

C. Government Accommodation of Religious Practice

While governments in the United States are strictly prohibited from endorsing religion or nonreligion, it is not unconstitutional for governments to adopt religiously neutral policies designed to accommodate private religious practice. Not surprisingly, courts are often called upon to clarify the line between permissible government accommodation of private religious practice and impermissible government endorsement of such practice. This Subpart discusses two recent cases—both involving government closings on religious holidays—in which federal courts located within the Sixth Circuit were asked to draw such distinctions.

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190 Id. at 265 (citations omitted).
191 Id. at 266.
192 Id.
193 Id.
194 Id.
195 See Brooks, 222 F.3d at 267.
196 Id.
197 Id.
198 See Zorach v. Clauson, 343 U.S. 306, 314 (1952) (upholding release of public school students for off-site religious instruction during school hours); cf. Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093, 2104 (2001) (stating that the Establishment Clause's "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.").
199 See generally Tribe, supra note 18, § 14-4.
In *Granzeier v. Middleton*, also discussed in Subpart B.1, *supra*, the Sixth Circuit was asked to decide whether the Establishment Clause prohibited Kenton County, Kentucky, from closing its courts (and certain other government buildings) for a "Spring Holiday" that was concededly scheduled to coincide with Good Friday. Applying the three-part *Lemon* test, a divided Sixth Circuit panel upheld the closings over Judge Moore's dissent.

First, the court found that although Good Friday has religious significance to Christians, it has also "become a day with secular effects in Northern Kentucky." For example, "[m]any school children are on Spring vacation the following week, . . . many Kentucky families start their vacations early, on Friday [and] [t]raffic statistics show that highway volume is very high on Good Friday." In consequence of these "secular effects" of Good Friday, the court found that closing the Kenton County Courthouse on Good Friday serves legitimate secular purposes, including: (1) avoiding special difficulty in securing the availability of jurors; and (2) providing a "Spring Break" for courthouse employees, "conveniently scheduled on a day of light activity and proximate to many families' vacations." Accordingly, the *Granzeier* court held that the Kenton County Courthouse's Good Friday closings satisfied *Lemon*’s requirement of a "legitimate secular purpose."

In addition, the *Granzeier* court held that the "primary effect" of the closings was neither to advance nor to inhibit religion. Specifically, applying the "endorsement test," the court found that no reasonable observer "would think that Kenton County is endorsing religion by closing its offices on the Friday before Easter." Rather, the court held,

[A] reasonable person who knew that many people in private and other public employment in the community had the day off and made plans to travel, and that the Courthouse had

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200 173 F.3d 568 (6th Cir. 1999).
201 See id. at 571. At an earlier stage in the case, discussed in Subpart B.1, *supra*, the County conceded that it had violated the Establishment Clause by originally posting religiously-themed signs on the courthouse entrances to announce the closings. *Id.* Although the signs were immediately removed, the constitutionality of the underlying closings remained at issue for decision. *Id.*

202 The thorny Establishment Clause question of Good Friday closings not only divided the *Granzeier* panel; it also has splitted the other circuits. *See* Cammack v. Waihee, 932 F.2d 765, 782 (9th Cir. 1991) (upholding Good Friday "Spring Holiday" closings); Koenick v. Felton, 190 F.3d 259, 269 (4th Cir. 1999) (same); Bridenbaugh v. O'Bannon, 185 F.3d 796, 802 (7th Cir. 1999) (same). *But see* Metzl v. Leininger, 57 F.3d 618, 624 (7th Cir. 1995) (striking down Good Friday closings where stated purpose was religious).
203 *Granzeier*, 173 F.3d at 574.
204 *Id.*
205 *Id.*
206 *Id.*
207 *Id.* at 574-76.
208 *Id.* at 574. Otherwise, reasoned the court, the same reasonable observer logically might be compelled to perceive an endorsement of religion in "the practice of closing public offices almost universally on Sunday (the day observed as holy by most Christians) and frequently on Saturday (the day observed by Jews and some Christians) to the exclusion of other days that may have similar significance for some religions."—or even in the use of the religiously-derived Gregorian calendar to date official government documents. *See* *Granzeier*, 173 F.3d at 575.
been closed on Good Friday for many years, would not think that the [mere] closing was an endorsement of religion . . . 209

Accordingly, the court held that the closings satisfied Lemon's (and the "endorsement test's") requirement of a "secular primary purpose," as perceived by a reasonable objective observer. 210

Finally, the court held that Lemon's "excessive entanglement" prong was satisfied, because the only government action that was required was the scheduling of the closure. 211 Accordingly, the court sustained Kenton County's practice of closing its courthouse on Good Friday, concluding that, "so long as...there is a significant secular reason for closing on any particular date...the fact that the closing is also convenient for persons of a particular faith does not render the closing unconstitutional." 212

In a related development, the Sixth Circuit recently affirmed a decision by a federal district judge in Ohio upholding the federal Christmas holiday 213 against Establishment Clause attack. 214 Specifically, the district court in Ganulin v. United States, 215 closely tracking the reasoning of the Sixth Circuit in Granzeier, 216 applied the Lemon test and determined that the federal government did not violate the Establishment Clause by closing most federal offices on Christmas day. 217 Not surprisingly, the plaintiff's attempts to obtain a reversal, at the Sixth Circuit and the Supreme Court, were unsuccessful. 218

III. THE ESTABLISHMENT CLAUSE AND GOVERNMENT FINANCIAL SUPPORT OF RELIGIOUS INSTITUTIONS

The Establishment Clause is implicated when governments choose to provide funds to religious institutions, including religious schools. 219 In 1947, the Supreme Court stated that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 220 However, this prohibition has never been understood to generally prevent governments from funding the non-religious or secular charitable or social service activities (such

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209 Id. at 576.
210 Id. at 574-76.
211 Id. at 574.
212 Id. at 576.
213 See 5 U.S.C. § 6103(a) (providing that, "...Christmas Day, December 25.").
216 173 F.3d 568 (6th Cir. 1999).
217 See Ganulin, 71 F. Supp. 2d at 832-35.
220 Everson, 330 U.S. at 16.
as hospitals or soup kitchens) that are often performed by religiously-affiliated organizations.\textsuperscript{221}

While religiously-affiliated organizations are normally eligible to receive government grants to support their nonsectarian charitable activities, in 1971, the Supreme Court, in \textit{Tilton v. Richardson},\textsuperscript{222} held that, "'no state aid at all go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones . . . ."\textsuperscript{223} More recently, however, the Court has cast some doubt on \textit{Tilton}'s vitality, by upholding government subsidies even to "pervasively sectarian" institutions, so long as equivalent subsidies are provided to similarly situated non-religious organizations,\textsuperscript{224} or where payment of the subsidy is triggered by a genuinely independent and private choice of an individual aid recipient.\textsuperscript{225}

Because government aid to religious institutions implicates the Establishment Clause, the \textit{Lemon} test has often been applied to adjudicate the constitutionality of government aid programs.\textsuperscript{226} Recently, however, the Supreme Court, in \textit{Agostini v. Felton},\textsuperscript{227} expressly held that the "excessive entanglement" prong of the \textit{Lemon} test should no longer be applied to resolve cases concerning government aid to schools.\textsuperscript{228} Rather, in such cases, \textit{Lemon}'s "excessive entanglement" prong must now be collapsed and evaluated in the same step as \textit{Lemon}'s "primary effects" prong.\textsuperscript{229} \textit{Agostini}'s new, truncated "primary effects" prong is violated if government aid to a school has the primary effect of advancing religion by: (1) resulting in governmental indoctrination; (2) defining its recipients by reference to religion; (3) creating an excessive entanglement; or (4) being reasonably viewed as an endorsement of religion.\textsuperscript{230} In addition, \textit{Agostini} leaves undisturbed \textit{Lemon}'s "secular purpose" prong, which continues

\textsuperscript{221} See, e.g., Bradfield v. Roberts, 175 U.S. 291, 298-99 (1899) (upholding aid to Catholic hospital); Bowen v. Kendrick, 487 U.S. 589, 593 (1988) (upholding federal funding for services related to teen pregnancy in religiously affiliated institutions). \textit{See also Zobrest v. Catalina Foothills Sch. Dist.}, 509 U.S. 1, 8 (1993). "We have never said that 'religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.'" \textit{Id.} (quoting \textit{Bowen}, 487 U.S. at 609). \textit{See Roemer v. Board of Pub. Works of Md.}, 426 U.S. 736, 746 (1976) (stating that, "religious institutions need not be quarantined from public benefits that are neutrally available to all.").

\textsuperscript{222} 403 U.S. 672 (1971) (emphasis added).


\textsuperscript{224} \textit{See e.g., Mitchell v. Helms}, 120 S. Ct. 2530, 2544-47 (2000) (upholding distribution of federal supplementary educational funds to all public and private elementary schools, including "pervasively sectarian" religious elementary schools).

\textsuperscript{225} \textit{See e.g., Witters}, 474 U.S. at 482 (upholding use of State vocational rehabilitation assistance funds to pay tuition for a blind student to be trained by a seminary as a pastor, missionary, or youth director).


\textsuperscript{227} 521 U.S. 203 (1997).

\textsuperscript{228} \textit{See id. at 222-23, 232-34; see also Mitchell}, 530 U.S. at 807-08 (discussing same).

\textsuperscript{229} \textit{See Agostini}, 521 U.S. at 232-33 (stating that in order to determine whether a government aid program results in "an excessive entanglement between church and state . . . . it is simplest to recognize why entanglement is significant and treat it . . . . as an aspect of the inquiry into a statute's effect."). (emphasis added).

to apply in school aid cases, as in other cases.\textsuperscript{231} Agostini's new analytical framework for school aid cases was recently reaffirmed by a plurality of the Supreme Court in \textit{Mitchell v. Helms}.\textsuperscript{232}

A. \textbf{Cases Holding Government Aid to Religious Organizations Unconstitutional Under the Establishment Clause}

There is not much consensus within the Sixth Circuit regarding government aid to religious organizations.\textsuperscript{233} While the Supreme Court has been hesitant in recent years to disallow government aid to a social service organization on the ground that the organization is "pervasively sectarian,"\textsuperscript{234} a federal district judge in Kentucky did threaten to disallow aid for precisely that reason, in \textit{Pedreira v. Kentucky Baptist Homes for Children, Inc.}.\textsuperscript{235} The \textit{Pedreira} case arose when an employee was fired from her position at the Spring Meadows Children's Home because she was homosexual.\textsuperscript{236} The Children's home, which was owned and operated by Kentucky Baptist Homes for Children, Inc., ("KBHC"), received substantial funding for its social service programs from the Commonwealth of Kentucky.\textsuperscript{237} In her wrongful termination suit, the fired employee claimed, \textit{inter alia}, that, government funding of the defendant's programs violated the Establishment Clause because, in addition to subsidizing food and housing for disadvantaged children, the government funds were also being used to promote religious indoctrination and to support activities such as Baptist religious services, religious training, and the instillation of Christian values.\textsuperscript{238}

The court agreed that if the plaintiff's allegations concerning the use of the funds were proved, then they would "evidenc[e] the advancement of religion as a primary force in the KBHC program,"\textsuperscript{239} and thereby render the government funding unconstitutional under the "primary effects" prong of \textit{Lemon}.\textsuperscript{240} In addition, the court agreed that KBHC would be constitutionally ineligible to receive direct monetary aid if it were proved to be "a pervasively sectarian institution."\textsuperscript{241} Accordingly, the court held that the plaintiff had stated valid claims under the Establishment Clause, denied the defendant's motion for summary judgment, and ordered that further proceedings in the case should continue.\textsuperscript{242} At present, the \textit{Pedreira} case is still awaiting final judgment.

Another form of government aid to a different "pervasively sectarian" religious institution was held unconstitutional in \textit{Steele v. Indus. Dev. Bd. of...
Metro. Gov’t,243 a recent federal district court decision from Tennessee. The Steele case arose when Industrial Development Board of the Metropolitan Government of Nashville and Davidson County, ("Board"), a local government agency, issued $15 million in tax-exempt industrial development bonds to finance a low-interest loan to David Lipscomb University.244 The University described itself as a local institution affiliated with the Churches of Christ, whose “primary mission has been to integrate Christian faith and practice with the pursuit of academic excellence.”245 The loan proceeds were used by the University to construct and equip a new library, to renovate and convert the old library into administrative offices, and to construct new athletic facilities and an addition to the school’s Business Center.246

Applying Lemon (as modified in Agostini for school aid cases), the Steele court held that Board had violated the Establishment Clause by providing direct aid (in the form of the tax-exempt bond issue) to an institution, Lipscomb, that was “so pervasively sectarian that the substantial tax benefit conferred directly on the school, in effect, was state sponsorship of the school’s Christian indoctrination.”247 Because the parties stipulated that the Board’s purpose in issuing the bonds—to assist a private educational institution—was legitimate and secular,248 the court’s Lemon analysis was limited to applying the combined effects-and-entanglement test announced in Agostini, which the Steele court articulated as follows: “[t]he analysis of the ‘effects’ prong of the Lemon test consists of three primary considerations: (1) whether the statute results in government indoctrination; (2) whether the statute defines its recipients by reference to religion; and (3) whether the statute creates an excessive entanglement.”249

Applying this test, the court determined that the tax-exempt bond issue resulted in unconstitutional government support for religious indoctrination, in violation of Agostini.250 To reach this determination, the court essentially equated Agostini’s “indoctrination” test with the preexisting “pervasively sectarian” test of Tilton.251 Applying Tilton, the court found that David Lipscomb University was so “pervasively sectarian” that government aid to the institution inevitably had the primary effect of promoting religion.252 Key factors influencing the court’s finding of Lipscomb’s “pervasive sectarianism” were: (1)

244 See id. at 694.
245 Id.
246 Id. at 704.
247 Id.
248 Id.
249 See Steele, 117 F. Supp. 2d at 704 (citing Agostini, 521 U.S. at 234) (internal citations omitted).
250 Id.
251 Id. at 706. Government aid may not be extended to “pervasively sectarian” church-related colleges and universities where “religion so permeates the secular education provided . . . that their religious and secular educational functions are in fact inseparable,” because such aid cannot avoid “the impermissible effect of advancing the religious beliefs of the institutions.” Id. (quoting Tilton, 403 U.S. at 679-80). In so doing, the Steele court acknowledged that Tilton’s “pervasively sectarian” test was expressly rejected in Justice Thomas’s plurality opinion announcing the judgment of the Court in Mitchell. Id. However, the court found that Tilton had not been rejected by the majority of the Mitchell Court that did not join Justice Thomas’s plurality opinion, and thus remained good law. Id. at 706-07.
252 See Steele, 117 F. Supp. 2d at 710.
that the University's charter indicated that the school was organized "for the purpose of teaching the word of God . . . the support of public worship, the building of churches and chapels and the maintenance of missionary undertakings;" (2) that the University required the Bible to be taught "every school day to every student enrolled . . . by teachers who are sound in the faith and faithful in their lives to its sacred truths;" (3) that daily attendance at chapel service was required of all students and faculty; and (4) that all teachers and administrators were required to be "members in good standing of the Churches of Christ." Based on these and other factors, the Steele court concluded that a substantial portion of Lipscomb University's activities amounted to religious indoctrination, which government is still generally barred from supporting under the combined effects-and-entanglement test announced in Agostini.

Finding that Lipscomb University was "pervasively sectarian" did not, however, end the Steele court's inquiry. Rather, Justice Thomas's plurality opinion in Mitchell suggests that government aid benefiting even "pervasively sectarian" educational institutions might not be unconstitutional, if the aid is provided on a religion-neutral basis to private citizens, who then decide to use those funds in support of religious education. In Steele, however, the court found that because the Board itself decided who would receive the benefit from the bonds, the aid to Lipscomb was not the result of individual choice exercised by private citizens. Thus, the tax-exempt bond issue was more akin to direct government support of religion, which remained forbidden under Mitchell.

Finally, the court applied the "endorsement test," by inquiring whether a reasonable observer would perceive the bond issue as an endorsement of religion. Because government financial aid is generally alleged to provide practical (rather than symbolic) support for religion, application of the "endorsement test" in aid cases necessarily requires the court to identify a specific object of the "reasonable observer's" gaze. Here, the Steele court focused on the Official Statement accompanying the bond issue, which had been jointly released by the Industrial Development Board and Lipscomb. The

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253 Id. at 710 (emphasis added).
254 Id. at 711.
255 Id. at 712-13.
256 Id. at 711-12.
257 Id. at 715-16.
258 See Mitchell, 120 S. Ct. at 2544. "If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'" Id. (quoting Witters, 474 U.S. at 486-89)) (footnote omitted).
259 See Steele, 117 F. Supp. 2d at 725.
260 Id.
261 Id. at 733.
262 See Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 772 (1972) (stating the primary evils against which the Establishment Clause protects have been "sponsorship, financial support, and active involvement of the sovereign in religious activity") (citations omitted).
264 See Steele, 117 F. Supp. 2d at 733.
court found that the Official Statement was "organized in a manner that place[d] the government's role first." However, the statement also announced that "the supreme purpose of the University is 'to teach the Bible as the revealed will of God to man and as the only and sufficient rule of faith and practice, and to train those who attend in a pure Bible Christianity.'" Accordingly, the court concluded that the structure and content of the Official Statement would cause a reasonable observer to deduce a religious endorsement from the Statement's association of the government with the project at Lipscomb University, combined with its simultaneous explication of the religious ties and affiliation of the University and the religious preferences of the University's students and faculty.

In sum, the court held that issuance of the tax-exempt Lipscomb bonds violated the Establishment Clause under three different methods of analysis: the pervasively sectarian test, the Agostini test, and the "endorsement test." Thus, the court granted the plaintiffs' motion for summary judgment and issued a permanent injunction prohibiting the Industrial Development Board and the Nashville Metropolitan Government from issuing additional tax-exempt bonds to Lipscomb, or to any other pervasively sectarian institution.

B. Cases Upholding Government Programs That Provide Financial Aid to Religious Organizations

Less than a year after a federal district judge in Steele invalidated one local government's attempt to issue tax-exempt bonds to finance capital improvements to a "pervasively sectarian" university, a similar bond issue performed by a different local government was upheld by the U.S. Court of Appeals for the Sixth Circuit. Specifically, in Johnson v. Econ. Dev. Corp., the Sixth Circuit held that the Establishment Clause did not prohibit an Oakland County, Michigan, public economic development corporation from issuing tax-exempt bonds to finance the construction of buildings at the Academy of the Sacred Heart, a local Roman Catholic elementary and secondary school.

In upholding the Oakland County bond issue, the court began by reaffirming—over Judge Nelson's objection—the distinction first drawn in Tilton between "pervasively sectarian" educational institutions (which are ineligible to receive direct government aid), and schools that are merely "sectarian" and thus not so disabled. Perhaps in order to avoid further dissent

265 Id.
266 Id. at 733-34.
267 Id.
268 Id. at 734-35.
269 See Steele, 117 F. Supp. 2d at 734-35.
270 See id. at 518.
271 241 F.3d 501 (6th Cir. 2001).
272 403 U.S. 672 (1971).
273 See Johnson, 241 F.3d at 510. "What the Establishment Clause prohibits is not aid to all sectarian schools, but [only] aid to an 'institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.'" Id. (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)). The Johnson court concluded that Tilton's "pervasively sectarian" test
from Judge Nelson, however, the Johnson majority proceeded simply to assume, without analysis, that the Academy of the Sacred Heart was not a “pervasively sectarian” institution, and thus was not disqualified under Tilton from receiving direct government aid.275

Accordingly, the court applied the Lemon test, as modified in Agostini for cases involving aid to schools.276 The court began its Lemon analysis by determining that Oakland County did have a legitimate secular purpose for issuing tax-exempt bonds to finance construction of a local parochial school: namely, “to create and maintain jobs” in both sectarian and non-sectarian businesses, that were expected to result both from the construction project itself, and from the economic development caused by the school’s expansion.277

Next, the court found that issuance of the tax-exempt construction bonds would not have the impermissible “primary effect” of advancing religion. Applying “the revised test set out in Agostini,” the court announced that “a government program does not have the primary effect of advancing or inhibiting religion if it: (1) does not result in government indoctrination of religion; (2) does not define its recipients by reference to religion; or (3) create an excessive government entanglement with religion.278

In analyzing the present applicability of Lemon/Agostini’s prohibition against “government indoctrination of religion,” the court adopted Justice Thomas’s view expressed in his opinion for the Mitchell plurality.279 Thomas’s view was that the Establishment Clause does not prohibit the government from financing religious indoctrination in schools, unless “any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.”280 The Johnson majority’s willingness to permit the government to fund some “religious indoctrination” is surprising, in light of the same majority’s pointed refusal to adopt Justice Thomas’s complementary proposal (also expressed in his Mitchell plurality opinion) to eliminate all legal distinction between “sectarian” and “pervasively sectarian” schools.281 Seemingly, the only purpose for maintaining such a distinction is to ensure that public funds made available for secular purposes to religiously affiliated schools are not diverted into supporting

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survived the recent Supreme Court decisions in Mitchell and Agostini. Id. at 510 n.2 (stating that, “it is Justice O’Connor’s opinion [in Mitchell], which does not abolish the distinction between ‘pervasively sectarian’ and ‘sectarian’ institutions and which expressly declines to adopt Justice Thomas’ expansive view, that is controlling upon this Court.”). In a concurring opinion, however, Judge Nelson interpreted Justice Thomas’s plurality opinion in Mitchell to have overruled Tilton’s distinction between “sectarian” and “pervasively sectarian” educational institutions. Id. at 518-19 (Nelson, J., concurring). “There was a time, to be sure, when the Supreme Court accorded constitutional significance to the distinction between ‘sectarian’ schools and schools characterized as ‘pervasively sectarian.’” Id. (quoting Mitchell, 120 S. Ct. at 2582-83 (Souter, J., dissenting). That time, according to Justice Thomas, “is thankfully long past.” Id. at 2550.

275 Id. at 510-11.
276 See Johnson, 241 F.3d at 512.
277 Id.
278 Id. at 513 (citing Mitchell, 120 S. Ct. at 2541).
279 Id. (citing Mitchell, 120 S. Ct. at 2541).
280 Id.
281 Id. at 510 n.2 (specifically rejecting Judge Nelson’s contention that Justice Thomas’s plurality opinion in Mitchell overruled Tilton’s distinction between “sectarian” and “pervasively sectarian” educational institutions). But see id. at 518-19 (Nelson, J., concurring). See generally Mitchell, 120 S. Ct. at 2550 (advocating overruling of Tilton, 403 U.S. at 672).
Accordingly, the Sixth Circuit's decision to maintain the formal distinction between "sectarian" and "pervasively sectarian" educational institutions, without enforcing a concomitant ban on government financing of religious indoctrination—i.e., to adopt as binding one part of Justice Thomas's plurality opinion in *Mitchell* but not another, logically inseparable, part—creates a "distinction without a difference," and is likely to cause analytic confusion that the court will ultimately need to resolve.\(^{283}\)

Nonetheless, applying its newly relaxed "indoctrination" standard, the *Johnson* court found that even if religious indoctrination were to take place in the new Academy of the Sacred Heart building, no reasonable observer would perceive the mere issuance of tax-free bonds to help finance construction of the building as implying that government endorsed any religious activity that might take place in the building once it was built.\(^{284}\) In reaching this conclusion, the court placed significant weight on the fact that the bonds were issued pursuant to a religiously neutral government program, through which Oakland County had also issued many similar tax-free bonds to assist in financing the construction of secular buildings.\(^{285}\)

Because the county economic development corporation did not select its bond recipients by reference to religion, the court found that the bond program at issue also satisfied the *Lemon/Agostini* requirement of religious neutrality.\(^{286}\) Specifically, the court found that the neutrality requirement was satisfied because the program did not "creat[e] a financial incentive to undertake religious indoctrination," nor did it favor religious beneficiaries in any way.\(^{287}\)

Finally, the court found that the bond program caused no unconstitutionally excessive entanglement between government and religious institutions.\(^{288}\) Specifically, the court found that "the government involvement with the Academy is a one-time matter; the Academy is not aimed more at sectarian rather

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\(^{282}\) See Steele, 117 F. Supp. 2d at 706. Government aid may not be extended to "pervasively sectarian" church-related colleges and universities where "religion so permeates the secular education provided . . . that their religious and secular educational functions are in fact inseparable," because such aid cannot avoid "the impermissible effect of advancing the religious beliefs of the institutions." *Id.* (quoting *Tilton*, 403 U.S. at 679-80).

\(^{283}\) Perhaps implicitly recognizing this problem, the *Johnson* court specifically noted that:

[The loan proceeds from the tax-exempt bonds did not go to the religious aspects of the Academy. The funds were limited to construction of an addition to the lower middle school, renovation of the science wing, and other renovations of existing secular facilities. The funds were not used for the construction, renovation, or improvement of the Academy's Chapel.](Johnson, 241 F.3d at 514. As interpreted by Justice Thomas, in *Mitchell*, the Establishment Clause seemingly would not mandate any such limitation, so long as the bonds were issued pursuant to religiously neutral criteria, *Agostini*, 521 U.S. 203, 231 (1997) (as these bonds were). *See Johnson*, 241 F.3d at 513-14. That the *Johnson* majority nonetheless found significant the statutory limitations on the permissible uses of the bond proceeds may therefore reflect its understanding that, *contra* Justice Thomas, public aid to religiously affiliated institutions still may not be used to pay for specifically religious activities. *Id.* at 514-15.)

\(^{284}\) *Id.* at 513-14.

\(^{285}\) *Id.* at 514.

\(^{286}\) *Id.*

\(^{287}\) *Id.* at 515 (citing *Mitchell*, 120 S. Ct. at 2543).

\(^{288}\) *See Johnson*, 241 F.3d at 515.
than secular education; and the government aid was not used for the religious purposes of the Academy."

Because all of the requirements of the Lemon test (as modified by Agostini for cases involving aid to schools) were satisfied, the court held that Oakland County's issuance of the tax-free bonds used to finance construction of a new parochial school building did not violate the Establishment Clause.

In addition to the federal courts, Establishment Clause cases sometimes are resolved by state courts. In another case concerning government aid to religious schools, the Kentucky Supreme Court, in Neal v. Fiscal Court, recently held that the government of Jefferson County, ("County"), Kentucky, did not violate either the Establishment Clause or the Religion Clauses of the Kentucky Constitution when the government paid approximately sixty-five percent of the total cost of transporting all non-public elementary school students, in the County, to school.

This result was not foreordained: although similar transportation programs have consistently been upheld when challenged under the Establishment Clause of the United States Constitution, Kentucky's corresponding state constitutional provisions have long been interpreted to "mandate a much stricter interpretation than the Federal counterpart found in the First Amendment's 'establishment of religion clause.'" Accordingly, in 1994, the Kentucky Supreme Court struck down a predecessor private school transportation program, in which public funds had been released directly to private religious schools.

This time, however, the defects in the 1994 program were cured. Under the Jefferson County program at issue in Neal, the County's transportation

289 Id. at 517.
290 Id. at 518.
291 986 S.W.2d 907 (Ky. 1999). The Neal case was the latest in a sixty-year line of Kentucky Supreme Court cases on this issue. See id. at 907-10 (surveying 60-year history of disputes in Kentucky courts over constitutionality of providing public funding for transportation of students to private and parochial elementary schools).
292 See Ky. Const. § 184 (prohibiting the use of tax money for other than common school educational purposes unless submitted and agreed to by voters); Id. § 171 (requiring that taxes levied and collected be used exclusively for public purposes); Id. § 189 (prohibiting the use of "any fund or tax... in aid of, any church, sectarian or denominational school.").
293 See Neal, 986 S.W.2d at 907. Jefferson County's school transportation program was adopted pursuant to a Kentucky statute that authorized each county, at its own election, to:

furnish transportation from its general funds, and not out of any funds or taxes raised or levied for educational purposes or appropriated in aid of the common schools, to supplement the present school bus transportation system for the aid and benefit of all pupils of elementary grade attending school in compliance with the compulsory school attendance laws of the Commonwealth of Kentucky who do not reside within reasonable walking distance of the school they attend and where there are no sidewalks along the highway they are compelled to travel.

294 See Everson, 330 U.S. at 18 (sustaining public funding of transportation of elementary school students to religious schools against Establishment Clause challenge).
295 Neal, 986 S.W.2d at 909-10 (citing Fiscal Court v. Brady, 885 S.W.2d 681, 686 (Ky. 1994)).
296 See Brady, 885 S.W.2d at 686-87.
297 See Neal, 986 S.W.2d at 910.
subsidies were paid directly to the individual bus and vehicle contractors hired by the local public Board of Education, with no funds ever passing into or through the hands of the private or parochial schools. Principally for that reason, the Neal court found that: "[t]he children are clearly the primary beneficiaries of this subsidy . . . . 'The fact that in a strained and technical sense the school might derive an indirect benefit from the enactment, is not sufficient to defeat the declared purpose and the practical and wholesome effect of the law.'" Upholding the transportation program, the court concluded that any public benefit it provided to private and parochial schools "is only incidental and, therefore, not unconstitutional."

The final, and perhaps best-known, recent Sixth Circuit cases involving public aid to religious schools are Simmons-Harris v. Goff, and Simmons-Harris v. Zelman, in which both the Ohio Supreme Court and the Sixth Circuit, respectively, each addressed whether Cleveland, Ohio's private school "voucher" program passed muster under the Establishment Clause. The two courts, unfortunately, reached contrary results; the United States Supreme Court has granted a writ of certiorari to resolve the dispute.

At issue in the two cases was the "school voucher" program enacted in 1995 by the Ohio Legislature, which provided eligible, low-income parents in Cleveland with up to $2,500 per student per year to pay for private or parochial school tuition. Although the voucher program was formally neutral with respect to religion, i.e., it did not restrict eligibility to religious or sectarian schools, as a practical matter certain "restrictions mandated by the statute limit[ed] the ability of nonsectarian schools to participate in the program . . . ." Accordingly, "close to 96% of the students enrolled in the program for the 1999-2000 school year attended sectarian institutions." Several Establishment Clause challenges followed.

In the first such challenge to reach an appellate court, the Ohio Supreme Court, in Goff, held that the voucher program did not violate the Establishment Clause, though the Supreme Court ultimately struck down the program for unrelated reasons. In so declining, the Court acknowledged that the United States Supreme Court, in 1973, had struck down a similar "school voucher" program in Comm. for Public Educ. and Religious Liberty v. Nyquist, on the ground that the program had the impermissible primary effect of advancing

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298 Id. at 911.
299 Id. (quoting Nichols v. Henry, 191 S.W.2d 930, 935 (Ky. 1945)) (internal footnote omitted).
300 Id.
301 711 N.E.2d 203 (Ohio 1999).
302 234 F.3d 945 (6th Cir. 2000), cert. granted, 122 S. Ct. 23 (Sept. 25, 2001) (No. 00-1751).
303 See Goff, 711 N.E.2d at 207; Zelman, 234 F.3d at 948.
304 See Goff, 711 N.E.2d at 207; Zelman, 234 F.3d at 948.
305 As discussed infra, the Ohio Supreme Court found no Establishment Clause violation. The Sixth Circuit, in contrast, held the "voucher" program unconstitutional.
306 See Zelman, 234 F.3d at 948.
307 Id. at 959.
308 Id.; accord id. at 949.
309 See Goff, 711 N.E.2d at 207-11, 218-19 (rejecting Establishment Clause claims); see also Id. at 216 (striking down voucher provision on ground that was enacted in violation of one-subject rule in Ohio Constitution).
religion.\textsuperscript{311} However, the Court, in \textit{Goff}, opined that the 25 year-old \textit{Nyquist} case was no longer good law, in light of putatively inconsistent Establishment Clause opinions more recently issued by the United States Supreme Court.\textsuperscript{312}

Shortly thereafter, the Ohio Legislature corrected the technical problems that had caused the Court to invalidate the voucher program, and reinstituted the program. The new program was again challenged; this time in federal court.\textsuperscript{313} After a federal district judge issued a preliminary injunction on the ground that the voucher program likely violated the Establishment Clause,\textsuperscript{314} the case was appealed to the Sixth Circuit.\textsuperscript{315}

Disagreeing with the Ohio Supreme Court's disposition of the Establishment Clause issue, the Sixth Circuit in \textit{Zelman} held that the voucher program, as applied, violated the Establishment Clause because it had the impermissible primary effect of advancing religion.\textsuperscript{316} Disagreeing with the Ohio Supreme Court, the Sixth Circuit held that \textit{Nyquist} was still good law,\textsuperscript{317} and was indistinguishable from the case at bar.\textsuperscript{318} In distinguishing the more recent precedents and adhering to \textit{Nyquist}, the \textit{Zelman} court explained that, unlike in cases where public aid to religious schools had been upheld:

\begin{quote}
[T]he Ohio [voucher] program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria. The effect of the voucher program is in direct contravention to these Supreme Court cases which mandate that the state aid be neutrally available to all students who qualify, that the parents receiving the state aid have the option of applying the funds to secular organizations or causes as well as to religious institutions, and that the state aid does not provide an incentive to choose a religious institution over a secular institution.\textsuperscript{319}
\end{quote}

In September, 2001, the United States Supreme Court granted a writ of certiorari in the \textit{Zelman} case.\textsuperscript{320} The Court is expected to issue an opinion in the case by June, 2002.

\begin{footnotes}
\item[311] See \textit{Goff}, 711 N.E.2d at 208 (citing \textit{Nyquist}, 413 U.S. at 794).
\item[312] See id.
\item[313] See \textit{Zelman}, 72 F. Supp. 2d at 834.
\item[314] See \textit{Zelman}, 72 F. Supp. 2d 834, 864-65 (N.D. Ohio 1999), aff'd, 234 F.3d 945, 948 (6th Cir. 2000). A few days later, the district court granted a partial stay of its preliminary injunction. \textit{Id}. Subsequently, the United States Supreme Court stayed the remainder of the district court's injunction, pending disposition of the Sixth Circuit appeal. \textit{Id}. at 865.
\item[315] See Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000).
\item[316] See \textit{Zelman}, 234 F.3d at 945.
\item[317] \textit{Id}. at 955. "The Supreme Court has refrained from overruling \textit{Nyquist}, and has instead distinguished various cases on the basis of their facts." \textit{Id}. (citing \textit{Nyquist}, 413 U.S. at 756).
\item[318] \textit{Id}. at 958 (stating that, "[w]e find that \textit{Nyquist} governs our result.").
\item[319] \textit{Id}. at 961.
\item[320] See \textit{Zelman} v. Simmons-Harris, 122 S. Ct. 23 (2001) (granting cert.). Oral argument was held on Wednesday, February 20, 2002.
\end{footnotes}
IV. WHAT'S NEXT?

In Parts I through III, supra, this Survey discussed recent court decisions in Kentucky and the Sixth Circuit involving the Establishment Clause of the United States Constitution. This Part discusses emerging Establishment Clause issues in Kentucky which have not yet been adjudicated in court. Specifically, Subpart IV.A discusses some bills recently introduced in the Kentucky legislature that may raise Establishment Clause concerns. Subpart IV.B then briefly discusses several existing policies and practices in Kentucky localities that may raise similar concerns.

A. Recent Legislative Activity Concerning Religion

1. Return of the Son of The Ten Commandments

On January 11, 2002, House Bill 324, ("H.B. 324"), was introduced in the Kentucky House of Representatives that, if enacted, would authorize every public school in the Commonwealth to offer "an elective course . . . that uses religious or scriptural texts, including the Bible, as instructional material." In a provision seemingly destined to revive the Ten Commandments controversy in Kentucky, H.B. 324 expressly provides that "[a]s an element of the course curriculum, the Ten Commandments, and other religious, literary, or historical documents may be posted, if the posting is appropriate to the overall educational purpose of the course.

Should H.B. 324 become law? Claims alleging that it violates the Establishment Clause are certain to arise. To resolve such claims, courts likely will apply the Lemon test, focusing particularly on Lemon's requirement that every state law have a "secular legislative purpose." In Stone, the Supreme Court held that, notwithstanding the Kentucky legislature's express avowals to the contrary, "Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms [had] no secular legislative purpose, and [was] therefore unconstitutional." In so holding, the Stone Court appeared to draw a bright line rule prohibiting schools from endorsing the religious message

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325 Id. at 41. "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature . . . and no legislative recitation of a supposed secular purpose can blind us to that fact." Id. (internal footnote omitted).
of the Ten Commandments by posting the Commandments in public school classrooms.\footnote{See id. at 42. "[I]t is no defense to urge that the religious practices [at issue] may be relatively minor encroachments on the First Amendment." \textit{Id.} (quoting School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963)). It is this bright line that federal courts in Kentucky have continued to enforce in the recent Ten Commandments cases. \textit{See supra} Part II.A. (discussing \textit{McCreary I}, 96 F. Supp. 2d at 679; \textit{McCreary II}, 145 F. Supp. 2d at 845).} Opponents of H.B. 324 will allege that the bill was motivated primarily by the legislature’s continuing desire to find a way to post the Ten Commandments in public school classrooms: an unconstitutionally sectarian purpose under both \textit{Lemon} and \textit{Stone}.\footnote{\textit{Stone}, 449 U.S. at 42.}

On the other hand, the Court, in \textit{Stone}, did not unconditionally expel the Ten Commandments (or the Bible) from public school classrooms. Rather, the Court made clear that while school-children may not be induced to read, meditate upon, venerate, or obey, the Ten Commandments or the Bible as objects of devotion, "the Ten Commandments . . . [and] the Bible may constitutionally be used in an appropriate study of history, civilizations, ethics, comparative religion and the like."\footnote{\textit{Stone}, 449 U.S. at 42 (citing School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963)).}

Echoing this specific language from \textit{Stone}, H.B. 324 authorizes public schools to post the Ten Commandments only on the walls of classrooms that are used to teach new elective courses in "history, civilization, ethics, comparative religion, literature, or other subject areas that uses religious or scriptural texts, including the Bible, as instructional material,"\footnote{\textit{2002 Ky. H.B. 324 § 1, 136th Leg., Reg. Sess. (visited Jan. 11, 2002) <http://www.lrc.state.ky.us/record/02rs/HB324.htm >.} and, even then, only if posting the Ten Commandments would be "appropriate to the overall educational purpose of the course."\footnote{\textit{Id.}} Moreover, H.B. 324 requires these new elective courses to "incorporate religious or scriptural texts in a manner that is academic, balanced, and objective, not devotional,"\footnote{\textit{Id.} § 2(a).} and to maintain religious neutrality.\footnote{\textit{Id.} § 2(b) (stating that the new elective courses shall "[n]ot favor or disfavor religion, or any particular religious belief.").} In short, H.B. 324 purports to authorize posting of the Ten Commandments on the walls of public school classrooms in precisely the sole context in which the \textit{Stone} Court stated that the Ten Commandments could be "integrated into the school curriculum . . . ."\footnote{\textit{Stone}, 449 U.S. at 42 (citing School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963)).} If \textit{Stone} is read literally, then H.B. 324 would appear to pass constitutional muster.

Or would it? Perhaps not, because a court may find that the Kentucky legislature was "too clever by half." By echoing \textit{Stone}, H.B. 324 may strike a court as the legislature’s intentional and well-lawyered attempt to return the Ten Commandments to the walls of public school classrooms, to the maximum extent permissible under the Supreme Court’s existing precedents. If so, however, then this legislative purpose would itself be impermissibly religious, in violation of \textit{Lemon} and \textit{Stone}.\footnote{\textit{Id.}}
Indeed, the district court in *McCreary I & II* employed similar reasoning when it recently enjoined public displays of the Ten Commandments on several county courthouses. In several of the displays at issue, the Ten Commandments nominally were presented as elements of larger displays that included secular "historical" or "educational" materials. Nonetheless, in evaluating the *bona fides* of the governments' avowed secular purposes, the court, in *McCreary I & II*, construed the purpose of the displays, not only in light of the Commandments' physical context (i.e., the surrounding secular materials), but also in light of their temporal context, i.e. as the latest iteration in Kentucky's history of controversy over government displays of the Ten Commandments. Viewed in the latter context, the court, in *McCreary I & II*, found that the sectarian purposes for the displays predominated over the secular ones. Were a future court similarly to take account of recent history when evaluating the constitutionality of H.B. 324, a court might conclude that the bill's avowed historical or literary purposes are mere "fig leafs" masking the impermissibly religious purpose of trying to return the Ten Commandments to public schools as objects of devotion.

2. The Declaration of Independence

In a related development, on January 8, 2002, a separate bill ("H.B. 139") was introduced in the Kentucky House of Representatives that may raise additional Establishment Clause issues. Specifically, if enacted, H.B. 139 would require Kentucky public school teachers and administrators to begin each school day by reciting to all third through twelfth grade classes the following words from the Declaration of Independence:

[W]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .

While no one would contend that the Constitution generally prohibits public school teachers from reciting the Declaration of Independence to their students, some civil libertarians have expressed concern that H.B. 139, as drafted, constitutes a veiled attempt to require a daily mention of the "Creator" in public school classrooms, and that its authors were motivated in large measure by that goal. In support of such charges, critics have asked: "Why choose just this one

336 See supra Part II.A.
337 See supra Part II.A.
339 Id.
340 See Patrick Crowley, *Some Truths Not Self-Evident*, THE CINCINNATI ENQUIRER, Jan. 18, 2002, at B1 (noting concerns raised by the American Civil Liberties Union of Kentucky that, "[i]f the
excerpt [from the Declaration of Independence] . . . that largely talks about a deity? . . . That suggests there is an intent to focus on God.\textsuperscript{341}

Under the \textit{Lemon} test, it is highly unlikely that daily recitation of a portion of the Declaration in public school classrooms would be found to have an impermissibly sectarian "primary effect," or to cause "excessive entanglement" between governmental and religious institutions.\textsuperscript{342} Accordingly, any claim that the bill violates the Establishment Clause is likely to be based on \textit{Lemon}'s requirement that every state law must have a "legitimate secular purpose."\textsuperscript{343}

House Bill 139—which is styled "an Act relating to patriotic recitation"—itself proclaims two secular purposes for daily recitations of the designated excerpt from the Declaration of Independence: (1) to provide recognition of the fundamental principles on which the United States was founded; and (2) to explain to students the relationship of the ideas set forth in the Declaration to the American Revolution, the formulation of the United States Constitution and its amendments, women's suffrage, the civil rights movement, and other political and economic developments in United States history.\textsuperscript{344} In addition, in public statements, the bill's sponsor has asserted additional secular purposes for the bill.\textsuperscript{345}

When the Supreme Court held that the Establishment Clause prohibits official recitation of the Lord's Prayer, it refused to accept a state government's avowals of a secular purpose for the recitations.\textsuperscript{346} Similarly, when the Supreme Court invalidated Kentucky's practice of posting the Ten Commandments in public school classrooms, it again rejected the Commonwealth's "self-serving" statements of secular purpose.\textsuperscript{347} Accordingly, there is no guarantee that a court would credit any of the Commonwealth's assertions of its secular purpose for authorizing daily recitations from the Declaration of Independence.\textsuperscript{348}

On the other hand, unlike the Lord's Prayer or the Ten Commandments, the Declaration of Independence was originally promulgated as a political rather than
a religious text. That fact, combined with the Declaration’s significance in American political history, renders it unlikely that a court would find H.B. 139 to be so impermissibly sectarian in purpose as to render the bill unconstitutional under Lemon. 349

Unlike H.B. 139, the Senate version of the same bill ("S.B. 174") does not require that any particular language in the Declaration of Independence be singled out for special attention in public school classrooms. 350 Rather, S.B. 174, if enacted, would instead require each public school student, at some point in her education, to receive general instruction in—and to be examined on her understanding of—"the Mayflower Compact, the Declaration of Independence, the Constitution, the Federalist Papers, George Washington’s Farewell Address, and flag etiquette ..." 351

The Mayflower Compact, of course, is a deeply religious document. 352 Moreover, George Washington’s Farewell Address famously endorses the embrace of religious principle as the indispensable building block for political prosperity. 353 It is not inconceivable that both of these documents may have been selected for inclusion in S.B. 174 based on their pronouncements on religion. Nonetheless, it is difficult to dispute that the Mayflower Compact and George Washington’s Farewell Address—like the Declaration of Independence, the Constitution, and the Federalist Papers, none of which are substantially sectarian—do indeed "stand as the foundation of our form of democracy, providing at the same time the basis of our national identity and the vehicle for


Id. § 2(a)-(b).

In the name of God, Amen. We whose names are underwitten, by the loyall subjects of our dread soveraigne Lord, King James, by the grace of God, of Great Britaine, Franc, and Ireland king, defender of the faith, etc. Haveing undertaken, for the glorie of God, and advanceyme of the Christian faith, and honour of our king and countrie, a voyage to plant the first colonie in the Northerne parts of Virginia, doe by these presents solemnly and mutually in the presence of God, and one another, covenant and combine our selves togeather into a civill body politicke, for our better ordering and preservation and furtherance of the ends aforesaid.

THE MAYFLOWER COMPACT (1620), available online at <http://www.yale.edu/lawweb/avalon/amerdoc/mayflowr.htm>.

Of all the dispositions and habits, which lead to political prosperity, Religion and Morality are indispensable supports ... Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle. It is substantially true, that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who, that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric?

orderly growth and change,” as avowed in S.B. 174. Because teaching schoolchildren about the foundation of American democracy and national identity is likely to be upheld as a legitimate secular purpose, S.B. 174 is also likely to survive any facial challenge if it is enacted. However, more substantial Establishment Clause problems might later arise should some individual public school instructors responsible for teaching these documents vouch for the truth of the religious content contained in the Mayflower Compact or George Washington’s Farewell Address.

B. Recent Developments "On the Ground"

In 1962, the United States Supreme Court first held that teacher-led prayer in public school violates the United States Constitution. The Supreme Court and the state Constitution notwithstanding, however, public expressions of prayer have not been unknown in or around Kentucky’s schools.

Early one morning in September, 2000, for example, more than 4,500 Louisville-area students simultaneously gathered in prayer around the flagpoles of 60 schools, as part of a coordinated “national day of student prayer.” In Eastern Kentucky, a Greenup radio station that carries high-school football games has begun broadcasting prerecorded prayers aired before kickoff. In 1994, the Kentucky High School Athletic Association eliminated public prayer from its state athletic tournaments. In mid-2000, however, prayers remained common at football games and other extracurricular activities in some Kentucky schools. And, of course, many Kentucky schools begin each day with a teacher-led “moment of silence or reflection.”

Whether these activities violate the Establishment Clause will depend, of course, on the facts and circumstances of each case. But a few general Establishment Clause principles are helpful to consider when evaluating these questions. First, for public expressions of prayer to be lawful at school-

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355 Id.
356 See Engel v. Vitale, 370 U.S. 421 (1962). Although the Sections 5 and 189 of the Kentucky Constitution, like the U.S. Constitution, also expresses a principle of Church-State separation, Kentucky courts historically did not construe the Kentucky State constitution to prohibit mandatory bible-reading in public schools. See, e.g., Hackett v. Brooksville Graded School Dist., 87 S.W. 792 (Ky. 1905) (upholding mandatory bible-reading in public schools).
357 See infra text accompanying notes 358-62.
358 See Peter Smith & Michael Hayman, Christian Students Again Meet Before School “At the Pole,” THE COURIER-JOURNAL, Sept. 21, 2000, at B1. The same prayer event was repeated on September 19, 2001, a rainy morning in greater Louisville. See Peter Smith, Students Pray “At the Pole” For The Victims of Terrorism, THE COURIER-JOURNAL, Sept. 20, 2001, at B3. Perhaps because of the rain, the 2001 event attracted fewer students in Louisville than had participated in 2000. Id.
360 See Joseph Gerth, Kentucky, Indiana Try To Gauge Impact: School Board Groups Will First Spread Awareness of Ruling, THE COURIER-JOURNAL, June 20, 2000, at 5A.
361 Id.
362 KY. REV. STAT. ANN. § 158.175(5). “At the commencement of the first class of each day in all public schools, the teacher in charge of the room may announce that a moment of silence or reflection not to exceed one (1) minute in duration shall be observed.” Id.
sponsored activities, school authorities (including teachers, coaches, and administrators) should retain a neutral attitude, neither encouraging nor discouraging such expressions.\textsuperscript{363} If students are given special access to school facilities (such as a public address system) to engage in religious activities, then other students must be provided an equivalent opportunity to use the same facilities, on a viewpoint-neutral basis.\textsuperscript{364} Schools should endeavor not to create situations where students will feel pressured or compelled to acquiesce in unwanted proselytizing from their fellow students.\textsuperscript{365} No students should be branded as "outsiders" from the school community because of their religious beliefs.\textsuperscript{366}

Based on these principles, student-initiated activities such as early morning prayer meetings around the schoolhouse flagpole should pass Constitutional muster, so long as the school authorities refrain from encouraging or discouraging students from participating.\textsuperscript{367} In fact, organizations as disparate as the ACLU and the National Association of Evangelicals have endorsed a statement issued by the U.S. Department of Education concluding that group prayer celebration may take place on school grounds so long as the events are led and organized by students, and take place outside regular school hours.\textsuperscript{368}

Similarly, it should not violate the Establishment Clause for non-school-operated radio stations that broadcast high school football games to air prerecorded prayers just before kickoff, so long as no school authorities participate in encouraging the radio station to do so.\textsuperscript{369} However, the Establishment Clause probably prohibits school authorities from taking affirmative steps to encourage or secure the broadcast of a prayer in connection with the broadcast of a school sporting event.\textsuperscript{370}

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\textsuperscript{363} See United States Department of Education Guidelines on Religious Expression In Public Schools (visited Jan. 8, 2002) <http://www.ed.gov/Speeches/08-1995/religion.html>. "Students may also participate in before or after school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event." \textsuperscript{1d.}

\textsuperscript{364} Id.

\textsuperscript{365} Id.

\textsuperscript{366} See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000). "[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday." \textsuperscript{1d.}

\textsuperscript{367} See United States Department of Education Guidelines on Religious Expression In Public Schools (visited Jan. 8, 2002) <http://www.ed.gov/Speeches/08-1995/religion.html>; see also Smith, \textsuperscript{supra} note 358 (noting that both civil libertarian and religious organizations have endorsed this statement).


School-sponsored prayer at sporting events, in contrast, is clearly unlawful under the Supreme Court’s recent decision in *Santa Fe Independent School District v. Doe.* The practice will doubtless persist, however, especially in religiously homogeneous areas where a lack of opposition to the practice may prevent a justiciable case or controversy from arising.

Whether Kentucky’s “moment of silence” law is constitutional is a closer question. In 1985, the Supreme Court held that a similar “moment of silence law” enacted in Alabama violated the Establishment Clause because the law endorsed religion and lacked any clearly secular purpose. Since that time, however, “moment of silence laws” enacted by other states have been sustained where they have been shown to advance secular purposes, such as “to provide students with an opportunity for a brief period of quiet reflection before beginning the day’s activities.” Kentucky’s law, which was enacted in 1996, has not been judicially challenged, nor has any similar state law enacted in any jurisdiction within the Sixth Circuit. To date, however, the Sixth Circuit has sustained mandatory “moments of silence” at certain state university functions, but has held a school board’s practice of opening its meetings with a prayer to violate the Establishment Clause. Should it be challenged, the constitutionality of Kentucky’s “moment of silence” will likely turn on whether the court is persuaded that providing students with a brief opportunity for quiet reflection constitutes a legitimate secular purpose for the law.

V. CONCLUSION

In recent years, the Justices of the United States Supreme Court have struggled to interpret the meaning of the Establishment Clause, and to apply that

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protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.” *Id.*


372 *See Wallace v. Jaffree,* 472 U.S. 38, 59-61 (1985) (invalidating law authorizing daily one-minute “moment of silence” “for meditation or voluntary prayer” in Alabama public schools, on ground that the law endorsed religion and lacked any clearly secular purpose) (emphasis added).

373 *Bown v. Gwinnett County Sch. Dist.,* 112 F.3d 1464, 1469 (11th Cir. 1997).

374 *See 1996 Ky. Laws Ch. 85 § 1, currently codified at Ky. Rev. Stat. § 158.175(5).*

375 *See Chaudhuri v. Tennessee,* 130 F.3d 232 (6th Cir.1997).

376 *See Coles,* 171 F.3d at 369 (discussed *supra* Part II.B.1).

377 *See Bown,* 112 F.3d at 1469.
meaning to resolve concrete disputes. Often, the Court has not reached a clear consensus, but has instead been compelled to issue splintered judgments set forth in plurality opinions buttressed by partially overlapping concurrences and dissents.\textsuperscript{378} Accordingly, the Court’s inability to resolve certain recurrent Establishment Clause problems has inevitably devolved some of its interpretive responsibility down to the lower federal courts. Geographically situated at the gateway to the Bible Belt, courts located within the Sixth Circuit have enjoyed substantial opportunity to exercise such interpretive responsibility.

The purpose of this Survey has been to explain and critique those courts’ performance of such duties, and to identify some future Establishment Clause disputes that the same courts may be called upon to resolve.

\textsuperscript{378} See, e.g., Mitchell, 120 S. Ct. at 2530.
I. INTRODUCTION

II. CASE SUMMARIES

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III. COMMENTARY – LEGISLATION

IV. AN AFTERWORD

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I. INTRODUCTION

Education law is less a body of law in its own right than it is the application of law - tort law, contract law, constitutional law, and so forth - in a particular context. Our categorizations within this education survey are of necessity somewhat arbitrary. We do not attempt to survey developments in areas of law - civil rights, for example - that clearly apply in the educational context, but that are deserving of treatment in their own right. Even excluding those areas, however, we could not hope to cover all the remaining topics that affect education. We have chosen instead to collect cases in five areas that received significant judicial attention or produced significant judicial developments in the period surveyed. In doing so, the concept of education law is narrowed further to a focus on public school law, primarily in elementary and secondary schools. Recognizing that with respect to public schools, the process of legislation is at least as much an engine of development as is the process of litigation, a review of recent legislation follows our review of recent case law.

II. CASE SUMMARIES

A. Rights of Students

_Banks v. Fritsch_, 39 S.W.3d 474 (Ky. 2001). Wade Banks was a 17 year-old junior at Bourbon County High School. He occasionally skipped his Agriculture Wood Construction class taught by John Fritsch. One day when Wade arrived at class, Fritsch had a large chain over his shoulder and several locks on his belt loop. Fritsch put the chain around Wade’s ankle, led him outside to an area where the class was working, put the chain around a tree, and locked it. Removing the chain around his ankle, Wade attempted to leave school but his fellow students chased him down. They carried him back to the tree, where Fritsch placed another chain around Wade’s neck and secured it to the tree.

Wade sued alleging false imprisonment, assault and battery, and outrageous conduct. Fritsch testified that the entire incident was a joke and that Banks never objected to the chaining. The trial court directed a verdict in favor of Fritsch, finding that Wade failed to present evidence that he suffered damages.

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3 See Banks v. Fritsch, 39 S.W.3d 474 (Ky. 2001).
4 Id. at 476.
5 Id.
6 Id.
7 Banks, 39 S.W.3d at 476.
8 Id.
9 Id.
10 Id. at 477.
through Fritsch’s conduct. The Court of Appeals affirmed in part and reversed in part.

The court held that the tort of outrageous conduct was not available on these facts. However, sufficient evidence of emotional damages existed to warrant submitting the issues of false imprisonment and assault and battery to the jury. Wade testified that he suffered humiliation, embarrassment, and emotional distress from the ridicule of his peers. Addressing Wade’s claim for false imprisonment, the court saw a factual issue concerning whether Fritsch’s conduct constituted an unlawful imprisonment. The Court of Appeals also found the trial court was wrong to dismiss Wade’s claims for assault and battery. According to *Graves v. Dairlyland Ins. Group*, actual damages are not an element of assault and battery. In addition, the Court of Appeals held that Banks might be able to recover for emotional damages arising from false imprisonment, assault, or battery.

*Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921 (6th Cir. 2000). John Doe, a diagnosed hemophiliac, joined the ninth grade basketball team at Woodford County High School. The school had a “no cut” policy; any ninth grader who wanted to play made the team automatically. A few days into practice Roy Chapman, the middle school principal, noticed Doe in the gym with the team. Chapman knew Doe was a hemophiliac. Chapman approached the team’s coach, Bobby Gibson, and suggested that Gibson check Doe’s medical records on file with the school. After reviewing Doe’s records, Gibson consulted with Mike Burkich, the high school principal. Burkich instructed Gibson to place Doe on “hold” status until Doe’s physician cleared him for physical activities. Gibson then informed Doe that he could not practice with the team, but could be the team’s manager. After receiving a letter from Doe’s physician, Burkich instructed the basketball coach to allow Doe to practice with the team.

Because of the way in which the school handled the situation, Doe no longer wanted to play on the team. He sued alleging violations of the Rehabilitation Act, the Americans with Disabilities Act, and the Family

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11 *id.*
12 *id.* at 480.
13 *Banks*, 39 S.W.3d at 481.
14 *id.* at 480.
15 *id.* at 482.
16 *id.* at 480.
17 *id.* at 480.
18 538 S.W.2d 42, 45 (Ky. 1976).
19 *Banks*, 39 S.W.3d at 480.
20 *id.* at 480.
21 Doe v. Woodford County Bd. of Educ., 213 F.3d 921, 923 (6th Cir. 2000).
22 *id.*
23 *id.*
24 *Id.* Later, Doe would allege that he and other players on the team overheard this conversation. *See supra* text accompanying note 19.
25 *id.*
26 *id.*
27 *Doe*, 213 F.3d 921 at 924.
28 *id.*
29 *id.*
Education and Privacy Act. The district court granted summary judgment for the defendants, holding that they acted appropriately when they placed Doe in "hold" status pending a decision on how to proceed. The Court of Appeals affirmed.

The Rehabilitation Act claim and the Americans with Disabilities Act claim were consolidated by the court. The Sixth Circuit regards the purpose, scope, and governing standards of the acts as largely the same. Cases construing one statute are instructive in construing the other. Citing the Fourth Circuit case of Montalvo v. Radcliffe, the Court of Appeals reasoned that the need to protect public health may at times outweigh the rights of disabled individuals. Given the defendants' obligation for the safety of the players, the court held that simply placing Doe on "hold" status while waiting for medical direction on how to proceed was reasonable. Since no evidence showed that anyone else overheard the conversation between Chapman and Gibson, the Court of Appeals found no violation of the Family Education Rights and Privacy Act.

B. Rights of Teachers

Bd. of Educ. of Erlanger-Elsmere v. Code, 57 S.W.3d 820 (Ky. 2001). Bill Code became a teacher at Lloyd Memorial High School in the Erlanger-Elsmere district in 1975. Code coached basketball from 1975-1984 and 1988-1992. Following the 1992 season, Code received a letter from the high school principal informing him that the principal would not recommend renewal of Code's coaching contract. The letter alleged that Code had demoralized students on the basketball team by discouraging them from playing other sports. In addition, the letter stated Code had a conflict with the football coaching staff regarding weightlifting philosophies. The superintendent accepted the principal's recommendation and later sent a letter to Code informing him he would not be coaching basketball.

Code brought an action against the district board of education alleging that he was entitled to a formal evaluation before a decision not to renew his
contract could be made. The Kenton Circuit Court granted summary judgment in Code’s favor. The Court of Appeals affirmed. The Supreme Court of Kentucky accepted discretionary review and reversed, holding Code was not entitled to a formal evaluation as coach prior to nonrenewal of the contract.

Code brought his claim under KRS § 156.101(6)(a) which provides “Each certified school employee...shall be evaluated by a system developed by the local school district and approved by the Kentucky Board of Education” and 702 KAR § 7:090 which requires that a basketball coach must also be a certified teacher. Code alleged, and the Circuit Court and Court of Appeals agreed, that these two statutes when read together required an evaluation before non-renewal of a contract. The Supreme Court reversed, reasoning the evaluation requirement is limited to the activities of teaching and administration. The Supreme Court noted that, in enacting the statutes, the General Assembly was interested in providing the public with information about the performance of certified school personnel, not with information about the performance of a school’s sports teams. The Supreme Court also dismissed Code’s allegation that the school board violated the Professional Negotiations Agreement, stating that its purpose is to improve scholastic, not athletic, performance of all students.

Lafferty v. Bd. of Educ. of Floyd County, 133 F. Supp. 2d 941 (E.D. Ky., 2001). Jerry Lafferty was a certified teacher in the Floyd County school system for 12 years. On September 1, 1998, the interim superintendent, Michael King found “ample evidence” that Lafferty had “initiated discussions with students about circumcision and the size of students’ penises.” On September 14, 1998 Lafferty acknowledged in a sworn statement that a conversation regarding student penises had occurred. Lafferty was fired. Lafferty requested and received a tribunal hearing lasting 13 days where he contested his termination. The tribunal upheld his termination, and Lafferty appealed in state court alleging state law violations against the Floyd County Board of Education (the Board) and a claim under 42 U.S.C. § 1983.

The Board removed the case to district court based on the federal question. The district court held that Lafferty’s pre-termination procedure

46 Id. at 822.
47 Id. at 821.
48 Id.
49 Id. at 826.
50 KY. REV. STAT. ANN. § 156.101 (current version at KY. REV. STAT. ANN. § 156.557 (West 2001)).
52 57 S.W.3d at 821.
53 Id.
54 Id. at 823.
55 Id.
56 Id. at 824.
58 Id. at 945.
59 Id.
60 Id. at 944.
61 Id. at 944, 946.
63 Lafferty, 133 F. Supp. 2d 944.
satisfied constitutional due process requirements, and further, even if Lafferty’s pre-termination procedure were considered cursory, it was saved by the thirteen day post-deprivation hearing. Termination of Lafferty for initiating comments and conversations with students regarding circumcision and penis sizes of students was not arbitrary according to the court.

The district court considered Lafferty’s federal claim alleging violation of 42 U.S.C. § 1983 in regards to his Fourteenth Amendment right to due process and his right to privacy. When considering a claim for violation of due process rights, courts undertake a two-step analysis: first whether the plaintiffs have a property interest that entitles them to due process protection, then a determination of what process is due. Lafferty satisfied the first prong because a tenured teacher has a viable property interest. The court then held the pre-deprivation procedure fulfilled the due process requirements. The Board took the time to investigate the incident and obtained Lafferty’s sworn statement prior to terminating him. The district court also concluded that, even were the pre-termination procedure cursory, it was saved by the post-deprivation hearing where Lafferty had the assistance of counsel and was able to challenge the evidence against him.

Pigue v. Christian County Bd. of Educ., 2001 Ky. App. LEXIS 79 (2001). Joe Don Pigue and other teachers, employed by the Christian County Board of Education (the Board), had their extended employment days reduced. Due to budget allocations, the Board reduced the extended employment days of forty-six teachers in the school district. No administrators or middle school or high school guidance counselors received a reduction of days. Although not all teachers were included in the reduction plan, all teachers of similar class and responsibilities were reduced.

The teachers filed suit alleging that the Board’s reduction of their extended employment days violated KRS § 161.760. Additionally, the teachers alleged the Board violated KRS § 61.805, the open meetings act. The trial court held that the Board did not violate § 161.760 because the reduction in extended employment days was pursuant to a uniform plan and did not violate

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64 Id. at 942.  
65 Id.  
66 Id. at 947.  
67 See U.S. CONST. amend. XIV.  
68 Lafferty, 133 F. Supp. 2d at 944.  
69 Lafferty, 133 F. Supp. 2d at 944, (citing Leary v. Daeschner, 228 F.3d 729, 741-742 (6th Cir. 2000)).  
70 See Lafferty, 133 F. Supp.2d at 944.  
71 Id. at 945.  
72 Id.  
73 Id.  
75 Id. at *2.  
76 Id. at *3.  
77 Id. at *3-4.  
78 Id. at *1; KY. REV. STAT. ANN. § 161.760(1) (Michie 2001).  
79 See KY. REV. STAT. ANN. § 61.805 (Michie 2001).  
the open meetings act. The Court of Appeals affirmed as to the open meetings act, but reversed as to the reduction because it was not part of a uniform plan.

KRS § 161.760(1) provides that a school district may reduce teachers’ extended employment days if there is either a uniform plan to be implemented or the teachers receive a corresponding reduction in responsibilities. The statute allows reductions in salary without specific notice if part of “a uniform plan affecting all teachers in the entire school district.” The Court of Appeals read the statute as requiring that “all teachers must be encompassed by the plan, even though not all are affected by its implementation.” Since the trial court did not reach the issues of whether the teachers received a reduction in responsibility or sufficiency of notice the case was remanded for further consideration.

C. Freedom of Speech

Castorina v. Madison County School Bd., 246 F.3d 536 (6th Cir. 2001). Timothy Castorina and Tiffany Dargavell, students at Madison Central High School, arrived at school wearing matching concert T-shirts. The T-shirts showed Hank Williams Jr. on the front and two Confederate flags on the back with the phrase “Southern Thunder.” Principle William Fultz gave the students the choice of either turning the shirts inside out or going home to change. Fultz determined that the T-shirts were in violation of the school dress code prohibiting students from wearing any clothing or emblem “that is obscene, sexually suggestive, disrespectful, or which contains slogans, words or in any way depicts alcohol, drugs, tobacco or any illegal, or immoral, or racist implication.” Castorina and Dargavell refused to change their T-shirts and were suspended for three days. Following their suspension they returned to school wearing the same T-shirts. After being suspended again, the students sued challenging the constitutionality of the disciplinary actions.

The district court found that wearing the T-shirts did not qualify as “speech” and that, even if it were “speech,” the students failed to show a First Amendment violation. Additionally, the court rejected the allegation that the school's dress code was vague or overbroad. The Court of Appeals reversed, holding that the students decision to wear the T-shirts was protected speech. It
remanded the matter to determine whether the school board had selectively applied the dress code to some racially sensitive symbols but not others.97 The Court of Appeals found that the students' decisions to wear the T-shirts were protected speech because the students' intended expression was both a commemoration of Hank Williams Sr.'s birthday and a statement affirming the students' shared southern heritage.98 The students alleged that other students wore clothing venerating Malcolm X and were not disciplined.99 The Court found this to be a factual dispute to be resolved and remanded the case.100 The Court acknowledged that if the students' assertions were true, then the school board enforced the dress code in an uneven and viewpoint-specific manner.101 Furthermore, if the school refused to bar the wearing of Malcolm X apparel but prohibited the Confederate T-shirts then this would give the appearance of a targeted ban of the kind that the Supreme Court has specifically struck down.102

Cockrel v. Shelby County Sch. Dist., 81 F. Supp. 2d 771 (E.D. Ky. 2000). Donna Cockrel was an elementary school teacher in the Shelby County school system.103 On May 30, 1996, Cockrel presented to her fifth grade class information regarding industrial hemp.104 Numerous news organizations covered the event, which included a presentation by actor Woody Harrelson and several industrial hemp farmers.105 Following this event, the district fired Cockrel claiming insubordination, conduct unbecoming a teacher, inefficiency, incompetency, and neglect of duty.106 Consistent with KRS § 156.101,107 the school district prepared a summative evaluation of the firing.108 It stated that Cockrel did not meet the school district's standards in several areas.109 Cockrel challenged the evaluation before an appeals panel, which dismissed the appeal as untimely.110 She then filed a complaint in Shelby County Circuit Court alleging that the Board of Education and Superintendent Leon Mooneyhan failed to afford her due process.111 In the instant action, Cockrel claimed that the same defendants unlawfully retaliated against her exercise of free speech rights in violation of 42 U.S.C. § 1983112 and in breach of her contract.113 The defendants asked the District Court to abstain under Younger v. Harris.114

97 Id.
98 Id. at 539.
99 Id.
100 Id. at 546.
101 Castorina, 246 F.3d at 544.
102 See, e.g., Police Depart. of Chicago v. Mosley, 408 U.S. 92 (1972) (striking down a no-picketing law that exempted labor-related picketing).
104 Id.
105 Id.
106 Id.
108 Cockrel, 81 F. Supp. 2d at 772.
109 Id. at 773.
110 Id.
111 Id.
113 Cockrel, 81 F. Supp. 2d at 773.
114 Id. (citing Younger v. Harris, 401 U.S. 37 (1971)).
“Abstention is appropriate only when there is a pending state proceeding, an important state interest exists, and there is an adequate opportunity to raise constitutional challenges in the state court.” The District Court abstained from reviewing Cockrel’s breach of contract claim since it involved several important and novel state law issues yet to be decided. As to the First Amendment claim, Cockrel had to prove that her conduct was constitutionally protected and that it was the substantially motivating factor in the school district’s decision to fire her. The court found that Cockrel’s First Amendment claim lacked merit because Cockrel did not state an opinion regarding the industrial hemp, and therefore, her First Amendment rights were not implicated. Since Cockrel’s presentation on industrial hemp was not a form of protected speech, the question of whether it was a motivating factor in her termination was irrelevant.

**Kincaid v. Gibson**, 236 F.3d 342 (6th Cir. 2001). Kentucky State University (“KSU”) funded the production and distribution of *The Thorobred*, the student yearbook. Capri Coffer, the editor of the yearbook during the 1993-94 academic year, updated the yearbook by changing its color and covering current events. Betty Gibson, KSU’s Vice President for Student Affairs, objected to the yearbook because it was not in a KSU school color, she did not like its theme, and it included current events unrelated to KSU. Gibson consulted with KSU President Mary Smith, and the two decided not to distribute the yearbooks.

Coffer and Charles Kincaid, another student at KSU, sued Gibson, Smith and individual members of the KSU Board of Regents. They claimed that the university’s confiscation of and failure to distribute the yearbook violated their rights under the First and Fourteenth Amendments. The district court granted summary judgment in favor of the defendants, holding that the KSU yearbook was a nonpublic forum and that KSU officials’ actions were reasonable.

The Court of Appeals reversed. Based upon the university’s policy and practice, it found that KSU intended to make the yearbook a limited public forum. The court reasoned that because the yearbook was a “journal of

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115 Id. (quoting *Younger*, 401 U.S. 37).
116 Id. at 773.
117 See U.S. CONST. Amend. I.
119 Id. at 776 (quoting *United States v. O’Brien*, 391 U.S. 367 (1968) where the court held that “conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea”).
120 *Cockrel*, 81 F. Supp. 2d at 776.
121 See *Kincaid v. Gibson*, 236 F.3d 342, 344 (6th Cir. 2001).
122 Id. at 345.
123 Id.
124 Id.
125 Id.
126 See U.S. CONST. amend I.
127 See U.S. CONST. amend XIV, § 1.
128 *Kincaid*, 236 F.3d at 357.
129 Id.
130 *Kincaid*, 236 F.3d at 357.
131 Id. at 349-351.
expression and communication in the public forum sense," the university's confiscation of the yearbook was arbitrary, unreasonable and in violation of Kincaid's and Coffer's First Amendment rights.

Leary v. Daeschner, 228 F.3d 729 (6th Cir. 2000). Mary Elizabeth Leary and Glenda H. Williams were special education teachers at Atkinson Elementary School. Atkinson was identified as a school "in decline." In an attempt to remedy Atkinson's poor student test scores, the state sent Nancy Bowlds, a highly skilled educator, to assess and change the situation. Bowlds proposed the use of a "collaborative model" of education at Atkinson. The proposal met with some resistance from faculty. To ensure the faculty would consist of teachers who were in favor of implementing the proposed changes, a decision was made to transfer some of the teachers at Atkinson to another school. Williams and Leary were among those involuntarily transferred. Williams and Leary sued, alleging that they were transferred in retaliation for exercising their First Amendment rights and that they were not afforded procedural due process in connection with the transfer.

The district court, denying the teachers' motion for a preliminary injunction based on the First Amendment claim, enjoined the superintendent, Stephen Daeschner, from transferring the teachers until they had received due process. After three days the district court dissolved the injunction finding that the school had provided sufficient process by notifying the teachers of a hearing to be held later that same day. The teachers appealed claiming the district court abused its discretion in denying a preliminary injunction on their First Amendment claim and in finding they had been afforded due process. Daeschner cross-appealed claiming the district court erred in determining that the teachers were entitled to due process. The Court of Appeals affirmed.

For the Court of Appeals the issue of whether the transfer was motivated, at least in part, as a response to the exercise of the teachers' constitutional rights was a close call. In deference to the lower court, the Appeals Court ultimately

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132 id. at 357.
133 id.
134 See Leary v. Daeschner, 228 F.3d 729, 733 (6th Cir. 2000).
135 id. at 734.
136 id.
137 id.
138 id.
139 id.
140 Leary, 228 F.3d at 735.
141 See U.S. CONST. amend. I.
142 See U.S. CONST. amend XIV, § 1.
143 Leary, 228 F.3d at 729.
144 id. at 736 (the teachers were given no prior notice and no opportunity to be heard).
145 Leary, 229 F.3d at 729.
146 id. Plaintiffs presented substantial evidence that they had been highly critical of the management of Atkinson and, as such, that they were considered leaders among the faculty.
147 Leary, 228 F.3d at 734. The Court found that the notice of the hearing was sufficient and furthermore, that the Plaintiffs waived their right to be heard by failing to attend the meeting.
148 id.
149 id. at 734.
150 id. at 739, see, e.g., Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998). For a public employee to succeed on a First Amendment claim of retaliatory acts, they must show that the acts were motivated by the exercise of a First Amendment right. id. at 737.
found that the standard of proof in an injunction action is much more stringent than on a summary judgment motion. As such, the Appeals Court refused to grant the teachers' preliminary injunction based on their First Amendment claims. However, it expressed no opinion as to the ultimate merits of the plaintiffs' case. The court stated:

[G]iven the closeness of the question, and the fact that the plaintiffs' arguments, while shedding some doubt on the district court's interpretation of the facts, do not show the district court's factual findings to be clearly erroneous, we affirm the district court's conclusion that the plaintiffs have not, for the purpose of the preliminary injunction, shown that the plaintiffs' transfer was motivated by their protected speech, and therefore that the plaintiffs have not shown a strong likelihood of success on the merits.

On their due process claim, the court found that the teachers were entitled to some pre-deprivation due process because their collective bargaining agreement created a property interest. However, since the essential requirements of due process are notice and an opportunity to respond, the requirements were met by sending the teachers letters and giving them the opportunity for a hearing.

*Long v. Bd. of Educ. of Jefferson County*, 121 F. Supp. 2d 621 (W.D. Ky. 2000). The School Based Decision Making Council at Atherton High School is a statutorily mandated body responsible for setting school policy to "provide an environment to enhance students' achievement and help the school meet its goals." To address the problem of gangs at school, promote student safety, prevent student-on-student violence over attire and to enable school officials to more easily identify non-students, the council implemented a new dress code.

Certain students and parents sued, alleging that the dress code violated rights guaranteed by the First and Fourteenth Amendments, the Americans with Disabilities Act (ADA), and 42 U.S.C. § 1983. The Jefferson County

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151 Leary, 228 F.3d at 739.
152 Id.
153 Id. at 739-740 (holding that the District Court's finding - the transfers were not motivated by the Plaintiffs' speech - was not clearly erroneous, the court went on to say that they doubted the contentions of Daeschner that he did not have a retaliatory motive.)
154 Leary, 228 F.3d at 739 (emphasis added).
155 Id. at 742.
157 Leary, 228 F.3d at 743.
159 *Long*, 121 F. Supp. 2d at 623.
160 See U.S. CONST. amend. I.
161 See U.S. CONST. amend. XIV.
Board of Education moved for summary judgment and the district court granted the motion.

The court reasoned that the right to wear clothes of one's own choosing has an expressive element, but is not akin to "pure speech." Since the dress code targeted the secondary effects of expression and was content neutral, the court applied the test of United States v. O'Brien. Focusing on the third prong of the O'Brien test - whether the incidental restriction on First Amendment freedoms is no greater than is essential to further the government's interest - the court concluded that because the school officials had an objective basis for adopting the dress code, the code was constitutional. The students' other claims also failed.

D. Freedom of Religion

ACLU of Ky. v. McCreary County, 145 F. Supp. 2d 845 (E.D. Ky. 2000). McCreary and Pulsaki Counties and the Harlan County schools posted framed copies of the Ten Commandments in the courthouses and schools as part of a series of displays. Subsequently, other historical materials, including the Magna Carta and the Declaration of Independence, were added. The District Court enjoined the displays and ordered their removal after suit was filed by the ACLU. Thereafter, an expanded third set of displays, again including the Ten Commandments and a scripture reference, was posted. The plaintiffs' asked the court to expand the preliminary injunction to include the new display.

The counties and the schools asserted five purportedly secular purposes for the display in order to satisfy the tripartite Lemon test used in Establishment Clause cases. The District Court found that the first three reasons reflected a religious rather than a secular purpose. The fourth and fifth reasons failed because the history of the litigation indicated that the defendants'

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164 Id. at 624 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).
166 Long, 121 F. Supp. 2d at 626 (citing O'Brien, 391 U.S. at 377).
167 Id. at 627, 628.
169 Id.
171 145 F. Supp. 2d at 847.
172 Id. (The court's ruling ultimately encompassed this third display and a fourth display.).
173 Id. at 848 (stating "[t]o erect a display containing the Ten Commandments that is constitutional"; (2) "to demonstrate that the Ten Commandments were part of the foundation of American Law and Government"; (3) "to include the Ten Commandments as part of the display for their significance in providing 'the moral background of the Declaration of Independence and the foundation of our legal tradition"; (4) "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government"; and (5) [as stated by the Harlan County School Board] "to create a limited public forum on designated walls within the school district for the purpose of posting historical documents which played a significant role in the development, origins or foundations of American or Kentucky law. . . .").
175 See U.S. Const. amend. 1.
176 145 F. Supp. 2d at 848-849 (citing Stone v. Graham, 449 U.S. 39, 41 (1980) (stating that the Ten Commandments have a foundation in law is stating a religious purpose)).
177 Id.
overall purpose was religious in nature.\textsuperscript{178} The law recognizes two permissible uses of the Ten Commandments within the public arena.\textsuperscript{179} One is if the Ten Commandments are integrated into a school curriculum in the study of history, civilization, ethics, comparative religion, or the like.\textsuperscript{180} The other is in a display incorporating both religious and secular figures.\textsuperscript{181} The court held that the displays at issue were outside the bounds of these permissible uses and extended the injunction.\textsuperscript{182}

_Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667 (E.D. Ky. 2000)._ The schools in the Harlan County School District posted copies of the Ten Commandments in their classrooms.\textsuperscript{183} A student and her parents sued to have the displays removed.\textsuperscript{184} When the suit was filed, the display consisted of a copy of the Ten Commandments.\textsuperscript{185} Following the filing of the lawsuit, the school added documents to the display including an excerpt from the Declaration of Independence, the Preamble of the Constitution of Kentucky, the national motto of “In God We Trust,” and other documents.\textsuperscript{186} The district court granted the motion for preliminary injunction and ordered the schools to remove the displays and not to erect similar displays.\textsuperscript{187}

The court found that the displays lacked the requisite secular purpose.\textsuperscript{188} The Board's resolution authorizing the posting contained repeated references to religion and clarified its purpose as endorsing religion.\textsuperscript{189} The district court reasoned that an objective observer would see the overriding theme of the display as endorsing or promoting Christianity.\textsuperscript{190} The only unifying element among the documents was reference to God, the Bible, or religion.\textsuperscript{191} Thus, the Harlan County Schools were enjoined from erecting any Ten Commandment or similar religious display.\textsuperscript{192}

_Good News Club v. Milford Central Sch., 533 U.S. 98 (2001)._ New York law allowed school districts to adopt policies regarding use of school buildings after school.\textsuperscript{193} Milford Central School (Milford) adopted a policy allowing district residents to use its buildings for the purposes of instruction, education, learning or the arts and for social, civic, recreational, and entertainment uses pertaining to the welfare of the community.\textsuperscript{194} Stephen and Darleen Fournier were district residents and sponsors of the Good News Club, a

\textsuperscript{178} Id. at 849-850.
\textsuperscript{179} Id. at 852.
\textsuperscript{180} Id. at 853.
\textsuperscript{181} Id.
\textsuperscript{182} 145 F. Supp. 2d at 853.
\textsuperscript{184} Id.
\textsuperscript{185} Id. at 672.
\textsuperscript{186} Id.
\textsuperscript{187} Id. at 667.
\textsuperscript{188} Doe, 96 F. Supp. at 675.
\textsuperscript{189} See Doe, 96 F. Supp. 2d at 675; see also ACLU v. Capitol Square Review and Advisory Bd., 210 F.3d 703 (6th Cir. 2000).
\textsuperscript{190} 96 F. Supp. 2d at 675.
\textsuperscript{191} Id. at 676.
\textsuperscript{192} Id. at 679.
\textsuperscript{194} Id. at 2097.
private Christian organization for children ages 6-12. Pursuant to Milford’s policy, they sought permission to hold the club’s weekly meetings in the school cafeteria. Milford rejected the club’s request on the ground that the proposed use was the equivalent of religious worship.

The club filed suit against Milford alleging that the denial of its application violated its rights to free speech, equal protection, and religious freedom. The District Court granted Milford summary judgment, finding the club’s “subject matter is decidedly religious in nature and not merely a discussion of secular matters from a religious perspective that is otherwise permitted under [Milford’s] use policy.” The Second Circuit affirmed, holding Milford’s policy of excluding the Club’s meetings was constitutional subject discrimination, not unconstitutional viewpoint discrimination. On writ of certiorari, the Supreme Court reversed, holding that the district violated the club’s free speech rights. The court also concluded that, under Lambs Chapel v. Center Moriches Union Free Sch. Dist., allowing the club to meet on school grounds would not have violated the Establishment Clause.

Both parties agreed, and the court assumed, that Milford operated a limited public forum. But, to exclude the club from the forum on the ground that it was religious in nature was viewpoint discrimination in violation of the Free Speech Clause. The court saw no logical difference between the club’s invocation of Christianity and other organizations’ invocation of ideals such as teamwork, loyalty, or patriotism.

The court rejected Milford’s Establishment Clause argument that elementary school children would perceive that the school was endorsing the club and would feel compelled to participate. It reasoned that allowing the club on school grounds would ensure, not threaten, neutrality toward religion. For the court, the facts did not support Milford’s conclusion that elementary school children were more impressionable or more likely to misperceive the presence of the club on school premises. In conclusion, however, the court clarified their ruling by stating that they did not address the issue whether an Establishment Clause claim would have excused Milford’s viewpoint discrimination because the school district did not raise this claim validly.

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195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.*
203 533 U.S. at 2099.
204 *Id.* at 2100.
205 *Id.*
206 *Id.* at 2102.
207 *Id.* at 2106.
208 *Id.* at 2104.
209 *Good News Club*, 121 S. Ct. at 2104-06.
210 *Good News Club*, 121 S. Ct. at 2104-06.
Mitchell v. Helms, 530 U.S. 793 (2000). Under Chapter 2 of the Education Consolidation and Improvement Act of 1981,211 the Federal Government distributes funds to state and local educational agencies.212 These agencies in turn lend educational materials and equipment to public and private schools, with the enrollment of each school determining the amount of aid it is eligible to receive.213 In Jefferson Parish, Louisiana, about 30% of the funds went to private schools, most of which were religiously affiliated.214 Mary Helms filed suit alleging that, as applied in Jefferson Parish, Chapter 2 violated the Establishment Clause of the First Amendment.215

The Chief Judge of the District Court agreed, holding that Chapter 2 had the primary effect of advancing religion.216 He issued an order excluding sectarian schools from participation in the Chapter 2 program.217 After the Chief Judge retired, another judge of the district court reversed the order and upheld Chapter 2.218 On appeal the Fifth Circuit, relying on Meek v. Pittenger219 and Wolman v. Walter,220 held that Chapter 2 violated the Establishment Clause.221 The Supreme Court reversed.222 A plurality of four justices held that Chapter 2, as applied in Jefferson Parish, is not a law respecting the establishment of religion simply because private religious schools receive aid.223 Two other justices concluded that Agostini v. Felton224 controlled and, to the extent that Meek225 and Wolman226 were inconsistent with Agostini,227 those cases should be overruled.228

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). Students and others brought an action against the Santa Fe Independent School District alleging that the district had engaged in several proselytizing practices.229 These included promoting attendance at Baptist revival meetings, allowing students to read Christian invocations and benedictions from the stage at graduation ceremonies, and delivering overtly Christian prayers over the public address system at home football games.230 While the suit was pending, the district changed its policy regarding prayer at school functions.231 The new policy

213 Id. at 802.
214 Id. at 803.
215 Id. at 803, 804; see also U.S. CONST. amend. 1.
216 Mitchell, 530 U.S. at 804.
217 Id.
218 Id.
221 Mitchell, 530 U.S. at 806, 807.
222 Id. at 836.
223 Id. at 835.
228 Mitchell, 530 U.S. at 295.
230 Id. at 295.
231 Id. at 296.
authorized two student elections, one to determine whether "invocations" should be delivered and another to select the spokesperson to deliver them.\textsuperscript{232} The district court enjoined the school district's original policy, but allowed the two-step process after modifying it to permit only nonsectarian, non-proselytizing prayer.\textsuperscript{233} The Fifth Circuit held that even the modified policy violated the Establishment Clause.\textsuperscript{234} The district petitioned for writ of certiorari, claiming its policy did not violate the Establishment Clause since the football game messages were private student speech, not public speech.\textsuperscript{235} The Supreme Court affirmed the appellate court stating the district's policies violated the Establishment Clause because the football game messages were public speech authorized by a government policy.\textsuperscript{236}

The Supreme Court relied on its decision in \textit{Lee v. Weisman}\textsuperscript{237} where it held that a prayer delivered by a rabbi at a middle school graduation ceremony violated the Establishment Clause.\textsuperscript{238} The Supreme Court reasoned that the pre-game invocation was not private speech because it was authorized by a government policy and took place on government property at government-sponsored school-related events.\textsuperscript{239} The Santa Fe school district did not show an intent to open the pre-game ceremony to "indiscriminate use."\textsuperscript{240} The school allowed only one student for the entire year to give the invocation.\textsuperscript{241} The statement made by the student was subject to particular regulations that confined the content and topic of the student's message.\textsuperscript{242} Additionally, the Court pointed to the fact that the perceived endorsement of the message was established beyond just the text of the policy.\textsuperscript{243} The message delivered by the student was broadcast over the schools public address system, which remained subject to school officials control.\textsuperscript{244} An objective Santa Fe High School student would unquestionably perceive the pre-game prayer as approved by the school.\textsuperscript{245} As such, student led prayer prior to football games was public speech and violated the Establishment Clause.\textsuperscript{246}

\textbf{E. Governmental Immunity}

\textit{Ammerman v. The Bd. of Educ. of Nicholas County}, 30 S.W.3d 793 (Ky. 2001). Current and former teachers at Nicholas County Elementary School brought a sexual harassment case against the Board of Education of Nicholas

\begin{footnotesize}
\begin{enumerate}
\item Id. at 298.
\item Id. at 297.
\item Id. at 298.
\item Santa Fe, 530 U.S. at 302.
\item Id.
\item 505 U.S. 577 (1992).
\item See Santa Fe Indep. Sch. Dist., 530 U.S. at 301.
\item Id. at 302.
\item Id. at 311.
\item Id.
\item Id.
\item Id. at 314.
\item Santa Fe, 530 U.S. at 314.
\item Id. at 308.
\item Id. at 290.
\end{enumerate}
\end{footnotesize}
County and the members of the Board. They sought damages based upon the conduct of a former teacher, Harry Spickler, who taught at the elementary school from 1977-1993. The evidence showed Harry Spickler accosted his female colleagues on a regular basis in a sexually overt manner. Over the years complaints were made to school supervisory personnel but nothing substantial was done to remedy the situation. Eventually, Spickler was dismissed. The teachers brought claims sounding in contract, tort, and statutory violations, including violations of KRS Chapter 344, the Kentucky Civil Rights Act.

The trial court dismissed the teachers' claims finding they had failed to state a claim for relief under breach of contract. In addition, the tort claims were found not actionable and otherwise time-barred, and the civil rights claims were barred by the five-year statute of limitations set forth in KRS § 413.120(2). The Court of Appeals affirmed. The Supreme Court affirmed the dismissal of all claims, holding the contract and tort claims were barred by sovereign immunity and the sexual harassment claims were time-barred.

The claim of sovereign immunity applies to both tort and contract claims. Since public schools are the responsibility of the state, local school districts retain immunity. Thus, the teachers' claims, with the exception of the civil rights claims, were barred under the doctrine of sovereign immunity. The teacher's civil rights claims failed, however, because civil rights claims are governed by a five-year statute of limitations.

In sexual harassment claims, the limitations period begins on the date the act of harassment occurs. Only the most recent alleged incident by Simons, an off color comment made in 1986, fell within the statute of limitations. The time allowed for the remaining instances had run in 1991. However, the Continuing Violation Doctrine can permit the plaintiff to bootstrap other incidents into the limitations period. The court, in this case, declined to adopt

247 See Ammerman v. Bd. of Educ. of Nicholas County, 30 S.W.3d 793, 796 (Ky. 2001).
248 Id.
249 Ammerman, 30 S.W. 3d at 796; KY. REV. STAT. ANN. § 413.120(2) (Michie 2001).
250 Id. at 796.
251 Id. at 793.
252 KY. REV. STAT. ANN. CHAPTER 344 (Michie 2001).
253 30 S.W.3d at 793.
254 Id.
255 Id. at 796.
256 30 S.W.3d at 793.
258 Ammerman, 30 S.W.3d at 793.
259 Id. at 797; see also University of Louisville v. Martin, 574 S.W.2d 676 (Ky. Ct. App. 1978).
260 30 S.W.3d at 797.
261 Id.
262 Id. at 798; KY. REV. STAT. ANN. § 413.120(2) (Michie 2001).
263 30 S.W.3d at 798.
264 Id. at 799 (which the court found did not amount to actionable sexual harassment as an isolated incident).
265 KY. REV. STAT. ANN. § 413.120(2) (Michie 2001).
266 30 S.W.3d at 799.
268 30 S.W.3d at 799.
the doctrine and declared that the complaint filed in 1994 exceeded the limitations period.²⁶⁹

*Minger v. Green,* 239 F.3d 793 (6th Cir. 2001). Gail Minger is the mother and personal representative of the Estate of Michael Howard Minger, who was a student at Murray State University (MSU).²⁷⁰ MSU had a policy requiring all first and second year students to live in on-campus dormitories.²⁷¹ On the morning of September 13, 1998, a fire started on the floor on which Michael lived.²⁷² The next day, Ms. Minger called the MSU housing office to inquire about the cause of the fire and spoke with the Associate Director of the Housing Office, David Wilson.²⁷³ Wilson told Ms. Minger the fire was minor and nothing to worry about because all the dorm residents were safe.²⁷⁴ On September 18th, 1998, a second fire was set on Michael’s floor in the same location as the September 13th fire.²⁷⁵ Michael, sleeping when the fire broke out, died of smoke inhalation.²⁷⁶

Gail Minger filed a diversity action in federal district court asserting state law claims against Wilson and Joseph Green, Director of Public Safety at MSU.²⁷⁷ The district court ruled that Wilson and Green were entitled to immunity under Kentucky law on the basis of their performance of discretionary acts within the general scope of their authority.²⁷⁸ The Court of Appeals affirmed the district court’s decision granting Green’s motion to dismiss.²⁷⁹ However, it reversed the district court’s decision granting Wilson’s motion to dismiss and remanded the matter to the district court.²⁸⁰

It is a well-established principle of Kentucky law that a state officer or employee is liable for “deliberate wrongdoing, regardless of whether he was acting within the scope of his authority.”²⁸¹ However, a state officer or employee who is negligent in the performance of the individual’s duties may be immune from suit under Kentucky law.²⁸² In Kentucky, the long-standing principle is that state officers and employees are entitled to immunity when performing discretionary functions within the general scope of their authority.²⁸³ Under Kentucky law, individual state employees who knowingly commit intentional torts or wrongful acts are not entitled to immunity.²⁸⁴ The Court of Appeals, in reversing the decision of the district court, concluded that Minger sufficiently

²⁶⁹ Id. (stating "[a]cts of sexual harassment so discrete in time or circumstances that they do not reinforce each other cannot reasonably be linked together into a single chain, a single course of conduct, to defeat the statute of limitations.") (citing Koelsch v. Beltone Electronics Corp., 46 F.3d 705, 707 (7th Cir. 1995)).
²⁷⁰ See Minger v. Green, 239 F.3d 793 (6th Cir. 2001).
²⁷¹ Id. at 796.
²⁷² Id.
²⁷³ Id.
²⁷⁴ Id.
²⁷⁵ Id.
²⁷⁶ Minger, 239 F.3d at 796.
²⁷⁷ Minger, 239 F.3d at 796.
²⁷⁸ Id. at 797.
²⁷⁹ Id.
²⁸⁰ Id. at 793.
²⁸¹ See Carr v. Wright, 423 S.W.2d 521, 522 (Ky. 1968).
²⁸² See Franklin County v. Malone, 957 S.W.2d 195, 202 (Ky. 1997).
²⁸³ See Minger v. Green, 23 F.3d at 798.
²⁸⁴ See Upchurch v. Clinton County, 330 S.W.2d 428, 430 (Ky. 1959).
alleged that Wilson intentionally misrepresented the cause of the September 13 fire in his September 14 conversation with her.285 Thus, Wilson was not immune from suit under Kentucky law.286 In contrast, Minger did not make any intentional tort claims against Green.287 As such, Green's performances in his duties were discretionary, and he was entitled to immunity.288

Turner v. Newport Bd. of Educ., 2000 Ky. App. LEXIS 108. Jeremy Turner was a student at A.D. Owens School in Newport, Kentucky.289 A suit against the school board and Jeremy's gym teacher alleged that Jeremy was seriously injured during gym class.290 The Circuit Court granted summary judgment to both the board of education and the teacher based on the doctrine of sovereign immunity and official immunity.291 The Court of Appeals affirmed.292

The Turners objected that they were unable to discover whether the school board had in force a policy of insurance and if so, they argued that this constituted a waiver of sovereign immunity.293 However, the court found this immaterial because local boards of education are clearly covered under the doctrine of sovereign immunity.294 Thus, the court held that summary judgment in favor of the Board was proper.295

The Turners then argued that the gym teacher had no immunity.296 The court summarized the teacher's potential liability: as an employee of the Newport Board of Education, the teacher is an employee of a subdivision of the state government, which is not subject to the direct direction or control of the central state government.297 It follows that if the teacher is being sued in his official capacity, he has sovereign or official immunity.298 If the teacher is being sued in his individual capacity, a court must ask whether he was performing a discretionary function or a ministerial function.299 If it is a discretionary function, he has official immunity.300 If it is a ministerial function, a court must ask if he was performing a ministerial duty within the scope of his official capacity, a ministerial activity inherently within the traditional role of government.301 If he is, official immunity applies.302 If he is not, the employee has no official immunity.303 The court, without deciding whether the teacher was entitled to

285 See Minger v. Green, 23 F.3d at 799.
286 Id.
287 Id. at 801.
288 Id. at 802.
290 Id. at *3, *15.
291 Id. at *2.
292 Id. at *1.
294 Id. at *2 (citing Clevinger v. Bd. of Educ. of Pike County, 789 S.W.2d. 5, 10, 11 (Ky. 1990)).
295 Id. at *4 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909) (for the rule that we find waiver only "by the most express language or by such overwhelming implications.").
297 Id. at *13.
298 Id. (citing Kentucky v. Malone, 957 S.W.2d 195, 202 (1997)).
299 Id. at *13.
300 Id.
301 Id. *14.
303 Id.
immunity in his individual capacity, held that there was insufficient evidence of negligence to overturn the grant of summary judgment.\textsuperscript{304}

III. COMMENTARY - LEGISLATION

It does not diminish the importance of the caselaw developments reviewed above to say that, with respect to education law, legislation is as much an engine for change as is litigation. In reviewing legislative developments, the temptation is to focus on the major programmatic initiatives such as adult education,\textsuperscript{305} the Professional Development Growth Fund,\textsuperscript{306} the Center for Middle School Academic Achievement,\textsuperscript{307} or career and technical education.\textsuperscript{308} What follows tries to resist that temptation and draw the reader's attention to developments perhaps of more particular interest to lawyers.

While the courts were giving attention to \textit{ACLU of Ky. v. McCreary County}\textsuperscript{309} and \textit{Doe v. Harlan County Sch. Dist.},\textsuperscript{310} the legislature was giving its attention to similar issues. Senate Joint Resolution 57\textsuperscript{311} provides that any public school teacher may post the Ten Commandments in classrooms with other documents as part of a historical display and declares a secular purpose for doing so.\textsuperscript{312} The resolution itself and a copy KRS § 158.195\textsuperscript{313} are to be part of that display.\textsuperscript{314} To carry the matter further, Ky. House Bill 662 provides that "no liability insurer shall refuse to pay under the terms of the policy and insured who is sued for posting the Ten Commandments . . . ."\textsuperscript{315}

\begin{footnotesize}
\textsuperscript{304} Id. *15, *16.
\textsuperscript{305} See S. Bill 1, 2000 Ky. Acts 526.
\textsuperscript{308} See H.R. Bill 185, 2001 Ky. Acts 123.
\textsuperscript{309} 145 F. Supp. 2d. 845 (E.D. Ky. 2001)
\textsuperscript{310} 96 F. Supp. 2d. 667 (E.D. Ky. 2000).
\textsuperscript{311} 2000 Ky. Acts 444.
\textsuperscript{312} \textit{Id.}
\textsuperscript{313} \textit{Ky. Rev. Stat. Ann. § 158.195} (West 2001). This statute states:

Local boards may allow any teacher or administrator in a public school district of the Commonwealth to read or post in a public school building, classroom, or event any excerpts or portions of: the national motto; the national anthem; the pledge of allegiance; the preamble to the Kentucky Constitution; the Declaration of Independence; the Mayflower Compact; the writings, speeches, documents, and proclamations of the founding fathers and presidents of the United States; United States Supreme Court decisions; and acts of the United States Congress including the published text of the Congressional Record. There shall be no content-based censorship of American history or heritage in the Commonwealth based on religious references in these writings, documents, and records.

\textit{Id.}
\textsuperscript{314} 2000 Ky. Acts 444.
\textsuperscript{315} 2000 Ky. Acts 237.
\end{footnotesize}
A number of states have "character education" statutes, and Kentucky now has followed suit. House Bill 1573\textsuperscript{316} defines "character education" to mean

[I]Instructional strategies that:
(1) Instill and promote core values and qualities of good character in students including altruism, citizenship, courtesy, honesty, human worth, justice, knowledge, respect, responsibility, and self-discipline;
(2) Reflect the values of parents, teachers, and local communities; and
(3) Improve the ability of students to make moral and ethical decisions in their lives.\textsuperscript{317}

The bill amended KRS § 156.095(3)\textsuperscript{318} to allow professional development programs under the auspices of the Kentucky Department of Education to include strategies to incorporate character education throughout the curriculum.\textsuperscript{319} It also amended KRS § 158.060 to consider that character education programs are valuable and legitimate components of the actual schoolwork that constitutes a school day.\textsuperscript{320} In a related vein, Ky. House Bill 506\textsuperscript{321} amended KRS § 158.175\textsuperscript{322} to direct the Kentucky Board of Education to develop a program of instruction relating to the flag of the United States and related patriotic exercises.\textsuperscript{323}

In delivering their instructional programs, school districts often use adult volunteers in supplementary instructional and non-instructional activities with pupils. Ky. House Bill 136 now expressly authorizes that practice.\textsuperscript{324} However, each local board of education must develop and adopt a policy requiring a state criminal records check on all volunteers that have contact with students on a regularly scheduled or continuing basis.\textsuperscript{325} Student teachers also are subject to the requirement of a criminal records check as a result of another amendment, House Bill 204.\textsuperscript{326}

The Education Professional Standards Board can discipline certified school employees for various forms of misconduct, including crimes.\textsuperscript{327} House Bill 623\textsuperscript{328} extends that authority to misdemeanor violations for controlled substances and to violations of the code of ethics promulgated by the board pursuant to KRS § 161.028(1)(h).\textsuperscript{329} Ky. House Bill 25 further expands the board's responsibilities to include implementation of the Teachers' National

\textsuperscript{316} 2000 Ky. Acts 162.
\textsuperscript{317} Id.
\textsuperscript{318} Ky. REV. STAT. ANN. § 158.060 (Michie 2001).
\textsuperscript{319} 2000 Ky. Acts 162.
\textsuperscript{320} Id.
\textsuperscript{322} Ky. REV. STAT. ANN. § 158.175 (Michie 2001).
\textsuperscript{323} 2000 Ky. Acts 235.
\textsuperscript{324} 2000 Ky. Acts 336.
\textsuperscript{325} Id.
\textsuperscript{326} 2001 Ky. Acts 60.
\textsuperscript{327} See 2000 Ky. Acts 269
\textsuperscript{328} Id.
\textsuperscript{329} Ky. REV. STAT. ANN. § 161.028(1)(h) (Michie 2001).
Certification Trust Fund. The fund provides stipends for teachers to prepare for certification by the National Board for Professional Teaching Standards. School-based Decision Making Councils are local policy-making bodies. Senate Bills 76 and 265 adjust the qualifications for membership on the council and require that the council adopt a policy to be implemented by the principal regarding consultation in the selection of personnel. School councils must now also consult on maintenance of a school library media center. House Bill 324 charges every board of education to establish and maintain a library media center in every elementary and secondary school and employ a school media librarian to manage its operations.

Among the other powers of local boards of education is the power of eminent domain. An amendment to KRS § 416.560 in House Bill 284 eliminates the requirement that local boards of education ask the Finance and Administration Cabinet to institute condemnation proceedings on its behalf. The change to annual legislative sessions necessitated amendments made by House Bill 173, may also affect construction of school facilities.

Finally, Senate Bill 64 amended the definition of "exceptional children and youth" in KRS § 157.200. Children so defined are eligible to participate in special education programs. The bill also amends KRS § 158.150(6) to provide that in certain circumstances suspension of exceptional children is considered a change of educational placement.

IV. AN AFTERWORD - U.S. SUPREME COURT 2002

Just as this article was going to press, the U.S. Supreme Court rendered its opinion in Owasso Independent School District v. Falvo. In Falvo, the Court decided that peer grading, the practice of asking students to score each other's tests, papers, and assignments, does not violate the Family Educational Rights and Privacy Act of 1974.
Kristja Falvo, the parent of three children in the Owasso public schools, claimed that peer grading embarrassed her children. She asked the school district to adopt a policy banning peer grading. The school district declined to do so.\(^{349}\) She then filed a class action suit in the United States District Court alleging that the peer grading policy violated the Act.\(^{350}\) The district court granted summary judgment for the school district.\(^{351}\) It held that grades put on papers by other students are not at that stage records within the meaning of the Act.\(^{352}\) The Court of Appeals for the Tenth Circuit reversed, finding that grades marked by students on other students’ work were records protected by the Act, and the very act of grading was an impermissible release of the information to the student grader.\(^{353}\)

The U.S. Supreme Court assumed without deciding that the Act affords a private right of action in cases such as this.\(^{354}\) Turning to the merits, a unanimous\(^{355}\) Court rejected the interpretation of the Court of Appeals as one that “would effect a drastic alteration of the existing allocation of responsibility between States and the National Government in the operation of the Nation’s schools.”\(^{356}\) The student papers are not educational records within the meaning of the act for two reasons. First, at the point of grading, the student papers are not “maintained” within the meaning of the Act; second, a student grader is not “a person acting for” the school district.\(^{357}\) Limiting its holding to the narrow point presented, the court expressly did not decide the broader question whether the grades on individual student assignment, once turned in to teachers, are protected by the Act.\(^{358}\)

The following day the U.S. Supreme Court heard oral argument in *Zelman v. Simmons-Harris*.\(^{359}\) The case is a challenge to the program of school vouchers as it operates in Cleveland, Ohio. Ohio adopted the Pilot Project Scholarship Program in 1995 as a response to a deepening educational crisis within the Cleveland City School District.\(^{360}\) The Pilot Project Scholarship Program provides two types of general relief for poverty-level families in the Cleveland school district. It grants scholarship awards that may be used at the qualifying school of the parents’ choice, and it provides to public school students money grants that may be used to pay for private tutoring.\(^{361}\)

\(^{349}\) *Owasso Indep. Sch. Dist.*, 122 S.Ct. at 937.

\(^{350}\) *Id.*

\(^{351}\) *Id.*

\(^{352}\) *Id.*

\(^{353}\) *Id.* at 937-38.

\(^{354}\) The court granted certiorari on this issue in another case. See *Gonzaga Univ. v. Doe*, 122 S. Ct. 865 (2002) (mem.).

\(^{355}\) *But see Owasso Indep. Sch. Dist.*, 122 S. Ct. at 941 (Scalia, J., dissenting).

\(^{356}\) *Id.* at 938.


\(^{358}\) *Id.* at 940.

\(^{359}\) 122 S. Ct. 916 (2002) (mem.).

\(^{360}\) See *Ohio Rev. Code* § 3313.974-979 (West 2001).

\(^{361}\) *Id.*
The case presents an Establishment Clause attack on the program. The federal District Court granted summary judgment in favor of respondents and enjoined the distribution of scholarships under the program. A divided panel of the Sixth Circuit affirmed the District Court's permanent injunction, holding that the program violates the Establishment Clause because it has the primary effect of advancing religion and constitutes an endorsement of religion and "sectarian" education. The Sixth Circuit reasoned that the decision in Committee for Public Education and Religious Liberty v. Nyquist controlled. The Supreme Court granted certiorari to consider whether the Establishment Clause prohibits Ohio's program from authorizing parents to use the scholarships at any private school, whether religious or not. A decision is expected by summer.

362 See Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999). At an earlier stage of the litigation, the case involved a multifaceted challenge to the voucher program in Ohio state court. Id. The state trial court upheld the constitutionality of the program, but the state court of appeals reversed. Id. On appeal, the Ohio Supreme Court concluded that the program did not violate the Establishment Clause, but held that the original enactment of the program violated the "single subject" requirement imposed by the Ohio Constitution. Id.
364 Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000).
366 Zelman v. Simmons-Harris, 122 S. Ct. 23 (2001) (mem.).
A SURVEY OF KEY ISSUES IN KENTUCKY ELDER LAW

by Adrienne Noble Nacev and Jeremy Rettig

I. INTRODUCTION

There are now more than 626,800 Kentuckians who are sixty (60) years old or older. Even more significant is the projection that "the older population will burgeon between the years 2010 and 2030 when the "baby boom" generation reaches age 65." As the number of older Americans increases, so too will the number of older Kentuckians. This burgeoning population of older Kentuckians will need legal counseling in those areas of law of particular concern to elders and will fuel the demand for attorneys practicing elder law in Kentucky. Although attorneys practicing in Kentucky generally cannot "specialize" in any particular area of law, "a lawyer [practicing in Kentucky] may communicate the fact that he or she has achieved a national certificate by an organization . . . by clearly identifying the certification and the organization" conferring the distinction. An indication of the growing importance of elder law is the fact that elder law is one area of the law in which such national certification is available.

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3 See Cabinet for Health Services, May is Older Americans Month (visited March 6, 2002) <http://chs.state.ky.us/chs/news/newsreleases/2001/nr0501.doc> (stating that "Governor Paul E. Patton has proclaimed May [2001] as Older Americans Month to honor the more than 626,800 Kentuckians who are 60 [sic] years old or older"); see also United States Department of Health and Human Services Administration on Aging, Profile of Older Americans: 2000 (visited March 6, 2002) <http://www.aoa.dhhs.gov/aoa/stats/profile/default.htm> (estimating that in 1999, there were approximately 493,154 Kentuckians sixty-five (65) years old or older).
4 United States Department of Health and Human Services Administration on Aging, supra note 3 (finding that the number of Americans sixty-five and older (65+) will likely double from 34.5 million in 1999 to around 70 million by 2030).
5 See KY. SUP. CT. R. 3.130(7.40).

A lawyer shall not state or imply that the lawyer is a specialist except as follows: (1) A lawyer admitted to engage in patent practice . . . (2) certified by an appropriate governmental agency in admiralty practice . . . (3) A lawyer may communicate the fact that he or she has achieved a national certificate by an organization qualifying under Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S. Ct. 2281 (1990), by clearly identifying the certification and the organization that has conferred the distinction, and such communication may occur only for so long as the lawyer remains so certified and in good standing with the organization.

Id.

6 See National Elder Law Foundation, Becoming a Certified Elder Law Attorney (visited March 6,
The National Elder Law Foundation (NELF) tests several categories of legal knowledge pertinent to the needs and concerns of elders as a pre-requisite to certification, which provides a guide to the scope and breadth of elder law. 

"Topics of review provided by the National Academy for Elder Law Association for becoming a ‘certified elder law attorney’ include":

1) Health and Personal Care Planning;
2) Residents Rights Advocacy;
3) Housing Issues;
4) Litigation & Administrative Advocacy;
5) Fiduciary Representation;
6) Retirement Planning;
7) Legal Capacity;
8) Income, Estate and Gift Tax;
9) Public Benefits;
10) Advice on Insurance Matters.

This survey article will address Kentucky statutory and case law as well as Kentucky administrative materials unique to elders. It will focus primarily on key recent developments that relate principally to the physical care, housing and medical treatment of elders in light of financial concerns and the potential need for financial guidance and assistance. The survey will not address areas of law covered in other legal disciplines or addressed primarily at the federal level. Although federal law is of fundamental import in Elder Law, this survey article will focus on Kentucky law.

Section II of this survey article provides historical background providing to practitioners a basic idea of the evolution of elder law in the United States in general and in Kentucky in particular. Section III will address fiduciary representation with an emphasis on (a) guardianship and (b) powers of attorney. Section IV will address health and end of life-decision making with an emphasis on living wills and advance directives. Section V discusses Health, Housing, and Human Rights. Subsection (a), of Section V, will address long-term care insurance; subsection (b) will address Medigap policies; subsection (c) will address Medicaid in Kentucky; subsection (d) will address housing counseling with respect to reverse mortgages; subsection (e) will address resident rights advocacy with regard to patients rights in nursing homes and assisted-living.

See also Amelia E. Pohl, What Is Elder Law Anyway?, 19 NOVA L. REV. 459, 459-63 (1995), reprinted in THOMAS P. GALLANIS ET AL., ELDER LAW, READINGS, CASES, AND MATERIALS 50 (2000). The National Elder Law Foundation (NELF) issues a “national certificate” to those who have demonstrated sufficient proficiency in elder law to meet their standards. Certification by NELF would allow the attorneys who wish to practice elder law in Kentucky to “communicate the fact that [they have] achieved a national certificate” so long as the attorney follows the guidelines of Kentucky Supreme Court Rule 3.130(7.40) as set out in footnote 5 above. Id.

See id.

This article will not address pre-mortem planning; insurance, other than long-term care insurance and Medigap policies; employment and retirement advice including social security; Medicare; income, estate, and gift tax advice; age and/or disability discrimination counseling and litigation and administrative advocacy, except as it relates specifically to covered areas. Those areas of law are either within the purview of those who concentrate in those fields or are addressed primarily at the federal level.
communities in Kentucky; and subsection (f) will address the abuse and neglect of elderly.

II. HISTORICAL BACKGROUND

Elder law as a distinct area of law, including Medicaid, Medicare, Medigap and long-term care insurance, is a fairly recent phenomenon. However, the concerns related to the care of those approaching the later portion of life and the appurtenant legal developments are not as recent. Nursing homes and other facilities that provide care for the elderly have long been a focus of concern and therefore provide the basis of this historical analysis of elder law.10

The operation of nursing homes is not recent. In fact, nursing homes originated in the United States in the eighteenth century as “poor relief centers.”11 During the eighteenth century, responsibility was placed on the “individual family to care for their own elderly family members.”12 Essentially, care of elders consisted of in-home care at the family level rather than on an institutional level or based on a sophisticated business or government funded program.13 The idea was one of morals and reciprocity. While families took care of their elderly family members, the elderly did what they could to help out in return.14 Through culture and law, the responsibility of caring for the elderly was placed on individual families rather than on government.15 Most evidence seems to indicate that in the eighteenth and possibly early nineteenth century, the government’s role was minor.16

As time progressed, the care of elderly made an about-face and took on a more structured and formal approach as government became more involved.17 The goal was to motivate persons who were receiving care from the newly created poor houses and almshouses18 to lead more upstanding lives and avoid private or public aid.19 By the end of the 1800’s, elders constituted a growing portion of the poor in almshouses and were transforming the almshouses into

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10 See David A. Bohm, Article, Striving for Quality Care in America’s Nursing Homes: Tracing the History of Nursing Homes and Noting the Effect of Recent Federal Government Initiatives to Ensure Quality Care in the Nursing Home Setting, 4 DePaul J. Health Care L. 317, 324 (2001).
11 Id. at 324.
12 Id. at 324 (citations omitted).
13 Id.
14 Id. at 325.
15 Id. at 326.
16 See Bohm, supra note 10, at 326.
17 Id. at 325-330.
18 The terms almshouses and poor houses seemed to have been used interchangeably in Kentucky, in the early 1900’s, to designate places for the care of indigent elders. See Maydwell v. Louisville, 76 S.W. 1091, 1092 (Ky. 1903) (stating that “[f]or the support of the indigent aged, almshouses are provided”) (emphasis added); Mason County Infirmary v. Smith’s Comm., 1901 Ky. LEXIS 234 (Ky. 1901) (stating that the Mason County Infirmary is the “’poor-house’ of the county” (*2) and that Dina Smith, who was “broken down by the infirmity of years” (*1), and was poor, became an inmate of the infirmary. Furthermore, the “poor-house” provided Ms. Smith with “kind treatment, clothing, lodging, nursing and medical attention” (*1)).
19 See Bohm, supra note 10, at 326.
Thus, the government’s role in the care of elders was increasing. Kentucky played its part in providing public monies to almshouses, as shown by case law dating back to 1893. Many Kentucky municipalities were authorized to purchase ground and erect poorhouses and almshouses on that land as early as 1874. Furthermore, providing almshouses for the support of the elderly was considered a public purpose; therefore, the local governments could tax its citizens to maintain the support of the elderly.

A person who was a “pauper” was a proper subject for a publicly funded poorhouse. Any property in the “pauper’s” possession at the time they were admitted to the poorhouse would be used by the local government to help pay for the care and maintenance of the “pauper.” However, there was only a prospective but no retrospective obligation for the “pauper” to pay for the “pauper’s” care if the property was acquired after their arrival to the poorhouse.

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20 Id. Due to the lack of care in many poor houses and almshouses, new facilities were developed and eventually the elderly population became the “mainstream resident” for the poor houses and almshouses by the late 1800’s. Id. at 328.
21 Id. at 325-331.
22 See Clayton v. City of Henderson, 44 S.W. 667 (Ky. 1898) (quoting 1893 Ky. St. § 3290: “[t]he common council of each of said cities shall . . . have power by ordinance . . . [t]o establish and erect hospitals, almshouses, city prisons . . . .”) (emphasis added).
23 See Mason County Infirmary, 64 S.W. at 466 (stating that “[b]y an act of the Legislature approved on the 4th of February, 1874, Mason County was authorized to purchase ground, and erect thereon a county poorhouse infirmary.”).
24 See Maydwell, 76 S.W. at 1092 (stating that while the Kentucky Constitution does not allow the collection of tax except for a public purpose, a public purpose means “whatever is necessary for the preservation of the public health and safety” including “the support of the indigent aged,” for which “almshouses are provided”).
25 See Mason County Infirmary, 64 S.W. at 466 (stating procedures to be followed when persons were admitted to the county infirmary as paupers).
26 Id. The court stated that Section 21 of the act provides:

Where persons are admitted into said county infirmary as paupers, and such persons be possessed of or the owners of real or personal property, or having an interest in same in reversion, or in any other manner, legally entitled to any gift, legacy, or bequest, or whatever nature or kind so-ever, the directors may, as soon after such persons admitted to said infirmary as they may think proper, take possession of all or any such property, or other interest such pauper may lawfully be entitled to, and sell or dispose of same as herein-after provided; and the net proceeds arising therefrom shall be applied, in whole or in part, under the especial directions of said directors, and in such manner as they think best, to the maintenance of such person during the continuance of such person as a pauper in said infirmary.

Id. (emphasis added) (citations omitted). In other words, if you owned property of any kind when you were admitted to the poorhouse, the county could sell your property and use the proceeds to pay for your stay. However, this statute was not retroactive and if you received property during or after your stay, the property could not be sold for the purpose of paying back previous care, but could be used for continued maintenance and care that was rendered. See id. at 467 (stating that the “charter is entirely prospective in its operation”). The theory of selling property to use the proceeds to pay for your stay is reflected in Medicaid “spend-down.” See discussion infra Section V.c.
27 Id.
Local government maintenance of almshouses continued through the 1920’s in Kentucky.\(^{28}\) Through the 1930’s, “being old all too often meant being poor.”\(^{29}\) The Social Security Act of 1935 not only helped to change this, but it also changed the role of public poor houses by indirectly transforming them into modern nursing homes.\(^{30}\) Before the Social Security Act was passed, the public poor house was envisioned as a place of last resort; however, the Act “signified that the community was once again accepting the poor and elderly as community members.”\(^{31}\) As Federal programs began to reimburse certain poor houses, those facilities became the “‘singularly most important source of institutional care for America’s elders.’”\(^{32}\)

The Social Security Act was an attempt to create a type of social insurance.\(^{33}\) United States citizens began paying into Social Security in 1935, and by 1940, the first American received her first payment of monthly benefits.\(^{34}\) The Social Security Act essentially defined who is an elder and thus paved the way for modern elder law.\(^{35}\)

\(^{28}\) See Zachert v. Louisville, 282 S.W. 1071 (Ky. 1926) (stating that Louisville had the authority to establish and maintain almshouses). In Zachert, the court implied that the operation of an almshouse came with limited liability. Miss Zachert worked for the Louisville City Hospital and while on duty was injured when a boiler exploded. \textit{Id.} at 1071. Ms. Zachert then brought an action against the city to recover damages. \textit{Id.} The City filed a general demurrer to the petition, which the Circuit Court sustained. \textit{Id.} The law in Kentucky stated that “a municipal corporation is not liable in actions for negligence in the performance of public duties incident to the exercise of its governmental functions; and . . . that the doctrine of respondeat superior does not apply to such employments.” \textit{Id.} at 1071. The Court of Appeals held that the city of Louisville was not liable for the reasons stated above and because the Kentucky Constitution and the municipal charter state that the city “is not responsible to persons injured by reason of the misconduct or negligence of its agents and employees therein.” \textit{Id.} at 1071.


\(^{30}\) See Bohm, \textit{supra} note 10, at 329.

\(^{31}\) \textit{Id.} at 329

\(^{32}\) \textit{Id.} (citations omitted).

\(^{33}\) See A Brief History of Social Security, \textit{supra} note 29.

\(^{34}\) \textit{Id.}

On January 31, 1940, the first monthly retirement check was issued to a retired legal secretary, Ida May Fuller, of Ludlow, Vermont, in the amount of $22.54. Miss Fuller died in January 1975 at the age of 100. During her 35 years as a beneficiary, she received over $22,000 in benefits.

\(^{35}\) \textit{Id.} (stating that, in 1956, the eligibility age for women was lowered to 56, and in 1961, the eligibility age for men was lowered to 62); \textit{see also} Social Security Administration, \textit{How Your Retirement Benefit is Figured} (visited Jan. 03, 2002) <http://www.ssa.gov/pubs/10070.html> (stating that (i) today, everyone is eligible for Social Security benefits at age 65; however, you can receive benefits at 62, but the benefits would come at a reduced rate; and (ii) that, Social Security benefits are based on earnings averaged over most of a worker’s lifetime. Your actual earnings are first adjusted or “indexed” to account for changes in average wages since the year the earnings were received. Then [the Social Security Administration] calculate[s] your average monthly indexed earnings during the 35 years in which you earned the most. [The Administration then] appl[ies] a formula to these earnings and arrive[s] at
The enactment of the Social Security Act sparked a transformation in elder law from a system that simply provided local almshouses and poorhouses to care for the elderly poor, into a complicated system whereby certain facilities received reimbursement for the care of elders and Federal, State and local government benefits were provided for the elderly who qualified.\textsuperscript{36} Social Security eventually led to the provision of disability benefits, which led to Medicare health insurance for seniors, and eventually led to the creation of Medicaid which is a major funding source for nursing home and community-based care for low-asset and low-income elders.\textsuperscript{37} Eventually, Medigap insurance policies were created as supplemental health insurance to Medicare, but unlike Medicare, Medigap is regulated by the insurance department in each state.\textsuperscript{38} As more and more elderly individuals became eligible for the various governmental programs, elder law dramatically changed into a mass of oftentimes confusing laws and regulations pertaining to medical needs and eligibility requirements.\textsuperscript{39}

In 1978, elder abuse became a formal part of Kentucky elder law, thus further broadening the horizon of elder law issues.\textsuperscript{40} Today, elder abuse hotlines have been established\textsuperscript{41} and older Kentuckians can now rely on patients' rights statutes\textsuperscript{42} that afford protection for patients in long-term care facilities, or elder abuse committees and other enforcement protocols to protect the elderly population in Kentucky, as well as on legislation, to prevent certain criminals from working with the elderly.\textsuperscript{43} Elderly are also protected from employees that have a history of abuse.\textsuperscript{44} Kentucky has undertaken its role as co-administrator

\textsuperscript{36} See A Brief History of Social Security, \textit{supra} note 29. During the 1960's, Medicare was created to provide health coverage for those Social Security beneficiaries that were aged 65 or older. This later extended to those receiving disability benefits. \textit{Id.}

\textsuperscript{37} See Legal Information Institute (LII), \textit{Medicaid Law: an Overview} (visited Feb. 11, 2002) \textless http://www.law.cornell.edu/topics/medicaid.html\textgreater . Medicaid is a "medical assistance program jointly financed by state and federal governments" for lower income persons including elders, enacted in 1965 as an amendment to the Social Security Act and is now a major social welfare program administered by the Health Care Financing Administration. \textit{Id.}


\textsuperscript{39} See 907 KY. ADMIN. REGS. 1:005 et. seq. (2001).

\textsuperscript{40} See Cabinet for Families and Children, \textit{Elder Abuse Fact Sheet} (visited Feb. 11, 2002) \textless http://cfc.state.ky.us/cfconline/august2000/elderabusestats.htm\textgreater . To report elder abuse you can call your local law enforcement or this hotline at 1-800-752-6200 at any time and to report a problem involving a nursing home you can call the Ombudsman program at 1-800-372-2991. \textit{Id.}

\textsuperscript{41} See K.Y. REV. STAT. § 216.515 (Michie 1998), \textit{infra} note 424.

\textsuperscript{42} K.Y. REV. STAT. § 216.532. Section 216.532 states that, "[t]he long-term care facilities as defined in KRS 216.510 shall not be operated by or employ any person who is listed on the nurse aide abuse registry required by 42 C.F.R. 483.156." \textit{Id. See also id.} § 286.787.


The Cabinet for Families and Children shall create an Elder Abuse Committee
of Medicaid. In 1994, Kentucky updated its “Living Will Directive Act” in order to provide the citizen broader power with regard to end-of-life decisions.

In 2000, the Kentucky General Assembly enacted a set of “Assisted-Living Communities” statutes, which went into effect in July of 2000. Assisted living communities provide more independence than traditional skilled nursing homes, while requiring strict certification standards. A major reason for the creation of the assisted-living statutes was to provide a “preferred residential housing and service arrangement that promotes independence, dignity and choice” to older Kentuckians. “Clients” of assisted-living communities in Kentucky must be able to take care of themselves for the most part or have someone from the outside come in and care for them.

Elder law effectively has been transformed into an enormous area of law consisting of several individual areas of practice. Today, Elder law involves...
A SURVEY OF KENTUCKY ELDER LAW

retirement planning, estate planning, Medicaid, Medigap, elder abuse prevention, and resident’s rights, among other issues. The remainder of this article will survey the above and other key recent developments in Kentucky Elder law.

III. FIDUCIARY REPRESENTATION

A. Guardianship

This section of the Survey will address the different types of guardianships under the Kentucky Revised Statutes. After a discussion of the statutory law, this section will examine the existing case law interpreting the statutory law and other aspects of guardianship as it relates to elder law in Kentucky.

1. Attorney-in-fact Can Be Appointed Guardian

One concern involves the question of what happens to the elderly client who has already granted someone a power of attorney and by doing so has chosen who they want to protect their assets. A client can plan for incapacity by voluntarily creating a durable power of attorney enabling many transactions to continue to occur on behalf of the principal even if incapacitated. However, if an elder client does not create a durable power of attorney and is then determined

52 It is difficult to limit the scope of history of Elder law; such a history could extend for countless numbers of pages; thus, the historical background of Elder law must be abbreviated for the purpose of this Survey.

53 Title XXXIII of the Kentucky Revised Statutes is titled “Administration of Trusts and Estates of Persons Under Disability.” Chapter 387 under Title XXXIII can be subdivided into two subsections. The first subsection consists of 387.010 -387.280. Section 387.010 provides the definitions for sections .010 to .280. The first definition defines the term “minor.” See KY. REV. STAT. § 387.010(1) (Michie 1999). Section 387.010(3) defines “guardian” as “an individual, agency, or corporation appointed by the District Court to have care, custody, and control of a minor and to manage the minor’s financial resources.” Id. § 387.010(3) (emphasis added). The second subsection to Chapter 387 is further titled “Guardianship and Conservatorship for Disabled Persons” and covers 387.500 to 387.800. Id. § 387.500 -.800. This second subsection has its own set of definitions in 387.510. Id. § 387.510. Section 387.010-.280 deals exclusively with minors and 387.500-.800 deal with adults both of whom require district court appointment upon a showing of disability. Id. §§ 387.020 and 387.520.

54 There is no established process or definition for determining incapacity or disability with regard to the durable power of attorney. Rather, they are to be determined by the courts. For instance, the terms "incapacity" and "disability" as used in K.R.S. 386.093 . . . are not defined in Chapter 386 and should be given their common and ordinary usage . . [. moreover,] [t]he period of incapacity or disability . . means that time prior to an adjudication of disability during which the principal's competency is legally uncertain but is capable of being determined by the courts . . . K.R.S. 386.093 relates to the effect of a Power of Attorney during later uncertainty as to whether the principal is 'alive' or 'dead'. . . Frequently, it is very uncertain as to when disability begins . . .

Rice v. Floyd, 768 S.W.2d 57, 58-59 (Ky. 1989) (emphasis added).
incapacitated by a district court in the controlling jurisdiction, the court will appoint a guardian or conservator to manage the principal's financial and/or personal affairs. The court will appoint a conservator for the principal if the principal requires assistance with only their financial assets, whereas the court will appoint a guardian if a person is disabled in managing both his personal affairs and his financial assets. Although a power of attorney, in general,

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55 See Rice, 768 S.W.2d at 60. (stating that incapacity or disability, as it relates to guardianship proceedings, is determined by a jury, whereby the jury will find the principal partially disabled, fully disabled, or not disabled at all with regard to the management of both the principal's financial and personal affairs. Upon such determination by the jury, "the court shall, without the jury, determine the type of guardian or conservator to be appointed"). Id. (citations omitted). See also KY. REV. STAT. § 387.510(8)(a)-(b) (Michie 1999). Chapter 387 states, " Disabled " means a legal, not a medical disability, and is measured by functional inabilities. It refers to any person fourteen (14) years of age or older who is:

(a) Unable to make informed decisions with respect to his personal affairs to such an extent that he lacks the capacity to provide for his physical health and safety, including but not limited to health care, food, shelter, clothing, or personal hygiene; or

(b) Unable to make informed decisions with respect to his financial resources to such an extent that he lacks the capacity to manage his property effectively by those actions necessary to obtain, administer, and dispose of both real and personal property.

Such inability shall be evidenced by acts or occurrences within six (6) months prior to the filing of the petition for guardianship or conservatorship and shall not be evidenced solely by isolated instances of negligence, improvidence, or other behavior.

Id.

56 See KY. REV. STAT. § 387.590(1)-(5) (Michie 1999). Appointing a guardian or conservator depends upon the level and type of disability of the principal and therefore is determined by the court, on a case-by-case basis, and in accordance with Kentucky Revised Statute Section 387.590. Section 387.590 provides in part:

(1) If the respondent is found partially disabled in managing his personal affairs, but not partially disabled or disabled in managing his financial resources, a limited guardian shall be appointed.

(2) If the respondent is found partially disabled in managing his financial resources, but not partially disabled or disabled in managing his personal affairs, a limited conservator shall be appointed.

(3) If the respondent is found partially disabled in managing both his personal affairs and financial resources, a limited guardian shall be appointed, unless the court considers it in the best interest of the ward to appoint both a limited guardian and a limited conservator.

(4) If the respondent is found disabled in managing his financial resources, but not partially disabled or disabled in managing his personal affairs, a conservator shall be appointed.

(5) If the respondent is found disabled in managing both his personal affairs and financial resources, a guardian shall be appointed, unless the court considers it in the best interest of the ward to appoint both a limited guardian and a conservator.

Id. § 387.590(1)-(5).

57 See id. § 387.510(1) (defining "conservator" as, "an individual, agency, or corporation appointed by the court to manage the financial resources of a disabled person"). See also id. § 387.590(4)-(5) supra note 56.
likely be subject to a subsequent appointment of a guardian, if a power of attorney has been created, the court will take notice of who the attorney-in-fact is and in appointing a guardian will give "due consideration" to the incompetent's preference.

2. There must be Strict Compliance with the Guardianship Statute

A central focus of recent Kentucky guardianship cases is the obligation of the guardian to comply strictly with the requirements of the guardianship statutes. Thus, the Kentucky Supreme Court has expressly stated that "[p]racticing members of the bar should be aware that strict compliance with the guardianship statute is necessary and expected."

Several of the more specific duties of a guardian include: (1) taking custody of the ward and establishing the ward's place of abode within the state; (2) making provisions for the ward's care and maintenance; (3) providing "any

58 See Rice, 768 S.W.2d at 59.
59 See Ky. REV. STAT. § 387.600(2) (Michie 2001). Section 387.600(2) states that,

[p]rior to the appointment, [of a guardian] the court shall make a reasonable effort to question the respondent concerning his preference regarding the person or entity to be appointed limited guardian, guardian, limited conservator, or conservator, and any preference indicated shall be given due consideration. If the respondent has designated another as his attorney in fact or agent by executing a power of attorney in writing, that designation shall be treated as an indication of the respondent's preference as to the person or entity to be appointed as his limited guardian, guardian, limited conservator, or conservator, and that preference shall be given due consideration. The court shall appoint the person or entity best qualified and willing to serve.

60 Scott v. Montgomery Traders, 956 S.W.2d 902, 904 (Ky. 1997) (dealing with guardianship as it is applied to minors).
61 See Ky. REV. STAT. § 387.660(1) (Michie 1999). Section 387.660(1) states that a guardian, unless modified by the court, is required,

[to take custody of the ward and to establish his place of abode within the state, except that, if at any time a guardian places a ward in a licensed residential facility for developmentally disabled persons, the guardian shall, within thirty (30) days of such placement, file with the court notice of the placement, stating with specificity the reasons for such placement, and an interdisciplinary evaluation report detailing the social, psychological, medical or other considerations on which such placement is predicated, a description of the treatment or habilitation programs which will benefit the ward as a result of such placement, and a determination that such placement will provide appropriate treatment in the least restrictive available treatment and residential program. For purposes of this subsection, the interdisciplinary evaluation report may be one performed within two (2) months prior to the placement for purposes of determining whether such placement is necessary and appropriate, or may be an evaluation and assessment provided by the residential facility immediately after placement. Notice to the court shall not be required where the ward is transferred from one licensed residential facility to another.

62 Id. § 387.660(2). Section 387.660(2) requires a guardian, unless her powers and duties are modified by the court, "[t]o make provision for the ward's care, comfort, and maintenance and
necessary consent ... to enable the ward to receive medical or other professional care ... 

4 (4) managing the ward's financial resources while expending only those sums "reasonable and necessary to carry out the powers and duties assigned" to the guardian by the court;64 (5) assuring that all rights of the ward are protected;65 and (6) filing an annual report with the court.66 The duties and obligations of a guardian are, however, subject to modification by order of the court.67

A guiding principle is that protection is to be achieved as unobtrusively as possible. Kentucky Revised Statute Section 387.500 provides that the means for individuals and courts to legally protect persons who are wholly disabled or partially disabled are to be accomplished by imposing the least restrictive means to afford protection on the basis of individual needs.68 "To this end, ... guardianship and conservatorship ... shall be ordered only to the extent necessitated by each person's actual mental and adaptive limitations."69

Kentucky Revised Statutes Section 387.590 also divides both guardianship and conservatorship into subcategories, called limited guardians and limited conservators.70 A limited guardian is defined as a guardian with fewer powers than the full guardian, whose duties and power are "specifically enumerated by court order."71 On the other hand, a limited conservator is defined as, "an individual, agency, or corporation appointed by the court to assist in managing the financial resources of a partially disabled person and whose powers and duties have been specifically enumerated by court order."72

Section 387.605 lists the factors relating to the choice of guardian for the court to consider when appointing an individual or entity as guardian or

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63 Id. § 387.660(3). Section 387.660(3) states that a guardian, unless her powers and duties are modified by the court, is required,

[to] give any necessary consent or approval to enable the ward to receive medical or other professional care, counsel, treatment or service, except that a guardian may not consent on behalf of a ward to an abortion, sterilization, psychosurgery, removal of a bodily organ, or amputation of a limb unless the procedure is first approved by order of the court or is necessary, in an emergency situation, to preserve the life or prevent serious impairment of the physical health of the ward.

64 See KY. REV. STAT. § 387.660(5) (Michie 1999). Section 387.660(5) requires the guardian, "[t]o expend sums from the financial resources of the ward reasonable and necessary to carry out the powers and duties assigned to him by the court and, unless a separate conservator has been appointed, to manage the financial resources of this ward." Id.

65 Id. See infra text accompanying note 77.

66 Id. §387.670(1)(a)-(g); § 387.710 (Michie 1999 & Supp. 2001).

67 Id. § 387.660 (stating that "a guardian of a disabled person shall have the following powers and duties, except as modified by order of the court") (emphasis added).

68 Id. § 387.500(1)-(4) (Michie 1999); see also Rice, 768 S.W.2d at 60 (stating that "K.R.S. 387.500(4) merely advises the trial court of the legislative intent to impose the least restrictive measures under the individual's circumstances.").

69 KY. REV. STAT. § 387.500(3) (Michie 1999) (emphasis added).

70 Id. § 387.590(1)-(5), supra note 56.

71 Id. § 387.510(4).

72 Id. § 387.510(2).
conservator. Section 387.600 (2) requires the court to consider attorneys-in-fact of a grantor as guardians for the grantor once the grantor is determined incompetent. Finally, the guardian statutes protect the incompetent's due process by requiring an interdisciplinary evaluation to be filed with the court and the right of the incompetent to a jury trial with the right to present evidence and the right to confront and cross-examine all witnesses.

3. Advantages of Limited Guardianship

Kentucky law recognizes limited guardianships, which acknowledge the continued capacity of the ward in some areas, if not all areas. A limited guardian is defined by the Kentucky Revised Statues as "a guardian who possesses fewer than all the legal powers and duties of a full guardian, and whose powers and duties have been specifically enumerated by court order." However, these duties may in fact include nearly all the duties of a full guardian. Kentucky Revised Statutes Section 387.640 requires the limited guardian to comply with the specific duties and powers the court assigns. A court may assign a limited guardian any portion of the duties that a full guardian possesses. The limited guardian must also comply with the reporting requirements placed on a full guardian.

In order to implement the principle that the least restrictive means should be used to protect a ward, the Supreme Court, in *Bye v. Mattingly*, held that the appointment of a limited guardian because of Alzheimer's does not destroy the testamentary capacity of the ward and does not create a presumption of the lack of testamentary capacity of the ward; and the court held further that the guardian does not have the burden of proving that there was no undue influence between the guardian and the ward.

In 1988, William McQuady (Mr. McQuady) executed a will leaving his entire estate to his surviving spouse, but if there were no surviving spouse, "all

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73 Id. § 387.605.
74 See supra note 59.
75 See KY. REV. STAT. §§ 387.540(1); 387.570(1) (Michie 1999).
76 Id. § 387.540(1).
77 See id. §§ 387.640–670.
78 Id. § 387.510(4) (emphasis added).
79 Id. § 387.640.
80 Id. § 387.650. Section 387.650 states that,

[the court may assign to a limited guardian any portion of the powers and duties specified in KRS 387.660. The court may assign other duties as are necessary to enhance the ward's safety and well being. A limited guardian shall comply with the reporting requirements specified by KRS 387.670 which pertain to his powers and duties as specified by the court, provided that all reports submitted shall include the information required by paragraphs (d) and (f) of KRS 387.670(1).

Id.
81 Id. See also KY. REV. STAT. § 387.670 (Michie 1999), supra text accompanying note 66. Id. § 387.660.
82 975 S.W.2d 451 (Ky. 1998).
83 See id.
realty was to pass to Richard Keith McQuady (McQuady) [second cousin to Mr. McQuady]. . . and all personalty was to pass to Samuel Thomas Beavin (Beavin), brother of [Mr. McQuady’s wife] Alberta Beavin McQuady. Mr. McQuady lost some of his eyesight and required assistance; following his wife’s death, he hired Ms. Bye, in May of 1989, to act as housekeeper and perform all tasks necessary to maintain the household.

In July, 1989, Mr. McQuady executed a new will leaving all but $100 to Ms. Bye rather than leaving assets to Samuel Beavin and Richard McQuady. Upon learning of certain expenditures, Beavin and McQuady became suspicious of the use of Mr. McQuady’s money by Ms. Bye. In May 1990, Beavin and McQuady petitioned the District Court to appoint a guardian/conservator for Mr. McQuady. “As a result of that hearing . . . Beavin [was appointed] as a Limited Conservator and Limited Guardian for Mr. McQuady.” In September of 1990, Mr. McQuady was diagnosed with Alzheimer’s disease.

In 1991, Ms. Bye petitioned the District Court to determine whether Mr. McQuady could marry Ms. Bye. Mr. McQuady testified that he was afraid of Ms. Bye and the District Court denied the petition. Several months after the petition to marry was denied, Mr. McQuady executed a new will “to re-enact the will he had executed in 1988, in effect leaving his personalty to Mr. Beavin and his realty to Mr. Richard McQuady.” Although Samuel Beavin drove Mr. McQuady to the law offices to execute the new will, he did not participate in the meeting. The lawyer and Mr. McQuady privately discussed the will Mr. McQuady desired.

Upon Mr. McQuady’s death, in 1992, Ms. Bye brought suit challenging the validity of the 1991 will. Upon appeal to the Kentucky Supreme Court, the first issue discussed was whether a partial disability judgment against an individual removes that person’s testamentary capacity or creates a presumption that a testator lacks testamentary capacity. The second issue discussed was whether a fiduciary relationship between a limited conservator/guardian and his ward creates a burden on the limited conservator/guardian to demonstrate that there was no undue influence.

Mr. McQuady was adjudged partially disabled by the District Court when Beavin was appointed as a Limited Conservator and Limited Guardian.

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Footnotes:
84 Id. at 454.
85 Id.
86 Id.
87 Id. at 454.
88 See Bye, 975 S.W.2d at 454.
89 Id. The Court did not specify the duties and powers assigned to Beavin as the Limited Conservator and Limited Guardian.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
95 See Bye, 975 S.W.2d at 454.
96 Id. at 454-55.
97 Id. at 455.
98 Id.
pursuant to KRS § 387.500 et seq. Ms. Bye argued that such a judgment effectively removed "Mr. McQuady's" capacity to draft a will or in the alternative that [such a judgment created] a presumption against testamentary capacity... .

Disagreeing with Ms. Bye, the Court stated that, "there is a strong presumption in favor of a testator possessing adequate testamentary capacity... [which can] only be rebutted by the strongest showing of incapacity." The Court continued by holding that although a ruling of disability, whether partial or total, is evidence of lack of testamentary capacity, it is not dispositive of the issue. Thus, when someone is found to be suffering from a mental disease, such as Alzheimer's, for which a limited guardian is appointed for the principal, that person is not automatically rendered incapable of drafting a will. The tests of capacity are different for drafting a will and for imposing a guardianship. The Supreme Court illustrated this point by stating, "this Court has always taken the broadest possible view of who may draft a will no matter what their infirmity." While reflecting on precedent, the Court stated that it has upheld the "rights of those afflicted with a variety of illnesses to execute valid wills."

Furthermore, the Court stated that Alzheimer's is variable, does not have a constant negative effect on a person's capacity, and is an illness with which the doctrine commonly referred to as the lucid interval doctrine was designed to deal. Accordingly, "under the [lucid interval] doctrine [Mr. McQuady] is presumed to have been experiencing a lucid interval during the execution of the will." The Court stated the presumption that Mr. McQuady had capacity is a rebuttable one, and to overcome the presumption, the evidence must conclusively

99 Id. (citing KY. REV. STAT. ANN. §§ 387.500 -.800 (Michie 1999 & Supp. 2001)). Section 387.590 states in part, "[i]f the respondent is found partially disabled in managing both his personal affairs and financial resources, a limited guardian shall be appointed, unless the court considers it in the best interest of the ward to appoint both a limited guardian and a limited conservator." KY. REV. STAT. § 387.590(3)(Michie 1999) (emphasis added).

100 See Bye, 975 S.W.2d at 455.

101 Id. (citing Williams v. Vollman, 738 S.W.2d 849 (Ky. Ct. App. 1987); Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. Ct. App. 1985)).

102 See Bye, 975 S.W.2d at 456.

103 Recognizing that the law promotes the creation of a will and appoints a guardian under a least restrictive means standard pursuant to Section 387.500(3), it is arguable that the tests for capacity are parallel for drafting a will and appointing a guardian. For example, the court will likely strive to find capacity when a person drafts a will and a jury finding of incapacitation is required for an appointment of a guardian. See KY. REV. STAT. § 387.570(1) (Michie 1999) (stating that "[a] hearing convened pursuant to KRS 387.500 to 387.770 for the purpose of determining the disability of a respondent, the respondent shall have a jury trial and shall have the right to present evidence and to confront and cross-examine all witnesses.").

104 See Bye, 975 S.W.2d at 456 (citations omitted).

105 Id. (citations omitted).

106 Id. (stating that "[w]hen a testator is suffering a mental illness which ebbs and flows in terms of its effect on the testator's mental competence, it is presumed that the testator was mentally fit when the will was executed."). The Court also stated that, "this is commonly referred to as the lucid interval doctrine." Id. (citing Warnick v. Childers, 282 S.W.2d 608, 609 (Ky. 1955); Pfuelb v. Pfuelb, 122 S.W.2d 128 (Ky. 1938). See In re Weir's Will, 39 Ky. 434 (1840); Watts v. Bullock, 11 Ky. 252 (1822)).

107 See Bye, 975 S.W.2d at 456. However, the Court made it clear that this doctrine only applies when there is evidence that the testator is suffering from a mental illness. Id.
demonstrate that Mr. McQuady lacked testamentary capacity at the time the will was executed to nullify the will.\textsuperscript{108}

On the facts, the Court held that Ms. Bye failed to present enough evidence to rebut the presumption of testamentary capacity.\textsuperscript{109} The Court pointed to Mr. McQuady’s testimony at the marriage hearing and stated that he was “very lucid and demonstrated a complete grasp of the circumstances . . . [and Ms. Bye] . . . failed to offer this Court evidence which demonstrates that [Mr. McQuady] did not have a lucid interval during which he executed the 1991 will.”\textsuperscript{110} The Court held that unless the opposing party presents sufficient evidence to rebut the presumption of the lucid interval doctrine, the Court will restrict the testator's "testamentary rights only when it is absolutely necessary and even then only to the degree required to defend [the testator's] interests."\textsuperscript{111}

In resolving the issue of whether a fiduciary relationship between a limited guardian and the ward imposes a burden on the limited guardian to demonstrate the non-existence of undue influence, the Court relied on the principle that there is “no presumption of undue influence aris[ing] from a bequest by a testator who has a confidential relationship with the beneficiary.”\textsuperscript{112} The Bye Court applied a two-part test to determine if there was in fact undue influence\textsuperscript{113} and a less-explicit third prong requiring that the contestant must also show that the testator was influenced prior to or during the execution of the will.\textsuperscript{114}

The first part of that test is whether the influence was of a type which is inappropriate,\textsuperscript{115} which requires the court to determine “whether the testator [was] exercising [his] own judgment.”\textsuperscript{116} The second part of this test requires that the “influence must be of a level that vitiates the testator's own free will so that the testator is disposing of [his] property in a manner that [he] would

\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 457.
\textsuperscript{112} See Bye, 975 S.W.2d at 458 (citing Palmer v. Richardson, 223 S.W.2d 745, 749-750 (Ky. 1949)). The court in Richardson stated that, "[w]e have often written that though the disposition might appear unreasonable and unfair -- even the disinheritance of a child -- that per se does not conclusively afford or sufficiently prove that it was made through undue influence." Richardson, 223 S.W.2d at 749.
\textsuperscript{113} See Bye, 975 S.W.2d at 457 (stating that "courts must examine both the nature and the extent of the influence.").
\textsuperscript{114} Id. The court held that,

[i]n addition to demonstrating that undue influence was exercised upon the testator, a contestant must also show influence prior to or during the execution of the will. Undue influence exercised after the execution of the will has no bearing whatsoever upon whether the testator disposed of her property according to her own wishes.

Id.
\textsuperscript{115} Id. (providing examples of inappropriate influence are "[i]nfluence from threats, coercion and the like").
\textsuperscript{116} Id. (citing Mayhew v. Mayhew, 329 S.W.2d 72 (Ky. 1959); Copley v. Craft, 312 S.W.2d 899 (Ky. 1958)).
otherwise refuse to do."117 Furthermore, the contestant must show that the testator was influenced before and at the time the will was executed.118

In applying these tests to the facts, the Court stated that it must look for "badges" of undue influence to determine if the will reflects the wishes of the testator.119 The Court held that a search for these "badges" in the 1991 will indicated that there was no undue influence present when the will was executed.120 Although Mr. McQuady was somewhat mentally impaired and going blind, there were several "badges" that were not present in this case, thus indicating the lack of undue influence.121 The will left property to the "natural objects of [Mr. McQuady's] bounty."122 Like the original will, the new will designated Samuel Beavin and Richard McQuady as beneficiaries.123 Both beneficiaries had longstanding relationships with Mr. McQuady. Beavin was Mr. McQuady's brother-in-law, Richard McQuady was Mr. McQuady's second cousin, and Beavin only drove Mr. McQuady to the lawyer's office. Thus, there was no undue influence.124

4. Guardian's Fiduciary Obligations

One area of major concern is the guardian's fiduciary obligations in relation to the ward's funds. The Kentucky Supreme Court, in Priestley v. Priestley, held that guardians must use utmost good faith care with respect to their duties to the ward.125

Id. (citing See v. See, 293 S.W.2d 225 (Ky. 1956); Rough v. Johnson, 274 S.W.2d 376 (Ky. 1955)).

See Bye, 975 S.W.2d at 457, supra text accompanying note 107. The Court did state that even if the influence occurred many years before the execution of the will, but affected the testator at the time of execution, the influence is improper and will render the will null and void.

Id. See Bye, 975 S.W.2d at 457. The court listed examples of "badges" as a, physically weak and mentally impaired testator, a will which is unnatural in its provisions, a recently developed and comparatively short period of close relationship between the testator and principal beneficiary, participation by the principal beneficiary in the preparation of the will, possession of the will by the principal beneficiary after it was reduced to writing, efforts by the principal beneficiary to restrict contacts between the testator and the natural objects of his bounty, and absolute control of testator's business affairs.

Id. (citing Belcher v. Somerville, 413 S.W.2d 620 (Ky. 1967); Golladay v. Golladay, 287 S.W.2d 904, 906 (Ky. 1955)).

Id.

Id.

Id.

Id.

Id. at 458 (stating that, [i]n Kentucky no presumption of undue influence arises from a bequest by a testator who has a confidential relationship with the beneficiary." ) (citations omitted).

Id. at 459 (stating that although there are, "instances in which a will is grossly unreasonable and the principal beneficiary actively participated in its execution, [and] a presumption of undue influence arises," Mr. Beavin "did not become privy to the drafting nor execution of the will" by driving Mr. McQuady to and from the lawyer's offices. Thus, "[u]nder . . . these circumstances . . . we [cannot] say that . . . Mr. Beavin actively participated in the execution of the [1991] will. Accordingly, this presumption does not apply in the instant case." ) (citations omitted).

949 S.W.2d 594 (Ky. 1997).

See id. at 598.
After ten years of marriage, Mr. Priestley suffered an aneurysm and severe disability and was hospitalized. While in the hospital, Mr. Priestley "suffered a fall which added to his physical disability." Mr. Priestley then executed a durable power of attorney. Subsequently, Mrs. Priestley was appointed Mr. Priestley's guardian.

During the time when Mrs. Priestley was acting as attorney-in-fact, prior to her appointment as guardian, she sold assets and placed many of the proceeds in bank accounts in her own name. After being appointed as Mr. Priestley's guardian, Ms. Priestley continued to conduct business for Mr. Priestley.

As guardian, Mrs. Priestley filed an action for medical negligence and loss of consortium against the hospital, which was settled. The settlement provided for the bulk of all payments to be postponed until "well beyond Mr. Priestley's life expectancy."

Mr. Priestley died, and one year later Mr. Priestley's children filed suit against Mrs. Priestley as the decedent's guardian for breach of fiduciary duty. At trial, a jury held that Mrs. Priestley breached her fiduciary duty on the ground that she mismanaged Mr. Priestley's assets. The Court of Appeals reversed but the Supreme Court reversed the Court of Appeals.

In upholding the jury's verdict against Mrs. Priestley, the Court applied the standard laid out in Deaton v. Hale, requiring the guardian or attorney-in-fact to use the "utmost good faith" in managing the ward's assets. The "utmost good faith" standard requires that the guardian must "account for any and all property received by [them] from the [ward]. [The guardian has] the responsibility of explaining to the satisfaction of the Court what disposition was made of the properties." The Court went on to state that "[t]he guardianship statute, KRS 387.600, is highly particularized and requires detailed reporting and review by the court. Our decisions and the statutes are far more consistent with the concept of limited discretion in the fiduciary than with broader discretion . . . ." Thus, when applying the utmost good faith standard, discretion is limited and the guardian does not have broad discretion in their decision-making.

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127 Id. at 595.
128 Id.
129 Id. (Guardianship proceedings had begun in district court; however, because the guardian ad litem appointed for Mr. Priestley suggested that Mrs. Priestley seek a durable power of attorney to manage Mr. Priestley's affairs, the guardianship proceedings were abandoned).
130 Id. at 595-96.
131 See Priestley, 949 S.W.2d at 596.
132 Id. (providing several examples and instances of Mrs. Priestley transacting business for Mr. Priestley).
133 Id. at 595-96.
134 Id. at 596.
135 Id. at 597 (stating that the children brought suit against Mrs. Priestley, individually, as guardian, and as administratrix of Mr. Priestley's estate for "misconduct in each of her three fiduciary capacities").
136 Id. at 595.
137 See Priestley, 949 S.W.2d at 597.
138 592 S.W.2d 127 (Ky. 1979).
139 See Priestley, 949 S.W.2d at 598 (following Deaton, 592 S.W.2d at 130 (stating that "[a]n agent is required to exercise utmost good faith toward his principal" (citations omitted)).
140 Deaton, 592 S.W.2d at 130.
141 See Priestley, 949 S.W.2d at 598.
capacity. Applying this standard, the trial court ruled on each item of expenditure by the fiduciary. The Supreme Court adopted the trial court's analysis that,

This is a case in which Mrs. Priestley is alleged to have breached certain fiduciary duties to Mr. Priestley. Mrs. Priestley's fiduciary duty to Mr. Priestley is not as a matter of law lessened by virtue of the marital relationship. In evaluating the Defendant's motion for a directed verdict, [the court must] emphasize the fiduciary aspects of their relationship, rather than the marital relationship.

Thus, the fiduciary duties are limited and the guardian is required to use an utmost good faith in their decision-making capacity.

5. Breadth of Guardian's Action

Another question is the breadth of the actions a guardian may take on behalf of the ward. Kentucky Revised Statutes, Sections 387.640-.720 lay out specific duties and obligations of both types of guardians and conservators; however, these statutes are "remedial rather than exclusive" and with the exception of K.R.S. 389A.010, powers and specific duties (including the scope thereof) are "assigned by the court." In McElroy v. Taylor, the Supreme Court of Kentucky held that the guardian of an incompetent adult has the ability to file a renunciation of a will on behalf of the ward, and it is within the jurisdiction of the district court to give effect to the renunciation. In 1994, Mrs. Hazel Bellmar died testate and was survived by her husband, Mr. Bellmar, who suffered from Alzheimer's disease. Prior to Mrs. Bellmar's death, Mr. Bellmar's son, William McElroy (McElroy), was appointed as his legal guardian. Upon Mrs. Bellmar's death, acting as guardian of Mr. Bellmar, McElroy filed a renunciation of the will. The executrix of Mrs. Bellmar's estate contested the renunciation.

The primary question before the Supreme Court was whether the district court has jurisdiction over a renunciation of a will by the guardian of an

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142 Id. at 599.
143 Id. at 598-99.
144 The Court did not state in what way the standard was breached, rather the Court stated that, "[i]t is unnecessary to separately discuss each of the transactions claimed to have been in breach of appellee's fiduciary duties. We simply say that we are unpersuaded that the trial court erred in its ruling on any part of the directed verdict motion." Id. at 599.
145 DeGrella v. Elston, 858 S.W.2d 698, 704 (Ky. 1993).
146 Ky. Rev. Stat. § 389A.010 et seq. (Michie 1999) (establishing requirements for the guardian to follow when the sale of real property is involved).
148 977 S.W.2d 929 (Ky. 1998).
149 See id. at 932.
150 Id. at 930.
151 Id.
152 Id.
153 Id.
incompetent adult or whether the renunciation should be filed in the circuit court. The Supreme Court held that renunciation of a will is a probate matter and one within the jurisdiction of the district court. A surviving spouse had a right to elect against a will and take their statutory portion of the estate and this right is a matter involving probate, therefore, it is within the discretion of the district court.

Although it was not a central issue in the case, the Court implied the guardian was permitted to file a renunciation of a will on behalf of the ward. The Court stated that in renouncing the will, "a guardian must behave in the manner in which an ordinary prudent man would conduct his own affairs" when making the decision of whether or not renunciation is right for the ward. To make a determination, the Court will use a "best interest" standard. Because a surviving spouse will generally only file a renunciation of a will if it is in their best interest, i.e., they will be better off renouncing the will, the court must determine if the renunciation by the guardian is, in fact, in the "best interest" of the ward. The Court goes on to remand the case and in so doing states that the executor opposing the renunciation may "present evidence that a renunciation would not be in the ward's best interest."

6. Contracts between the Ward and Guardian

Another area of concern is the validity of contracts between a guardian and a ward. Although it is clear that a guardian can make contracts on behalf of a ward, the validity of a contract between a guardian and a ward is problematic. The Bye Court reiterated in dictum the general rule permitting a guardian to contract for a ward but stated that its decision in Bye did not disturb the "well-settled rule that a contract between a guardian and a ward does indeed create a presumption against the transaction which must be rebutted by the guardian with clear and convincing evidence."

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154 See McElroy, 977 S.W.2d at 930.
155 Id. at 931 (citing KY. REV. STAT. § 24A.120(2), (3)).
156 See McElroy, 977 S.W.2d at 931.
157 Id. (implying that a renunciation of the wards will by the guardian was permissible by stating that, "[t]his case seeks to determine whether the district court has jurisdiction over a renunciation of a will by the guardian of an incompetent adult or whether such a renunciation must be filed in the circuit court.").
158 Id. at 932.
159 Id. at 932 (stating that "the court must determine whether it is in the best interest of the ward").
160 See id.
161 Id.
162 See Meade v. Fullerton's Adm't, 98 S.W.2d 1, 2 (Ky. 1936).
163 Bye, 975 S.W.2d at 458 (citing Meade, 98 S.W.2d at 2 (Ky. 1936) which held that, as the relation between a guardian and ward is considered one of the most important and delicate of trusts, contracts made by guardians with their wards, such as the acquisition of their property immediately after they become of age, are looked upon by the law with suspicion, and upon the appearance of unfairness or abuse of confidence they will be set aside (citation omitted)).
The Court noted the distinction between a contract and a bequest in a will by stating that a will, unlike a contract, does not involve negotiations or competing interests between the donor (ward) and the donee (guardian). However, contracts place the parties in an adversarial relationship for which each participant will try to maximize their own interest. Thus, a presumption is created against a contract between a ward and guardian, and a higher level of scrutiny is applied than is applied in assessing the validity of a will.

7. Guardianship and Termination of Artificial Life Prolonging Treatment

The powers of a guardian are not limited to financial and personal planning for the ward. The powers of a guardian can extend to making end-of-life decisions for an incapacitated ward. The Supreme Court of Kentucky, in DeGrella v. Elston, allowed the district court appointed guardian (who happened to be the ward’s mother) to terminate artificial nutrition and hydration.

One issue in DeGrella was “the right of the legal guardian and next of kin of an incompetent person in a persistent vegetative state to terminate artificial nutrition and hydration.” The guardian sought a declaratory judgment to the effect that the guardian could substitute their judgment for that of the ward. Although there is no specific statutory language directly on point, the Supreme Court held that when a person does not expressly use a living will, there is nevertheless a common law right to terminate artificial treatment upon the showing of clear and convincing evidence that the patient would choose to terminate their life. By adding the common law right of an individual to terminate their own life to the principle of “substituted judgment” that is essentially the foundation of guardianship, the Court held that the guardian could substitute their judgment to terminate artificial treatment for that of a ward upon adults.

The distinction between a bequest in a will and a transaction is that a will gift does not involve any negotiation or competing interests between donor and donee. However, in a transaction, the parties are placed in an adversarial relationship in which each party is attempting to maximize their own benefit without regard to the other. Accordingly, all contracts between a ward and guardian are due a much higher level of scrutiny and thus the presumption against them is created.

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164 Id. at 458. The court stated that:

The distinction between a bequest in a will and a transaction is that a will gift does not involve any negotiation or competing interests between donor and donee. However, in a transaction, the parties are placed in an adversarial relationship in which each party is attempting to maximize their own benefit without regard to the other. Accordingly, all contracts between a ward and guardian are due a much higher level of scrutiny and thus the presumption against them is created.

166 See DeGrella, 858 S.W.2d at 702 (holding that a guardian has the power, upon a showing of clear and convincing evidence that the ward would choose to die, to make the decision for the ward to withdraw life-sustaining treatment).

167 Id. at 705-06.

168 858 S.W.2d 698 (Ky. 1993).

169 See id. at 710 (affirming the trial courts decision to allow the guardian to terminate the wards life-prolonging treatment).

170 Id. at 703.

171 Id. at 701.

172 Id. at 702.
a showing of clear and convincing evidence of the ward’s expression that they would have chosen to terminate their life in that situation.173

Kentucky Revised Statute Section 311.631(3) stretches DeGrella by requiring surrogates with authorization to make health care decisions, such as termination of life-prolonging treatment, to act "in good faith, in accordance with any advance directive executed by the individual who lacks decisional capacity, and in the best interest of the individual who does not have decisional capacity."174

8. Guardianship and Legal Disability Determination

One ongoing question is the relationship between a power of attorney and a guardianship and whether the appointment of a guardian limits or extinguishes the power of the attorney-in-fact under a durable power of attorney. The Supreme Court, in Rice v. Floyd,175 stated that a guardianship imposes broader powers, duties and accountability than does a traditional durable power of attorney or regular power of attorney.176 Accordingly the Court held that a trial judge is "required to conduct a hearing pursuant to K.R.S. 387.5801 when a durable power of attorney is challenged by a petition for a guardianship."177 The Court held that a guardianship supercedes the durable power of attorney.178 The Court pointed to the last sentence of Kentucky Revised Statute 386.093 which

was demonstrated in a recent case before the Kentucky Court of Appeals. Woods v. Commonwealth, Ky. App., 46 K.L.S. 10 (July 30, 1999) (discretionary review granted and Court of Appeals decision ordered not published, April 12, 2000). Woods involved a 71-year-old mildly retarded man who had never been legally competent, and had been a ward of the state since age 18. A cardiac arrest that had deprived him of oxygen left him in a PVS and the Cabinet for Human Resources, as his guardian, sought permission from the court to remove his feeding tube. The court-appointed guardian ad litem contested the petition on the ground that KRS 311.631 was unconstitutional and inconsistent with the court rulings in Cruzan and DeGrella because Mr. Woods had not expressed his wishes on the subject of life-prolonging treatment. The Court of Appeals disagreed. Adopting the opinion of Fayette Circuit Judge Payne, the Court of Appeals upheld KRS 311.631 and authorized its application in the case at bar. In doing so, it recognized that DeGrella left open the question whether life-prolonging treatment could be withdrawn where there was not clear and convincing evidence of the patient's wishes, and concluded that the "best interest" test set forth in KRS 311.631 could be applied in such cases and permitted the removal of the feeding tube. [T]he case is pending on discretionary review by the Kentucky Supreme Court....

175 768 S.W.2d 57 (Ky. 1989).
176 See id. at 59.
177 KY. REV. STAT. § 387.580 (Michie 1999).
178 See id. at 59.
stated that "[i]f a fiduciary is thereafter appointed by the court for the principal, the power of the attorney in fact shall thereupon terminate and he shall account to the court's appointed fiduciary."180

In Rice, Mrs. Floyd executed a durable power of attorney, appointing a lawyer, Guy K. Duerson (Duerson), as her attorney-in-fact.181 Mrs. Floyd was admitted to a hospital and Mrs. Rice, Mrs. Floyd's daughter, filed two petitions to have herself appointed as her mother's guardian.182 The district judge dismissed both petitions stating that the durable power of attorney provided for the management of Mrs. Floyd's personal and financial affairs.183

The Supreme Court reversed the district court's decision and held that while a durable power of attorney may be sufficient during actual disability, upon a finding of legal disability, Kentucky Revised Statute 387.500 et seq. requires appointment of a guardian to "take care of the day-to-day personal business of an incompetent."184 Furthermore, "the durable power of attorney . . . does not make the appointment of a guardian automatically unnecessary."185

The Court reasoned that, "[t]he durable power of attorney is not comprehensive enough to replace the provisions of Chapter 387 in regard to the administration of the estates of incompetents."186 It would be contrary to the public interest to authorize unlimited power of attorneys, the Court reasoned; thus the court protects a ward's civil or legal rights in regard to disability by appointing a guardian or conservator.187

Additionally, guardianships are preferred since courts can require greater accountability of guardians than they can attorneys-in-fact.188 For example,

[T]he guardian is answerable to a court and must file accounts at least annually[,] . . . a guardian must comply with K.R.S. 389A.010 et. seq. whenever the sale of real property is involved. The attorney-in-fact may sell real estate as if it were his own. The guardian must also file biennial accounts with the district court. [citations omitted]. An attorney-in-fact is not [a fiduciary] . . . subjected to the reporting requirements of K.R.S. 387.500 et. seq. The attorney-in-fact is accountable only to his principal . . . .

The Court held that a durable power of attorney is not a substitute for a guardianship and the existence of a durable power of attorney does not prevent the institution of guardianship proceedings.190

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180 Id. (quoting KY. REV. STAT. § 386.093 (1972) (amended 1998; 2000). The recent amendments to Section 386.093 omit the last sentence that was quoted in Rice.
181 Id.
182 Id. at 57.
183 Id.
184 Rice, 768 S.W.2d at 59 (interpreting KRS 387.500).
185 Id. at 58.
186 Id. at 59.
187 See id. at 59.
188 Id. at 59.
189 Id.
190 See Rice, 768 S.W.2d at 60-61.
B. Powers of Attorney

This section of the Survey will address first the two types of powers of attorney: (i) the regular power of attorney and (ii) the durable power of attorney. It will then address Kentucky Revised Statute 386.093, which governs the continued existence of a power of attorney, durable or otherwise, upon the disability, incapacity, or death of the principal, and the section’s effect on both powers of attorney.

There are basically two types of powers, the general and the durable power of attorney. For both, the enabling instrument provides for the specific powers granted to the attorney-in-fact. Either power can authorize the conveyance or release of property and can authorize limited investment power. Powers granted in either power of attorney should be stated specifically in the instrument.

The durable power of attorney differs principally from the general power of attorney in that it survives the subsequent disability or incapacity of the principal. On the other hand, both regular and durable powers continue unless the attorney-in-fact has actual knowledge of the death of the principal.

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191 The medical power of attorney will be discussed briefly under the heading of “Living Wills and Advance Directives” of this Survey.

192 See KY. REV. STAT. § 386.093(1) (Michie 1999 & Supp. 2001) A durable “power of attorney” is defined as a writing which states as follows:

As used in this section, “durable power of attorney” means a power of attorney by which a principal designates another as the principal’s attorney in fact in writing and the writing contains the words, “This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time”, or “This power of attorney shall become effective upon the disability or incapacity of the principal”, or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal’s subsequent disability or incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

193 See id. If the power not durable as described in Section 386.093(1), then it is necessarily implied that the power is a general power.

194 See id.


196 Id. (stating that “powers of attorney must grant specifically and not in a general fashion”). But cf. Deaton, 592 S.W.2d 127 (Ky. 1979) (requiring the attorney-in-fact to account for all property disposed of under a power of attorney which granted “blanket power to sell and convey any or all property without limitation”) (emphasis added).

197 See KY. REV. STAT. § 386.093(1) (Michie 1999 & Supp. 2001) and text accompanying note 192.

198 See KY. REV. STAT. § 386.093(3) (Michie 1999 & Supp. 2001). Section 386.093(3) provides:

[t]he death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

Id.
1. Attorney-in-fact as Distinguished from a Guardian

Attorneys-in-fact are distinguishable from the court appointed guardian mainly because the guardianship supercedes the power of attorney upon a finding of legal disability. The guardian is also accountable to both the court and the principal, whereas the attorney-in-fact owes their fiduciary obligations solely to the grantor of the power. Finally, "[a]n incompetent cannot be sued and an attorneys-in-fact cannot defend an action on behalf of an incompetent. Defense must be completed by a legally appointed guardian."

2. Duty of Attorneys-in-fact to account for Transactions

An agent holding a power of attorney is required to provide an accounting "for any and all property, real or personal, that is received by him from or for his principal" unless the instrument creating the power states otherwise. Thus, in Deaton v. Hale, the Supreme Court of Kentucky held that the principal of a power of attorney has the right to require an accounting from the attorney-in-fact. In 1970, Mr. Hale was hospitalized and executed a power of attorney naming his wife, Mrs. Hale, "as his attorney-in-fact, with blanket power and authority to sell and convey any or all of his real or personal property without limitation."

Mrs. Hale predeceased Mr. Hale. Prior to her death, Mrs. Hale had sold Mr. Hale's real estate and she had disposed of his stocks and bonds. Mr. Hale was advised by his counsel that the money was being used for his personal care, but was not advised as to the disposition of his other assets.

Eighteen days after Mrs. Hale passed away, Mr. Hale was adjudged incompetent. Elizabeth Deaton (Deaton) was appointed his guardian and filed suit against Mrs. Hale's estate on the grounds that Mrs. Hale had breached her fiduciary duty to Mr. Hale. Deaton sought an accounting for all the property which had formerly belonged to Mr. Hale.

The trial court and court of appeals found that Mrs. Hale, as attorney-in-fact, did not have to make an accounting to the principal for funds disposed of by her while acting as attorney-in-fact. The Supreme Court reversed, holding that an accounting of all property that was disposed of by the attorney-in-fact while acting as the attorney-in-fact must be included in the accounting to the principal.

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199 See Rice, 768 S.W.2d at 59.
200 id.
201 id. at 59-60.
202 See Deaton v. Hale, 592 S.W.2d 127, 130 (Ky. 1979).
203 id.
204 id.
205 id. (emphasis added) (The court did not describe what the Power of Attorney stated).
206 id. at 128.
207 id.
208 See Deaton, 592 S.W.2d at 128.
209 id.
210 id. at 129.
211 id.
212 id.
when the principal so demands.\textsuperscript{213} The Court stated that “[t]he right of a principal to require an accounting of his [attorney-in-fact] is elementary.”\textsuperscript{214}

In reaching its decision, the Court addressed the duties and responsibilities of attorneys-in-fact to their principals.\textsuperscript{215} The Court stated that such duties and responsibilities are parallel to the nature of the particular office which the attorney-in-fact agrees to perform by accepting the power and, unless it is otherwise agreed in the instrument creating the power, “there is no discretion as to whether an accounting may be required.”\textsuperscript{216}

Accordingly, the Court held that the attorney-in-fact is required to make an accounting when demanded by the principal and that the burden is not on the principal to prove that their property came into the hands of the attorney-in-fact by reason of the power.\textsuperscript{217} Rather, the Court concluded, the burden was on the attorney-in-fact to explain the disposition of any and all property received by them.\textsuperscript{218}

3. Statutory accounting

Kentucky Revised Statute Section 386.020 requires an attorney-in-fact who is holding funds for loan or investment, and who makes loans or investments, to account for all interest and profit received.\textsuperscript{219}

4. An Attorney-in-fact may not abuse the Power to convey Real Property

The Supreme Court, in \textit{Kentucky Bar Assoc. v. Allen},\textsuperscript{220} permanently disbarred Ms. Allen from practicing law in Kentucky for, inter alia, abusing the power of attorney placed in her.\textsuperscript{221} Ms. Allen unlawfully transferred title to certain real estate without giving notice to the principal or the principal’s guardian and then kept the proceeds of the sale for herself.\textsuperscript{222} In 1997, Ms. Allen had obtained a power of attorney from Margaret Block’s Guardian.\textsuperscript{223} Later that year, Ms. Allen used the power to convey real property, owned by Ms. Block, for $40,000 but failed to give notice to Ms. Block or her guardian or to use the proceeds for the benefit of the principal.\textsuperscript{224} Ms. Block sued alleging the unauthorized sale of the real estate and the conversion of the $40,000.\textsuperscript{225} Ms. Allen was forced to pay back the $40,000.\textsuperscript{226}

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\footnotesize
\textsuperscript{213} \textit{Id.} at 130.
\textsuperscript{214} \textit{Deaton,} 592 S.W.2d at 130 (citations omitted).
\textsuperscript{215} \textit{Id.}
\textsuperscript{216} \textit{Id.} (citations omitted) (emphasis added).
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id.} (citations omitted).
\textsuperscript{219} \textit{See KY. REV. STAT.} § 386.020 (Michie 1999).
\textsuperscript{220} 32 S.W.3d 765 (Ky. 2000).
\textsuperscript{221} \textit{See id.} at 768. There were other facts involved here which fueled the Court’s decision of disbarment.
\textsuperscript{222} \textit{Id.} at 767.
\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.}
\textsuperscript{225} \textit{Id.} (citing Hargis v. Allen, 99-CI-2918 (1999)).
\textsuperscript{226} \textit{See Allen,} 32 S.W.3d at 767.
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5. Duty to record Power of Attorney

Kentucky Revised Statute Section 382.370 requires an attorney-in-fact with the power to convey or release property to record the power in the appropriate offices if the conveyance is required by law to be recorded.\textsuperscript{227} Section 382.370 also provides that a recorded power is not revoked unless a written revocation or some form of memorandum showing revocation, attested by the clerk, is recorded in that office.\textsuperscript{228} Finally, the statute allows for the power of attorney to authorize any transaction including the sale of property, the sale of stock, or other transactions.\textsuperscript{229}

6. Attorneys-in-fact must use Utmost Good Faith

Under a durable power of attorney and a regular power of attorney, the attorney-in-fact can transfer and release property but must exercise "utmost good faith in doing so."\textsuperscript{230} In \textit{Wabner v. Black},\textsuperscript{231} the Supreme Court of Kentucky applied the "utmost good faith" standard to the durable power of attorney.\textsuperscript{232}

In 1994, Mr. Tapp executed a durable power of attorney in favor of his niece, Ms. Wabner.\textsuperscript{233} Ms. Wabner argued and the jury agreed that the durable power of attorney instructed her to collect Mr. Tapp's bank accounts and certificates and deposit them into an account naming her as joint owner with right of survivorship.\textsuperscript{234} There was evidence from a will drafted in 1986, by Mr. Tapp,

\begin{footnotesize}
\begin{enumerate}
  \item See Ky. Rev. Stat. § 382.370 (Michie 2001). Section 382.370 provides:
  \begin{quote}
  [p]owers of attorney to convey or release real or personal property, or any interest therein, may be acknowledged, proved and recorded in the proper office, in the manner prescribed for recording conveyances. If the conveyance made under a power, is required by law to be recorded or lodged for record, to make same valid against creditors and purchasers, then the power must be lodged or recorded in like manner, and no such power so recorded shall be deemed to be revoked by any act of the party by whom it was executed, except from the time when there has been lodged for record in the office in which the power is recorded a written revocation, executed and proved or acknowledged in the manner prescribed for conveyances, or a memorandum of revocation made on the margin of the record thereof, which memorandum is signed by the party executing the same, and attested by the clerk.
  \end{quote}
  \end{enumerate}
\end{footnotesize}

\textsuperscript{227} See id.
\textsuperscript{228} See id.
\textsuperscript{229} Id. (stating that "[p]owers of attorney to convey or release . . . any interest therein, may be acknowledged . . . "); see also, Treece, supra note 195, at 27 (stating that attorneys-in-fact have limited investment powers) (citation omitted).
\textsuperscript{230} See Priestley, 949 S.W.2d at 598 (citing Deaton v. Hale, 592 S.W.2d 127 (Ky. 1979)).
\textsuperscript{231} 7 S.W.3d 379 (Ky. 1999).
\textsuperscript{232} See id. at 381.
\textsuperscript{233} Id. at 380.
\textsuperscript{234} Id. The durable power of attorney stated:

I, GEORGE H. TAPP, of U.S. Highway 41-A North, Sebree, Webster County, Kentucky, 42455, hereby constitute and appoint NANCY C. WABNER, of 8036 U.S. Highway 41-A North, Dixon, Kentucky 42409, my true and lawful attorney in fact, with full power for me and in my name and stead, to make contracts, lease, sell or convey any real or personal property that I may now
that: (1) Ms. Wabner was to inherit the family farm and (2) that all of his bank accounts existing at the time the will was executed would become the property of the joint owner. Mr. Tapp died about a month after he had executed the durable power of attorney, at the age of 94. By that time, Ms. Wabner "had collected into the accounts approximately 80% of her uncle's assets other than the farm."

The co-executors of Mr. Tapp's will brought suit against Ms. Wabner seeking to set aside the transfer of the assets into the joint bank accounts, arguing that the power of attorney did not give Ms. Wabner the authority to make gifts to herself.

The jury returned a verdict in favor of Ms. Wabner; however, the Court of Appeals overturned the verdict. The Court of Appeals held that Ms. Wabner's authority to make a gift to herself was a question of law to be determined by the trial court, not a jury. The Court of Appeals adopted a "flat rule" rule stating that an attorney-in-fact must have express written authority to make gifts of the principal's property to themselves or others. The Supreme Court of Kentucky rejected the adoption of a "per se" restoration standard and applied the "utmost good faith" standard set forth in Deaton, noting that, "[t]his Court recently cited Deaton and its 'utmost good faith' standard of conduct as controlling authority in Priestley. . . ." The Court there quoted an entire passage from Deaton:

\[\text{[A]n attorney-in-fact, one acting under a Power of Attorney, must account for any and all property, real or personal, that is received by [them] from or for [their] principal. The accounting must be for all property that is received by [them] while acting in [their] official capacity or otherwise. We do not mean to say, and we do not hold, that an agent operating in a fiduciary...}\]

own or hereafter own, to receive and receipt for any money which may now or hereafter be due to me, to retain and release all liens on real or personal property, to draw, make and sign any and all checks, contracts, or agreements; to invest or re-invest my money for me; to institute or defend suits concerning my property, and to enter into any safe deposit box at any bank and to remove any documents or materials therefrom belonging to me; to cash any certificates of deposits which I own or to change and redesignate the ownership thereof in my sole discretion, to cash any savings bonds, and generally to do and perform for me and in my name all that I might do if present and I hereby adopt and ratify all the acts of my said attorney done in pursuance of the power hereby granted, as fully as if I was present acting in my own proper person, provided however, that my said attorney is not to bind me as surety, guarantor or endorser for accommodation.

235 See Wabner, 7 S.W.3d at 380.
236 Id. at 380.
237 Id.
238 Id.
239 Id.
240 Id. at 380.
241 See Wabner, 7 S.W.3d at 380-81.
242 Id. at 381 (citing Deaton, 592 S.W.2d at 130).
243 Id. (citing Priestley, 949 S.W.2d at 598).
capacity, such as in the instant case, is liable for restoration or reimbursement for all properties received by [them] from the principal or from whatever source. What we are saying is that the agent does have the responsibility of explaining to the satisfaction of the Court what disposition was made of the properties. The agent is required to go forward with an explanation when proof is introduced showing that the property was in the hands of the agent. The burden of going forward with the proof so as to explain the disposition of any and all properties received by the agent is then with [the agent]. The issue thereby presented is one of fact to be decided by the court or by a jury, as the case may be.\textsuperscript{244}

The Court stated that Ms. Wabner “did what was expressly authorized by the [durable] power of attorney.”\textsuperscript{245} The only question left was for the jury: whether Ms. Wabner’s “exercise of the express authority granted by the [durable] power . . . was attended by the utmost good faith.”\textsuperscript{246} Because the jury had returned a verdict for Ms. Wabner, the Court held that an appellate court may not substitute its judgment for that of the jury.\textsuperscript{247} Accordingly, the Court reinstated the judgment of the trial court on the issue of “utmost good faith.”\textsuperscript{248}

7. *Powers of Attorney are subordinate to Court Established Guardianships*

Both durable and regular powers of attorney are subordinate to court established guardianships. The Supreme Court of Kentucky, in *Rice v. Floyd*,\textsuperscript{249} stated that the “durable power of attorney is not limitless.”\textsuperscript{250} As discussed in the Guardianship section of this survey, the Court held that attorney’s-in-fact must yield to a court appointed guardian and that court appointed guardians have a higher degree of accountability to the court and therefore can have broader powers.\textsuperscript{251}

8. *Setting a Termination Date for the Power of Attorney*

When an attorney is drafting a power of attorney, a termination date should be a concern. Setting a termination date for the power may promote accountability because a “termination date could help promote responsibility on the part of the [attorney-in-fact], since he would be aware that there was a

\textsuperscript{244} Id. (quoting Deaton, 592 S.W.2d at 130).
\textsuperscript{245} Id.
\textsuperscript{246} Id. at 381.
\textsuperscript{247} See *Wabner*, 7 S.W.3d at 382 (stating that “[a]lthough this Court may not agree with the verdict reached by the jury here, it is not the place of an appellate tribunal to substitute its judgment for that of a fact-finding body”).
\textsuperscript{248} Id.
\textsuperscript{249} 768 S.W.2d 57 (Ky. 1989).
\textsuperscript{250} Id. at 59 (citations omitted).
\textsuperscript{251} See id.
definite date on which he would be required to account for his actions pursuant to
the [power of attorney]."252

The use of the "power of attorney" instrument, either durable or regular,
provides a practical and simple way to protect the client's property and other
interests. Furthermore, creation of a durable power of attorney may avoid the
necessity of establishing a guardianship. However, there are duties that apply to
an attorney-in-fact and the attorney drafting the power must make sure the
attorney-in-fact is aware of these duties.253 The same "utmost good faith"
standard applies to both the regular power of attorney and a durable power of
attorney and both powers end on the death of the principal; only the regular
power of attorney ends upon the actual incapacity of the principal.254 Finally,
consider setting a termination date for the power of attorney.255

IV. LIVING WILLS AND ADVANCE DIRECTIVES256

Subsection (A) of this section begins with a discussion on the foundation
for living wills and advance directives in the principle of consent to medical
procedures. Subsection (B) will analyze how living wills can provide the
necessary consent. Subsection (C) will discuss the revised Living Will Directive
Act. Finally, subsection (D) will focus on health care decision-making via
advance directives.

A. Consent is Required for Medical Procedures

The logical foundation for living wills and advance directives is common
law consent. Living wills and advance directives stem from the common law
principle of informed consent by allowing an elderly person to give consent to
medical procedures and even the withdrawal of medical treatment in some cases.
In Tabor v. Scobee,257 the Supreme Court of Kentucky held that consent was
required from the patient before a medical procedure could take place.258 In
Tabor, a surgeon was operating on a patient and discovered that the patient's
fallopian tubes were infected and diseased, subsequently removing the tubes
without first obtaining consent from the patient's stepmother even though the
stepmother was nearby.259 The Court stated that the patient had the right via her
stepmother to decide whether she wished to refuse or undergo the removal of the

252 Treece, supra note 195, at 27.
255 See Treece, supra note 195, at 27.
256 See KY. REV. STAT. § 311.621(2) (Michie 2001). An advanced directive is defined as "a living
will directive made in accordance with KRS 311.621 to 311.643, a living will or designation of
health care surrogate executed prior to July 15, 1994, and any other document that provides
directions relative to health care to be provided to the person executing the document." Id.
257 254 S.W.2d 474 (Ky. 1951).
258 See id. at 475 (stating that an emergency or accident may be an exception to informed consent).
259 Id.
fallopian tubes, unless obtaining consent was made impractical by an immediate, life-threatening emergency.\textsuperscript{260}

The Court’s reasoning for its decision was that an operation on a patient by a doctor who did not obtain consent, whether informed or otherwise, was a trespass.\textsuperscript{261} "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault..."\textsuperscript{262} Living wills and advance directives are a statutory means for providing both the required control over one’s own body and the consent necessary for the performance of medical procedures.

Forty-two years after \textit{Tabor} was decided, the Supreme Court of Kentucky, in \textit{DeGrella v. Elston},\textsuperscript{263} decided "the first of the so-called ‘right to die’ cases, spawned by modern technology, to reach [the Supreme] Court."\textsuperscript{264} The Court recognized a common law right of a competent person to forego medical treatment.\textsuperscript{265} The Court held in part that the right of a competent person to forego medical treatment extended to an incompetent individual.\textsuperscript{266} Incompetent individuals have the ability to exercise the right to refuse medical treatment \textit{if they have made their ‘medical desires known prior to becoming incompetent.’}\textsuperscript{267} The Court also stated that there is a common law right to terminate artificial nutrition and hydration upon a showing of clear and convincing evidence that the patient would choose to end their life.\textsuperscript{268}

In \textit{DeGrella}, plaintiff DeGrella had sustained severe brain damage after being beaten.\textsuperscript{269} Medical treatment could not help; she remained in a persistent vegetative state in a nursing home in Kentucky.\textsuperscript{270} For nearly ten years, Degrella had been receiving nourishment and water through a surgically implanted tube and had been breathing through a tube inserted into her throat.\textsuperscript{271} There was no significant possibility that her condition would improve.\textsuperscript{272}

DeGrella's mother (Elston) was appointed guardian and filed an action to have a Guardian Ad Litem advocate DeGrella's interests.\textsuperscript{273} Elston's petition argued that she was permitted by Kentucky law to substitute her judgment for that of DeGrella.\textsuperscript{274} Elston wanted the court to declare that she had the right to discontinue her daughter’s life support.\textsuperscript{275} The Guardian Ad Litem argued that Kentucky law did not authorized the power Elston sought.\textsuperscript{276}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 475 (citing Schloendorff v. Society of N.Y. Hospital, 105 N.E. 92 (N.Y. 1915) (Cardozo, J.).
\item Id. (emphasis added).
\item 858 S.W.2d 698 (Ky. 1993).
\item Id. at 700 (citation omitted).
\item See id. at 703 (citations omitted).
\item Id. at 705.
\item Id. at 705 (citation omitted) (emphasis added).
\item See \textit{DeGrella}, 858 S.W.2d at 706.
\item Id. at 700-01.
\item Id.
\item Id.
\item Id. at 701.
\item See \textit{DeGrella}, 858 S.W.2d at 701.
\item Id.
\end{enumerate}
\end{footnotesize}
The Court asked two questions pertinent to the determination of whether a guardian could make a life-ending decision for the ward under Kentucky common law. The first question was, whether there was a right to die and what impact the Living Will Act had on that right. The second question was “whether a person who has clearly stated, as a competent adult, that she would choose to die if ever reduced to the conditions presented, retains the right to [make such a decision] after a devastating injury has rendered her incompetent and left her in a persistent vegetative state.

The Court began its analysis by recognizing the common law right of a competent person to refuse medical treatment and by extending this right to incompetent persons if their desires are made known before they become incompetent. The Court extended the common law right of a competent person to refuse medical treatment by stating that "every state that has considered the matter has upheld the right of patients in a persistent vegetative state, through surrogates, to elect to withdraw such medical care: some courts based their decision on common law rights and some on common law viewed as constitutionally protected." After stating that there is a right to die, the Court determined the impact of the Living Wills Act on that right. The Court recognized that the Living Will Act provides the power for a competent person to put their desire to refuse medical treatment in writing. However, the Court held that one is required to make a showing of clear and convincing evidence as to the medical facts regarding the patient's condition and the choice of the patient before life-prolonging treatment can be withdrawn when the patient has not made their desire express while competent. Finally, the Court stated that the Living Will Act provides for a “subjective inquiry into whether the patient wishes the continuation of medical procedures to interdict 'the natural process of dying.'"

B. Living Wills can provide the Necessary Consent

Ultimately, DeGrella was confined to “substitute decision-making by a surrogate in conformity with the patient’s previously expressed wishes . . . [and] involve[d] only the right of self-determination and not the quality of life.” The Court stated that an individual's ‘inalienable right to life’ . . . outweighs any consideration of the quality of the life, or the value of the life, at stake.”

277 Id.
278 Id. at 701-02.
279 Id.
280 Id. at 705 (citation omitted).
281 See DeGrella, 858 S.W.2d at 705.
282 Id. at 705-06 ("The decisions reviewed in Cruzan reason that where the wishes of the patient are plainly manifest from statements made when competent, the right of self-determination should not be lost merely because an individual is no longer able to sense a violation of such right.") (citing Cruzan v. Director Missouri, 497 U.S. 261 (1990)).
283 See DeGrella, 858 S.W.2d at 706-07.
284 Id.
285 Id. at 702.
286 Id. at 707.
287 Id.
288 Id. at 702.
The Court necessarily implied that when a living will or advance directive is not used to provide the required consent for terminating artificial treatment, only a showing of clear and convincing evidence that the patient would have chosen to die is sufficient to permit another person to decide when the patient should die.\textsuperscript{289}

\textit{C. The Living Will Directive Act}\textsuperscript{290}

Although oral statements and other evidence may be sufficient to prove by clear and convincing evidence that the patient’s life prolonging medical treatment should be terminated under common law;\textsuperscript{291} the Living Will Directive Act (“L.W.D.A.”) specifically requires that a living will be in writing.\textsuperscript{292}

The L.W.D.A. provides several options and requirements for an individual who puts their wishes in writing. First, the L.W.D.A. codifies the common law right to consent to or refuse medical treatment.\textsuperscript{293} The Supreme Court of Kentucky, in \textit{Coulter v. Thomas},\textsuperscript{294} stated that, in \textit{DeGrella}, “[the Court] acknowledged the common law right [to refuse medical treatment], but focused on the legislative codification found in KRS 311.621(8), (formerly KRS 311.622(1)).”\textsuperscript{295}

Second, the L.W.D.A. grants an adult the right to direct “the withholding or withdrawal of life-prolonging treatment; . . . or the . . . withdrawal of artificially provided nutrition or hydration,”\textsuperscript{296} in writing and to have that right honored.\textsuperscript{297}

Third, the L.W.D.A. “shall not be construed to . . . authorize, or approve mercy killing or euthanasia, or to permit any affirmative or deliberate act to end life other than to permit the natural process of dying.”\textsuperscript{298}

Fourth, as of 1998, the L.W.D.A. requires that if a court appoints a fiduciary for the grantor, the fiduciary is bound by the terms of the grantor’s advance directive.\textsuperscript{299} Fifth, the L.W.D.A. expressly states that if an advance

\textsuperscript{289} See \textit{DeGrella}, 858 S.W.2d at 702.
\textsuperscript{290} See \textit{KY. REV. STAT.} § 311.643 (Michie 2001). “KRS 311.621 to 311.643 may be cited as the Kentucky Living Will Directive Act.” \textit{Id}.
\textsuperscript{291} See \textit{generally DeGrella}, 858 S.W.2d 698.
\textsuperscript{292} See \textit{KY. REV. STAT.} § 311.625 (Michie 2001).
\textsuperscript{293} See \textit{KY. REV. STAT.} § 311.621(8) (Michie 2001). “‘Health care decision’ means consenting to, or withdrawing consent for, any medical procedure, treatment, or intervention.” \textit{Id}.
\textsuperscript{294} 33 S.W.3d 522, 524 (Ky. 2000).
\textsuperscript{295} See \textit{Coulter}, 33 S.W.3d at 524 (citing \textit{DeGrella}, 858 S.W.2d at 703).
\textsuperscript{296} \textit{KY. REV. STAT.} § 311.623(1)(a) and (b) (Michie 2001). \textit{See also KY. REV. STAT.} § 311.631 text accompanying note 174.
\textsuperscript{297} See \textit{id.} § 311.623(2), text accompanying note 296.
\textsuperscript{298} \textit{id.} § 311.639 (stating that Sections 311.621 to 311.643 do not condone mercy killing).
\textsuperscript{299} \textit{id.} § 311.6231.

\textit{If, following the execution of an advance directive under KRS 311.623, a court of the grantor’s principal domicile appoints a fiduciary charged with the care and protection of the grantor’s person, the fiduciary shall be bound by the terms of the grantor’s advance directive. If the advance directive designates a surrogate to make health care decisions for the grantor, the surrogate may continue to act.}
directive designates a surrogate to make health care decisions for the grantor, the surrogate may continue to act even if a court has appointed a fiduciary to protect and care for the grantor's person.

Finally, even if a surrogate is designated to make health care decisions, the "surrogate is only permitted to act on behalf of the grantor when the grantor no longer can make decisions." 302

D. Health Care Decision-making Advance Directives

Before being repealed and encompassed in the L.W.D.A., the Health Care Surrogate Act of Kentucky 303 granted "a person 'with decisional capacity' the right to 'designate' others 'as a surrogate or successor surrogate to make any health care decision on behalf of the grantor, excluding the right to withhold or withdraw artificial nutrition and hydration . . . ." 304 Both the right to designate a surrogate to make health care decisions on behalf of the grantor and the grantor's right to expressly state a desire regarding the withdrawal of artificial treatment via a living will are provided for in the 1994 version of the Living Will Directive Act. 305 In Vitale v. Henchey, 306 the Supreme Court held that where an attorney-in-fact under a medical power of attorney does not consent for a medical procedure, a battery is committed on the patient. 307

In Vitale, the Supreme Court was faced with the question of whether a battery was committed when the holder of a medical power of attorney did not consent to a medical procedure on the grantor of the power. 308 Mrs. Henchey granted her son a medical power of attorney when she was hospitalized for a blood clot in her leg. 309 The blood clot was removed by Dr. Sparrow after Mr. Henchey gave consent on behalf of his mother. 310 A few days later, another operation was necessary but was outside of Dr. Sparrow's specialty; therefore, Dr. Sparrow suggested Dr. Wieman as the best doctor to perform the operation and told Mr. Henchey that a doctor named Dr. Vitale was not a good choice. 311 Although Mr. Henchey gave his consent for Dr. Wieman to perform the surgery, Dr. Vitale performed the surgery instead. 312 A third operation was required. Although Mr. Henchey consented to the performance of the surgery by Dr. Sparow, Dr. Vitale performed this surgery as well. 313 The morning after the third surgery, Dr. Vitale called Mr. Henchey to inform him that he had performed

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300 See KY. REV. STAT. § 311.621(15) (Michie 2001). A "surrogate" is defined as "an adult who has been designated to make health care decisions in accordance with KRS 311.621 to 311.643." Id.
301 See id. § 311.623; see also text accompanying note 296.
304 See DeGrella, 858 S.W.2d at 707-08.
305 See KY. REV. STAT. §§ 311.623-.643 (Michie 2001).
306 24 S.W.3d 651 (Ky. 2000).
307 See id. at 653.
308 Id. at 651.
309 Id. at 653.
310 Id.
311 Id. at 654.
312 See Vitale, 24 S.W.3d at 654.
313 Id.
the surgery and that Mr. Henchey’s mother was not likely to survive. At that point Mr. Henchey responded “who the hell are you and why are you involved?” Mr. Henchey’s mother died the following day.

Mr. Henchey filed an action against Dr. Vitale claiming that Dr. Vitale committed battery on his mother when he performed surgery without Mr. Henchey’s prior knowledge and consent. The trial court held that informed consent had its basis in negligence and directed a verdict in favor of the physicians when Mr. Henchey did not prove that a violation of the accepted standard of medical care had occurred. The Court of Appeals reversed, holding that where the physician fails to obtain consent a battery is committed and that Mr. Henchey’s claim was one of battery. Proof of the accepted medical standard, therefore, was not required.

The Supreme Court affirmed the Court of Appeals and held that, since Mr. Henchey alleged that he would not have consented to Dr. Vitale performing the surgeries, his claim was a claim of battery. The Court stated that, “Kentucky recognizes an action for battery when a physician performs an operation without the consent of the patient.” Operation on a patient without their consent is a battery as opposed to medical malpractice because the claim does not depend on the physician’s surgical skill or professional judgment.

The Court concluded that if Mr. Henchey did not authorize Dr. Vitale to perform the surgeries, there was no consent and Dr. Vitale committed battery. The Court remanded the case to the trial court for a new trial on the claim for battery.

V. HEALTH, HOUSING, AND HUMAN RIGHTS

There are several areas of elder law that are extremely important and derive principally from statutory and regulatory provisions. This section will discuss some of these important topics such as (A) long-term care insurance; (B) Medigap policies; (C) Medicaid; (D) housing counseling; (E) residents rights in nursing homes and assisted-living communities; and (F) abuse and neglect of the elderly including self neglect.

A. Long-Term Care Insurance

The practice of elder law includes advising clients about long-term care decisions and requires knowledge of long-term care insurance. This section will

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314 Id.
315 Id.
316 Id.
317 Id.
318 See Vitale, 24 S.W.3d at 654.
319 Id. at 655.
320 Id. at 656.
321 Id. (citations omitted).
322 Id.
323 Id. at 658.
324 See Vitale, 24 S.W.3d at 660. The new trial on the battery issue has not yet been conducted.
address: (1) long-term care insurance in general; (2) the law with regard to long-
term care insurance in Kentucky; (3) the different types of long-term care
insurance policies; and (4) consumer information regarding long-term care
insurance in Kentucky.

1. Long-Term Care

Long-term care "is the type of care provided to a person who has a long-
term illness or condition from which recovery is unlikely" and who needs
assistance with activities of daily living, such as bathing, getting in and out of
bed, toileting, and feeding themselves.\textsuperscript{325} The need for long-term care can result
from accidents, physical impairments, or diseases.\textsuperscript{326} Persons with long-term
care needs often reside in nursing homes, community settings, or their own
homes; however, about 20 percent of all long-term care is rendered in a nursing
home.\textsuperscript{327}

The need for long-term care affects many seniors and "[t]he number of
seniors needing [long-term care] is expected to double over the next thirty years
as baby boomers retire."\textsuperscript{328} An alarming statistic shows that even though the
need for long-term care will "eventually affect eighty percent of all families in
the United States only one in six will be able to pay for more than three years of
[long-term care] at $40,000 per year."\textsuperscript{329} Imagine that "a couple . . . [has] assets
valued at $100,000. Private pay for nursing home care at a cost of $37,000
annually for just one spouse would deplete their total financial resources in less
than three years . . ."\textsuperscript{330} While Medicaid has been the long-term care "safety net
for the elderly who cannot manage for themselves,"\textsuperscript{331} private long-term care
insurance is a method for some clients to manage their assets and stay away from
Medicaid.\textsuperscript{332}

2. Types of Long Term Care Insurance

Because of the expense, long-term care insurance may not be practical
for many elderly clients.\textsuperscript{333} Long-term care insurance is largely used by those
with both the financial means and "the luxury of long-term horizons in that they
can foresee the eventual need for such products."\textsuperscript{334} Those eligible for Medicaid
and those with a large amount of assets would not be interested.

There are several concerns to bear in mind when considering private
policies that are not regulated by Kentucky statutes. First, not every policy costs

\begin{footnotes}
\item See Robert D. Hayes et al., Article: What Attorneys Should Know About Long-Term Care
Insurance, 7 ELDER L.J. 1, 7 (1999).
\item Id. at 7 (citation omitted).
\item Id. at 7 (citation omitted).
\item Id.
\item Id. at 9-10.
\item Jason A. Frank, Esq., Article, The Necessity of Medicaid Planning, 30 U. BAL. L.F. 29, 34
(1999).
\item Hayes, supra note 318, at 13.
\item Id. at 18.
\item Beneficiaries must be able to make the monthly payments.
\item Hayes, supra note 318, at 18 (citations omitted).
\end{footnotes}
the same or has the same benefits. For example, some policies may not cover preexisting health problems such as "mental or nervous disorders other than Alzheimer's or related dementia; alcohol or drug addiction; illnesses caused by an act of war, self-inflicted injuries, attempted suicide, and any treatment already paid for by the Government." Second, some older long-term care insurance policies "require a prior period of hospitalization . . . as a prerequisite for coverage during nursing home confinement." It also costs more to purchase inflation protection.

3. The Long-Term Care Insurance Act

Long-term care insurance in Kentucky is governed by Kentucky Revised Statute Section 304.14-605(1), which was enacted in 1992. It states that the purpose of the “Long-Term Care Insurance” statute is "to promote the public interest, . . . and] the availability of long-term care insurance policies, to protect applicants . . . from unfair or deceptive sales . . . to facilitate public understanding . . . flexibility and innovation in the development of long-term care insurance coverage."

Long-term care insurance cannot be terminated or nonrenewed due to the age or the deterioration of health of the insured. Furthermore, long-term care insurance policies must provide coverage for all types of nursing care equally. Also, if for any reason, an applicant is not satisfied, they can return the policy within thirty days of its delivery and have the premium refunded. Long-term care insurance policies in Kentucky must also provide coverage for at least twelve consecutive months for each person covered.

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335 See Kentucky Department of Insurance, Consumer Guide to Long-Term Care Insurance, 6 (Fall 2000).
336 See Frank, supra note 323, at 34 (citations omitted).
337 Hayes, supra note 318, at 21 (citations omitted).
338 See KY. REV. STAT. § 304.14-625 (Michie 2001). “KRS 304.14-600 to 304.14-625 may be cited as the Long-term Care Insurance Act.” Id.
339 Id. § 304.14-605(1).
340 Id.
341 Id. § 304.14-615(2)(a).
342 Id. § 304.14-615(2)(c) (stating that, “[a] long-term care insurance policy shall not: . . . (c) Provide coverage for skilled nursing care only or provide significantly more coverage for skilled care in a facility than coverage for lower levels of care”).
343 See KY. REV. STAT. § 304.14-615(6) (Michie 2001). “Long-term care insurance applicants shall have the right to return the policy or certificate within thirty (30) days of its delivery and to have the premium refunded if, after examination of the policy or certificate, the applicant is not satisfied for any reason.” Id.
344 Id. § 304.14-600(1). Section 304.14-600 provides in part:

“Long-term care insurance” means any insurance policy or rider advertised, marketed, offered, or designed to provide coverage for not less than twelve (12) consecutive months for each covered person on an expense-incurred, indemnity, prepaid, or other basis for one (1) or more necessary or medically necessary diagnostic, preventive, therapeutic, rehabilitative, maintenance, or personal care services, provided in a setting other than an acute care unit of a hospital unless the hospital or unit is licensed or certified to provide long-term services.
The General Assembly enacted an additional section to the "Long-term Care Insurance Act" in 2001, which states that any insurance policy issued on or after June 21, 2001 that provides coverage for assisted living benefits must cover services received in any assisted living community.


Kentucky's Long-Term Care Insurance Act provides for a consumer guide to long-term care insurance. This consumer guide requires a detailed analysis of every long-term care insurance company and their policies as well as comparison charts, comparison checklists and a basic overview of long-term care insurance and other options for covering the cost of long-term care. The consumer's guide must be delivered free of charge to anyone who requests the guide. Finally, the guide must at least contain (a) the definitions of "long-term care services provided in Kentucky, the cost of services, sources of payment for long-term care, and eligibility for assistance programs;" (b) factors that affect premium rates; (c) an explanation of the types of limitations; (d) certain check lists; and (e) a comparison of the policies and premiums.

B. Medigap Policies

Medigap is also known as Medicare supplemental insurance. Medigap is designed to cover some of the health care costs that Medicare does not

Id. 147
Id. § 304.14-617.

See id. § 304.14-617(1) (Michie Supp. 2001). Subsection (1) states that the assisted living community must (a) meet the "requirements of KRS 194A.700 to 194A.729" and any regulations under those sections and (b) meet "any additional requirements of an assisted living community set forth in the long-term care policy approved by the commissioner." Id. 148

Id. § 304.14-560.

See Kentucky Department of Insurance, Consumer Guide to Long-Term Care Insurance (Fall 2000); see also KY. REV. STAT. § 304.14-560(1) (Michie 2001). Section 304.14-560(1) provides,

[t]he commissioner of insurance shall biennially compile a consumer's guide to long-term care insurance in Kentucky. The consumer's guide shall cover all insurers offering health insurance policies in Kentucky, including health maintenance organizations, which provide coverage for services provided in long-term care facilities as defined in KRS 216.510(1). The purpose of the consumer's guide shall be to improve the buyer's ability to select the most appropriate long-term care coverage and to improve the buyer's understanding of long-term care.


See KY. REV. STAT. § 304.14-560(2) (Michie 2001).

See id. § 304.14-560(1). A copy of the newest version of the Consumer Guide can be ordered by calling 1-800-462-2081 or by visiting <http://www.doi.state.ky.us/kentucky/fpubs.asp>.

See Greenlee, supra note 38, at 344. See also 42 U.S.C.A. § 1395ss(g)(1) (Supp. 2001). Section 1395ss(g)(1) provides:

[for purposes of this section, a medicare supplemental policy is a health insurance policy or other health benefit plan offered by a private entity to individuals who are entitled to have payment made under this subchapter, which provides reimbursement for expenses incurred for services and items for
cover. 352 Whereas Federal law regulates Medicare, because Medigap is private health insurance which provides coverage that extends beyond the limit of Medicare, each state’s insurance department must regulate Medigap. 353 Furthermore, Medigap policies can only pay after Medicare payments have been authorized. 354

Even though the insurance department of each state must regulate Medigap, federal law prescribes the regulations and stipulations for Medigap insurance policies. 355 Federal law requires that private insurance companies can sell only ten specific policies in the United States. 356 "These plans are labeled with letters, A through J, and every company must use the same letter to label its plan." 357 Plan A is the most basic coverage. 358 Although any particular company does not have to sell all ten plans, every company must sell Plan A and the benefits provided for in any of the other plans they sell cannot be modified in any way. 359 All policies sold must be guaranteed renewable, "except for failure to pay premiums." 360

Although Medigap policies will provide for some coverage beyond the scope of Medicare, not every health care problem will be covered by the

which payment may be made under this subchapter but which are not reimbursable by reason of the applicability of deductibles, coinsurance amounts, or other limitations imposed pursuant to this subchapter; but does not include a Medicare + Choice plan or any such policy or plan of one or more employers or labor organizations, or of the trustees of a fund established by one or more employers or labor organizations (or combination thereof), for employees or former employees (or combination thereof) or for members or former members (or combination thereof) of the labor organizations and does not include a policy or plan of an eligible organization (as defined in section 1395mm(b) of this title) if the policy or plan provides benefits pursuant to a contract under section 1395mm of this title or an approved demonstration project described in section 603(c) of the Social Security Amendments of 1983, section 2355 of the Deficit Reduction Act of 1984, or section 9412(b) of the Omnibus Budget Reconciliation Act of 1986 or, a policy or plan of an organization if, the policy or plan provides benefits pursuant to an agreement under section 1395(a)(1)(A) of this title. For purposes of this section, the term "policy" includes a certificate issued under such policy.

352 See Greenlee, supra note 38, at 345.
353 Id. at 344.
354 Id. (stating that Medigap is secondary to Medicare).
356 See Greenlee, supra note 38, at 344 (citing 42 U.S.C. § 1395ss(p)(2)).
357 Id.
358 Id. at 345.
359 Id. at 344-45.
360 Id. at 345 (citing 42 U.S.C. § 1395ss(q)(1)). Section 1395ss(q)(1) provides that:

The requirements of this subsection are as follows:
(1) Each medicare supplemental policy shall be guaranteed renewable and
   (A) the issuer may not cancel or nonrenew the policy solely on the ground
       of health status of the individual; and
   (B) the issuer shall not cancel or nonrenew the policy for any reason other
       than nonpayment of premium or material misrepresentation.

Medigap policy.\textsuperscript{361} Also, an insurer of Medigap insurance "may reject an applicant based upon the applicant's pre-existing health condition."\textsuperscript{362} Thus, even though a Medicare beneficiary is not required to purchase a Medigap policy at the time the beneficiary become 65 (the age of eligibility for Medicare), waiting any longer will expose the beneficiary to a higher risk of being turned down for health conditions that come about as the beneficiary gets older.\textsuperscript{363}

C. Medicaid

"Medicaid is a jointly-funded, federal-state health insurance program for certain low-income and needy people," including elders.\textsuperscript{364} Among other benefits Medicaid provides are nursing facility based care or home and community based services through an approved waiver program to eligible elders who need a nursing home level of care but cannot afford to pay for their own care.\textsuperscript{365}

Title XIX of the Social Security Act of 1965 created Medicaid as a medical assistance program for certain financially and physically needy people over the age of twenty-one.\textsuperscript{366} Medicaid works by making payments, on behalf of the beneficiary, to health care providers.\textsuperscript{367} Although the Centers for Medicare and Medicaid Services (CMS)\textsuperscript{368} administers Medicaid at the federal level, the Cabinet for Health Services, Department for Medicaid Services administers Medicaid in Kentucky.\textsuperscript{369}

Federal law requires each state to cover certain services;\textsuperscript{370} however, each state may establish additional coverage over a wide range of services.\textsuperscript{371} A

\textsuperscript{361} See Greenlee, supra note 38, at 345 (stating that common exclusions are "mental or emotional disorders, alcohol and drug addiction, cosmetic surgery, foot care, chiropractic or other care to correct spinal disorders, dental care, eyeglasses, hearing aids, eye exams, rest cures, custodial care, and routine physical exams").

\textsuperscript{362} Id. at 346.

\textsuperscript{363} See id.

\textsuperscript{364} Elder Law Committee of the Kentucky Bar Association, Allison Connelly Ed., LAWS AND PROGRAMS FOR OLDER KENTUCKIANS 36 reprinted in UK/CLE 2001, 206.


\textsuperscript{366} See id. at 2.

\textsuperscript{367} See id. at 2.

\textsuperscript{368} CMS was formerly called Health Care Financing Administration (HCFA).

\textsuperscript{369} See Yaros supra note 365, at 2.

\textsuperscript{370} Id. § (III) states:

The state Medicaid plan must cover inpatient and outpatient care, laboratory and x-ray services, nursing facility services for individuals twenty-one years of age or older, early and periodic screening, diagnostic, and treatment services for individuals younger than the age of twenty-one, family planning services and supplies, physician services, medical and surgical services furnished by a dentist, home health care services, and services furnished by a certified pediatric nurse practitioner. 42 U.S.C. Section 1396d(a)(1)-(5), (7), and (21); 42 U.S.C. Section 1396a(a)(10).

\textsuperscript{371} Id.
few of Kentucky's Medicaid covered services include: prescription drugs, home health services, x-rays, dental care, hearing and vision care, hospice, and ambulance services.372

In order to be eligible for Medicaid, one must file an application with any Community Based Services office.373 Anyone can apply and "[a]n individual eligible for Supplemental Security Income (SSI) through the Social Security Administration shall be eligible for Medicaid without filing a separate application."374 For every application submitted, a decision must be made regarding that application within 45 days.375 One exception is that if a disability determination is required, the decision must be made within 60 days.376 Furthermore, applicants will be required to furnish certain financial and technical verification criteria.377 If changes are made to a beneficiary's situation that affect their Medicaid eligibility, the beneficiary is required to report those changes within 10 days.378 Finally, "[e]ligibility is redetermined every 12 months or when there is a change in circumstances."379

A person may be eligible for Medicaid on the basis of medical need or categorical need.380 Medical need arises when someone needs the level of care provided in a nursing facility.381 Categorical eligibility applies to those sixty-five

dentures, prosthetic devices, eyeglasses, services in an intermediate care facility for the mentally retarded, hospice, case management, home and community based services through a waiver program approved by CMS, and any other medical or remedial care recognized under state law and furnished by a licensed practitioner. 42 U.S.C. Section 1396d(a)(6), (8)-(20), and (22)-(25).

Applicants/representatives, are required to furnish verification of financial and technical eligibility criteria as follows (see 907 KAR 1:011E):

1. Age.
3. KY resident.
5. Qualified alien admitted for permanent residence or a nonqualified alien (see 8 U. S. C. 1641 (a) - (c)).
6. Income - if earned (last 2 months pay stubs) if unearned (award letters from Social Security/V.A.)
7. Resources - deeds, car titles, life insurance policies, bank statements, last 3 months bank statements, checking/savings account information, etc.
8. Social Security number/card.

Id. (citing 907 KY. ADMIN. REGS. 1:011E (1999) amended 907 KY. ADMIN. REGS. 1:011 (2001)).

372 Id. at 3.
373 See Yaros, supra note 365, at 3.
374 Id.
375 Id.
376 Id.
377 Id. § (IV)(E) states:

Id. at 4.
379 Id. (citing 42 U.S.C.A. § 1396n(e)(2)(C) (1999); 42 U.S.C.A. § 1396r (1999); KY. 380 Id.
381 Id. § (V)(A) (citing 42 U.S.C. § 1396n(c)(2)(C) (1999); 42 U.S.C.A. § 1396r (1999); KY. 311 See Yaros, supra note 365, at 3.
(65) and older, who have very limited assets and income and need the medical services for which they are applying.\footnote{382}

There are typically three situations for which an elder will qualify for Medicaid based on income: (1) those in the community not seeking home and community based services who have very limited income or are able to "spend-down" to the established amounts by paying for some of their own medical expenses; (2) individuals needing a nursing home level of care but seeking home and community based services; or (3) individuals living in a nursing facility who have countable income at a certain level established annually or whose monthly costs of care exceed their income.\footnote{383}

A Medicaid applicant must also meet resource requirements.\footnote{384} Excluded resources are not considered in measuring countable resources.\footnote{385}

Example are the home, a motor vehicle of a limited value if the person needing Medicaid has no spouse living in the community, and limited reserves for burial, among other exceptions.\footnote{386}

Applicants who transfer assets for less than value, not including the home, within thirty-six months of applying for Medicaid may not be eligible for Medicaid.\footnote{387} Note that, "certain transfers are permitted between certain parties" such as, transfers to spouses and disabled children.\footnote{388} Property transferred to non-exempt trusts is subject to a sixty-month look-back period.\footnote{389}

\footnote{382} Id. § (V)(B) (citing 42 U.S.C.A. § 1396a(a)(10)(A) (1999)).

\footnote{383} Id. at 4-5. \textit{See also Cabinet for Health Services Medicaid Nursing Facility and Waiver Services} (visited Jan. 12, 2002) \textless http://chs.state.ky.us/dms/Covered%20Services/NursingFacility.htm#Waiver Services\textgreater  (stating that in 2001 the annual amount was $1,590 and setting out other requirements for nursing facility and waiver program eligibility).

\footnote{384} \textit{See} Yaros, \textit{supra} note 365, at 5. \textit{See also} 907 Ky. Admin. Regs. 1:645(2) (2001). "Section 2. Resource Limitations. (1) For the medically needy as established in 907 KAR 1:011, the upper limit for resources for a family size of one (1) and for family size of two (2) shall be $2,000 and $4,000 respectively, with fifty (50) dollars for each additional member." \textit{Id.}

\footnote{385} \textit{See} Yaros, \textit{supra} note 365, at 5.

\footnote{386} \textit{Id.} (citing 907 Ky. Admin. Regs. 1:645 (1999)).


\footnote{388} Yaros, \textit{supra} note 365, at 6 (emphasis omitted).

\footnote{389} \textit{Id.} at 7-8.

\textit{Intervivos Trusts Created after August 10, 1993 - Effective 10/1/93.} An individual will be considered to have established a trust when the assets of the individual are used to form all or part of the corpus of a trust, other than by will. Assets include all income and resources of the individual and the individual's spouse, including all income to which either is entitled, but did not receive, due to action by the individual, the spouse, or any person, court, or administrative body acting on behalf of or at the direction of the individual or spouse. 42 U.S.C. Section 1396p.

\textbf{1. Revocable Trusts}

If an individual has established a trust, other than by will, the corpus of the trust is considered an available resource to the individual. Payment from the trust to or for the benefit of the individual are considered income to the individual with
makes such a transfer, there is a rebuttable presumption that the transfer is invalid as a transfer for the purpose of qualifying for Medicaid. This results in a period of ineligibility for Medicaid payment for nursing facility or home and the exception of payments for medical costs. Payments for medical care or medical expenses are excluded as income. Payments to anyone else are considered a disposal of assets by the individual and are subject to transfer rules. When a portion of a revocable trust is treated as a transfer of assets for less than fair market value, the look-back period is extended from the usual thirty-six months to sixty months. 42 U.S.C. Section 1396p(d) (3). 907 KAR 1:650

2. Irrevocable Trusts

a. Where payment can be made to the individual under the terms of the trust.

If an individual has established a trust, other than by will, and there are circumstances under which payment could be made to benefit the individual, then the amount of the full payment that could be made is considered an available resource to the individual. Payment from income or corpus for any other purpose or to any other person is considered a disposal of assets by the individual and is subject to transfer rules. Payments for medical care or medical expenses are excluded as income.

b. Where payment from all or a portion of the trust cannot be made to or for the benefit of the individual

If there are no circumstances under which payment can be made to the individual from all or any portion of the trust, then all or that portion of the corpus or income is subject to the transfer rules. The date of the transfer is the date the trust was established or, if later, the date payment was foreclosed to the individual. In these cases, the look-back period is extended to 60 months.

c. Exempt Trust Created after August 10, 1993. The following trusts do not affect Medicaid eligibility:

1. Special Needs Trusts - Trusts containing the assets of an individual who is younger than 65 and disabled, when the trust is established for the benefit of such individual by a court, parent, grandparent, or legal guardian. Upon the individual's death, the assets remaining in the trust must reimburse the Medicaid program up to the amount of assistance paid on that individual's behalf. The trust can be revocable or irrevocable and may contain the assets of individuals other than the disabled individual. 42 U.S.C. Section 1396p(d) (4)(A).

2. Pooled Trust - Trusts established and managed by a non-profit association for disabled individuals, of any age, which contain the pooled assets of several individuals, but which maintain a separate account for each beneficiary. These trusts must be established solely for the benefit of the disabled individual by the individual, or by a court, parent, grandparent, or legal guardian. Upon the individual's death, the assets remaining in the trust must reimburse the Medicaid program for the amount of assistance paid on that individual's behalf, unless the trust retains the account. 42 U.S.C. Section 1396p(d)(4)(C).

Id. 300 Id. at 6.
community based services, which begins to run on the first day of the first month in which the impermissible transfer was made.\footnote{Id. (citing 42 U.S.C.A. § 1396p(c)(1) (1999); 907 Ky. ADMIN. REGS. 1:650 (1999)).}

To calculate the period of ineligibility, or penalty period, divide the value of what was given away by the average monthly private pay rate for nursing facility care.\footnote{Id.} For example, if the applicant gives away $40,000 and the average private monthly pay rate is $4,000 per month, the period of eligibility is ten months, running from the date of the impermissible transfer.

To make an improper transfer can be very costly because there is no cap on the penalty period, which lasts until the amount given away has been reduced to the eligibility threshold.\footnote{Id.} Therefore, if a very large amount were given away there could be a very long period of ineligibility; thus, in that situation one must be especially careful about the date of the Medicaid application and apply only after the look-back period has expired.\footnote{Yaros, supra note 365, at 6. See also supra text accompanying note 370.}

Additional eligibility rules apply for individuals living in a nursing facility\footnote{See 907 KY. ADMIN. REGS. 1:655(Section 1(12)). Section 1:655(Section 1(12)) provides:}
who have a spouse living in the community.\footnote{Id.} In order to determine Medicaid eligibility, all the resources owned by both spouses, either singly or jointly, are considered.\footnote{See Yaros, supra note 365, at 8. See also 907 KY. ADMIN. REGS. 1:655(Section 1(24) and (25)), (Section 2), and (Section 3(2)(a)) (2001).} The resources are then allocated so that the community spouse receives a Community Spouse Resource Allowance (CSRA), plus the resource limit; the current maximum CSRA is $89,000.\footnote{Id. See also Cabinet for Health Services Medicaid Nursing Facility and Waiver Services (visited March 6, 2002) <http://chs.state.ky.us/dms/Covered%20Services/NursingFacility.html#Nursing facility (NF)> (listing the current amount at $89,000).}

Upon determination of eligibility for Medicaid, an institutionalized person without a community spouse generally contributes all income towards
nursing care, minus a small personal needs allowance, any support for minor children and certain previously incurred medical and housing expenses.399

If there is a community spouse, the community spouse may receive a minimum income allowance (MIA) from the institutionalized spouse's income to ensure that the community spouse meets the federal Minimum Monthly Maintenance Needs Allowance (MMMNA).400 The balance of the institutionalized spouse's income, which remains after paying the MIA, minus a $40 personal needs allowance and other authorized amounts for child support and incurred medical expenses, would go to pay for the nursing home care.401

The Cabinet for Human Resources is authorized to file a claim to recover Medicaid costs from the estates of aid recipients.402 The duty to seek estate recovery is limited by a number of factors including: (1) the presence of a surviving spouse, children under age 21, or a blind or disabled child; (2) undue hardship; and (3) cost ineffectiveness.403

Hearings and appeals relative to questions concerning Medicaid eligibility are governed by Kentucky administrative regulations.404 Final administrative decisions are subject to judicial review.405

D. Housing Counseling

1. Reverse Mortgages

A reverse mortgage allows elderly homeowners who are short on cash to stay in their home and receive the additional money they need for home, health and other expenses.406 A reverse mortgage lets the homeowner convert the equity in their home into cash.407 Lenders that provide reverse mortgages are governed by the requirements for reverse mortgages located in the federal Truth in Lending Act (TILA) (Regulation Z).408 Section 226.33, of the Code of Federal Regulations, lists several requirements for lenders including what information must be disclosed409 and notice to consumers that they are not obligated because they have "merely . . . received the disclosures required by this section or have signed an application for a reverse mortgage loan."410

399 Id. at 9 (citing 907 Ky. Admin. Regs. 1:655).
400 Id (indicating the amount for the year 2000). See also 907 Ky. Admin. Regs. 1:655(Section 3).
401 Id.
404 Yaros, supra note 365, at 9-10 (citing 907 Ky. Admin. Regs. 1:560 (1999)).
405 Id. at 10.
406 See generally Jean Reilly, Article: Reverse Mortgages: Backing into the Future, 5 Elder L.J. 17 (1997) (discussing reverse mortgages, the tax considerations of the reverse mortgage and its public benefits).
A reverse mortgage can be obtained through private lenders, banks, and the federal government. A popular government based reverse mortgage is the Home Equity Conversion Mortgage (HECM). The HECM program is a federal program created by Congress in 1987. The HECM is run by the U.S. Department of Housing and Urban Development (HUD) and is a federally-insured private loan.

Eligibility requirements for HUD’s reverse mortgage, the HECM, are delineated in the United States Code. An individual must be a sixty-two year old or older homeowner, who occupies at least one unit of the residence, who is able to service the mortgage properly, has received adequate counseling by a third party, and has a “very low outstanding mortgage balance or own your home free and clear.”

Although Home Equity Conversion Mortgage loans cater to lower- and middle-income homeowners, there are several private lenders that target other

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411 See Reilly, supra note 406, at 39.
412 Id.
413 United States Department of Housing and Development, supra note 399.
416 See 12 U.S.C.S. § 1715z-20(d)(3). A dwelling must be designed “principally for a 1- to 4-family residence in which the mortgagor occupies 1 of the units.” Id.
418 See 12 U.S.C.S. § 1715z-20(d)(2)(B) (1998 & Supp. 2001); see also Reilly, supra note 406, at 25-6. The HECM was threatened with litigation by the Governor of Arizona claiming that the counseling requirement constitutes age discrimination. Id; and 12 U.S.C.S. § 1715z-20(k)(3)(A)-(C) (Supp. 2001). Section 1715z-20(k)(3) allows for the individual to waive the counseling requirement. Id. Section 1715z-20(k)(3) provides in part:

Waiver of counseling requirement. The mortgagor under a mortgage insured under this subsection may waive the applicability, with respect to such mortgage, of the requirements under subsection (d)(2) (relating to third party counseling), but only if—

(A) the mortgagor has received the disclosure required under paragraph (2);

(B) the increase in the principal limit described in paragraph (2) exceeds the amount of the total cost of refinancing (as described in such paragraph) by an amount to be determined by the Secretary; and

(C) the time between the closing of the original home equity conversion mortgage that is refinanced through the mortgage insured under this subsection and the application for a refinancing mortgage insured under this subsection does not exceed 5 years.

Id

419 United States Department of Housing and Urban Development, supra note 399 (discussing eligibility requirements for the HUD reverse mortgage). For more information on the HUD reverse mortgage, visit the HUD website at <http://www.hud.gov> or call 1-800-217-6970, toll-free.
420 Reilly, supra note 406, at 43 (citations omitted).
homeowners. An examination of each lender would be required to determine the appropriate alternative for one's client.

E. Residents Rights in Nursing Homes and Assisted-Living Communities

As discussed briefly in the Historical Background section of this Survey, Kentucky has advanced greatly with respect to the care and protection of the elderly. In 1978 the Kentucky General Assembly enacted a resident rights statute for residents in long-term care facilities. As of 2001, Kentucky Revised Statute Section 216.515 encompasses 26 rights of residents residing in long-term care facilities. These rights must be posted in every long-term care facility.

1. Residents' Rights in Nursing Homes

Residents' rights in nursing homes in Kentucky took a giant leap forward as a consequence of the enactment of the Nursing Home Residents' Bill of Rights regulated by Kentucky Revised Statute Section 216.515. "The Bill of Rights must be posted in every Kentucky nursing home."

One of the more basic rights for a resident residing in a nursing home may be the right not to be involuntarily discharged. "Under current [Kentucky] law, involuntary discharge from a nursing home can occur for only three reasons." First, involuntary discharge may occur for medical reasons. Second, a resident may be involuntarily discharged to protect the welfare of the resident or others in the facility. Finally, a resident may be involuntarily discharged for non-payment of charges. If a resident is going to be discharged

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421 See generally Reilly, supra note 406 (discussing in great detail some of the various private lender reverse mortgages).
422 See Reilly, supra note 406 (providing a detailed discussion of the HECM Reverse Mortgages and some of the private lenders such as, Transamerica HomeFirst, Ever Yours, Fannie Mae and Freddie Mac).
423 See KY. REV. STAT. § 216.515 (Michie 1998). See also id. § 216.510(1). Section 216.510(1) provides:

"Long-term-care facilities" means those health-care facilities in the Commonwealth which are defined by the Cabinet for Health Services to be family-care homes, personal-care homes, intermediate-care facilities, skilled-nursing facilities, nursing facilities as defined in Pub. L. 100-203, nursing homes, and intermediate-care facilities for the mentally retarded and developmentally disabled.

Id.
424 Id. § 216.515.
425 Id. § 216.520 (1).
427 Id. at 166 (emphasis added).
428 Id.
429 Id.
430 Id.
431 Id.
or transferred, notice to the resident or their representative, in writing and thirty days in advance of the transfer or discharge is required.\(^\text{432}\)

Finally, every nursing home is required to “establish written procedures for the submission and resolution of complaints and recommendations, which should be conspicuously displayed throughout the facility.”\(^\text{433}\)

2. Residents’ Rights in Assisted-Living Communities

As noted above, every long-term care facility must conspicuously post the Residents’ Bill of Rights throughout the facility.\(^\text{434}\) The question becomes, is an assisted-living facility a “long-term care facility?” Kentucky law defines long-term care facilities as, “those health-care facilities in the Commonwealth, which are defined by the Cabinet for Health Services to be family-care homes, personal-care homes, intermediate-care facilities, skilled-nursing facilities, nursing facilities as defined in Pub. L. 100-203, nursing homes, and intermediate-care facilities for the mentally retarded and developmentally disabled.”\(^\text{435}\) Even though assisted-living facilities are not expressly mentioned in the definition of long-term care facilities, they would likely be classified as an “intermediate-care facilities”. Assisted-living facilities provide services similar to those described in Section 216-510(1). If so classified, the Residents’ Bill of Rights would be required to be posted throughout those facilities.

Assisted-living facilities must also provide each client with a minimum 30-day move-out notice and, upon providing such notice, must assist the client in finding appropriate living arrangements.\(^\text{436}\) Furthermore, each assisted-living facility must have “written policies on reporting and recordkeeping of alleged or actual cases of abuse, neglect, or exploitation of an adult . . . [and] any . . . staff member who has reasonable cause to suspect that a client has suffered abuse, neglect, or exploitation” has occurred must report such abuse, neglect, or exploitation.\(^\text{437}\) Finally, all staff and management of every assisted-living

\(^{432}\) Elder Law Committee of the Kentucky Bar Association, \textit{supra} note 426, at 167.

\(^{433}\) Id. (citing Ky. REV. STAT. § 216.520 (Michie 1998)).

\(^{434}\) See Ky. REV. STAT. § 216.520 (1) (Michie 1998).

\(^{435}\) Ky. REV. STAT. § 216.510 (1) (Michie 1998).

\(^{436}\) See Ky. REV. STAT. § 194A.705(4) (Michie Supp. 2001) (requiring that, “[e]ach assisted-living community shall assist each client upon a move-out notice to find appropriate living arrangements. Each assisted-living community shall share information provided from the office regarding options for alternative living arrangements at the time a move-out notice is given to the client”); see also id. § 194A.713(7)-(9) (requiring that, each assisted-living facility provide in the lease agreement a “[m]inimum thirty (30) day notice provision for a change in the community’s fee structure; . . . ”); id. § 194A.709(2) and (3). Section 194A.709(2) and (3) provide:

(1) An assisted-living community shall have written policies on reporting and recordkeeping of alleged or actual cases of abuse, neglect, or exploitation of an adult under KRS 209.030.

(2) Any assisted-living community staff member who has reasonable cause to suspect that a client has suffered abuse, neglect, or exploitation shall report the abuse, neglect, or exploitation under KRS 209.030.

\(^{437}\) Id. § 194A.709(2) and (3). Section 194A.709(2) and (3) provide:
community must receive education and orientation on client rights and adult abuse and neglect. 438

F. Abuse and Neglect: including Self Neglect

There are many forms of elder abuse that the attorney practicing elder law should be aware of when dealing with their elderly clients. 439 In 1999, there were nearly 5000 reports of abuse ranging from spousal abuse, abuse by an adult other than a spouse, neglect and abuse by a caretaker, self-neglect, and exploitation in Kentucky. 440 While caretaker neglect and abuse might result in tort litigation against the caretaker, a large amount of elder abuse is due to self-neglect. 441 Attorneys need to be aware of neglect and abuse in order to serve their client. "Signs that an adult may be abused or neglected include severe depression or any drastic changes in behavior or dress, suspicious bruises or other injuries, or over-medication." 442 In addition, an elderly client may be more vulnerable to self-neglect when they are living alone and are mentally or physically unable to provide for safe shelter and other basic needs of living. 443 Finally, exploitation may be spotted by financial irregularities or a change in power of attorney. 444

In 1998, the Kentucky General Assembly created the Elder Abuse Committee to develop a model protocol on elder abuse and neglect in Kentucky. 445 Kentucky law requires the reporting of elderly abuse. For example,

438 Id. § 194A.719. Section 194A.719 provides:

Assisted-living community staff and management shall receive orientation and in-service education on the following topics as applicable to the employee’s assigned duties:

1. Client rights;
2. Community policies;
3. Adult first aid;
4. Cardiopulmonary resuscitation;
5. Adult abuse and neglect;
6. Alzheimer’s disease and other types of dementia;
7. Emergency procedures;
8. Aging process;
9. Assistance with activities of daily living and instrumental activities of daily living;
10. Particular needs or conditions if the assisted-living community markets itself as providing special programming, staffing, or training on behalf of clients with particular needs or conditions; and
11. Assistance with self-administration of medication.


440 Id.

441 See id. (indicating that 1,456 of about 5,000 reports of elder abuse in Kentucky were of self-neglect).

442 Cabinet for Families and Children, supra note 439.

443 See id.

444 Id.

445 See KY. REV. STAT. § 209.005 (Michie 2001).
Kentucky Revised Statute 194A.709 requires assisted-living communities and their staff members to report abuse and neglect pursuant to *K.R.S. 209.030.* Furthermore, the statute provides that:

Any person, including, but not limited to, physician, law enforcement officer, nurse, social worker, cabinet personnel, coroner, medical examiner, alternate care facility employee, or caretaker, having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation, shall report or cause reports to be made in accordance with the provisions of this chapter.

Finally, neither a nursing home nor assisted-living community may employ a person who would provide direct services to an elderly citizen "if that person has been convicted of a felony offense related to theft; abuse or sale of illegal drugs; abuse, neglect, or exploitation of an adult; or the commission of a sex crime."  

VI. CONCLUSION

Elder law is an important and developing area of the law in which there is certain to be future legislative, judicial, and administrative activity. Elder law is of great significance to elders and those representing them. At this stage in its development, Elder law offers some protection for older Kentuckians. As more and more elders begin to rely on Elder law to protect their rights, Elder law will necessarily see a surge in litigation.

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The Need to Close Kentucky’s Revolving Door: Proposal for a Movement Towards a Socially Responsible Approach to Treatment and Commitment of the Mentally Ill

By Kathleen Winchell

I. Introduction

The end of the 20th century brought forth dramatic advances in the understanding and treatment of severe mental illnesses. New theories on the origin of mental illness evolved, contributing significantly to our comprehension of mental illness. Additionally, the development of highly effective medications and psychological therapies greatly aided our ability to successfully treat the mentally ill. However, despite these advances, many mentally ill individuals still do not receive the help they need. Many are unaware that they are ill and should seek help. At least 40% of the 3.5 million Americans diagnosed with either schizophrenia or manic-depression, two very severe mental illnesses, lack insight into their disorder; and they do not recognize that the symptoms of their mental illnesses are, in fact, symptoms. Additionally, many cannot be committed, or, if committed, must be released, from mental institutions because they do not meet the criteria of involuntary hospitalization statutes designed to protect their civil liberty interests. The result is that mentally ill individuals suffer because they do not get the help they need. There is no doubt that a person’s civil liberties are important, and, since a mentally ill person may not be aware of her right to exercise her civil liberties, the protection of a mentally ill person’s civil liberties seems of utmost importance. Protection in the form of denial of necessary treatment of the mentally ill, however, does not seem to be helping anyone. Herschel Hardin, former member of the board of directors of the British Columbia Civil Liberties Association and father of a child with schizophrenia, stated that treatment can restore mentally ill patients’ “dignity, their free will, and the meaningful exercise of their liberties.” Hardin asks, “How can so much degradation and death – so much humanity – be justified in the name of civil liberties?” and answers that “It cannot.”

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2 See William Spaulding, Applications of Therapeutic Jurisprudence in Rehabilitation for People with Severe and Disabling Mental Illness, 17 T.M. Cooley L. Rev. 135 (2000).
3 See id.
4 Id.
5 Id.
7 See id.
9 See id.
Kentucky, like many other states, struggles with the issue of how to effectively treat the chronically mentally ill. Recently, an article entitled “Arrests of Mentally Ill Woman Reach At Least 60” appeared in Louisville’s Courier-Journal.\(^\text{10}\) The article chronicled the legal and mental health history of Patricia Ann Smith, a thirty-eight year-old Louisville woman who has been arrested at least 60 times in the past seven years.\(^\text{11}\) Patricia Smith has been diagnosed as a chronic schizophrenic.\(^\text{12}\) She has been charged with more than 100 crimes in the past seven years.\(^\text{13}\) Some of Patricia Smith’s charges include prostitution, robbery, kidnapping, and murder.\(^\text{14}\) In 1994, Patricia Smith was charged with killing an 87-year-old woman.\(^\text{15}\) Police have noted in their records that Smith “preys on the elderly.”\(^\text{16}\) Most recently, Smith was arrested for stealing a wallet at St. Louis Bertrand Church and biting a church parishioner on the hand.\(^\text{17}\) Smith was charged with robbery and trespassing.\(^\text{18}\)

Sadly, this is not the first time Patricia Smith’s story has made the news. In 1999, the Courier-Journal featured an article chronicling Smith’s criminal record and mental illness history, which, though almost two years ago, was already extensive.\(^\text{19}\)

According to the Courier-Journal article, Smith is “legally incompetent to stand trial but does not meet Kentucky’s criteria for involuntary commitment to a mental hospital.”\(^\text{20}\) Therefore, Smith is continuously released into the streets, where, according to court records, she “stops taking her medication, starts using cocaine and often has run-ins with the law.”\(^\text{21}\) Sadly, Smith will inevitably commit another crime. The court will find her incompetent to stand trial for this crime and seek to have her involuntarily committed to a mental institution. Because she will cease to meet the criteria for involuntary commitment, the mental hospital will release her. She will then be discharged out onto the streets again, where this complex cycle known as the “revolving door” between incompetency to stand trial and inability to be held in a mental institution will undoubtedly begin again.

According to Jefferson County Attorney Irv Maze, commitment to reforming the system is “very lacking.”\(^\text{22}\) Sheriall Cunningham, executive director of the Mental Health Association of Kentucky, admits that the revolving door epidemic is “a crying shame.”\(^\text{23}\) Commonwealth’s Attorney Dave Stengel plans to seek an indictment for Smith’s most recent arrest at St. Louis Bertrand


\(^{11}\) See id.

\(^{12}\) See id. at A5.

\(^{13}\) Id.

\(^{14}\) Id. at A1; see also Kim Wessel, A Legal Revolving Door Case Exposes Conflict in Kentucky Laws, THE COURIER-JOURNAL, September 26, 1999.

\(^{15}\) See Wessel, supra note 10.

\(^{16}\) See id. at A5.

\(^{17}\) Id. at A1, A5

\(^{18}\) Id.

\(^{19}\) Id.

\(^{20}\) Id. at A1.

\(^{21}\) Id. at A5.

\(^{22}\) See Wessel supra note 10, at A1, A5

\(^{23}\) See id. at A5.
Church, but he admits this will only start the revolving door cycle over again, stating that the Commonwealth is “grasping at straws” in an attempt to alleviate the problem.\textsuperscript{24}

Representative Sheldon Baugh, a Republican from Russellville, served on a task force which recommended almost four years ago that Kentucky’s involuntary hospitalization standards not apply to those mentally ill persons who have been accused of violent crimes.\textsuperscript{25} The task force recommended a separate legal process that would apply to these mentally ill persons.\textsuperscript{26} Nothing came of the task force’s recommendation, however, and Baugh is “just as concerned now as [he] was then.”\textsuperscript{27}

Sheriall Cunningham, on the other hand, said she is “extremely leery” about changing the law, as it would possibly involve “trampling on the rights of the mentally ill.”\textsuperscript{28} After all, as Dave Stengel noted, “mental hospitals aren’t meant to be prisons.”\textsuperscript{29} Mental hospitals are meant to treat those who are mentally ill, not to warehouse criminal defendants found incompetent to stand trial. Undoubtedly, the revolving door problem – and how to resolve it without suppressing fundamental liberty interests - is a challenging, complicated issue facing our society.

Clearly, an effort should be made to stop the revolving door problem, the constant cycle of crime, incompetency to stand trial, involuntary hospitalization, and release. From a fiscal standpoint, revolving-door patients consume a large amount of mental health service dollars due to the high costs of hospitalization.\textsuperscript{30} From a public safety standpoint, it is clear from Patricia Smith’s story, and the stories of many others like her, that public safety is threatened when potentially dangerous mentally ill individuals are left unmonitored in the community.

This Note begins in Part II with a brief history of civil commitment law and an overview of Kentucky’s present civil commitment law. In Parts III and IV, the legal standards for competency to stand trial and involuntary commitment to a mental institution are outlined. The Note discusses the constitutional ramifications of broadening these standards so that persons like Patricia Smith could stand trial or be kept in a mental institution for an extended period of time. In Parts V and VI, the Note proposes alternatives to civil commitment that would, if properly implemented, assist in keeping persons like Patricia Smith non-dangerous and on their medications without depriving them of their liberty to the extent of confinement in a mental institution. This Note proposes that Kentucky should take action and move toward a more treatment-oriented, social service model of commitment of the mentally ill. Kentucky should adopt a court-ordered outpatient treatment program, as other states have done, where patients could be ordered to undergo outpatient treatment programs in the community. This proposal is discussed further in sections V and VII of this Note.

\begin{itemize}
\item \textsuperscript{24} \textit{id.}
\item \textsuperscript{25} \textit{id.}
\item \textsuperscript{26} \textit{id.}
\item \textsuperscript{27} \textit{id.}
\item \textsuperscript{28} \textit{id.}
\item \textsuperscript{29} See Wessel \textit{supra} note 10, at A1, A5.
\item \textsuperscript{30} See Ken Kress, \textit{An Argument for Assisted Outpatient Treatment for Persons with Mental Illness Illustrated with Reference to a Proposed Statute for Iowa}, 85 \textit{IOWA L. REV.} 1269, 1341-1342 (2000).
\end{itemize}
Throughout, the Note attempts to provide examples of legislation enacted by other states in an attempt to solve their revolving door problem and proposes similar actions which could be taken in Kentucky.

II. CIVIL COMMITMENT

Involuntary commitment, or "civil commitment,"31 of the mentally ill is "reserved for those whom society, or the psychiatric profession, feels are unaware that hospitalization will benefit them; who protest, or have no opinion, concerning a hospitalization that to other 'more rational' observers seems necessary."32 Traditionally, it has been within the states' power to commit mentally ill citizens to psychiatric hospitals against their will.33 The State's authority to confine the mentally ill rests upon two distinct legal doctrines: parens patriae and police power.34 Under its parens patriae authority, the State acts on behalf of certain individuals who are believed incapable of acting in their own best interest.35 The police power authorizes the State to confine persons in order to prevent harm to the community due to anti-social actions.36

Of course, though within the States' power, involuntary commitment is an extreme infringement on personal liberty. As the Supreme Court stated in Lessard v. Schmidt,37 "[t]he power of the state to deprive a person of the fundamental liberty to go unimpeded about his or her affairs must rest on a consideration that society has a compelling interest in such deprivation."38 The State must show either a compelling interest in protecting the mentally ill from harming themselves (State's exercise of its parens patriae authority) or from

31 See THOMAS S. SZASZ, LAW, LIBERTY, AND PSYCHIATRY 39 (1969). Thomas Szasz defines "civil commitment" as the "involuntary detention of a person in an institution designated as a mental hospital." Id. See BLACK'S LAW DICTIONARY 167 (6th ed. 1991). "Civil Commitment" is defined in Black's Law Dictionary as "a form of confinement order used in the civil context for those who are mentally ill, incompetent, alcoholic, drug addicted, etc., as contrasted with the criminal commitment of a sentence." Id.


34 See Durham, supra note 33, at 395, citing John Q. La Fond, An Examination of the Purposes of Involuntary Civil Commitment, 30 BUFFALO L. REV. 499 (1981).

35 See id.


38 See Lessard, 349 F. Supp. 1078, 1084.
harming others (State’s exercise of its police power).\textsuperscript{39} Because there must be strong justification for the State’s act of involuntary-committing one of its citizens, statutes must be drafted to ensure that each person meets strict criteria before he or she can be involuntary hospitalized.\textsuperscript{40}

A great deal of debate surrounds civil commitment.\textsuperscript{41} In the late 1960’s and early 1970’s, public opinion shifted from support of civil commitment to support of limits on the state’s civil commitment authority.\textsuperscript{42} Before the 1960’s, “medical” models of civil commitment, which conferred “broad authority on mental health experts to hospitalize coercively persons they deemed mentally ill and in need of hospitalization” were used in many states.\textsuperscript{43} These models dissolved drastically in favor of “legal” models of commitment.\textsuperscript{44} The legal model of commitment, as opposed to the medical model, contains “significant substantive and procedural safeguards [to] limit the authority of medical specialists to commit persons deemed mentally ill.”\textsuperscript{45} The changes toward the legal civil commitment model during the late 1960’s and 1970’s reflected a civil libertarian ideology.\textsuperscript{46} Forces influencing the shift from the medical model to the legal model include an increased recognition of the substantial loss of liberty involved in involuntary commitment to a mental hospital, rising public awareness of the stark conditions of state mental health facilities, increased emphasis on protective criminal procedures, and developments in constitutional procedures “enunciating rights to make decisions concerning one’s own body.”\textsuperscript{47} As a result of shifting attitudes, many states completely revised their civil commitment laws by providing additional procedural safeguards and by establishing restrictive substantive criteria for civil commitment.\textsuperscript{48}

After stringent statutes were enacted, however, and after expansive deinstitutionalization occurred in the 1980’s, many became concerned that the system had gone too far.\textsuperscript{49} “Almost before the ink of the newly written laws had dried, a heated debate began regarding the direction, extent, and impact of this

\textsuperscript{39} See id.
\textsuperscript{40} Id.
\textsuperscript{41} See Durham, supra note 33, at 397.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{47} See supra note 33, at 397.
civil libertarian reform of commitment laws."\textsuperscript{50} This debate was sparked by violent acts committed by deinstitutionalized mentally ill patients that ended in tragedy\textsuperscript{51} and the widely publicized plight of the homeless mentally ill.\textsuperscript{52} These unfortunate, yet predictable, outcomes of the new laws have caused some states to shift yet again, this time from the civil libertarian model of civil commitment to what Aviram and Weyer refer to as a "social service" model.\textsuperscript{53} This model returns to a form of what Durham refers to as the "medical" model.\textsuperscript{54} A social service model focuses on developing treatment programs, including outpatient treatment programs, for the mentally ill and ensuring that those in need of help actually obtain help.\textsuperscript{55} The more treatment-oriented, rather than the civil libertarian, model of civil commitment stems in part from the claim, usually made by psychiatrists and psychologists, that "restrictive state commitment statutes operate to deprive mentally ill persons of essential therapeutic services that could humanely and effectively treat their illness and thereby substantially improve their well-being."\textsuperscript{56}

Kentucky’s current criteria for civil commitment / involuntary hospitalization are stated in Ky. Rev. Stat. § 202A.026. This statute, enacted in 1982, provides that:

No person shall be involuntarily hospitalized unless such person is a mentally ill person:

1. Who presents a danger or threat of danger to self, family or others as a result of the mental illness;
2. Who can reasonably benefit from treatment;
3. For whom hospitalization is the least restrictive mode of treatment presently available.\textsuperscript{57}

Ky. Rev. Stat. 202A.011 defines the terms found in the involuntary commitment statute. A “mentally ill person” is “a person with substantially impaired capacity to use self-control, judgment, or discretion in the conduct of the person’s affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior,  

\textsuperscript{50} See Aviram, supra note 46, at 772.
\textsuperscript{51} See id. (citing R.O. Boorstin, City Planning 20 Percent Increase in Beds for Psychiatric Patients, NEW YORK TIMES, July 27, 1986, at A25).
\textsuperscript{53} See Aviram, supra note 46, at 771.
\textsuperscript{54} See Durham, supra note 33, at 397-398.
\textsuperscript{56} See Durham, supra note 33, at 398.
\textsuperscript{57} See KY. REV. STAT. 202A.026 (Michie 2001).
or emotional symptoms can be related to physiological, psychological, or social factors."58 "Danger" or "threat of danger to self, family, or others" is defined as "substantially physical harm or threat of substantially physical harm upon self, family, or others, including actions which deprive self, family, or others of the basic means of survival including provision for reasonable shelter, food, or clothing." 59 "Least restrictive alternative mode of treatment" is defined as "treatment which will give a mentally ill defendant a realistic opportunity to improve the individual's level of functioning, consistent with accepted professional practice in the least confining setting available." 60 There is no definition provided for "reasonably benefit from treatment." If a person involuntarily committed no longer meets these four criteria (including that he or she must first be a "mentally ill person"), he or she must be released from the mental institution.61

III. INCOMPETENCY TO STAND TRIAL

While civil commitment proceedings may be initiated by petitions filed by friends or family members of the mentally ill, without any type of criminal proceedings, civil commitment proceedings may be initiated when defendants are found incompetent to stand trial for a crime they have allegedly committed. In Kentucky, if the court finds a criminal defendant incompetent to stand trial, the court "shall conduct an involuntary hospitalization proceeding under Ky. Rev. Stat. Chapter 202A or 202B." 62 If the court finds that a defendant is presently incompetent to stand trial, but that there is a "substantial probability" that the defendant "will attain competency in the foreseeable future," however, the court shall commit the defendant to a treatment facility or a forensic psychiatric facility and order him to submit to treatment for sixty (60) days or until the psychologist or psychiatrist treating him finds him competent, whichever occurs first, except that if the defendant is charged with a felony, he shall be committed to a forensic psychiatric facility unless the secretary of the Cabinet for Health Services or the secretary's designee determines that the defendant shall be treated in another Cabinet for Health Services facility. Within ten (10) days of that time, the court shall hold another hearing to determine whether or not the defendant is found competent to stand trial.63

The defendant's "treatment" can include "medication or counseling, therapy, psychotherapy, and other professional services provided by or at the direction of psychologists or psychiatrists."64 The "foreseeable future" in which the court must find that there is a "substantial probability" that the defendant will

59 See id. at 202A.011 (2) (Michie 2001).
60 See id. at 202A.011(8) (Michie 2001).
62 See Ky. Rev. Stat. § 504.110(2) (Michie 2001); Ky. Rev. Stat. § 202B is a statute similar to KRS 202A and deals with commitment of mentally retarded individuals.
attain competency is defined as "not more than three hundred sixty (360) days." Although the statute is not exactly clear, and there are no published Kentucky opinions clarifying that a defendant can be ordered to undergo treatment for periods of 60 days (or until competency is established, whichever occurs first) until the 360 days have ended (i.e., 6 periods of 60 days of treatment totaling 360 days), the circuit court has interpreted the statute to mean that a defendant with a substantial probability of attaining competency has 360 days to do so.67

Criminal defendants, of course, cannot stand trial if found incompetent. The Supreme Court has held that the conviction of an accused person while he or she is legally incompetent violates due process of law under the Fourteenth Amendment.68 In Dusky v. United States69, the Supreme Court stated that "the test [for whether a defendant is competent to stand trial] must be whether he has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as a factual understanding of the proceedings against him.70

The constitutional mandate set forth in Dusky is adopted in Kentucky's definition of "incompetency to stand trial," found in Ky. Rev. St. § 504.060(4): "Incompetency to stand trial means, as a result of mental condition, lack of capacity either to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense."71

The Commonwealth of Kentucky does allow for a court to order that a defendant be involuntarily medicated with the goal that the defendant, after treatment, will be competent to stand trial.72 The issue of whether defendants can be forcefully medicated in order to be competent to stand trial, however, has been the focus of national attention in the Russell Weston, Jr., case.73 For now,

65 See id. at § 504.060(3).
66 See KY. REV. STAT. § 504.110(1) (Michie 2001). The statute's plain language reads as though 60 days is the maximum number of days in which a defendant with a substantial probability of attaining competency must attain competency. Id. After the first 60-day period of treatment, according to the statute's plain language, a defendant must undergo civil commitment proceedings if not competent. Id.
67 See Eugene Englert v. Bishop, No. 96-CI-104758 (Jefferson Cir. Ct., Div. 5, August 22, 1996). According to Judge John W. Potter, "the statute [KRS 504.060(3)] defines foreseeable future as 360 days which contemplates a defendant becoming competent after more than 60 days of treatment. This possibility could not exist if after one hearing the Court were limited to either finding the defendant competent or letting him go free of the criminal system (i.e., proceeding under the mental inquest statutes)." Id.
70 See id.
71 KY. REV. STAT. § 504.060(4) (Michie 2001).
72 See Turner v. Commonwealth, 860 S.W.2d 772 (Ky. 1993).
however, defendants in Kentucky can be forcefully medicated. In *Turner v. Commonwealth*, the Kentucky Supreme Court, citing the U.S. Supreme Court case *Riggins v. Nevada*, held that a defendant could be ordered to undergo medication for mental illness in order to attain competency for trial if a "reasonable medical probability" existed that, with medication, the defendant would attain competency. The Court, thus, applied the U.S. Supreme Court's ruling in *Riggins* that the due process rights of a defendant ordered to be medicated during trial are not violated if there is a finding that: (1) the medication is medically appropriate, and (2) considering less intrusive alternatives, medication is essential for the defendant's own safety or the safety of others. The Kentucky Supreme Court made its ruling despite defendant Turner's argument that the evidentiary standard "beyond a reasonable doubt" applied to proceedings relating to the "intrusive treatment of involuntarily committed persons," and, therefore, he should not have been medicated involuntarily if the State could not meet this standard. Turner interpreted *Riggins* to mean that as long as the district court, before ordering medication, makes a finding about reasonable alternatives to the medication or the

*Games With Ill Defendants, The Detroit News,* February 16, 2001, at 09. Weston's lawyers argue that the State cannot force Weston to be medicated against his will. They argue that the medication can have detrimental side effects and that if Weston takes the medication and becomes competent, Weston may appear "sane" to the jury, detrimentally affecting his insanity defense. On July 27, 2001, the U.S. Circuit Court of Appeals, District of Columbia, ruled that Weston could be medicated with the goal of being competent to stand trial. According to the court, the interest in standing trial overrode Weston's liberty interest in refusing the medication. *Id.*

504 U.S. 127, 136 (1992). *Riggins* held that due process is satisfied in connection with the administration of antipsychotic drugs to a defendant during trial only if a finding is made that (1) medication is medically appropriate, and (2) considering less intrusive alternatives, medication is essential for the defendant's own safety or the safety of others. Additionally, the Court determined that it was error to permit the State to administer an antipsychotic drug to the defendant without a prior determination of whether there were reasonable alternatives.

See *Turner*, 860 S.W.2d at 774.


See Ky. Rev. Stat. 202A.196(3) and (4) (Michie 2001). These sections provide:

(3) The hospital may petition the district court for a *de novo* determination of the appropriateness of the proposed treatment. Within seven (7) days, the court shall conduct a hearing, consistent with the patient's due process rights to due process of law, and shall utilize the following factors in reaching its determination:

(a) Whether the treatment is necessary to protect other patients or the patient himself from harm;
(b) Whether the patient is incapable of giving informed consent to the proposed treatment;
(c) Whether any less restrictive alternative treatment exists; and
(d) Whether the proposed treatment carries any risk of permanent side effects.

(4) Upon the completion of the hearing, the court shall enter an appropriate judgment.

*Id.*

See *Turner*, 860 S.W.2d at 774.
appropriateness of such medication, the ordering of medication is constitutionally 

If defendants are incompetent to stand trial, with no substantial probability of attaining competency in the foreseeable future, the court conducts involuntary hospitalization proceedings against the defendant under Ky. Rev. Stat. § 202 A or 202 B. If the defendant does not meet all of the requirements of involuntary hospitalization under Ky. Rev. Stat. § 202A, the defendant may not be hospitalized. In order to be involuntarily hospitalized, the State must prove that the defendant is a person: (1) who is mentally ill; (2) who is a danger to himself or others; (3) who can reasonably benefit from treatment; and (4) for whom hospitalization is the least restrictive alternative mode of treatment available. Additionally, if the defendant is committed, and, at any time, fails to meet the involuntary hospitalization requisites, the defendant must be released under Ky. Rev. Stat. § 202A.171.

If the defendant does not meet all of the requirements for involuntary hospitalization, he or she cannot be hospitalized; in this scenario, the defendant would have to be released from custody and would no longer have to take the medication that may, in the future, make him or her competent to stand trial. Many violent mentally ill offenders who are violent at the time of hospitalization may meet the standard for involuntary hospitalization, but it is easy to see how those accused of non-violent crimes, such as shoplifting or burglary, or those who become non-violent after taking medication, would not.

In terms of reforming the procedures for finding defendants incompetent to stand trial with the goal of reducing the revolving door problem, a lengthening of the 360-day “foreseeable future” time period would be an unlikely possibility, as it would seriously threaten the constitutional right to a speedy trial. Such a lengthening would undoubtedly be challenged with arguments that the defendant has a right to a speedy trial and a right to be free from infringements on liberty. In Jackson v. Indiana, the U.S. Supreme Court stated that the dismissal of criminal charges against an incompetent person accused of a crime is justified by the “Sixth-Fourteenth Amendment right to a speedy trial, or the denial of due process in holding pending charges indefinitely over the head of one who will never have a chance to prove his innocence.” In Jackson, the Court held that indefinite commitment of a criminal defendant solely on account of his lack of capacity to stand trial violates due process. “Such a defendant cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future. If it is determined that he will not,
the State must either institute civil proceedings applicable to indefinite commitment of those not charged with crime, or release the defendant. 90

Because of the Court's ruling in Jackson, based on the Sixth, 91 Eighth, 92 and Fourteenth 93 Amendments of the U.S. Constitution, and because of similar rights guaranteed by §§2, 94 11, 95 14, 96 and 17 97 of the Kentucky constitution, incompetent defendants cannot be held indefinitely in the hope that they may eventually become competent to stand trial. This is why, in Kentucky, defendants cannot be involuntarily committed for longer than 60-day increments and for up to a maximum of 360 days. 98 At the end of the maximum time period, if the defendants still are not competent to stand trial, involuntary hospitalization proceedings must begin, 99 and the pending charges against the defendant are typically dropped with or without prejudice. 100 Defendants cannot be held in the hospital indefinitely while criminal charges are pending against him or her, as the defendant would be denied a speedy trial, a right guaranteed by the speedy trial clause of the Sixth Amendment. 101 Additionally, defendants cannot be held involuntarily under civil commitment orders if they do not meet the criteria for involuntary hospitalization. 102

A substantial number of criminal defendants who the court determines will not attain competency in the foreseeable future, or who do not attain competency at the end of the 360 days, cannot be held involuntarily in a psychiatric facility because they do not meet the criteria of Kentucky's involuntary hospitalization statute. 103 Therefore, the defendants must be released from the hospital under Ky. Rev. Stat. § 202A.171. 104 These criminal defendants often commit criminal acts after being released, 105 and the "revolving door" of being incompetent to stand trial, but not meeting the criteria of involuntary hospitalization, begins once again. 106 This "gap" in the law should be minimized

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90 Id.
91 See U.S.CONST. amend. VI. Accused have a right to a speedy trial.
92 See U.S.CONST. amend. VIII. Cruel and unusual punishments shall not be inflicted.
93 See U.S.CONST. amend. XIV, § 1. No State shall deprive any person of life, liberty, or property without due process of law.
94 See KY. CONST § 2. "Absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority."
95 See KY CONST § 11. Accused shall have a speedy and fair trial.
96 See KY CONST § 14. Accused shall have remedy by due course of law and justice administered without delay.
97 See KY CONST § 17. Cruel punishment shall not be inflicted.
98 See KY REV. STAT. § 504.110 (Michie 2001).
99 See id.
101 See U.S.CONST. amend. VI.
103 Interview with Dr. Larry Curl, Ph.D., psychologist, Central State Hospital, Louisville Kentucky. (December 2000).
105 Interview with Dr. Larry Curl, Ph.D., psychologist, Central State Hospital, Louisville Kentucky. (December 2000). See also E. Fuller Torrey, M.D. and Mary Zdanowicz, Esq., Why Deinstitutionalization Turned Deadly, THE WALL STREET JOURNAL, August 4, 1998.
106 Interview with Dr. Larry Curl, Ph.D., psychologist, Central State Hospital, Louisville Kentucky. (December 2000).
in order to ensure that both justice and proper treatment of the mentally ill may occur.

Outpatient treatment for those defendants who cannot be held in a psychiatric institution may be suitable. Rather than releasing the defendant if involuntary hospitalization requirements are not met, the defendant could be ordered to undergo outpatient treatment, if he or she met a lesser outpatient commitment standard.

IV. KY. REV. STAT. § 202A.026, KENTUCKY’S CRITERIA FOR INVOLUNTARY HOSPITALIZATION

Frequently, even chronically mentally ill people become stable while in a mental hospital and are released because they no longer meet the involuntary hospitalization requirements. In the hospital, they take their medications on a regular basis, they receive shelter, and they interact with others. Even Patricia Smith, after being hospitalized for merely twelve days in 1999, was described by a Central State Hospital psychiatrist as “rational and goal oriented in her conversation . . . calm and cooperative . . . compliant with treatment. She gives no indication of being a danger to herself or others.” Based on this evaluation, Smith was recommended for release. But every time she is released, Smith stops taking her medication, starts using illicit drugs, and commits some sort of crime.

Without a structured, regimented setting, patients released from mental hospitals often stop taking their medication. Without the stability that their medication provides, many patients become violent and/or commit crimes in the community. They are found incompetent to stand trial and are once again involuntarily committed to the psychiatric hospital.

Assistant Jefferson County Attorney Martin Kasdan, Jr., a prosecuting attorney representing the Commonwealth of Kentucky in involuntary commitment proceedings against mentally ill respondents like Patricia Smith, expressed concern that some patients committed under Ky. Rev. Stat. 202A.026 cannot be committed long enough to receive full benefit from treatment. As a result, they are released before they are able to successfully continue their treatment regimen and function in the community. Kasdan expressed that perhaps if they could be held in the hospital longer, they would be more likely to succeed once released into the community.

It seems that a broadening of the criteria of the statute would facilitate increased commitments under Ky. Rev. Stat. 202A.026 and an increased duration of hospitalization for some patients. Constitutional concerns regarding the

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107 See Wessel, supra note 14.
108 See id.
109 Id.
110 See Durham, supra note 33, at 410.
112 Telephone interview with Martin Kasdan, Jr., Assistant Jefferson County Attorney (Dec. 2000).
113 See id.
114 Id.
patients' liberty interest, however, are abundant in this area, given that involuntary commitment is such a substantial infringement of a person's liberty.

A. Broadening of the "Dangerousness" Requirement

1. The Supreme Court has mandated that one must be "dangerous" to be involuntarily committed.

To be involuntarily committed, one must be a "danger or threat of danger to self, family or others."115 The United States Supreme Court has held that to be involuntarily committed to a mental institution, a patient must be dangerous; having a mental illness is not enough to commit a person against his or her will. In O'Connor v. Donaldson,116 a landmark case on involuntary commitment, the Court held that

A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.117

Even if the patient were "dangerous" when committed, and his or her involuntary commitment was then justified, the commitment cannot constitutionally continue after the basis for the commitment (including dangerousness) no longer exists.118

In O'Connor, the Court made a point of noting that the State may not confine the mentally ill merely to ensure them a standard of living superior to the standard they enjoy in the community.119 "The mere presence of a mental illness does not disqualify a person from preferring his home to the comforts of an institution. . . . [A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."120

In Lessard v. Schmidt,121 a U.S. Supreme Court case addressing the concept of dangerous, the Court defined dangerousness as a condition where "there is an extreme likelihood that if the person is not confined, he will do immediate harm to himself or others."122

118 See O'Connor, 422 U.S. at 574-575.
119 See id. at 575.
120 Id.
122 See id. at 1093.
2. Difficulty of Proving and Predicting Dangerousness: Using Predictions of "Future" Dangerousness to Fulfill the "Dangerousness" Requirement

Many mental health professionals consider the label of "dangerous" to be a subjective determination, and a difficult determination to accurately make. Research indicates that the definition of "dangerousness" has definite subjective components, and that "[s]ome psychiatrists are much more ready than others to pin the dangerous label on a patient."123 Lessard v. Schmidt124 acknowledged the ambiguity inherent in predictions of dangerousness:

Although attempts to predict future conduct are always difficult, and confinement based upon such a prediction must always be viewed with suspicion . . . civil confinement can be justified in some cases if the proper burden of proof is satisfied and dangerousness is based upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another.125

In short, dangerousness is difficult to diagnose and difficult to predict. "Dangerousness can be recognized retrospectively, but the prospective determination [prediction of danger or threat of danger] of dangerousness is inexact. The prospect of future dangerous behavior can be a legitimate concern when we are considering cases en masse, but the prediction may be irrelevant concerning any individual case."126

Potential negative outcomes resulting from differing interpretations of the "dangerousness" requirement include: (a) a patient not getting necessary treatment because he or she does not meet a "strict" definition of dangerousness necessitating evidence of actual physical harm to one’s self or others; or (b) a patient kept in the hospital too long because of a "subjective" opinion under a "broad" definition of dangerousness that a patient would not be able to take care of one’s self if released from the hospital. Clearly, a balance must be struck.

Some argue that an imminent or current dangerousness standard, which most states, including Kentucky,127 require,128 is not the answer, as it does not encompass those who will likely be dangerous in the foreseeable, though not immediate, future.129 As Ken Kress states:

123 See Robitscher, supra note 32, at 253.
125 See id. at 1093.
126 See Robitscher, supra note 32, at 252.
127 See Ky. Rev. Stat. § 202A.011 (Michie 2001). Though Kentucky courts have not addressed this issue in any published opinion, the statute defines "danger" or "threat of danger to self, family, or others" as "substantially physical harm or threat of substantially physical harm upon self, family, or others, including actions which deprive self, family, or others of the basic means of survival including provision for reasonable shelter, food, or clothing," indicating that one must be currently dangerous. Id.
129 See Kress, supra note 30, at 1294.
Regrettably, many individuals with mental illness who are not currently dangerous to self or others are either currently deteriorating, or are at risk of doing so in the near future, and becoming dangerous. Because these individuals are not presently dangerous to self or others, under a current or imminent dangerousness standard, they cannot be required to visit regularly with a mental health professional. But if we wait until they are both imminently dangerous and have committed a recent, overt act or threat before we assist them in obtaining treatment, we will have guaranteed that many dangerous people will be in our midst. And we will have ensured that preventable violence will occur. We should not wait until it is too late.\footnote{See id.}

Kress implicates the current or imminent dangerousness requirement in exacerbating the revolving door problem, noting that dangerous individuals with mental illnesses must be released when they cease being mentally ill or dangerous.\footnote{Id. at 1295-1296.} Outside of the hospital environment, they often become ill, dangerous, and in need of hospitalization once again.\footnote{Id.} So, it would seem that if predictions of future dangerousness could be accurately made, a definition of dangerousness which includes a “likelihood of future dangerousness” would be ideal so that patients who would likely become dangerous to themselves or others in the foreseeable future could be hospitalized for a longer duration.

Given the extreme unreliability of predictions of future dangerousness, however, broadening the definition of “dangerousness” to include a label of “dangerous” if it is foreseeable that the patient could be dangerous seems unconstitutional. We cannot, in essence, “punish” someone by institutionalizing them for what they may do. It would violate a mentally ill offender’s liberty interest to commit him or her on the basis that he or she may be dangerous in the future, based on a somewhat tenuous prediction. A task force of the American Psychiatric Association concluded that “the state of the art regarding predictions of violence is very unsatisfactory.”\footnote{See American Psychiatric Association, Clinical Aspects of the Violent Individual (1974), quoted in John Monahan, Predicting Violent Behavior 27 (1981).} The ability of psychiatrists or any other professionals to reliably predict future violence is unproved.\footnote{See id.} An American Psychological Association task force reached a similar conclusion: “The validity of psychological predictions of dangerous behavior . . . is extremely poor, so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgments.”\footnote{See American Psychological Association, Report of the Task Force on the Role of Psychology in the Criminal Justice System 33, 1099-1113, quoted in John Monahan, Predicting Violent Behavior 27 (1981).} The position that preventive or therapeutic intervention based upon a prediction of future behavior “violates the most fundamental rights guaranteed in a democratic society,” which is that people are supposed to receive “punishment for past acts,
not detention for future acts," has gained a large number of adherents.136 As the Court noted in People v. Bradley,137 "[t]o hold a medical opinion that an individual could ‘conceivably be dangerous,’ then, will not be enough to find someone ‘dangerous’ for purposes of involuntary commitment."138

3. Broadening of the "Dangerousness" requirement to encompass a broad definition of "grave disablement" and/or "danger to property"

i. Grave Disablement

Some states have broadened the definition of "dangerousness," despite the efforts of civil libertarian lawyers, to include "grave disablement" as a form of dangerousness.139 "Grave disablement" provides a broader definition of dangerous in that it does not necessitate that a patient perform or threaten to perform a physically violent act.140 If a patient is unable to care for or protect him or herself in the community or cannot provide "nourishment, personal or medical care, shelter, or self-protection and safety," then that patient can be considered "gravely disabled."141

Washington’s involuntary commitment statute, Wash. Rev. Code § 71.05 (2000), provides for involuntary commitment when “a person presents, as a result of a mental disorder, a likelihood of serious harm, or is gravely disabled.” "Gravely disabled" is defined as

A condition in which a person, as a result of a mental disorder:

(a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or

(b) [M]anifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.142

This definition of "gravely disabled" expands the scope of the state’s parens patriae power by including not only those persons who are a danger to themselves, but also those who demonstrate "severe deterioration" in functioning by showing "loss of cognitive or volitional control over actions."143

138 See id. at 274.
140 See id. at 282.
141 Id.
142 See WASH. REV. CODE § 71.05.020(1) (2001).
143 See id.
The state of Washington had observed that many discharged patients were able to care for themselves for a short time period after being released from the hospital. Then, however, many stopped taking their prescribed medication and, as a result, exhibited rapid deterioration in their ability to function independently in the community. The expansion of the definition of "gravely disabled" in the statute, which occurred in 1979, allows evidence of "severe deterioration" as a basis for commitment. This expansion was a result of observations that after approximately 60 - 90 days, many patients stopped taking their medication and "exhibited rapid deterioration in their ability to function independently." Evidence of this "deterioration" is thought to indicate a "reasonable probability that the person is, or will imminently become, gravely disabled without treatment."

The Kentucky statute's definition of dangerousness does include actions which "deprive self, family, or others of the basic means of survival, including provision for reasonable shelter, food or clothing." Kentucky's statute, then, seems to have a "grave disablement" provision, to some extent, although the statute does not use the words "grave disablement" to describe the inability to provide food, clothing, or shelter to one's self or family. Kentucky's definition of "dangerousness" already seems rather broad, given that it does not mandate that one demonstrate physical violence to be "dangerous," but includes a form of dangerousness that allows for deterioration of quality of life or the quality of life of others. Although the Washington statute's definition of "dangerous" is broader than Kentucky's, the statute is broad at a risk, for it allows persons to be institutionalized based on grave disablement and / or evidence of deterioration in their ability to function independently. This standard, an expansion from Washington's previous standard, similar to Kentucky's standard, that involuntary commitment of a mentally ill person was only available if he or she could not satisfy her basic "human needs," helped to create an "avalanche of involuntary admissions [which] practically overwhelmed the institutional resources available in [Washington]." Additionally, studies found that many patients who had no previous contact with psychiatric facilities were committed, and these new patients stayed in the hospital longer than other patients and became chronic users of state mental hospitals. Clearly, the broadening of "grave disablement" increased the number of people in the hospital and the time they spent there. Additionally, it placed a major strain on Washington's budget and, arguably, infringed upon the civil liberties of patients committed under the new statute.

144 See Durham, supra note 33, at 410.
145 See id.
146 See WASH. REV. CODE § 71.05.020(1) (2001).
147 See Durham, supra note 33, at 410.
148 See id.
149 See KY. REV. ST. ANN. § 202A.01(2) (Michie 2001).
150 See id.
151 Id.
152 See WASH. REV. CODE § 71.05.020(1) (2001).
153 See Durham, supra note 33, at 410, citing WASH REV. CODE ANN. § 71.05.020 (West Supp. 1985).
154 See Durham, supra note 33.
155 See id. at 401.
In New Jersey, a major conflict existed between various organizations when considering whether to adopt a "grave disablement" standard when drafting its involuntary commitment statute. The New Jersey Psychiatric Association and the New Jersey Mental Health Association favored "grave disablement," arguing that more mentally ill people in need of hospitalization could be reached. The Division of Mental Health and Hospitals and the Office of the Public Advocate opposed an inclusion of "grave disablement," arguing that it would increase the likelihood of inappropriate commitments and that it was unnecessary because people meeting the definition of "grave disablement" could be cared for in the community. In the end, "grave disablement" was integrated into the New Jersey statute's definition of "dangerousness to self," as it is in Kentucky. New Jersey's statute reads:

"Dangerous to self" means that by reason of mental illness the person has threatened or attempted suicide or serious bodily harm, or has behaved in such a manner as to indicate that the person is unable to satisfy his need for nourishment, essential medical care or shelter, so that it is probable that substantial bodily injury, serious physical debilitation or death will result within the reasonably foreseeable future; however, no person shall be deemed to be unable to satisfy his need for nourishment, essential medical care or shelter if he is able to satisfy such needs with the supervision and assistance of others who are willing and available.

Significantly, though New Jersey was moving towards a social service approach to involuntary commitment, rather than a civil libertarian approach, it chose not to adopt a separate "grave disablement" provision, which likely would have made civil commitment more accessible. The New Jersey standard of danger to self does not use the terms "gravely disabled," and it is not as broad as the Washington standard. It does not state that "severe deterioration," or loss of cognitive or volitional abilities, will be evidence indicating that one is a danger to one's self. Notably, it clearly states that if the patient can survive in the community with the help of others, the patient should be in the community.

Montana's broad involuntary commitment standard is as follows:

If the court determines that the respondent is suffering from a mental disorder, the court shall then determine whether the respondent requires commitment. . . [T]he court shall consider the following:

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156 See Aviram, supra note 46, at 796-797.
157 See id. at 797.
158 Id.
(a) whether the respondent, because of a mental disorder, is substantially unable to provide for the respondent's own basic needs of food, clothing, shelter, health, or safety; 
(b) whether the respondent has recently, because of a mental disorder and through an act or an omission, caused self-injury or injury to others;
(c) whether, because of a mental disorder, there is an imminent threat of injury to the respondent or to others because of the respondent's acts or omissions; or 
(d) whether the respondent's mental disorder, as demonstrated by the respondent's recent acts or omissions, will, if untreated, predictably result in deterioration of the respondent's mental condition to the point at which the respondent will become a danger to self or to others or will be unable to provide for the respondent's own basic needs of food, clothing, shelter, health, or safety. Predictability may be established by the respondent's relevant medical history.¹⁶¹

Section (c) of the statute seems very broad and largely based on predictions established by the person's medical history. This statute says that a mentally ill person may be involuntarily hospitalized on the basis that they will predictably deteriorate if not hospitalized. It therefore follows, then, that they need not have deteriorated before being admitted to the hospital, and, inevitably, some people will be hospitalized who are not dangerous and will not become dangerous, in violation of O'Connor v. Donaldson.¹⁶²

While Kentucky's standard could, perhaps, be broadened to model the Washington standard of "grave disablement," Kentucky already incorporates "grave disablement," in a narrower sense, into its definition of dangerousness to self.¹⁶³ Making the statute any broader seems to run the risk of the patient not having to exhibit any real degree of dangerousness at all, and a patient must be dangerous to be confined in a psychiatric hospital against his or her will.¹⁶⁴ The New Jersey / Kentucky approach is superior to the Montana and Washington approaches. Whereas the Washington approach, through its "severe deterioration" provision, provides that discharged patients who do not take their medication while in the community can be considered "gravely disabled," the New Jersey approach indicates that monitoring the discharged patient while in the community, a preventive approach, is favorable. A structured outpatient treatment program, as discussed in section IV of this Note, could help to care for those who are not presently dangerous enough to be civilly committed, or who are dangerous when committed, but, when taking medication in the hospital, become stable. These patients should be monitored in the community to ensure they continue taking their medication, a significant factor in determining whether

¹⁶² 422 U.S. 563 (1975). See discussion in Section III A of this Note, infra.
or not they will become “dangerous” in the future, and, thus, continue the revolving door cycle.\textsuperscript{165}

\textit{ii. Danger to Property}

Kentucky’s definition of dangerousness does not currently include “danger to property,”\textsuperscript{166} but some states’ statutes do incorporate “danger to property” into their definitions of dangerousness.\textsuperscript{167} It seems that it may be advantageous for Kentucky to incorporate a “danger to property” provision in its involuntary commitment standard. In certain situations, such as arson, or the torturing of animals, such a standard would be appropriate to use as evidence of “dangerousness” for purposes of involuntary commitment.

The Model Law for Assisted Treatment, drafted by the Treatment Advocacy Center, contains a definition of dangerousness to others that includes danger to property.\textsuperscript{168} Evidence that a person has “recently and intentionally caused significant damage to the substantial property of others” is considered evidence of dangerousness to others under the Model Law.\textsuperscript{169} The Comment to the Model Law states that “[t]he harm to property criterion . . . not only protects property but also reflects that someone who engaged in the wanton destruction of the substantial property of others due to the symptoms of mental illness is likely to be a threat to the physical safety of others as well.”\textsuperscript{170} It is easy to see how dangerousness to property could expand to result in dangerousness to others.

However, limits would have to be set on what property would have to be damaged, and to what extent this property would have to be damaged, in order to constitute “danger to property” to the degree that it would be grounds to civilly commit someone. The Model Law does not clarify these issues, but only states that the property must be “substantial.”\textsuperscript{171} Involuntary commitment involves a substantial curtailing of liberty, and unless the value of the property is significant, or there is a risk of danger to others inherent in the destruction of the property, damage to property should not, by itself, fulfill the “dangerousness” requirement to involuntary commitment.

\textit{B. Broadening the “Reasonably Benefit from Treatment” & “Least Restrictive Alternative” Requirements}

\textsuperscript{165} \textit{See Kress, supra} note 30, at 1294-1299.

\textsuperscript{166} \textit{See} KY. REV. STAT. ANN. § 202A.011, § 202A.026 (Michie 2001).

\textsuperscript{167} \textit{See, e.g.,} WASH. REV. CODE § 71.05.020(14)(a) (2000) (defining the phrase “likelihood of serious harm” in the commitment standard as: “a substantial risk that . . . (iii) physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others”); \textit{see also} KAN. STAT. ANN. 59-2902(g)(1) (2001) (defining the phrase “likely to cause harm to self or others” in the commitment standard as whether the person “is likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others or substantial damage to another’s property, as evidenced by behavior causing, attempting, or threatening such injury, abuse, or damage”). \textit{See also} N.C. GEN. STAT. § 122C-3(11)(b) (2001).


\textsuperscript{169} \textit{See id.}

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} \textit{Id.}
In Kentucky, patients cannot be involuntarily committed and remain committed unless they can “reasonably benefit from treatment.” Another possibility of altering Ky. Rev. Stat. § 202A.026 to ensure patients are not released until they can function in society may be to form a definition of “reasonably benefit from treatment” that would include a time period of “maintenance” in the hospital, where the prevention of the patient’s deterioration would itself be defined as a form of “benefit from treatment.” This time period would be ideally mandated for patients who have improved, but have not necessarily reached maximum improvement, or for patients who are not expected to take their medication once released. At present, if the Commonwealth cannot show that patients can reasonably benefit from further treatment in the hospital (i.e., if they do not respond to medication and are not expected to respond, or if they have reached the highest level of improvement with their medication and are not expected to improve further), the patient must be released.

However, this alternative, like the broadening of the definition of dangerousness, may be considered unconstitutional in light of O'Connor v. Donaldson. In O'Connor, the patient, Donaldson, was confined for nearly fifteen years for “care, maintenance, and treatment” as a mental patient in a Florida state hospital. Donaldson did receive medication, but received no other real treatment: “Donaldson’s confinement was a simple regime of enforced custodial care, not a program designed to alleviate or cure his supposed illness...” O'Connor [the hospital’s superintendent] described Donaldson’s treatment as ‘milieu therapy.’ But witnesses from the hospital staff conceded that, in the context of this case, ‘milieu therapy’ was a euphemism for confinement in the ‘milieu’ of a mental hospital.” While the hospital argued that such confinement was a form of “treatment,” the Court rejected this argument. Furthermore, the Court noted that “incarceration is rarely, if ever, a necessary condition for raising the living standards of those capable of surviving safely in freedom.”

Continued commitment of a patient for purposes of preventing the deterioration of the patient runs the risk of becoming the type of ‘milieu therapy’ rejected in O'Connor. Without a specific plan or structure set forth that would increase the patient’s likelihood of success when finally released, it seems that an increased duration of commitment beyond the requirements of Ky. Rev. Stat. § 202A.026 may result in unconstitutional confinement. It would clearly be difficult to prove that such confinement is the “least restrictive” mode of treatment.

In Kentucky, patients cannot be hospitalized unless hospitalization is the “least restrictive alternative mode of treatment,” which is treatment that will

172 See KY. REV. STAT. ANN. § 202A.026(2) (Michie 2001).
173 See id.
175 See id. at 565-566.
176 Id.
177 Id. at 569.
178 Id. at 575.
179 Id.
“give a mentally ill individual a realistic opportunity to improve the individual’s level of functioning . . . in the least confining setting available.” Patients are often medicated in the hospital and are released when they become non-dangerous and stable because hospitalization is no longer the least restrictive form of treatment. The problem is that when patients are released from the hospital, they often are not ordered to attend any sort of outpatient treatment program. As a result, many slip back to instability and become dangerous to themselves and others, as Patricia Smith repeatedly has. Again, a structured and monitored outpatient therapy program may be the answer.

V. TOWARDS A PREVENTIVE MODEL: OUTPATIENT COMMITMENT ORDERS

A. Outpatient Treatment and the Current Status of Outpatient Treatment in Kentucky

It is clear that medication has a beneficial effect on many mentally ill individuals. It is also clear that many mentally ill patients, especially schizophrenics, tend not to take medication if they are not in a mental hospital. Some studies show that mentally ill people tend to be more violent than the rest of the population generally, and this violence is intensified if left uncontrolled by medication. A 1992 study by Bruce Link of the Columbia University School of Public Health reported that seriously mentally ill individuals living in the community were three times as likely to use weapons or to "hurt someone badly" as the general population. In 1992, sociologist Henry Steadman studied individuals discharged from psychiatric hospitals and found that “27 percent of released male and female patients report at least one violent act within a mean of four months after discharge.” A 1998 MacArthur Foundation study found that seriously mentally ill individuals committed twice as many acts of violence in the

181 See id.
182 Telephone interview with Dr. Eric Y. Drogin, J.D., Ph.D., ABPP, July, 2001. See also Commonwealth v. Miles, 816 S.W.2d 657 (1991). According to Dr. Eric Drogin, J.D., Ph.D., ABPP, an attorney and psychologist in Louisville, Kentucky, patients are, at times, instructed to attend outpatient treatment, such as counseling, as a condition of their release. Dr. Drogin drew the analogy of a criminal "plea bargain" – the judge releases the patients on the condition that they attend outpatient treatment. Id. However, this procedure is not set forth in any statute, and it is not clear whether the practice is practiced across the state. It is also not clear what would happen to the patients if they did not attend outpatient treatment. Id.
183 See E. Fuller Torrey, M.D. and Robert J. Kaplan, J.D., A National Survey of the Use of Outpatient Commitment, 46 PSYCHIATRIC SERVICES (August 1995), (visited July 16, 2001) <http://www.psychlaws.org/LegalResources/Articles/Law>; Kress, supra note 29, at 1295-1206. "Left to their own devices, consumers often relapse and become ill, dangerous, and in need of rehospitalization." Kress, supra note 30, at 1296. Kress points out that even when a community treatment plan does exist, many are unable to follow the plan because they deny that they are ill. Id. at 1295. Approximately one-third to one-half of all individuals who suffer from schizophrenia deny that they are ill. WAVIER F. AMADOR, I'M NOT SICK, I DON'T NEED HELP! (2000) (describing anosognosia, a condition when persons with mental disorders lack awareness of their mental illness), cited in Kress, supra note 30.
184 See Torrey, supra note 183.
185 See id.
period immediately prior to their hospitalization, when they were not taking medication, compared with the post-hospitalization period when most of them were taking medication. Additionally, statistics show that while individuals with untreated severe mental illness represent less than 1% of the total population, the commit almost 1,000 annual homicides in the United States, or between 4% and 5% of the total murders.

An outpatient commitment order, with consequences if violated, would serve to ensure that patients would remain on the medications they are prescribed, and, in turn, would alleviate violence and the revolving door syndrome. There is currently no form of statutory outpatient commitment order in Kentucky.

Kentucky’s two statutory provisions for outpatient treatment care are found in Ky. Rev. Stat. § 202A.081 and § 202A.181. Ky. Rev. Stat. § 202A.081 states the following:

(1) Following the preliminary hearing but prior to the completion of the final hearing, the court may order the person held in a hospital . . . or released, upon application and agreement of the parties, for the purpose of community-based outpatient treatment. No person held under this section shall be held in jail unless criminal charges are also pending.

(4) The release of the person pursuant to subsection (1) of this section for the purpose of community-based outpatient treatment does not terminate the proceedings against the person, and the court ordering such release may order the immediate holding of the person at any time with or without notice if the court believes from an affidavit filed with the court that it is to the best interest of the person or others that the person be held pending the final hearing, which shall be held within twenty-one (21) days of the person’s further holding.

(5) If the person is released pursuant to subsection (1) of this section for the purpose of community-based outpatient treatment, the final hearing may be continued for a period not to exceed sixty (60) days if a provider of outpatient care accepts the respondent for specified outpatient treatment. Community-based outpatient treatment may be ordered for an additional period not to exceed sixty (60) days upon application and agreement of the parties.

According to Ky. Rev. St. § 202A.081, outpatient community-based treatment can be provided for a period of up to 120 days, if all parties agree that outpatient treatment is appropriate. This statute seems to anticipate that some patients will succeed as outpatients and will then not need to be involuntarily

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186 Id.
188 See KY. REV. STAT. § 202A.081 (Michie 2001).
189 See id.
committed under Ky. Rev. St. § 202A.026. This screening method would benefit those who are likely to improve with outpatient treatment and who would then not have to be committed to a psychiatric hospital.

Ky. Rev. St. § 202A.181 provides for a “convalescent leave status” release from the hospital that includes outpatient care with medical supervision as a less restrictive alternative to civil commitment:

An authorized staff physician may release an involuntary patient on convalescent leave status when the physician concludes that the patient would not present a danger or a threat of danger to self or others if provided with continued medical supervision in a less restrictive alternative...Release on convalescent leave status does not terminate the involuntary hospitalization order and shall include provisions for the development of a treatment plan jointly by the hospital and by a provider of outpatient care.

This statute, which is infrequently implemented, applies only to those patients who would not present a danger to others if treated in the community. The statute does not state that the patients are no longer dangerous in general, just that they are non-dangerous to the extent that they are provided with continued medical supervision. These patients are still under an involuntary hospitalization order. The statute, by its title, states that it is applicable only to those still considered “convalescent,” a term not defined in the statute. The statute does not apply to those who, after a duration in the hospital, appear to be fully stable, as Patricia Smith has repeatedly appeared, and are released into the community without any outpatient treatment plan or without “convalescent leave status.” Many people, like Patricia Smith, are released into the community because they no longer meet the requirements of Ky. Rev. St. § 202A.026, the involuntary commitment statute, and, therefore, must be released. The “convalescent leave status” statute, on the other hand, implies that the patients are still dangerous to themselves or others and, therefore, can still be under an involuntary commitment order, but are not so dangerous that medical treatment outside of the hospital would be a risk.

Neither Ky. Rev. Stat. § 202A.181, the “convalescent leave status” statute, nor any other Kentucky statute, contain a detailed outpatient program for those patients who have already been committed to the hospital and who have been released because they no longer meet the requirements of Ky. Rev. Stat. § 202A.026, the involuntary commitment statute. Although the Court could recommend such treatment, there is no statutory provision for monitoring the individuals recommended for outpatient treatment, nor is there any statutory provision setting forth what would happen to a patient who did not follow

191 Telephone Interview with Dr. Eric Drogin, J.D., Ph.D., ABPP (August 2, 2001).
193 See id.
194 Id.
195 Id.
196 Id.
through with outpatient treatment. As a result, many patients are left unmonitored when they are released from the hospital and, unsurprisingly, like Patricia Smith, they often discontinue their medications and commit violent or criminally disruptive acts. Smith was repeatedly dropped off at relatives’ houses with only a limited supply of medication, which she stopped taking every time she was released.\footnote{197} Apparently, no follow-up care was provided for Smith, or, if it was provided, it seems there were no consequences for Smith’s lack of compliance with such care. It seems that Smith was left unmonitored upon release from the hospital.

Noncompliance with medication is most commonly the result of side effects associated with anti-psychotic medications, a poor doctor-patient relationship, or the individual’s lack of insight into the underlying illness.\footnote{198} This is especially true for schizophrenics. In one study, Amador and Strauss found that “nearly 60 percent of the patients with schizophrenia had moderate to severe unawareness of having a mental disorder.”\footnote{199} Half of all schizophrenics stop using their medications within one year of beginning treatment.\footnote{200} A “[schizophrenic’s] distorted view of reality [may] not allow them to recognize their illness,”\footnote{201} and, as such, they terminate their medication. The nature of a schizophrenic person’s delusions make him prone to “abandon the [highly effective] medications that may quell the angry, suspicious voices in [his] head.”\footnote{202} If patients do not believe they are mentally disordered and in need of medication, or if they do not believe medication will help them, they will not follow through with community treatment if left unmonitored.\footnote{203}

B. Proposal for Outpatient Commitment in Kentucky

I propose that Kentucky implement a statute that combines a court order for outpatient treatment, accompanied by consequences if violated, with intensive mental health services. States which have done so have shown improved outcomes in alleviating their revolving door problem.\footnote{204}

\footnote{197} See Wessel, supra note 14.
\footnote{201} See Margolis, supra note 200.
\footnote{202} See id.
\footnote{203} Id.
\footnote{204} See Study: Court-Ordered Care Alone Doesn’t Yield Better Outcomes. MENTAL HEALTH WEEKLY, February 26, 2001 (stating that patients’ improved outcomes come from combining a
1. Legislation Enacted / Proposed by Other States Organizations

An examination of other states' statutes and proposed statutes assists in determining what legislation Kentucky should enact. In North Carolina, for example, outpatient treatment can be ordered by a district court judge after a court hearing where the judge finds that the individual meets four criteria: (1) mental illness; (2) capacity to survive safely in the community with supervision from family, friends, or others; (3) treatment history indicative of need for treatment in order to prevent deterioration which would predictably result in dangerousness; and (4) mental illness limits or negates the ability to make an informed decision to seek or comply voluntarily with recommended treatment. If the potential patient meets the criteria and outpatient treatment is ordered, the court designates the treatment facility at which the outpatient treatment program will be completed. The order leaves determination of type, amount, and frequency of medication and psychosocial therapy to the mental health professional. As Dr. Hiday and Dr. Scheid-Cook note, the North Carolina statute takes a preventive approach to outpatient commitment. If committed to outpatient treatment, the patients avoid hospitalization and their treatment program in the community is monitored. The North Carolina standard for outpatient commitment is lower than its standard for involuntary commitment to an institution, as the statute attempts to reach those who would, most likely, eventually reach the standard of involuntary commitment if left unmonitored. As Dr. Hiday and Dr. Scheid-Cook state:

[A]lthough these criteria are lower than those for involuntary hospitalization, they do not widen the net of social control to capture the mentally ill who otherwise would not be within the purview of civil commitment law. Rather they attempt to prevent involuntary hospitalization in the near future for those who have stopped treatment, are deteriorating, and are likely to threaten or do substantial harm as they have repeatedly done in the past.

In North Carolina, if the patient does not comply with the prescribed outpatient treatment, the physician, the physician's designee, or the treatment

\[\text{court order with intensive mental health services).}
\]
\[205 \text{See N.C. GEN STAT, § 122C-263(d) (1999).}
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\[206 \text{See id.}
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\[207 \text{Id.; see also Virginia Aldige Hiday, Ph.D. and Theresa L. Scheid-Cook, Ph.D, Outpatient Commitment for "Revolving Door" Patients: Compliance and Treatment, 179 JOURNAL OF NERVOUS AND MENTAL DISEASE 83, 84 (1991).}
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\[208 \text{See Virginia Aldige Hiday, Ph.D. and Theresa L. Scheid-Cook, Ph.D, Outpatient Commitment for "Revolving Door" Patients: Compliance and Treatment, 179 JOURNAL OF NERVOUS AND MENTAL DISEASE 83, 84 (1991).}
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\[209 \text{See id.}
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\[210 \text{See N.C. GEN STAT, § 122C-263(c)(2) (1999). To be involuntarily committed, one must have a mental illness and be either dangerous to self or others.}
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\[211 \text{See Hiday, supra note 207, at 84.}
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\[212 \text{See id.}
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center "shall make all reasonable effort to solicit the respondent's compliance." If the patient fails to comply but does not clearly refuse to comply, he or she may be taken into custody to be examined, when, hopefully, the patient will decide to continue with treatment; if not, the physician determines whether the patient meets the criteria for involuntary commitment. Medication may not be forced at any time unless the patient has been involuntarily committed, but the outpatient treatment physician may prescribe and administer medication to the patient, and the outpatient centers are to assist in medication maintenance.

A study of the effectiveness of the North Carolina statute on revolving-door patients found that those patients ordered to outpatient commitment were more likely to attend their sessions at the community mental health centers to which they were assigned. Almost all persons in the study, 93%, ordered to outpatient treatment were still in outpatient treatment 6 months after their hearings, despite the fact that most of the outpatient commitment orders had terminated 3 months earlier and had not been extended. Close to half of the patients studied (45.2%) never missed their appointments without giving an acceptable excuse and rescheduling. After a second failure to attend, over three fourths (77.4%) of the patients attended their scheduled appointments and activities. "Given the characteristics of revolving door patients," the authors of the study noted, "psychosis, chronicity, dangerousness, multiple hospitalizations, and treatment refusal—these results represent a major accomplishment." North Carolina clinicians stated that outpatient commitment serves to "'keep the patient on medication and out of the hospital' (in that order)."

Another "preventive" model of outpatient commitment is found in Hawaii. The Hawaii standard is similar to North Carolina's, but it has two additional requirements. First, that the potential patient, at some time in the past "(A) has received inpatient hospital treatment for a severe mental disorder or substance abuse, or (B) has been imminently dangerous to self or others, or is gravely disabled, as a result of a severe mental disorder or substance abuse;" and second, that "there is a reasonable prospect that the outpatient treatment ordered will be beneficial to the person." These requirements more or less appear in the North Carolina statute; however, the North Carolina statute does not require dangerousness, but does require a treatment history indicating that treatment is necessary in order to avoid deterioration that would predictably result in

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214 See id.; see also Hiday, supra note 207, at 84.
215 See N.C. Gen Stat, § 122C-273(a)(3) (1999) ("In no case may the respondent be physically forced to take medication or forcibly detained for treatment unless he poses an immediate danger to himself or others. In such cases involuntary commitment proceedings shall be initiated."); see also N.C. Gen Stat, § 122C-273(a) (1999); Hiday, supra note 207.
216 See Hiday, supra note 207, at 85.
217 See id. at 86.
218 Id. at 87.
219 Id.
220 Id.
221 Id. at 88.
dangerousness.\textsuperscript{224} In Hawaii, the court's order specifies the type of outpatient treatment ordered and may authorize medication.\textsuperscript{225} As in North Carolina, medication may not be forced.\textsuperscript{226} If patients fail to comply with their outpatient treatment program, the outpatient treatment psychiatrist or his or her designee "shall make all reasonable efforts to solicit the subject's compliance with the prescribed treatment."\textsuperscript{227} The psychiatrist notifies the court that the patient is not complying, and may submit a petition for involuntary hospitalization.\textsuperscript{228}

Georgia, like North Carolina and Hawaii, also has a standard for outpatient commitment that is lower than its standard for inpatient commitment.\textsuperscript{229} In Georgia, patients must meet the definition of "outpatient," a person who, based on treatment history or current mental status, will require outpatient treatment in order to avoid predictable and imminent dangerousness, and "who, because of the person's current mental status, mental history, or the nature of the person's mental illness, is unable voluntarily to seek or comply with outpatient treatment."\textsuperscript{220} Additionally, the court must find that the outpatient treatment chosen by the court is available and that "the patient will likely obtain that treatment so as to minimize the likelihood of the patient's becoming an inpatient."\textsuperscript{231} If the patient fails to comply with treatment, the patient may be forced to undergo emergency medical treatment.\textsuperscript{232}

These models of preventive outpatient treatment serve to monitor those individuals who are prone to stop taking their medications and becoming dangerous. Patients can be treated in the community, thereby avoiding involuntary hospitalizations. In turn, patients are better able to preserve their liberty interests. Consistent with the "least restrictive alternative" doctrine, outpatient commitment "transplant[s] some individuals who otherwise would have been involuntarily hospitalized, and treat[s] them in the community instead."\textsuperscript{233} The State is able to exercise both its police power by ensuring that these mentally ill individuals remain stable and non-dangerous to others and their parens patriae power by ensuring that they are not dangerous to themselves.

A detailed outpatient program would be helpful in monitoring patients released from psychiatric hospitals and preventing the "revolving door" of

\textsuperscript{228} See id.
\textsuperscript{229} See Ga. Code Ann § 37-3-1(9.1)(1998). In Georgia, "Inpatient" means a person who is mentally ill and:

(i) Who presents a substantial risk of imminent harm to that person or others, as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to that person or other persons; or
(ii) Who is so unable to care for that person's own physical health and safety as to create an imminently life-endangering crisis; and
(iii) Who is in need of involuntary inpatient treatment.
\textsuperscript{230} See id.
\textsuperscript{233} See Kress, supra note 30, at 1302.
continuous commitment and re-commitment. Such programs also protect the patient’s liberty interest, as the patient is no longer confined to a psychiatric hospital. In the introduction to “The Model Law for Assisted Treatment,” prepared by the Treatment Advocacy Center in Arlington, Virginia, E. Fuller Torrey, M.D. and Mary T. Zdanowicz, J.D., state that:

Perhaps the single most important reform needed to prevent the need for repeated hospitalization and to prevent the consequences of non-treatment is to encourage the use of assisted outpatient treatment . . . . In the most comprehensive study to date, long-term assisted outpatient treatment was shown to reduce hospital admissions by 57 percent . . . . Additionally, the same study showed that long-term assisted treatment combined with routine outpatient services reduced the predicted probability of violence by 50 percent.234

The Model Law for Assisted Treatment’s standard for inpatient treatment and outpatient treatment are the same. Assisted treatment can be ordered either on an inpatient or outpatient basis if a Psychiatric Treatment Board, consisting of a lawyer, a physician, and a person who has demonstrated experience with mental illness,235 either personally or through a family member, finds the following by clear and convincing evidence:

a. that the person has a severe psychiatric disorder;
b. that the person is either a danger to himself or herself, a danger to others, gravely disabled, or chronically disabled; and
c. that, except for someone found to be a danger, the person is likely to benefit from assisted treatment.236

234 See Model Law for Assisted Treatment, supra note 166.
235 See Jonathan Stanely, J.D. Important Aspects of the Model Law, reprinted at <http://www.psychlaws.org> (visited January, 2001). Stanley states that “[m]ost times, the decisions of whether or not to place a person in treatment, and, if so, what type of care is most appropriate, are left to a judge with little experience with or understanding of mental illness.” The Model Law’s decision-making body is derived from a variety of sources.
236 See Model Law, supra note 168, at Article 7, § 7.3. The criteria for assisted treatment are modified from MONT. CODE ANN. § 53-21-126(1), Montana’s inpatient commitment statute. This statute is as follows:

If the court determines that the respondent is suffering from a mental disorder, the court shall then determine whether the respondent requires commitment. In determining whether the respondent requires commitment and the appropriate disposition under 53-21-127, the court shall consider the following:

(a) whether the respondent, because of a mental disorder, is substantially unable to provide for the respondent’s own basic needs of food, clothing, shelter, health, or safety;
(b) whether the respondent has recently, because of a mental disorder and through an act or an omission, caused self-injury or injury to others;
(c) whether, because of a mental disorder, there is an imminent threat of injury to the respondent or to others
The Model Law defines "gravely disabled" as a condition where a person is incapable of making an informed medical decision and has behaved in such a manner as to indicate that he or she is unlikely, without supervision and the assistance of others, to satisfy his or her need for either nourishment, personal or medical care, shelter, or self-protection and safety so that it is probable that substantial bodily harm, significant psychiatric deterioration or debilitation, or serious illness will result unless adequate treatment is afforded.\textsuperscript{237}

The Model Law defines "chronically disabled" as a condition where a person is incapable of making an informed medical decision and, based on the person's psychiatric history, the person is unlikely to comply with treatment and, as a consequence, the person's current condition is likely to deteriorate until his or her psychiatric disorder significantly impairs the person's judgment, reason, behavior or capacity to recognize reality and has a substantial probability of causing his or her to suffer or continue to suffer severe psychiatric, emotional or physical harm.\textsuperscript{238}

Evidence that a person is dangerous to others may include:

a. that he or she has inflicted, attempted, or threatened in an objectively serious manner to inflict harm on another;

because of the respondent's acts or omissions; and

(e) whether the respondent's mental disorder, as demonstrated by the respondent's recent acts or omissions, will, if untreated, predictably result in deterioration of the respondent's mental condition to the point at which the respondent will become a danger to self or to others or will be unable to provide for the respondent's own basic needs of food, clothing, shelter, health, or safety. Predictability may be established by the respondent's relevant medical history.
b. that by his or her actions or inactions, he or she has presented a danger to a person in his or her care; or

c. that he or she has recently and intentionally caused significant damage to the substantial property of others. 242

The Psychiatric Treatment Board applies the statute and determines the "least restrictive possible appropriate alternative," whether it be inpatient treatment or outpatient treatment. An initial order for assisted treatment on an outpatient basis may be for up to 180 days. 243

The Model Law is interesting in that it has the same standard for both inpatient and outpatient commitment, yet while the "chronically disabled" and "gravely disabled" components of the standard seem appropriate for outpatient commitment, they may seem over-inclusive for inpatient commitment. The Model Law states that a person must be "either a danger to himself or herself, a danger to others, gravely disabled, or chronically disabled." 244 Chronic and grave disablement are, in the Model Law, based only on probabilities that the person will, in the future, be in physical danger because of his or her disablement. 245 Many think that this future probability should not be enough to involuntarily commit a person to a mental institution. Jonathan Stanley states, however, that "[t]he Model Law mimics the more progressive of the jurisdictions with gravely disabled criteria by explicitly including someone who is likely to suffer harm without treatment." 246 Additionally, the "chronically disabled" element "allows consideration of possible harm to a person with symptomatic mental illness in light of past psychiatric history (which would include previous non-compliance with treatment), current likelihood of treatment compliance, and the risk of deterioration without treatment." 247 According to Stanley, "[t]his [chronically disabled] standard is thus tailored to assist those who are stuck in the revolving door." 248

While this may be true, unless O'Connor v. Donaldson 249 is overruled, non-dangerous patients cannot be hospitalized against their will. 250 While the statute seems appropriate for outpatient treatment, its application could result in non-dangerous individuals being hospitalized.

The Model Law does state that when determining the person's assisted treatment, "[t]he treatment setting shall be the least restrictive possible appropriate alternative." 251 This ensures that though the same standards are applied to both inpatient and outpatient treatment, the least restrictive form of

242 Id.
243 Id. at Article 7, § 7.4.
244 See Model Law, supra note 168, at Article 7, § 7.3.
245 See id.
246 See Stanley, supra note 235 (emphasis added).
247 See id.
248 Id.
249 422 U.S. 563 (1975).
250 See id.
251 See Model Law, supra note 168, at Article 7, § 7.4.
THE NEED TO CLOSE KENTUCKY’S REVOLVING DOOR

treatment must always be ordered. While the combination of the standards, if implemented correctly, would not seem to cause problems, it seems better to keep the standards for outpatient commitment and inpatient commitment in a separate statute. Since the standard for outpatient commitment should be less stringent than the standard for inpatient treatment, it seems that to combine the two standards, with only the statement that the least restrictive form of treatment should be ordered, may lead to confusion and may even facilitate inpatient admissions when outpatient treatment could have helped the patient in a less restrictive setting.

Ken Kress, Professor of Law at the University of Iowa College of Law and Director of the Civil Commitment Project, proposes a model statute for Iowa that sets forth the criteria for an outpatient commitment order. An individual is an appropriate candidate for outpatient treatment if all of the following are true:

- The individual is at least eighteen years old.
- The individual is suffering from a mental illness.
- Without outpatient treatment, within the reasonably foreseeable future, at least one of the following is true:
  1. The individual is more likely than not to cause physical injury to the individual or to others.
  2. The individual is more likely than not to lack substantial capacity to take care of the individual’s basic needs for nourishment, shelter, clothing, and health.
- At least one of the following will be true if the individual undergoes outpatient treatment:
  1. The individual alone will more likely than not be capable of taking care of the individual’s basic needs for nourishment, shelter, clothing, and health.
  2. The individual will be capable of taking care of the individual’s basic needs for nourishment, shelter, clothing, and health, with the help of family, friends, or others with responsibility for the individual’s well-being.
- For at least one temporally extended prior period, the respondent has failed to follow any reasonable treatment plan at all without reasons or without adequate justification.
- The individual has previously been determined to be seriously mentally impaired . . . and has been hospitalized for inpatient treatment.
- As a result of the individual’s mental illness, the individual lacks the capacity to make rational treatment decisions.
- It is more likely than not that the individual will benefit from outpatient treatment.

If individuals are placed on outpatient treatment and they violate their outpatient

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252 See Kress, supra note 30, at 1373, Proposed law § 229B.2, “Criteria for Order for Outpatient Treatment.”

253 See id.
treatment orders, the court is to “take reasonable steps to ensure compliance with the . . . outpatient commitment order.”254 This includes directing that the patient’s advocate remind the patient of his or her treatment obligations and/or presenting the patient to the treatment facility or program for treatment.255 If the treating medical officer or the treating medical officer’s agent feels that the patient should be treated as an inpatient in a mental institution, the medical officer or agent shall initiate an application for an order of involuntary hospitalization.256

Kress argues that the outpatient treatment order, which has a lesser standard than the inpatient order, will allow patients who would normally go astray after being released from the hospital to be effectively treated in the community, thereby decreasing the chances of them returning to the hospital.257 According to Kress, “[t]he more dangerous you are, and the less able you are to care for yourself, the more supervision you need.”258 The proposed statute attempts to codify this practical distinction as a legal distinction by setting less strict criteria for assisted outpatient treatment than for inpatient involuntary hospitalization.259 Kress proposes that the statute, consistent with the least restrictive alternative doctrine, will “transplant some individuals who otherwise would have been involuntarily hospitalized, and treat them in the community instead. . . the proposed statute will increase considerably the civil liberties of many persons with serious mental illness by treating them in the community so that they can avoid inpatient hospitalization.”260

ii. Though Outpatient Treatment is Much Less Intrusive than Inpatient Treatment, Patients’ Constitutional Rights Should be Protected

Some do question the constitutionality of outpatient treatment programs. In August of 1999, in response to the tragic killing of Kendra Webdale, who died as a result of being pushed in front of a subway train by Andrew Goldstein, a diagnosed schizophrenic who had stopped taking his medication, New York passed “Kendra’s Law.”261 Kendra’s Law permits state courts to order assisted outpatient treatment to those patients who: (1) are 18 years or older; (2) have a mental illness; (3) are unlikely to survive safely in the community without supervision; (4) have a history of noncompliance with treatment; (5) are unlikely to voluntarily participate in treatment; (6) are in need of outpatient treatment to prevent relapse or deterioration; and (7) are likely to benefit from outpatient therapy.262 Under Kendra’s Law, the court can order patients to take medication

254 Id. at 1381, Proposed law § 229B.15, “Notification of Outpatient Noncompliance – Response.”
255 Id.
256 Id. at 1376-1377, Proposed law § 229B.9, “Order for Inpatient Treatment”.
257 Id. at 1298.
258 Id. at 1301.
259 See Kress, supra note 30, at 1301.
260 See id. at 1302.
262 See N.Y MENTAL HYG. LAW 9.60. See also Gutterman, supra note 261, at 2412-2413.
or order “packages of voluntary enhanced services” not including forced medication. Jennifer Gutterman states that:

“Kendra’s Law is most controversial for its failure to delineate the circumstances under which an outpatient can be involuntarily medicated. . . . [It] does not explicitly require an adjudication of incompetency before forcibly medicating an individual. . . . without proper guidelines, Kendra’s Law may curtail a mental patient’s constitutionally protected liberty and privacy interests in making treatment decisions.”

Gutterman further argues that “courts have consistently held that mentally ill prisoners, detainees, and inpatients retain constitutional liberty and privacy interests in refusing unwanted medication. Outpatients are logically entitled to similar, or even greater, constitutional protections. Because outpatients by definition are not imminently dangerous to society and retain some degree of functional capacity, they are deserving of the most strict level of scrutiny before involuntary medication is authorized.” Gutterman’s argument is that while outpatient commitment may be ideal for those with severe mental illnesses, as it allows such individuals to live in the community rather than the hospital, a more appropriate solution for less severely afflicted individuals may be “rehabilitative services” based on choice rather than a court order. Strict outpatient commitment laws, some may argue, are in violation of an individual’s liberty interest and right to privacy, and the State’s interest in preventing harm does not outweigh these violations.

Outpatient treatment, however, because it is a much less intrusive alternative to inpatient, involuntary treatment, is not as severe an infringement on the patients’ liberty interests when compared to inpatient treatment. This is why a lesser standard for outpatient treatment, and a more stringent standard for inpatient treatment, seems appropriate. In some states, patients who could be helped by outpatient treatment may meet the standard for inpatient treatment, and could, thus, be hospitalized when there are other lesser restrictive alternatives to treat the patient. This should not occur. Finally, patients ordered to outpatient treatment who are not in need of medication would not be ordered to take it – their outpatient commitment order could consist of counseling or other forms of rehabilitative services.

It seems that if there is a continued evaluation of the patient’s status and the medical appropriateness of the patient’s treatment (including analysis of the medication’s side effects) the outpatient treatment program will be constitutional. With these safeguards, outpatient commitment seems to be an ideal compromise.

263 See N.Y. MENTAL HYG. LAW 9.60; see also Statelines New York: NYC Requests Forced-Medication Court Orders, AMERICAN POLITICAL NETWORK, June 5, 2000.
264 See Gutterman, supra note 261, at 2414.
265 See id. at 2339-2440.
266 Id.
267 Id..
268 Id. at 2443.
269 Id. at 2440.
for both the patient and the State, as it strikes a balance between the patient’s liberty interest and the State’s interest in protecting the patient and the public.

iii. Proposal for Outpatient Commitment in Kentucky

I propose that Kentucky adopt an outpatient treatment program similar to North Carolina, Georgia, Hawaii, and the proposed statute for Iowa. These states have created “preventive” outpatient commitment programs where patients can avoid hospitalization, and yet are not alone and unmonitored in the community when they are released from the hospital.

A standard such as North Carolina’s outpatient commitment standard could be adopted in Kentucky. The individual must meet the four criteria of: (1) mental illness; (2) capacity to survive safely in the community with supervision from family, friends, or others; (3) treatment history indicative of need for treatment in order to prevent deterioration which would predictably result in dangerousness; and (4) mental illness limits or negates the ability to make an informed decision to seek or comply with recommended treatment.\(^{270}\) As the North Carolina study discussed above in subsection “i” of this section shows, this preventive model of outpatient treatment has been very successful in ensuring compliance of revolving door patients.\(^{271}\) This standard is lower than North Carolina’s standard for inpatient commitment and is similar to Georgia’s standard for outpatient commitment.\(^{272}\) This standard allows a patient’s past history serves as evidence of a need for treatment; additionally, this “past history” component ensures that only those patients who have demonstrated that they cannot, on their own, comply with treatment will be ordered to undergo treatment.\(^{273}\)

Georgia’s outpatient commitment statute states that a court must find that the outpatient treatment chosen by the court will “minimize the likelihood of the patient’s becoming an inpatient.”\(^{274}\) This goal is admirable and should be included in Kentucky’s outpatient treatment statute. One of the main goals of outpatient treatment is to prevent the person from reaching the point that inpatient treatment is the least restrictive form of treatment. Another goal, of course, is to protect society from consequences that may occur if a violent mentally ill person is left untreated and commits violent acts. Preventive outpatient treatment would help to ensure these persons would receive treatment and would remain on prescribed medications. In turn, preventive treatment would assist in the protection of society and the preservation of the patient’s liberty interest.

Consequences for violations of the outpatient commitment order should also appear in Kentucky’s outpatient commitment statute. As in the Hawaii statute and the proposed Iowa statute, a physician or his or her designee should

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\(^{270}\) See N.C. GEN STAT § 122C-263(d)(1) (1999).


\(^{272}\) See id.

\(^{273}\) Id.

make all reasonable efforts to solicit the patient’s compliance.275 The patient’s status should not go unmonitored, and all efforts should be made to ensure that the patients are taking their medication and complying with other forms of ordered treatment. Only after all efforts have been made to effectuate the patient’s compliance should a petition for involuntary commitment be filed.

A lowering of the requirements for involuntary commitment would allow those persons to be reached who are not yet so dangerous that they must be involuntarily committed, but who, as statistics show, are likely not to take their medication and, as a result, to become dangerous. If the court considered such evidence as, “how recently the respondent has failed to follow reasonable treatment recommendations, and whether such failures . . . have led to the respondent’s hospitalization, failure to be able to take care of the respondent’s basic need for nourishment, shelter, clothing, or health, or to the respondent’s being dangerous to self or others”276 in determining whether to order outpatient commitment, outpatient commitment should be appropriately given.

Finally, not only preventive, pre-hospitalization outpatient treatment should exist; post-release outpatient treatment programs should also be established. Kentucky should utilize its “Convalescent Leave Status”277 statute, currently rarely used.278 This statute allows patients on involuntary commitment orders to be released from the hospital if the “physician concludes that the patient would not present a danger or a threat of danger to self or others if provided with continued medical supervision in a less restrictive alternative mode of treatment.”279 The release does not terminate the involuntary hospitalization order, and the provider of the outpatient care continuously monitors the patients.280 To improve the statute, first, a definition of “convalescent” should be added to the statute. Additionally, the statute should specify how the patient should be monitored while on convalescent leave status. Furthermore, if the patient no longer meets the criteria for involuntary commitment, then the patient should not be on convalescent leave status, still under the involuntary hospitalization order, but should be placed on outpatient commitment.

Outpatient commitment allows the State to exercise both its police and parens patriae powers, and the individuals to exercise his or her civil liberties. It alleviates the revolving door problem by keeping patients stabilized in treatment programs when, otherwise, these patients would stop taking their medication and would likely be re-hospitalized. It should be more fully implemented in Kentucky so that Kentucky does not fall by the wayside in protecting its citizens and assisting the mentally ill in receiving needed treatment. As the Treatment Advocacy Center states, “[w]hile numerous scientific studies have proven that assisted outpatient treatment is effective in ensuring treatment compliance, many

275 See Kress, supra note 30, at 1381, Proposed law § 299B.15; see also HAW. REV. STAT. § 334-129(c) (1998).
276 See Kress, supra note 30, at Appendix 1, § 19, New Section 299B.17, HF 2366, 78th General Assembly, 2d Sess. (Iowa 2000). Iowa’s proposed law states that these factors should be considered as evidence for whether one should be ordered to undergo outpatient treatment.
277 See KY. REV. STAT. § 202A.181(Michie 2001). This statute is discussed in Section A of this section.
278 Telephone interview with Dr. Eric Drogin, J.D., Ph.D., ABPP (August 2, 2001).
280 See id.
states fail to utilize what is at their disposal. Instead, they choose to tolerate the revolving-door syndrome of hospital admissions, readmissions, abandonment to the streets and incarceration that usually engulfs those not receiving treatment.\footnote{281}

VI. ALTERNATIVE PREVENTIVE PROGRAMS THAT MAY ALSO HELP STOP THE REVOLVING DOOR

A. Advance Directives in the Area of Mental Health

Many states currently have laws that allow a person to make future health care decisions, while competent, that would later have to be made on their behalf in the event they became incompetent. Through the use of an "advance directive," a competent adult can control not only what health care decisions he or she would want made in the event that he or she became incompetent, but also can choose a person to make health care decisions on his or her behalf.\footnote{282} Many states, including Kentucky,\footnote{283} have "advance directive" statutes; however they are not frequently applied in the area of mental illness.

Robert Bernstein, executive director of the Judge David L. Bazelon Center for Mental Health Law, states that "American society needs to try every other possible approach before turning to coercion.\footnote{284} The Bazelon Center suggests the use of Advance Directives for those who suffer from mental illness.\footnote{285}

California’s Health Care Decisions Law, for example, states that "health care decision-making for incapacitated adults can be achieved by one or more of five methods: (1) the power of attorney for health care; (2) oral or written individual health care instructions; (3) surrogate decision making; (4) court appointed conservatorship; and (5) judicial determination of health care.\footnote{286}

Mentally ill individuals could make health-care decisions while they are at a level of competency to do so. In the event the individual becomes incompetent, the individual’s wishes set forth in the advance directive could be followed. If the patient were discharged from a hospital, failed to take her

\footnotesize{\begin{itemize}
\item \footnote{283}{See KY. REV. STAT. §§311.621-643 (Michie 2001) provide for the “Living Will Directive Act.” The Act allows individuals to appoint an agent and/or provide specific instructions for all health care decisions, which presumably could include mental health care.
\item \footnote{284}{See Wray Herbert, Fearsome Madness: Schizophrenia Remains Frustratingly Hard to Control, U.S. NEWS AND WORLD REPORT, August 10, 1998, at 53, quoted in Margolis, supra note 200, at 155.
\item \footnote{285}{See Margolis, supra note 200, at 155.
\item \footnote{286}{See Jeanine Lewis, Health and Welfare: Chapter 658 California’s Health Care Decisions, 31 McGEORGE L. REV. 501, 501 (2000).}
medication, and became incompetent, the hospital could look to her advance directive before undergoing involuntary commitment proceedings.

The use of advance directives in the area of mental illness could be beneficial, and could have a significant impact on the reduction of revolving door patients. Rather than continuously returning to the court system, mentally ill patients who lose competency may be treated in a manner in which they have previously directed without the involvement of the courts. Also, another benefit is that there is relatively little, if any, State infringement upon the individual's personal liberties because the decisions are made in accordance with the individual's desires. An additional benefit to this option for treatment of the mentally ill is that because the Kentucky statutes already provide for the use of advance directives, there would be little action required in order to put this option to use.

VII. FEASIBILITY OF PROPOSALS

As mentioned in part III, infra, Kentucky already provides for the use of advance directives, so there would be little action or expense required in order to put this option to use. Additionally, it does not seem like there would be a great amount of cost or effort in drafting a "damage to property" provision for Kentucky's involuntary commitment statute.

As far as costs involved with development of a court-ordered outpatient treatment program, Ken Kress, in discussing a proposal for an outpatient treatment program in Iowa, argues that outpatient treatment will reduce hospitalization costs and release funds to expand community services. Kress also notes that "public discourse during the consideration of an outpatient treatment statute may convince the legislature to increase spending on mental health services."

Inpatient care is the most expensive form of mental health treatment. In the past ten years, mental health care costs have risen in response to higher psychiatrist's fees and prescription costs. Patients caught in the revolving door, under current statutes, typically end up spending sporadic periods of time in a mental hospital, and this time quickly adds up. A 1995 study of rehospitalization costs for schizophrenic patients found that these hospitalizations cost $2.3 billion dollars in 1993. The authors of the study found that 40% of these costs were attributed to medicine noncompliance, and

288 See KY. REV. STAT. §§311.621-643.
289 See Kress, supra note 30, at 1275.
290 See id. at 1275.
291 Id. at 1341.
293 See Kress, supra note 30, at 1341.
60% were attributed to nonresponsiveness to medicine. This figure does not include the costs attributed to individuals suffering from mental illnesses other than schizophrenia. Medicine noncompliance by all persons with mental illness easily exceeds $1 billion per year.

If outpatient commitment orders were established in every state, the number of persons hospitalized in mental institutions would decrease, and, therefore, costs would be saved. In a North Carolina study tracking the results of outpatient commitment orders, the number of days patients spent in the hospital reduced from an average of 57.6 per 100 days, per person, to 38.4 per 100 days, per person, resulting in an average savings of 19.2 hospital days per year, a 33.3% reduction. In an Ohio study, the number of inpatient days was reduced from an average of 133 days per year, per person, to an average of 44.3 days per year, per person, resulting in an average savings of 88.7 hospital days per year, a 66.6% reduction. A similar six-month study in Massachusetts resulted in a 60.7% reduction in the amount of days spent in the hospital. These studies show that outpatient treatment and outpatient commitment orders keep patients out of the hospital more effectively than if they did not exist, that is, if states only had inpatient commitment orders. The option of outpatient commitment orders allows patients to receive effective treatment, yet at the same time preserve their liberty interests and avoid confinement in a mental institution. Additionally, since patients would be spending less time in the hospital, significant costs would be saved as well.

Significantly, having consequences affecting patients who do not follow their outpatient treatment orders seems to be key in the effectiveness of the orders. One Tennessee study did not find a reduction of inpatient days when outpatient treatment orders were in place. However, “the outpatient commitment statute had no enforcement mechanism, thus raising questions about the seriousness with which committed individuals viewed the court order and possibly invalidating the study.” Moreover, the study was conducted immediately after the Tennessee law had been changed, raising the prospect that the full effects of the new law had not been realized.

Studies have shown that patients under outpatient commitment orders also spend less time in prisons, reducing costs significantly. Nationally, 16 percent of the state prison population is mentally ill. At a cost of $50,000 per

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295 See Kress, supra note 30, at 1341.
296 See id. at 1342.
297 Id. at 1343 (citing Gustavo A. Fernandez and Sylvia Nygard, Impact of Involuntary Outpatient Commitment on the Revolving Door Syndrome in North Carolina, 41 Hospital & Community Psychiatry 1001, 1003).
298 See Kress, supra note 30, at 1344, citing Mark R. Munetz, M.D. et al., The Effectiveness of Outpatient Civil Commitment, 47 Psychiatric Services 1251, 1252 (1996).
299 See Jeffrey Geller et al., The Efficacy of Outpatient Treatment in Massachusetts, 25 Admin. & Pol’y in Mental Health 271, 278 (1998) (finding that patients on outpatient treatment spent 137 fewer days per year as inpatients in hospitals than those not on outpatient treatment).
301 See id.
302 Id.
303 See Kress, supra note 30, at 1340-1354.
304 See Kress, supra note 30, at 1353, citing John Gibeaut, Who Knows Best? It’s an Outgoing
person, per year, taxpayers pay $8.5 billion to incarcerate these mentally ill offenders.\textsuperscript{305} Many of these offenders were arrested for misdemeanors, such as trespassing and disorderly conduct, and could be treated in outpatient treatment programs at 40 percent of the cost to incarcerate them.\textsuperscript{306}

The savings that would result from outpatient commitment orders could be used to provide services to persons currently not receiving any services, or to improve services to those whose current treatment regimens have proven inadequate.

Also, as Kress points out, Medicaid can offer reimbursement for psychiatric services provided to those in the community:

\textit{U}nder Medicaid, mental health regulations prohibit medicaid reimbursement for hospitalization [of] any person over the age of twenty-one and under age sixty-five, who resides in an institution for mental diseases (IMD), even for treatment unrelated to mental illness. However, Medicaid will reimburse for psychiatric services provided to those in the community. Therefore, to the extent that assisted outpatient treatment in the community replaces inpatient hospitalization services, states will receive increased federal medicaid contributions for psychiatric services.\textsuperscript{307}

Receiving medicaid funding for services provided on an outpatient treatment basis would certainly aid in ensuring states that an outpatient treatment program would be a feasible, cost-effective option. Given the rising costs of hospitalization, including mental health hospitalization, and the fact that revolving door patients frequently admitted and re-admitted into the hospital are substantial contributors to this cost, it seems that states, including Kentucky, cannot afford \textit{not} to create effective outpatient treatment programs.

\section*{VIII. Conclusion}

Clearly, something should be done about Kentucky's revolving door problem. Utilizing advance directives in mental health would allow the patient, while competent, to voice his or her own wishes regarding mental health


\textsuperscript{305} See Kress, \textit{supra} note 30, at 1353, \textit{citing} Dep't of Justice Source Book: Criminal Justice Statistics 1996.

\textsuperscript{306} See Kress, \textit{supra} note 30, at 1353-1354, \textit{citing} Presentation by Gerard Clancy, M.D., Professor of Psychiatry, University of Iowa Hospitals and Clinics, Director, Impact Program, Jounson County, Iowa, to the Johnson County Mental Health/Developmental Disability Planning Council, 1999. A Program of Assertive Community Treatment costs approximately $10,000 per patient per year. The cost of a residential care facility can be approximately $15,000 to $20,000 per year.

treatment. Addition of a “danger to property” provision within the definition of “dangerousness” in Kentucky’s involuntary commitment statute would help to ensure that mentally ill offenders causing danger to property, which could potentially lead to danger to others, would receive treatment. Finally, implementing outpatient commitment orders seems to be a practical and feasible approach to greatly minimizing the revolving door problem. The orders balance the patient’s liberty interests with the State’s interest in protecting the mentally ill individual and the community.

To design an effective outpatient treatment program will, of course, take time and effort from legislators, psychiatrists, psychologists, lawyers, and judges. This effort should be made before it is too late. In California, Alice Porcelli’s son stabbed and choked a woman who came to his door to ask him if he would take her cat to the veterinarian. She had begged and pleaded with prosecutors and psychiatrists to send her son, who suffers from paranoid schizophrenia, to a mental hospital. He was not sent. “Unfortunately,” she remarked, “people have to die for (anyone) to listen.” Russell E. Weston, Jr., who allegedly shot and killed two Capitol policemen in 1998, “has once again brought paranoid schizophrenia and the treatment of paranoid schizophrenics to the nation’s attention.” Elana Margolis remarks that:

“[the shooting at the Capitol building by Russell E. Weston Jr. is a prime example of self-medication as an inadequate post-commitment treatment . . . . Weston was released from the state hospital after doctors consulted his family and determined that he was no longer a danger. Weston stopped taking his medication just two weeks after he was released.”

It took the tragic death of Kendra Webdale, who was pushed in front of an oncoming train by schizophrenic Andrew Goldstein in 1999, to drive New York’s legislators to enact an outpatient commitment program. Goldstein, like Weston, had stopped taking his medication.

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308 See Kress, supra note 30, at 1277.
309 See id.
310 Id.
311 Id.
312 See Margolis, supra note 200, at 129.
313 See id. at 142-144, citing Ray Long and Barbara Freidman, For Weston’s Family, Tears and Questions: Relatives Detail His Troubled Past, CHICAGO TRIBUNE, JULY 27, 1998, at 1.
314 See Gutterman, supra note 261, at 2401.
315 See id.
It is easy to see how a similar incident could occur with Patricia Smith, who allegedly murdered an 87-year-old woman in 1994, but was incompetent to stand trial for the crime. Action should be taken before anymore similarly gruesome, and preventable, events occur. As it stands now, Kentucky is spending more money and faced with more crime as a result of the lack of any detailed, enforced outpatient commitment statute.

316 See Wessel, supra note 14.
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