Kentucky Department of Public Advocacy's

34th Annual Public Defender Education Conference

June 12-14, 2006
Holiday Inn Cincinnati Airport
Erlanger, Kentucky

The Next Level

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FILLING OUT THE CLE CARD FOR KENTUCKY:

SPONSER:	KY DEPT. OF PUBLIC ADVOCACY
ACTIVITY:	34th ANNUAL KY PUBLIC DEFENDER CONFERENCE
LOCATION:	ERLANGER, KY
DATE:	06/12/2006
ACTIVITY:	82988
TOTAL CLE CREDITS:	12.50
ETHICS:	8.75 HOURS (MAXIMUM AVAILABLE)

ETHICS CREDITS ARE INCLUDED IN THE TOTAL NUMBER OF CREDITS

General Conference Information

Message/General Information Center: You will be able to receive any messages at the DPA Registration Desk starting Monday at 1:00 p.m. through the remainder of the Conference. A message board will be stationed at the registration area. In case of an emergency, we will look for you in the meeting rooms. Any changes in the conference program will be posted at the DPA Registration Desk and in the lobby. The telephone number at the hotel is (859) 371-2233. The fax number is (859) 371-5002.

Smoking Policy: There will be no smoking in any of the meeting rooms or lobbies. You will only be able to smoke outside the building.

Family: If you are bringing your family, they are welcome to drop in on any or all of the Conference programs if they're interested. If you have small children who would disrupt any of the learning, we ask that you not bring them to any Conference program.

Meals For You & Your Family: Your registration includes dinner on Monday night, breakfast and lunch on Tuesday, and breakfast on Wednesday. Please see the DPA Registration Desk for individual meal prices if you wish to purchase meal tickets for your family.

Evaluations: You will be given an evaluation form for each individual session each day. Please complete the evaluation form and return to the DPA staff person at the end of each session. We need your evaluative thoughts.

Social Gatherings: Monday evening there will be dinner in the *Kenton/Boone/Campbell* Room at 6:30 p.m. with an introduction by **Governor Ernie Fletcher**. During dinner will be presentations of the *Gideon, Nelson Mandela Lifetime Achievement, Rosa Parks, In Re Gault, Professionalism & Excellence, Anthony Lewis Media, Public Advocate, and Furman* Awards with remarks by **Ernie Lewis**, Public Advocate, and **Bob Ewald**, KBA President-Elect. Your family is welcome. If your family would like to eat this meal, please purchase tickets at the DPA Registration Desk by 5:00 p.m. Desserts and coffee will be served following the awards presentations in the Lobby - Upper Terrace Area.

CLE Credits: There are a total of 12.50 KBA CLE credits available, including 8.75 hours of KBA CLE Legal Ethics credits offered throughout the Conference to choose from. You received your CLE form in your registration packet. Please fill out the CLE form and return to the DPA Registration Desk before the close of the Conference on Wednesday. Kentucky uses IBM cards for reporting CLE credits **(the Activity Number for this event is 82988)**. You need to know your Bar Number. If you do not know your number, ask at the DPA Registration Desk and they can give it to you. There will also be out-of-state CLE forms available at the Registration Desk for Tennessee and Ohio. For Missouri, Indiana and West Virginia, please leave a note at the DPA Registration Desk stating you need CLE credit in that state and a letter will be sent on your behalf requesting your CLE hours. If you need credit from another state, please let us know at the DPA Registration Desk. If the CLE card is not given to KBA within 30 days of the CLE activity, the only way they will accept it is if it is accompanied by $10.00 per card. Conference attendees are responsible for that $10.00 if the card if not given to Lisa Blevins by the 25th day after the Conference. See SCR 3.665(5)(e).

KBA Convention: When our conference ends at Noon on Wednesday, the 80 people contacted will be able to attend KBA's conference Wednesday afternoon through Thursday at afternoon.

Directions to the Northern Kentucky Convention Center: From the hotel, get onto 275 East (left off of Mineola Pike). From 275, take exit 84 to 75 North (Cincinnati). Once on 75 North, take exit 192 to the 5th Street/ Covington/Newport exit. At the exit ramp, turn right and get into the left lane. You will travel 6 lights and turn left onto Madison. (this is just past the US Courthouse). Once on Madison, you will go through the lights of 4th and 3rd Streets. After you pass 3rd Street and the Kenton Co. Justice Center, the Transit Center is on your right. Take the 2nd entrance for public parking. Parking varies from $6-12, depending how long you stay. Carpooling is encouraged. Please be aware that there are several parking lots that are **private** and **are not available** for parking. The security guard will be happy to stop you and make you turn around. Also note and be careful that there are numerous 4-way stops along this street.

34TH ANNUAL KENTUCKY PUBLIC DEFENDER EDUCATION CONFERENCE

***Holiday Inn Cincinnati Airport*, Erlanger, Kentucky**

June 12-14, 2006

MONDAY, JUNE 12, 2006

11:00 a.m. - 12:50 p.m. **Juvenile Branch Meeting in the Thoroughbred Board *Room (Lunch provided)***
12:00 p.m. - 4:00 p.m. **CONFERENCE REGISTRATION *(Registration booth is located in the lobby area of the Bluegrass Pavilion.)***
3:00 p.m. **Check-in to Hotel**

ANNUAL '06	**Kenton/Boone/Campbell** Rounds 370	**Kenton** Rounds 140	**Owen** Rounds 90	**Boone** Rounds 140	**Campbell** Rounds 90	**Pendleton** Theatre 30	**Grant** Theatre 30	**Clermont** Theatre 40	**Hamilton** Theatre 40	**Dearborn** Theatre 30
1:00–- 1:45p.m.	**Welcome –** **The State of Indigent Defense in Kentucky and Legislative Overview** - Public Advocate, Ernie Lewis									
1:45 - 2:45 p.m.	**Cultural Issues at the Impact the Presentation of the Case** - Cessie Alfonso									
15 minute break										
3:00 – 4:00 p.m.		**What's Love Got to Do with It? Successfully Presenting the Sex Consent Defense** - Stephanie Page - Cathy Bennett		**Closing Arguments** - David Feige		**Constitutional Rights of Inmates** - - Lili Lutgens	*Ethics* **Case Management Ethics Consideration** - Richard Chapman - Karen Scales	**Interviewing** - Cessie Alfonso	**Supreme Court Justice Will Scott**	**Involuntary Mental Health Civil Commitments: The Basics and Beyond** Bill Dolan
15 minute break										
4:15 – 5:15 p.m.	**Pretrial Services Risk Assessment** - Tara Klute - Charlotte McPherson - Ed Crockett								**Technology in the Appellate Arena**	
6:00 p.m. **Cash Bar in Lobby – Upper Terrace Area** 6:30 p.m. **Awards Banquet Kenton/Boone/ Campbell Rooms**										

COMMISSION MEETING
4:00 – 5:30 p.m.
Thoroughbred Boardroom

TUESDAY, JUNE 13, 2006

7:00 – 8:15 a.m. – Buffet Breakfast available in Upper Terrace Area of Lobby

ANNUAL '06	Kenton/Boone/Campbell Rounds 370	Kenton Rounds 140	Boone Rounds 140	Campbell Rounds 90	Owen Rounds 90	Pendleton Theatre 30	Grant Theatre 30	Clermont Theatre 40	Hamilton Theatre 40	Dearborn Theatre 30	Riverview Boardroom
8:30 – 9:45 a.m.		***Crawford v. Washington:*** **Looking Back and Looking Ahead** - Robert G. Lawson			**Criminal Defense Investigation** - Diana Queen						
15 minute break											
10:00 - Noon		**Confronting Medical Evidence & Cross Examining Medical Experts in Child Sexual Assault Accusations** - Stephanie Page - Cathy Bennett	*Ethics* **Criminal Defense Attorneys, at Trial, on Appeal, and in Post Conviction. What does it mean to put the client first?** - Jay Barrett - Rebecca Diloreto	**DNA Forensics: Technology and Applications** - Dr. Michael Baird	**Meth Toxicology** - Dr Martinez	**No Silver Bullet: Basics of Substance Abuse Treatment** - Randy Hignite	**Men's Rage** - Cessie Alfonso	**Hot Issues in Juvenile Practice** - Tim Arnold - Gail Robinson	**DUI Litigation Techniques** - Will Zevely - Jerry Cox	*Ethics* **Investigators and Case Management Ethics** - Richard Chapman - Karen Scales	**Arson Open Case Review** - Mike Parks
Lunch											
1:00 – 2:30 p.m.		**New Legislation** - Margaret Case - Ernie Lewis	**The Medical Examiner and You: We're Here to Help** - Dr. Gregory Davis	**Uncovering Story of Innocence: Investigating Sexual Assault Accusations** - Stephanie Page - Cathy Bennett	**Crystal Meth Defense** - Scott West - Rick Neal - Euva May	**The Latino Client** - Ivy Velez	**Post Trial Juror Interviewing** - Susan Balliet - Marguerite Thomas	**The Admissibility of Digital Evidence** - Michael Losavio - Judge Jaeger	**Life in the Balance** **Reporting on Hot Issue in Capital Defense** - Bette Niemi and panel	**Recent Legal Developments in the Law Pertaining to Youthful Offenders** - Pete Schuler	*Ethics* **Case Management Ethics Consideration** - Richard Chapman - Karen Scales
2:45 – 4:45 p.m.		**Beyond Mistakes: New Ways of Looking at ID Cases** - David Feige		***Daubert* and the Shaken Baby Evidence** - Sam Weaver - Amy Craft - Susan Balliet - John Palombi	*Ethics* **Implementation of DPA's New Standards for Criminal Defense Investigations** - Panel	**The Immigration Consequences of Crime** - Cori Hash	*Ethics* **Case Management Ethics Consideration** - Richard Chapman -Karen Scales	*Ethics* **Drug Court** - John Delaney - Lynda Campbell	*Ethics* **The Consulting Expert** - Dr. Eric Drogin	**Meth Toxicology Open case review** - Dr Martinez - Scott West	

Ω These programs qualify for KBA CLE **ETHICS** credits. **KBA has approved this conference for a total of 12.50 credits, including up to 8.75 hours of Ethics. The Activity Number is 82988.**

NEW STAFF: All Law Clerks and New Staff are invited to meet with Public Advocate Ernie Lewis
5:00 - 5:45 p.m. Kenton Room

WEDNESDAY, JUNE 14, 2006

7:00 – 8:15 a.m. – Buffet Breakfast available in Upper Terrace Area of Lobby

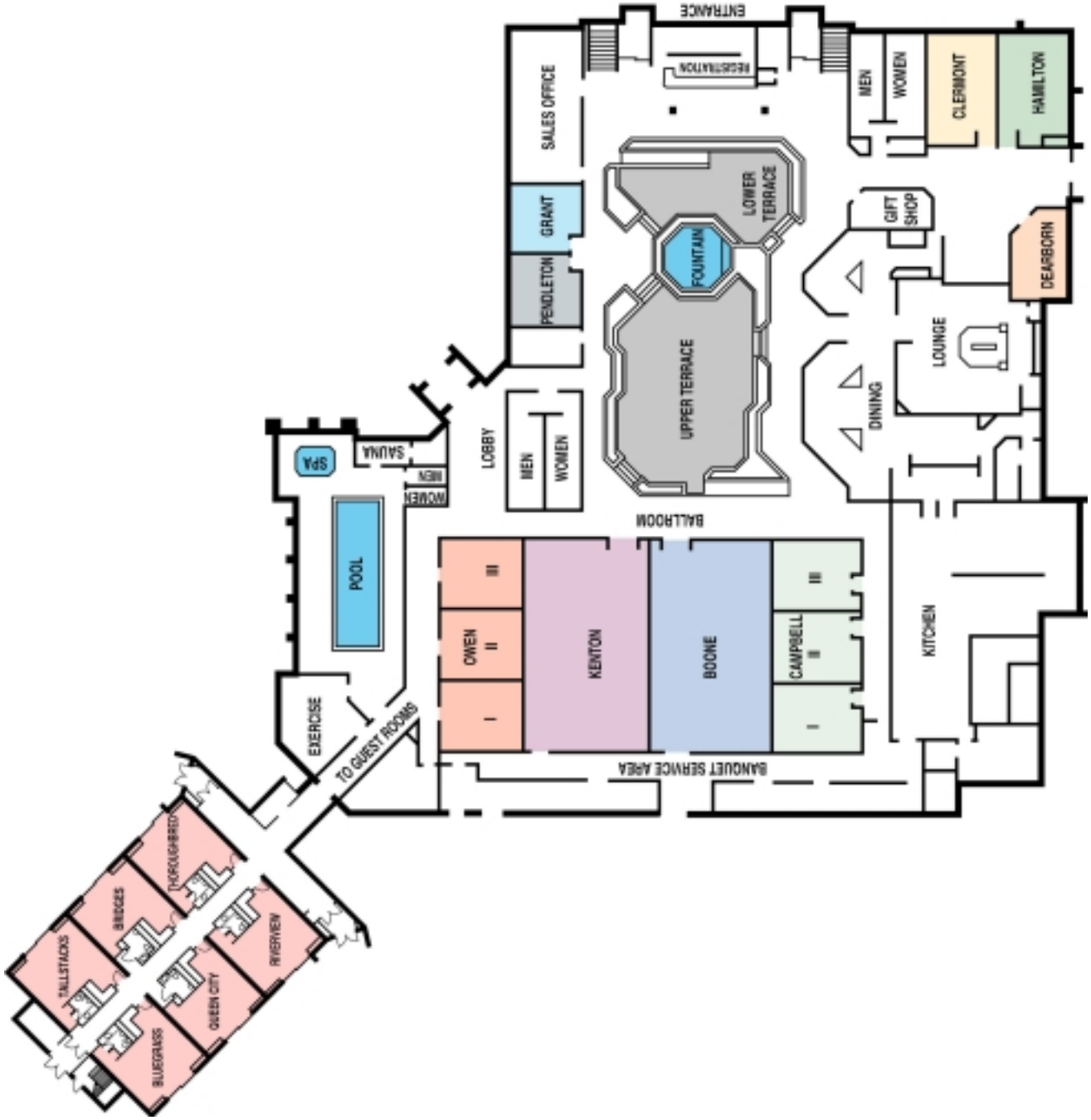
ANNUAL '06	Kenton/Boone/ Campbell Rounds 370	Kenton Rounds 140	Boone Rounds 140	Campbell Rounds 90	Owen Rounds 90	Pendleton Theatre 30	Grant Theatre 30	Clermont Theatre 40	Hamilton Theatre 40	Dearborn Theatre 30
8:45 a.m. – 10:00 a.m.		**Addiction Withdrawal and Treatment** - Karen Hargett - John Delaney		**Forensic Entomology** - Bob Hubbard	**"There's a New Case that Says…" Recent Developments in the Appellate Courts** - Damon Preston	**The Criminalization of Blackness** - Lisa Clare - Don Morehead - Chris Woodall	**Juvenile Mental Health Assessments** - Dr. Eric Drogin	**Defending Capital Clients Who Have Mental Retardation: Assessing, Investigating and Litigating** - Missy Runyon - Jim Gibson	***Ethics*** **Supervisory Role and the Use of an Electronic Case Management System** - Jay Barrett - Richard Chapman	**Quality of Life and the Heavy Caseload** - Jim Wren
15 Minute Break										
10:15 a.m. – 11:15 a.m.		**DUI Update** - Rob Riley		**Public Records vs. Personal Privacy** - Dawn Jenkins - Margaret Case	**Understanding the Changes in the Sex Offense Registration Law & Its Implications for your Practice** - Roger Gibbs - Sam Potter	**KHEAA Loan Assistance for Public Defenders** - Meredith Robinson		**Appeals – Utilizing recent cases** - Damon Preston		*Ethics* **Mentoring** - Glenn McClister
15 Minute Break										
11: 30 - Noon	**Closing** - David Feige									

To determine your KBA CLE credits, divide the number of minutes of programs you attend which qualify for CLE credits by 60 minutes.
For example, 300 minutes of qualifying programs equal 5 KBA CLE credits.

Information for the KBA CLE card:

Sponsor: Ky Dept. of Public Advocacy
Activity: 34th Annual Public Defender Conference
Location: Erlanger, KY
Date: 06/12/2006
Activity Number: 82988
Total Credits: 12.50

Ethics Credits: 8.75
(Ethics credits are INCLUDED in the TOTAL number of credits.)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BOONE
CAMPBELL III
III
I
KITCHEN
EXERCISE
TO GUEST ROOMS
BANQUET SERVICE AREA
THOROUGHBRED
BRIDGES
TALLSTACKS
RIVERVIEW
QUEEN CITY
BLUEGRASS

ETHICS OPPORTUNITIES AT THE 2006 DPA ANNUAL CONFERENCE

Monday, June 12:

3:00 – 4:00 p.m. *Grant*	**Case Management Ethics Considerations**

Tuesday, June 13:

10am – Noon *Boone*	**Criminal Defense Attorneys, at Trial, on Appeal and in Post Conviction: What does it mean to put the client first?**
10am – Noon *Dearborn*	**Investigators and Case Management Ethics**
1:00 - 2:30 p.m. *Riverview Boardroom*	**Case Management Ethics Considerations**
2:45 – 4:45 p.m. *Owen*	**Implementation of DPA's New Standards for Criminal Defense Investigations**
2:45 – 4:45 p.m. *Grant*	**Case Management Ethics Considerations**
2:45 – 4:45 p.m. *Clermont*	**Drug Court**
2:45 – 4:45 p.m. *Hamilton*	**The Consulting Expert**

Wednesday, June 14:

8:45 – 11:15 *Hamilton*	**Supervisory Role and the Use of an Electronic Case Management System**
10:15 – 11:15 am *Dearborn*	**Mentoring: An Orientation for Potential New DPA Mentors**

Presentation Summary

A listing of our presentations and a description of the Learning Objectives for each session follows. Meeting rooms are indicated in the left-hand column in italics under session times.

MONDAY, JUNE 12, 2006

TIME / ROOM	TOPIC / SPEAKER(S) / LEARNING OBJECTIVESS
1:00 – 1:45 p.m. *Kenton/Boone/Campbell* CLE .50	**Welcome & The State of Kentucky Public Defense and New Legislation** - Public Advocate, Ernie Lewis **Objectives:** A review of the last year's significant events that affect the statewide public defender program in Kentucky and its assistance to over 100,000 clients.
1:45 – 2:45 p.m. *Kenton/Boone/Campbell* CLE 1.00	**Cultural Issues at the Impact: The Presentation of the Case** **- Cessie Alfonso, LCSW, *Alfonso Consultants*** **Objectives:** 1. To increase awareness of assumption and expectations shaped by culture. 2. To address how culture creates blind spots. 3. To increase the participants ability to engage and communicate across culture differences.
3:00 – 4:00 p.m. *Kenton/Owen* CLE 1.00	**What's Love Got to Do with It?** **Successfully Presenting the Sex Consent Defense** - Stephanie Page, Senior Trial Counsel, Public Defender Division, Committee for Public Counsel Services, Boston, Massachusetts - Cathy Bennett, Training Director, Committee for Public Counsel Services, Boston, MA **Objectives:** When consent turns to remorse, regret, and revisionist history the result can be a false accusation of rape. The consequences of a false accusation have always been severe, but criminal, civil and quasi-civil sanctions now make conviction on even lesser charges horrific for the client and his or her family. The fact is that these cases can be tried and won. This session will: 1. Present strategies to find and present the story of innocence or reduced culpability at trial 2. Explore ways to make the trial presentation of crucial facts more visual through demonstrative evidence 3. Discuss how defense counsel's gender may play a role in how the case is presented 4. Help you find and persuasively present the emotional themes of the case and attempt to answer the overriding "WHY" question for the jury 5. Discuss ways to identify and foreclose improper prosecution arguments and diffuse potent prosecution arguments

3:00 – 4:00 p.m.
Boone/Campbell
CLE 1.00

Closing Arguments
- David Feige, Attorney and Author, Bronx, New York

Objectives: To teach participants how to integrate storytelling, detail, demonstrative evidence, and point of view in their summations.

3:00 – 4:00 p.m.
Pendleton
CLE 1.00

Constitutional Rights of Inmates
– Lili Lutgens, Attorney, American Civil Liberties Union of Kentucky

Objectives: Participants will identify the legal standards applicable to prison condition cases and First Amendment cases arising in prison.

3:00 – 4:00 p.m.
Grant
CLE 1.00
Ethics

Case Management Ethics Consideration
- Richard Chapman, Manager, Information Resource Branch, Law Operations
- Karen Scales, Program Coordinator, Law Operations

Objectives:
1. Relate electronic case management to the daily work of a staff attorney and ethical responsibility to document all events.
2. Discuss situations where client confidentiality is an issue.
3. Discuss strategies for staff attorneys using newer technology tools to make effective use while not compromising client confidentiality.

3:00 – 5:15 p.m.
Clermon
CLE 2.00

Interviewing
- Cessie Alfonso, LCSW, *Alfonso Consultants*

Objectives: To increase participants interviewing skills.

3:00 – 4:00 p.m.
Hamilton
CLE 1.00

Supreme Court Justice Will Scott

Objectives:
1. Learn how cases are processed by our appellate courts.
2. Learn how the Court analyzes issues.
3. Learn what the Court expects from attorneys at oral argument.
4. Learn what facts or legal arguments the Court is open to considering under the palpable error doctrine.
5. Review the significant Kentucky Supreme Court rulings from the past year from the perspective of a member of the bench.
6. Learn how the appellate court looks at the work of indigent defense lawyers and the Court's thoughts on balancing the many demands of the DPA appellate docket.
7. Learn what changes may be ahead for a newly compositioned Court and if any changes are expected in the opportunity to have oral argument or other litigation practices.

3:00 – 4:00 p.m.
Dearborn
CLE 1.00

Involuntary Mental Health Civil Commitments: The Basics and Beyond
– Bill Dolan, Attorney, Protection and Advocacy

Objectives: To learn the 202A process, including the roll of the prosecutor and defense attorney, the elements, and discharge, plus exam some lingering issues like timing and trial commissioners.

4:15 – 5:15 p.m.
Kenton/Boone/Campbell
CLE 1.00

Pretrial Services Risk Assessment
- Tara Boh Klute, AOC, Field Manager, Pretrial Services
- Ed Crockett, AOC, General Manager, Pretrial Services
- Charlotte McPherson, AOC, Operations Supervisor, Pretrial Services

Objectives: To discuss national research on Pretrial Risk Assessment Practices and to introduce the new Kentucky Pretrial Services Risk Assessment.

4:15 – 5:15 p.m.
Hamilton
CLE 1.00

Technology in the Appellate Arena
Moderated by:
- Damon Preston, Appeals Branch Manager
- Randy Wheeler, Attorney, Appeals Branch

Objectives: Evolving technology is (finally) making its way into criminal appellate practice. In this session, we will be primarily examining how technology can be used in the preparation of criminal appeals. We will also look at electronic filing practices in the state and federal courts.

4:00 – 5:30 p.m.
Thoroughbred

Public Advocacy Commission Meeting

6:00 – 6:30 p.m.
Upper Terrace in Lobby

Reception

6:30 p.m.
Kenton/Boone/Campbell

Annual Defender Awards Banquet
Welcome by Governor Ernie Fletcher, with Remarks from Bob Ewald, KBA President-Elect and awarding Professionalism an Excellence Award
Presentations of Awards: *Rosa Parks, Nelson Mandela Lifetime Achievement, Gideon, In Re Gault, Anthony Lewis Media, Robert F. Stephens, Furman, and Public Advocate Awards*

Tuesday, June 13, 2006

7:00 – 8:15 a.m.
Upper Terrace Area in Lobby

Buffet Breakfast *(included with registration)*

8:30 – 9:45 a.m.
Kenton/Boone/Campbell
CLE 1.00

***Crawford v. Washington*: Looking Back and Looking Ahead**
– Robert Lawson, Professor of Law, University of Kentucky

Objectives: Obtaining an understanding of the current relationship between the Confrontation Clause and the Hearsay Rule of the Law of Evidence.

8:30 – 9:45 a.m.
Owen
CLE 1.00

Criminal Defense Investigation

Moderated by:
– Diana Queen, Investigator, *Kentucky Innocence Project*

Objectives: In this roundtable session investigators will discuss courses of investigation for the most widely used criminal defenses. The investigator will learn the general and specific methodology for creating specific courses of investigation. Moderators will lead roundtable discussions centered on investigative techniques used to uncover reasonable doubt and or to determine factual innocence in a criminal case. Handouts will be provided on each topic and investigators may choose a criminal defense topic of their interest.

This session is good for either the novice investigator or experienced investigator in developing strategic courses of criminal defense investigation. (1hr investigative CEU credit for this session)

10:00 – 12:00
Kenton
CLE 2.00

Confronting Medical Evidence and Cross Examining Medical Experts in Child Sexual Assault Accusations

- Stephanie Page, Senior Trial Counsel, Public Defender Division, Committee for Public Counsel Services, Boston, Massachusetts
- Cathy Bennett, Training Director, Committee for Public Counsel Services, Boston, MA

Objectives: Knowing how to identify, interpret and attack erroneous opinions about medical evidence is essential to successfully defending our clients in child sexual assault accusations. Prosecutors often rely on medical evidence in attempting to prove that a sexual assault occurred, and/or that it was forcible rather than consensual. Juries often attach a great deal of significance to this type of evidence. However, the more you learn about this area, the more you see that medical observations can be misinterpreted, misleading, and subject to misuse in court to convict the innocent.

This session will:

1. Introduce medical terminology and diagnoses often used in connection with sexual assault cases.
2. Identify resources and means to discover what you need to know in these cases.
3. Explore the ways in which either lack of medical findings or the existence of medical symptoms can lead to erroneous conclusions about sexual assault.
4. Suggest strategies and methods for cross examining the Commonwealth's experts.

10:00 – 12:00
Boone
CLE 2.00
Ethics

Criminal Defense Attorneys, at Trial, on Appeal and in Post Conviction: What does it mean to put the client first?

- Jay Barrett, Trial Division Director
- Rebecca Ballard Diloreto, Director, Post Trial Division

Objectives:

1. What are the ethical obligations and practical responsibilities of attorneys towards their client at each stage of the representation, at trial, on appeal, in post-conviction?

2. What obligations outlive the direct representation?
3. What are an attorney's obligations vis-à-vis successor counsel?
4. Who owns the client's file and what does that mean?
5. What difference does it make that all of the lawyers work for the same organization?
6. What difference does it make if the client had retained counsel at trial but appointed counsel on appeal or in post conviction?
7. Can two attorneys represent the same client at the same time?
8. How do attorneys who represent the same client but on different matters resolve any conflicts that may arise from Objectives of representation that conflict.
9. Is successor counsel obligated to interview previous counsel to evaluate the claims or the prior legal work performed?
10. Does the Commonwealth represent a trial attorney in a contested post conviction action?
11. What client confidences must be kept even if a post conviction action has been filed?
12. How expansive is the duty of loyalty towards a prior client and what actions or discussions does such a duty preclude.
13. Does the duty of loyalty preclude later representation of someone in conflict with your former client?
14. Does the duty of loyalty limit an attorney's comments on the legal work done by successor counsel on behalf of a client?
15. How does an attorney weigh their obligations as officers of the court against duties of loyalty and confidentiality?

10:00 – 12:00
Campbell
CLE 2.00

DNA Forensics: Technology and Applications

- Dr. Michael Baird, PhD., Laboratory Director, DNA Diagnostics

Objectives: Participants will learn:

1. DNA basics and the latest testing systems being used in labs today.
2. The forensic case process.
3. Potential red flags when reviewing casework done by the government crime lab or looking to outsource to a private lab.
4. Case Study: defense-initiated 2nd opinion DNA testing.
5. Hands-on demonstration: DNA evidence collection techniques.
6. Hands-on demonstration: Serology testing of blood and semen

10:00 – 12:00
Owen
CLE 2.00

Meth Toxicology

- Terry T. Martinez, Ph.D., Toxicologic Associates Inc., St. Louis, MO

Objectives: At the completion of the lecture, the attendee will:

1. Understand the mechanism of pharmacologic and toxicologic action of methamphetamine.
2. Know the clinical effects of methamphetamine on the structures and organs of the human body.
3. Understand the chemical structural relationship between ephedrine and methamphetamine and how these minor differences relate to major changes in clinical effect.
4. Be able to discuss the chemicals and sequence of steps necessary for the production of methamphetamine from ephedrine precursor using both the red phosphorous and the lithium ammonia methods.

10:00 – 12:00
Pendleton
CLE 2.00

No Silver Bullet: Basics of Substance Abuse Treatment

- Randy Hignite, LCSW, CADC, Regional Director, Substance Abuse Services, Bluegrass Regional Mental Health and Mental Retardation Board, Inc.

Objectives:

1. The Basics
2. Be able to identify at least 2 models of addiction theory.
3. Have an understanding of what theory of addiction fit their beliefs.
4. Be able to answer the question: Why is addiction a disease?
5. Be able to understand the difference between Use, Abuse, and Dependency.
6. Have an understanding of the levels of care in addiction treatment.

10:00 – 12:00
Grant
CLE 2.00

Men's Rage

- Cessie Alfonso, LCSW, *Alfonso Consultants*

Objectives: Try to develop a better understanding of how circumstances of individual situations generate anger and rage in men. The goal is to identify particular reasons why the client has such anger and rage.

10:00 – 12:00
Clermont
CLE 2.00

Hot Issues in Juvenile Practice

- Gail Robinson, Attorney, Juvenile Post Dispositional Branch
- Tim Arnold, Manager, Juvenile Post Dispositional Branch

Objectives:

1. To learn about recent developments in juvenile law.
2. To brainstorm about issues appearing in the local juvenile courts.
3. Collaborate on how best to litigate these issues.

10:00 – 12:00
Hamilton
CLE 2.00

DUI Litigation Techniques

- Will Zevely, *Busald, Funk and Zevely*, Florence, KY
- Jerry Cox, *Cox & Fish*, Mount Vernon, KY

Objectives: An overview of the current "science" used in the prosecution of DUI cases and techniques to challenge this through investigation, pretrial litigation, and trial.

10:00 – 12:00
Dearborn
CLE 2.00
Ethics

Investigators and Case Management Ethics

- Richard Chapman, Manager, Information Resource Branch, Law Operations
- Karen Scales, Program Coordinator, Law Operations

Objectives:

1. Relate electronic case management to the daily work of a law firm investigator and ethical responsibility to document all events.
2. Discuss situations where client confidentiality is an issue.
3. Discuss strategies for investigators using technology tools while not compromising confidential client data.

10:00 – 12:00
Riverview Boardroom
CLE 2.00

Arson: Open Case Review

- Mike Parks, Investigator, London

Objective: An opportunity for individual consultation on Arson Investigation with Mike Parks. Everyone attending will need to sign a confidentiality agreement.

12:00 – 1:00
Upper Terrace Area in Lobby

Lunch *(included with registration)*

1:00 – 2:30
Kenton
CLE 1.50

New Legislation

Margaret Case, General Counsel
Ernie Lewis, Public Advocate

Objectives: To offer an overview of significant criminal justice legislation coming out of the 2006 Kentucky General Assembly.

1:00 – 2:30
Boone
CLE 1.50

The Medical Examiner and You: We're Here to Help

- Gregory J. Davis, MD, State Medical Examiner, & Professor of Pathology and Laboratory Medicine, University of Kentucky College of Medicine

Objectives:

1. Discuss the current death investigation system in Kentucky and other states.
2. Understand cause, manner, and mechanism of death.
3. Be conversant in basic autopsy technique.
4. Realize the sensitivity and specificity of autopsy in response to certain questions from defense counsel, prosecutors, families, and others.
5. Differentiate the real world of forensic medicine from the fantasy world in popular television shows.

1:00 – 2:30
Campbell
CLE 1.50

Uncovering the Story of Innocence: Investigating Sexual Assault Accusations

- Stephanie Page, Senior Trial Counsel, Public Defender Division, Committee for Public Counsel Services, Boston, Massachusetts
- Cathy Bennett, Training Director, Committee for Public Counsel Services, Boston, MA

Objectives: Everyone who knows anything knows that Perry Mason didn't win the cases, Paul Drake won them because he always found the tell tale document, witness, or other evidence that would blow the prosecution's wrongful case out of the water.

This session will:

1. Present and explore successful tactics in investigating sexual assault cases.
2. Describe sources of information that can be tapped from the hospital, court and other publicly available records, internet sites (you won't believe what you can find there).
3. Discuss tactics and concerns in witness interviews.

1:00 – 2:30
Owen
CLE 1.50

Crystal Meth Defense

- B. Scott West, Directing Attorney, Murray
- Rick Neal, Attorney, Post Conviction Branch
- Euva D. May, Attorney, Frankfort Appeals Branch

Objectives:

1. Discuss the latest developments in trying meth cases;
2. Discuss the jury questions and lesser included offenses involved in meth cases.

1:00 – 2:30
Pendleton
CLE 1.50

The Latino Client

- Ivy Velez, Attorney, Florence, KY

Objectives: The nation has seen a tremendous increase in its immigrant communities. In recent years, the number of immigrants in the United States grew by 40%. While the growth of the immigrant population is well documented, much less is known about their customs and cultural ways. It is also unknown how these communities organize themselves civically, economically, and culturally. In particular, the Latino community has become the biggest minority in United States.

With the increase of the Latino population comes an increase in the number of Latino individuals that have to go through the criminal justice system. The Public Defender office plays a central role in this process. Our Defenders offer support to those Latino immigrants that get involved with the criminal justice system. At the same time, they are challenged by problems brought by the unknown cultural and ethnical background of these clients.

Through this presentation, we will learn that communication is only one of several issues that Defenders face when representing a Latino client. We will discuss some of those main issues. We will also learn about the basic characteristics of a Latino client and the differences among them based on their region of origin.

1:00 – 2:30
Grant
CLE 1.50

Post Trial Juror Interviewing

- Susan Balliet, Manager, Capital Post-Conviction Branch
- Marguerite Thomas, Manager, Post-Conviction Branch

Objectives: In interviewing jurors
1. What is smart?
2. What is legal?
3. What is ethical?

The session will cover the practical, the mandated and the strategic. Attendees will review the current DPA policy on jury interviews, the caselaw on the subject and will brainstorm what additional considerations should be a part of our policy. This session can be helpful to post conviction practitioners as well as trial attorneys facing a retrial of a case.

1:00 – 2:30
Clermont
CLE 1.50

The Admissibility of Digital Evidence

- Michael Losavio, Attorney, Louisville
- Hon Steven Jaeger, Circuit Judge, Kenton Co.

Objectives: participants will, as a result of this class:
1. Identify facts relating to digital evidence that may impact its admissibility,
2. Apply certain rules of evidence in your analysis and argument as to admissibility of digital evidence and
3. Use the term “digital evidence” with confidence in professional and social settings.

1:00 – 2:30
Hamilton
CLE 1.50

Life in the Balance: Reporting on Hot Issues in Capital Defense

- Bette Niemi, Manager, Capital Trial Branch, Shepherdsville
- John Marcus Jones, Attorney, Capital Trial Branch, Cynthiana
- Chris Woodall, Attorney, Hopkinsville
- David Harshaw, Attorney, LaGrange Post Conviction

Objectives:

1. Will the Evolving Standard of Decency Embrace the Mentally Ill?
2. Opening Statements In Penalty.
3. Victims of Torture and What They Can Teach Us About Our Capital Clients
4. Schizotypal Personality Disorder.

1:00 – 2:30
Dearborn
CLE 1.50

Recent Legal Developments in the Law Pertaining to Youthful Offenders

- Peter Schuler, Chief Juvenile Defender, Louisville Metro Public Defender

Objectives: We will analyze and discuss recent appellate court decisions pertaining to waived and transferred youthful offender cases to Circuit Court. We will also discuss how HB 3 will impact our practice pertaining to youthful offenders. Finally, we will also present some new practice ideas pertaining to the handling of waiver and transfer hearings.

1:00 – 2:30
Riverview
CLE 1.50
Ethics

Case Management Ethics Consideration

- Richard Chapman, Manager, Information Resource Branch, Law Operations
- Karen Scales, Program Coordinator, Law Operations

Objectives:

1. Relate electronic case management to the daily work of a staff attorney and ethical responsibility to document all events.
2. Discuss situations where client confidentiality is an issue.
3. Discuss strategies for staff attorneys using newer technology tools to make effective use while not compromising client confidentiality.

2:45 – 4:45
Kenton/Boone
CLE 2.00

Beyond Mistakes: New Ways of Looking at ID Cases

- David Feige, Attorney and Author, Bronx, New York

Objectives: To teach participants new strategies for litigating eyewitness ID cases, including:

1. Creating a narrative and challenging the zone of suspicion.
2. Learning to “bring it home” in summation.
3. Strategic motions practice.

2:45 – 4:45
Campbell
CLE 2.00

Daubert and the Shaken Baby Evidence

- Sam Weaver, Attorney, Boyd Co.
- Amy Craft, Attorney, Attorney, Boyd Co.
- Susan Balliet, Manager, Capital Post-Conviction Branch
- John Palombi, Attorney, Capital Post-Conviction Branch

Objectives:

1. To demonstrate that challenging established scientific evidence is a possible litigation strategy.
2. To discuss the science behind shaken baby syndrome.
3. To discuss the law arising from *Daubert*.
4. To present two of the expert witnesses in shaken baby.

2:45 – 4:45
Owen
CLE 2.00
Ethics

Implementation of DPA's New Standards for Criminal Defense Investigations

- Paul Flinker, Investigator, Boone Co.
- Sharon Travis, Investigator, Henderson
- Diana Queen, Investigator, *Kentucky Innocence Project*
- Jay Barrett, Trial Division Director
- Margaret Case, General Counsel
- Rob Sexton, Central Regional Manager and Directing Attorney, Owensboro

Objectives:

1. To consider how DPA's new standards for criminal defense investigations will be applied in real-life scenarios that are encountered by defender staff in their day-to-day work for clients.
2. To explore the proper roles to be played by attorneys and by the individuals in other positions on the defense team.
3. To learn ways in which the new standards are designed to ensure compliance with the Kentucky Rules of Professional Conduct, including Rules 1.1, 1.3, 1.4, 5.3, and 5.5.

2:45 – 4:45
Pendleton
CLE 2.00

The Immigration Consequences of Crime

- Cori Hash, Attorney, Maxwell Street Legal Clinic, Lexington

Objectives:

1. To learn how to advise non-citizen defendants about the consequences of their pleas.
2. To gain a basic understanding of which crimes or types of crimes will make a non-citizen ineligible for immigration benefits and/or cause him or her to be deported.
3. To gain a basic understanding of immigrant statuses.

2:45 – 4:45
Grant
CLE 2.00
Ethics

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Objectives:

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2:45 – 4:45
Clermont
CLE 2.00
Ethics

Drug Courts

- John Delaney, Directing Attorney, Boone Co.
- Lynda Campbell, Bluegrass Regional Manager and Directing Attorney, Richmond

Objectives: A discussion of the issues facing public defenders when a client becomes involved in drug court including:

1. The role of the public defender:
   a. Before the client chooses to go to drug court;
   b. While the client is in drug court;
   c. In the event the client fails in drug court.
2. Confidentiality rights and waiver.
3. Candor toward the tribunal.
4. Representing client under a disability.

2:45 – 4:45
Hamilton
CLE 2.00
Ethics

The Consulting Expert

- Eric Drogin, J.D., Ph.D., ABPP, Louisville, KY

Objectives:

1. To discern between the roles of testifying and consulting experts.
2. To identify strategic opportunities and ethical constraints in the utilization of consulting experts.
3. To review case examples and scholarly reflections on the utilization of consulting experts, with an emphasis on ethical duties owed to indigent clients.

2:45 – 4:45
Dearborn
CLE 2.00

Meth Toxicology: Open Case Review

- Terry T. Martinez, Ph.D., Toxicologic Associates Inc., St. Louis, MO
- B. Scott West, Directing Attorney, Murray

Objectives: An opportunity for individual consultation with Dr. Martinez. Everyone attending will need to sign a confidentiality agreement.

5:00 – 5:45
Kenton Room

New Staff & New Law Clerks

- Ernie Lewis, Public Advocate

Objectives: New defender attorneys and defender staff who have joined DPA since June 2005 are invited to come and ask any questions and give any input to the Public Advocate and other members of the Leadership Team.

Wednesday, June 14, 2006

7:00 – 8:15 a.m.
Upper Terrace Area in Lobby

Buffet Breakfast *(included with registration)*

8:45 – 10:00
Kenton/Boone
CLE 1.25

Addiction Withdrawal and Treatment

- Karen Hargett, Transitions Assistant Executive Director
- Larry Wells, MSW, Transitions Organizational Development Director
- Charlotte Wetherington, Transitions, Recovery Advocate
- Transitions' clients
- John Delaney, DPA, Covington Directing Attorney

Objectives:

1. The attendees will learn what amounts to substance abuse. They will learn what amounts to addiction and what are the differences between abusing substances and being addicted to substances.

   - Addiction is a progressive and chronic illness abuse is not

2. Attendee's will learn how the appropriate treatment level is determined and the various treatment levels will be discussed:
   Education
   Out patient treatment
   Residential treatment
   Length of treatment

   - The differences between the treatment options will be discussed.
   - Voluntary vs. forced treatment and the effect on success of treatment.

3. What treatment options/programs are available in the greater Northern KY area: Will discuss new residential treatment centers opening in Northern KY through the Recovery Kentucky program.

4. The panel will discuss what actually occurs in treatment.
   a. What is required of a participant
   b. What actions will get you trouble
   c. What will get a participant terminated
   d. Casey's Law: An overview of the law and a P.D involvement.
      a. What the law supporters hope it will accomplish
      b. Indigent clients and Casey's Law
         1. Who pays for the initial evaluations
         2. Who pays for the required drug treatment
      c. P.D. as court appointed counsel for the respondent in Casey's cases.
      d. Possible penalties and incarceration in Casey's cases.

8:45 – 10:00
Campbell
CLE 1.25

Forensic Entomology

- Bob Hubbard, Investigator, LaGrange Post Conviction

Objectives:

1. Gain understanding of PMI.
2. Discuss insect development.
3. Study role of insects in decomposition.
4. Review the stages of decomposition.
5. Consider barriers to decomposition.

8:45 – 10:00
Owen
CLE 1.25

"There's a New Case that Says…"
Recent Developments in the Appellate Courts
- Damon Preston, Appeals Branch Manager
- Angela Johnson, Attorney, Appeals Branch

Objectives: In this session, trial and appellate attorneys will learn of dozens of recent published opinions likely to impact criminal defense practice. Guaranteed No Fluff!!! 90 minutes jam-packed with information.

8:45 – 10:00
Pendleton
CLE 1.25

The Criminalization of Blackness
- Lisa Clare, Attorney, Appeals Branch
- Chris Woodall, Attorney, Hopkinsville
- Don Morehead, Attorney, Appeals Branch

Objectives: To create a joint effort between trial and appellate attorneys in preserving and challenging racially biased behaviors at all points in the minority client's experience with the justice system.

1. To disrupt the processes by which the criminal defense bar has come to expect and accept as "the norm" with regard to minority persons in the justice system.
2. To increase awareness to the context in which law-enforcement officials, prosecutors and judges operate.
3. To unmask seemingly ambiguous conduct by examining situations which obscure the racially biased outcome of:
    - selective surveillance;
    - justifications for searches;
    - the invasiveness of searches;
    - prosecutorial discretion in charging minorities;
    - prosecutorial discretion in the offer of plea agreements;
    - conduct toward racial minorities during trial and sentencing.

8:45 – 11:15
Grant
CLE 2.25

Juvenile Mental Health Assessments
- Eric Drogin, J.D., Ph.D., ABPP, Louisville, KY

Objectives:
1. To identify assessment tools and techniques unique to juvenile defendants.
2. To review the distinction between forensic and treatment-oriented evaluations.
3. To reinforce the value and importance of specific client-focused retention strategies and referral questions.

8:45 – 10:00
Clermont
CLE 1.25

Defending Capital Clients Who Have Mental Retardation: Assessing, Investigating and Litigating
- Missy Runyon, Mitigation Specialist, Capital Trial Branch, Cynthiana
- Jim Gibson, Attorney, Capital Trial Branch, Shepherdsville

Objectives:
1. To be able to identify clients with possible mental retardation.
2. To understand how to investigate and prove this possibility.
3. To be able to utilize expert assistance.
4. To understand how to utilize a diagnosis of mental retardation in capital litigation.

Emphasis will be placed on understanding concepts such as practice effect, *Flynn* effect, and malingering.

8:45 – 11:15
Hamilton
CLE 2.25
Ethics

Supervisory Role and the Use of an Electronic Case Management System
- Jay Barrett, Trial Division Director
- Richard Chapman, Manager, Information Resource Branch, Law Operations

Objectives:
1. Relate electronic case management to the daily work of a supervisory attorney.
2. Discuss situations where client confidentiality is an issue.
3. Discuss strategies for supervising attorneys to use technology tools for management while not compromising client confidentiality.

8:45 – 10:00
Dearborn
CLE 1.25

Quality of Life and the Heavy Caseload
- Jim Wren, Attorney, Hazard

Objectives: To practice various techniques and strategies to maintain a high quality of life, while coping with an onerous caseload and criminal docket.

10:15 – 11:15
Kenton/Boone
CLE 1.00

DUI Update
- Rob Riley, Attorney, Louisville

Objectives: A review of the current state of DUI law and practice. Focus on caselaw from the last year, statutory changes and novel or new ideas to better represent our DUI clients.

10:15 – 11:15
Campbell
CLE 1.00

Public Records vs. Personal Privacy
- Dawn Jenkins, Executive Advisor
- Margaret Case, General Counsel

Objectives: Privacy is a proverbial hot-button topic these days. The public expects that government will protect their personal data. On the other hand, open records are considered a foundational element in government accountability.

This session is an advanced and creative approach to understanding the rights of attorneys and investigators to successfully obtaining records within Kentucky law and the Freedom of Information Act balanced by the responsibility of custodians of records to ensure privacy.

10:15 – 11:15
Owen
CLE 1.00

Understanding the Changes in the Sex Offense Registration Law & Its Implications for your Practice
- Roger Gibbs, Eastern Regional Manager and Directing Attorney, London
- Samuel L. Potter, Attorney, Appeals Branch

Objectives:
1. To understand the changes in the sex offense registration law made by recent legislation,
2. To understand how these changes will affect how sex offense cases are practiced,
3. To understand how to properly advise clients before accepting plea offers and after convictions,
4. To think prospectively about problems that may arise as a result of these changes,
5. To identify what issues may need to be appealed and how to properly preserve them,

6. To provide a checklist for you to utilize when handling a sex offense case, and
7. To provide people for you to contact when problems regarding registration arise in the future.

10:15 – 11:15
Pendleton
CLE 1.00

KHEAA Loan Assistance for Public Defenders

- Meredith Robinson, Marketing Support Manager, Kentucky Higher Education Assistance Authority (KHEAA)

Objectives: To provide information on The Student Loan People's new Best in Law loan forgiveness program.

10:15 – 11:15
Clermont
CLE 1.00

Appeals: Utilizing Recent Cases

- Damon Preston, Appeals Branch Manager
- Julia K. Pearson, Staff Supervisor, Appeals Branch

Objectives: This session will focus on recent appellate decisions that will affect criminal appeals. Distinct from the 8:45 session, this class will examine cases that impact appellate review, such as those regarding preservation, standard of review, and appeals of post-conviction actions.

10:15 – 11:15
Dearborn
CLE 1.00
Ethics

Mentoring

- Glenn McClister, Attorney, Education and Strategic Planning Branch

Objectives:

1. To give an overview of how the Department of Public Advocacy plans to use a mentoring system to ensure effective and ethical practice by newly-hired public defenders, (KRPC 5.1, 5.2)
2. To give initial training to potential new mentors on the knowledge, skills, and attitudes necessary for a successful mentor-protégé relationship.
3. To offer potential new mentors and proteges an opportunity to discuss the benefits and problems they foresee coming from DPA's mentoring program.
4. To sensitize new mentors and proteges to client confidentiality and conflict of interest issues that can arise during a mentor-protégé relationship, (KRPC 1.6, 1.7(b))

11:30 – Noon
Kenton/Boone/Campbell
CLE 0.0

Closing

- David Feige, Attorney and Author, Bronx, New York

Preparation is still the greatest technique for winning.

-- Larry Pozner

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Our National and Kentucky Faculty Biographical Information

Cessie Alfonso has a Bachelor's of Arts in Psychology and Sociology from Hood College. Cessie earned her Master's Degree in Social Work from Rutgers University in 1977. Cessie is nationally recognized expert in forensic social work. She is the founder and President of Alfonso Consultants. Ms. Alfonso is a bilingual (Spanish Speaking), multicultural (Afro-Puerto Rican-Cuban) social worker, who has trained attorneys to appreciate and integrate into their practices the ethnic and cultural diversity of their client's lives. She is also a nationally recognized domestic violence/battered woman's expert who has appeared on national television (Sally Jesse Raphael Show, Montel Williams Show) and has conducted training in this area for professionals in the criminal justice system. For the past 20 years, Alfonso Consultants has provided social work and psychological assessments to the clients of civil and criminal attorneys throughout the United States, as well as internationally. As a Mitigation Specialist in death penalty cases, Ms. Alfonso and her Consultants have conducted over 700 mitigation investigations. In addition, Alfonso Consultants provide psychotherapy to attorney's clients and individuals from all walks of life.

Tim Arnold is a graduate of Knox College in Galesburg, IL, and the University of Kentucky College of Law. He has been with the Juvenile Post Dispositional Branch in Frankfort, KY since 1996, and now serves in the Branch Manger.

Dr. Michael Baird, the Laboratory Director of DNA Diagnostic Center, received is PhD. in Genetics from the University of Chicago. Dr. Baird has decades of experience in the field of DNA testing. In 1982, he was at the forefront of DNA testing as part of a team that pioneered identification through DNA and then offered it commercially. In 1987, Dr. Baird was the first DNA expert to testify in a U.S. court case and has since testified in over 600 court cases involving DNA and forensics. NBC News hired him as their on-air DNA expert during the OJ Simpson trial. He has written and published numerous articles and manuscripts in the field of DNA technology, paternity testing, and forensics. Dr. Baird joined DDC after having spent the prior 7 years as Chairman of the Parentage Testing Board for the American Association of Blood Banks (AABB). This organization oversees, sets rules and regulations, and accredits DNA paternity testing laboratories in the U.S. He has also been a member of the AABB Standards Committee for 15 years, setting the standards and guidelines for AABB accredited laboratories. Dr. Baird is currently the president of HITA, the Human Identity Trade Association. This is an organization of individuals from the DNA field who represent DNA industry to the government and the public.

Before she moved to Kentucky, **Susan Jackson Balliet** put in 15 years litigating class actions for various civil legal aid offices in California, and served for three years as the first director of Stanford Law School's clinical training office. In 1992, Balliet switched her practice to criminal appellate work, joining the Department of Public Advocacy's Appeals Branch in 1998. Since March 2000, she has supervised capital post conviction cases for the agency. Balliet's interest in expert opinion evidence began with her arguing *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999) (acknowledging the validity of DNA testing). Since then she has contributed to DPA's Evidence Manual, and presented numerous times on issues involving experts.

Jay Barrett is a 1979 graduate of the University of Connecticut School of Law and its criminal legal clinic. He joined DPA in 1982 as directing attorney of the Stanton office and also served as East Regional Manager from 1986 to 1988. After three years with New Hampshire Public Defenders Jay returned to Kentucky in private practice in Prestonsburg, before rejoining DPA in 2001 in the Paintsville office. He has served as Trial Division Director since February of 2004.

Cathleen L. Bennett is a trial attorney and the Training Director at the Committee for Public Counsel Services (the state public defender) in Massachusetts. Cathleen L. Bennett is the Training Director at the Committee for Public Counsel Services. She joined CPCS as a trial attorney in the Public Defender Division in 1987, where she represents indigent clients charged with felonies in the District and Superior Courts of the Commonwealth of Massachusetts. As Training Director, she teaches full time public defenders and private attorneys who accept appointments to represent indigent clients in criminal cases. She is an adjunct professor at Boston College School of Law and is a frequent faculty member and student at Massachusetts Continuing Legal Education programs. She is on the faculty of the National Criminal Defense College and has taught at trial advocacy programs around the country. She is proud and grateful to have taught and learned at Faubush for DPA.

Lynda Campbell attended the University of Florida and graduated in 1977 and got her J.D. in 1980 from Florida State University. Lynda worked as a public defender in Daytona Beach, Florida for 4 years and then joined the DPA in 1984. She is presently the Directing Attorney in the Richmond trial office, and Bluegrass Regional Manager for DPA trial offices.

Margaret Case After working as a DPA appellate law clerk, Margaret left the agency for a federal district court clerkship. Then, while in private practice in Danville, she routinely handled appeals for indigent criminal defendants as a member of DPA's panel of contract lawyers. But, in 1989, Margaret returned to DPA full-time and, over the years, has worked at every level of criminal defense litigation — at trial, on direct appeal, and in post-conviction. For nine years, her practice was exclusively in death penalty defense. Currently, Margaret is General Counsel for the Department. She holds membership in the Kentucky and National Associations of Criminal Defense Lawyers. In 2004, she was DPA's *Gideon Award* recipient.

Richard Chapman is the manager of the DPA Information Resource Branch. He has been with DPA since May 2004 in that same capacity. He is a graduate of American University Washington College of Law.

Lisa Clare graduation *summa cum laude* from Georgetown College in 1978. From there, she obtained a Master of Divinity prior to entering the University of Kentucky College of Law. She has practiced law for the past 18 years and has led workshops in the following areas of law: housing, disability, special education, juvenile, and most recently, the impact of immigration law in the practice of criminal law. She and her husband have four children and live in Shelby County.

Jerry J. Cox is the senior partner in *Cox & Fish*, LLC and has been practicing criminal defense law for over 36 years. He has served on the faculty of DPA's Trial Practice Institute. He is a member of the American and Kentucky Bar Associations and has served o the KBA's Unauthorized Practice of Law Committee (1993-Present), Criminal Rules Committee (1995-Present), Legislative Committee (1999-Present), Prescription Drug Abuse Task Force (2003) and as Chair of the Criminal Law Section (1994). He is a member of the Kentucky Association of Criminal Defense Lawyers; received the Presidential Award in 1995 and served as President in 1997. He is a life member of NACDL and has served on the Board of Directors since 2000. He also serves as Chairman of the NACDL Audit Committee (2001-Present). In 2003, he was recognized by the NACDL for significant contributions to the members of NACDL. He also served on the Kentucky Criminal Justice Council's Drug Strategy Committee (1999-Present), Public Advocacy Commission (1999) and the Kentucky Bar Foundation (President, 2002). Jerry Cox is certified as a Criminal Specialist by the National Board of Trial Advocacy. In 2004, he served on the NBTA Board of Examiners. In 2002, he was awarded DPA's Nelson Mandela Lifetime Achievement Award for his commitment to criminal defense. In 2003, 2004 and 2005, NACDL Presidents awarded Cox Presidents' Commendations for outstanding service to the goals and objectives of the NACDL and for outstanding service in fighting for the rights of all persons. In 2004, he received the President's Special Service Award from the Kentucky Bar Association. Cox has written and lectured extensively on criminal law issues.

Amy Craft has been with the Department of Public Advocacy since 2002. A graduate of The University of Indiana (BA in Communications) and The University of Cincinnati Law School. She is married to Paul Craft and has one child, Jonah (age 1).

Ed Crockett began as a Pretrial Officer in 1976, working up to Unit Manager, Information Systems Manger, Assistant General Manager, and has been the General Manager in the Public Service division of the Kentucky Court of Justice and Administrative Office of the Courts since 2003. He is responsible for Pretrial Release, Court Security, and Record Services. Ed received his Bachelors of Science in Organization Management from Northern Kentucky University.

Gregory J. Davis, MD, is a State Medical Examiner for the Commonwealth and served as Associate Chief Medical Examiner from 1997 – 2005. He is Professor of Pathology and Laboratory Medicine at the University of Kentucky College of Medicine, where he is director of the autopsy service and of resident physician education. Dr. Davis has almost twenty years of experience as a forensic pathologist.

John Delaney graduated from the University of Massachusetts in 1985 with a degree in economics. He worked in the Peace Corps after college for the ministry of Agriculture in Tanzania and in 1992, graduated from Western New England College of Law. Prior to working for DPA, he worked for New England Legal Services and Massachusetts Committee for Public Counsel Services. Mr. Delaney started working for DPA in 1993 in Pikeville; left DPA in 1997 to work for a private firm in Northern Kentucky and returned to DPA in 1998. In he fall of 2003, John became Directing Attorney for the Boone County Office. This spring, he became the Directing Attorney for the Covington office.

Rebecca Ballard DiLoreto began with DPA as a law clerk in 1984. She has represented clients at the trial, appellate and post conviction level. She enjoys the creativity involved in criminal defense work and the opportunities present in this work to both help others and improve the justice system. She has learned from many great criminal defense lawyers, investigators, mitigation specialists and secretaries in Kentucky through the years. She continues to learn a great deal from the new lawyers and professional staff who join DPA each year. Working as DPA's Post Trial Division Director since the creation of the division in 1997 has allowed Rebecca to see our work from a variety of perspectives. With her husband, Don, an Italian romantic, musician and pilot, Rebecca is blessed with three children, two teenagers and one near teen. They make their home in Lexington.

William Stewart "Bill" Dolan is a Staff Attorney Supervisor with the Division of Protection and Advocacy, Department of Public Advocacy in Frankfort. His practice involves assisting adult individuals with disabilities pursue legal, administrative, and other appropriate remedies. He received a B.A. degree in Business Administration from Carthage College, *magna cum laude*, and a J.D. from the Louis D. Brandeis School of Law and Education. He formerly clerked for Joseph R. Huddleston, Kentucky Court of Appeals, and practiced with *O'Bryan, Brown & Toner, PLLC.*

Eric Y. Drogin, J.D., Ph.D., ABPP, is a Fellow and Director of the American Academy of Forensic Psychology; a Diplomat and President of the American Board of Forensic Psychology; and a Diplomat of the American Board of Professional Psychology. Previously chairing the American Psychological Association's Committee on Legal Issues and also APA's Joint Task Force with the American Bar Association, he is currently a member of APA's Committee on Professional Practice and Standards. Dr. Drogin is a former President of the New Hampshire Psychological Association. He currently participates in the Harvard Medical School Program in Psychiatry and the Law, and serves the University of Louisville School of Medicine as an Associate Clinical Professor of Psychiatry and Behavioral Sciences. Dr. Drogin received his Doctor of Philosophy (Ph.D.) degree in Clinical Psychology from Hahnemann University. Dr. Drogin is a Fellow of the American Bar Foundation. His American Bar Association service includes the Life and Physical Sciences Division (Chair), the Commission on Mental and Physical Disability Law (Commissioner), the Behavioral Sciences Committee (former Chair), the Committee on Scientific Evidence, the Biotechnology Law Committee, the International Criminal Law Committee, the International Health Law Committee, the Science and Technology Committee, and the Committee on United States Lawyers Practicing Abroad, and formerly included the Committee on Scientific Misconduct. Dr. Drogin is a Member of Council of ABA's Section of Science and Technology Law, and is also an ABA appointee to the National Conference of Lawyers and Scientists. He currently serves the Franklin Pierce Law Center as an Adjunct Professor of Law and Mental Health, and the University of Wales as an Honorary Professor of Law. Dr. Drogin received his Juris Doctor (J.D.) degree from the Villanova University School of Law. Having authored or co-authored approximately 150 legal and scientific publications to date, including the American Bar Association's *Criminal Law Handbook on Psychiatric and Psychological Evidence and Testimony* and its companion volume, the *Civil Law Handbook on Psychiatric and Psychological Evidence and Testimony,* Dr. Drogin has lectured extensively throughout the United States and in England, Ireland, Wales, and Canada. He regularly presents continuing education seminars for attorneys and mental health professionals on such topics as forensic assessment, ethics, and professional development. Dr. Drogin's multidisciplinary practice encompasses mental health law, expert witness testimony, and trial consultation.

David Feige is a public defender and a writer. Until recently, he served as the Trial Chief of The Bronx Defenders, an innovative public defender office in the South Bronx. In 2002, he was awarded the prestigious National Legal Aid and Defender Association's Reginald Heber Smith Award. A nationally known lecturer on trial skills and eyewitness identification issues, David is on the faculty of the National Criminal Defense College, and has taught trial skills for the National Institute for Trial Advocacy, and at law schools and public defender offices around the country. David's writings on the criminal justice system have been published in *The New York Times Magazine, The Los Angeles Times Magazine, Slate,* and *The Nation*. In 2004 he was awarded a Soros Media Justice Fellowship. David's commentaries on the criminal justice system can be heard on National Public Radio and its New York affiliate WNYC, and he is a frequent commentator on Court TV. His first book, a searing indictment of the criminal justice system, was published on June 3, 2006, by Little, Brown & Co. It's called "*INDEFENSIBLE*".

Paul Flinker served with the Covington, Kentucky Police Department from 1972 - 1996 retiring as a Captain in 1996 to begin a new career in Management Information Systems. From 1996 - 2003 Paul served as the MIS manager for a local Healthcare organization in Northern Kentucky. Falling victim to out-sourcing in 2003 Paul learned that a new Public Advocate office was opening in his home county of Boone, applied for the investigators position and was given the job in October 2003. Paul has a BA in Criminal Justice Administration from the Union Institute in Cincinnati, Ohio and is a graduate of the Southern Police Institute at the University of Louisville.

Roger Gibbs is a graduate of Georgetown College and the University of Kentucky College of Law. He was a staff attorney for the Jefferson County Public Defender's office from 1986 to 1993. Since 1993, Roger has been Directing Attorney for DPA's London office and the Eastern Regional Manager. Roger is the father of two wonderful children, James and Hannah, and the husband of Teressa.

Jim Gibson graduated from the University of Kentucky College of Law in December 1975. He has been with DPA's Capital Trial Branch since 1997. In prior lives, he was in private practice, served in the Army JAG Corps, and was a staff attorney with the Louisville Public Defender Office.

Karen Hargett is the Assistant Executive Director of Transitions Inc., an agency that provides housing and counseling for people recovering from drug and alcohol addiction.

David Harshaw is a 1996 graduate of the University of Louisville Law School. He has been a trial attorney in the Jefferson County Public Defenders Office, has been on staff at the Kentucky Civil Liberties Union, has been an associate at *Segal, Stewart, Cutler, Lindsay, Janes & Berry,* and for the last five years has been an attorney in DPA's LaGrange Post Conviction Branch.

Cori Hash is an Equal Justice Works Fellow at the Office of Kentucky Legal Services Programs. She works at the Maxwell Street Legal Clinic offering legal assistance to low-income immigrants. She represents clients in family-based immigration, citizenship, asylum, and other immigration legal matters. She also focuses on the issue of economic exploitation of immigrants, specifically unpaid wages, denial of public benefits, and consumer fraud. Ms. Hash is a graduate of the University of Texas, where she received her degree in Latin America Studies, and the University of Texas School of Law. She is a member of both the Texas and Kentucky bars.

Randy Hignite LCSW, CADC is currently the Regional Director of the Substance Abuse Services for the Bluegrass Regional Mental Health and Mental Retardation Board, Inc. In this capacity he is responsible for two residential substance abuse programs, medication-assisted treatment for narcotics addiction (methadone), specialized substance abuse treatment for pregnant and parenting women, and outpatient substance abuse treatment services in 17 central Kentucky counties. Mr. Hignite has over thirty years experience in the delivery of services to people with substance abuse and mental health problems.

Bob Hubbard has been with the Department of Public Advocacy since October of 1981. During his employment, he began work as a Paralegal with the Post Conviction Services Branch in the LaGrange office. Bob has been certified by the Criminal Defense Investigator Training Council, and currently works in the capacity of Investigator for the LaGrange Post-Conviction office. Over the years, Bob has worked extensively with prison and sentencing issues, mitigation, and alternative sentencing. Bob is also a regular contributor to *The Advocate*, and a presenter or assistant during DPA sponsored training.

Judge Steven Jaeger presides in Kenton Circuit Court of the Commonwealth of Kentucky. He previously served on the district court bench and in private practice. He is currently the chair of the Court of Justice Technology Committee.

Dawn Jenkins graduated in 1996 with an MSW from University of Louisville Kent School of Social Work and was the recipient of the Bertha Capen Reynolds Award. She worked as policy analyst for Kentucky Youth Advocates and the Kentucky Mental Health Coalition. She also served as Director for Kentucky Jobs with Justice. She attended the Brandeis School of Law in 2003-04 and was a law clerk in the LaGrange Capital Post-Conviction Office before being hired as a Mitigation Specialist. She has recently been named as Executive Advisor for the Office of Public Advocate.

Angela Johnson is a native of Louisville. She received her BA in English and Political Science from the University of Kentucky in 2001, and is a 2004 graduate of UK College of Law. She was admitted to the Kentucky bar in 2005. She has been with DPA Appeals since September of 2005. She is the proud mother of Isaiah Michael.

John Marcus Jones graduated from the University of Kentucky School of Law in 1998. Following graduation, he started work for the Department of Public Advocacy in the Post Conviction Branch in Frankfort. Marcus later transferred to the Richmond office to work as a trial attorney. In November of 2004, Marcus started work in the Capital Trial Branch representing clients throughout Southeastern Kentucky.

Tara Boh Klute began her career with Pretrial Services as a line interviewer in the Fayette County Program in June of 1995. She was promoted in March of 1996 to the position of Intake Officer. Ms Klute was responsible for processing defendants in jail and processing citizen complaints through an alternative dispute resolution program. In March of 1997, Ms Klute was promoted to the position of Shift Supervisor. She was responsible for the direct supervision of the jail interviewers and the mediation intake staff. In May 1999, Ms Klute transferred to the Pretrial Records Division as a shift supervisor. After holding this position for two years, she was promoted and transferred to the 54th Judicial District as the Unit Supervisor. In August 2003, Tara was promoted to the position she holds today; Field Manager. Her responsibilities include statewide management and new program implementation. Ms Klute holds a BA in Sociology, a BS in Police Administration from Eastern Kentucky University, and attended Graduate School at the University of Kentucky. Tara has been a member of the National Association of Pretrial Services Agencies (NAPSA) since 1996 and currently serves on the Diversion Committee and the certification focus group.

Robert G. Lawson is a professor of law at the University of Kentucky. He has been there 40 years, ahs served as Dean of the College twice, and has taught extensively in the criminal law and evidence areas. He is the author *The Kentucky Evidence Law Handbook* and co-author of *Kentucky Criminal Law*. He was the principal drafter of the Kentucky Penal Code that was enacted in 1974 and was the principal drafter of the Kentucky Rules of Evidence that were adopted in 1992. He recently received a special recognition from the Association of Criminal Defense Lawyers.

Erwin W. (Ernie) Lewis grew up in Missouri, the son of a Baptist minister and a school teacher. He has two children, Ben, a third year student at Chase Law School, and Rachel, who has completed her freshman at Kenyon College, and is spending 2006 working as an Americorps volunteer while deciding where to resume her education. They reside in Frankfort, Kentucky. Ernie received his undergraduate degree from Baylor University in 1969, a Masters of Divinity from Vanderbilt University in 1973, and a *Juris Doctoris* (J.D.) from Washington University in 1977. He has been with the Department of Public Advocacy since he was admitted to the bar in 1977 in several different capacities, including appellate lawyer, local assistance branch manager, directing attorney of the Richmond Trial Office, and Regional Manager for the Central Kentucky Region. Since 1985, he has been on the faculty of the National College of Criminal Defense located at Mercer Law School in Macon, Georgia. He is on the faculty of the National Defender Leadership Institute as well as the NLADA's Nuts and Bolts of Defender Leadership. He is serving as Co-Chair of the American Council of Chief Defenders during 2006-2007. He was named Kentucky Public Advocate by Governor Patton in October of 1996, and again in 2000. He was appointed to a third term by Governor Fletcher in 2004. He has served as a member of the Governor's Task Force on Domestic Violence and Sexual Assault, the Department of Juvenile Justice Advisory Board, the Board of the Kentucky Association of Criminal Defense Lawyers, the Board of the Appalachian Research and Defense Fund, the Governor's Criminal Justice Response Team, the Kentucky Criminal Justice Council, the Kentucky Corrections Commission, the Chair of the Corrections/Committee Based Sanctions Committee of the Criminal Justice Council, and the Governor's Drug Summit. He is on the Advisory Board of the International Centre for Healing and the Law in Kalamazoo, Michigan. He has testified on indigent defense issues before Task Forces in Georgia, North Carolina, Texas, and Louisiana. In 2000, he was named Outstanding Lawyer by the Kentucky Bar Association.

Michael Losavio is an attorney who lectures at the University of Louisville.

Lili Lutgens serves as the first ever staff attorney for the American Civil Liberties Union of Kentucky. She is a licensed attorney and a licensed clinical social worker. She received her undergraduate degree in English from Transylvania University, her law degree from Vanderbilt University, and her social work degree from the University of Louisville. Before taking her job as staff attorney for the ACLU of Kentucky, Ms. Lutgens spent sever years working as a clinician primarily with families and children in the foster care.

Euva D. May is a 1998 graduate of the Brandeis School of Law at the University of Louisville. Euva has been with the Department of Public Advocacy since 2000. Presently, she is a staff attorney in the appellate branch.

Terry T. Martinez, Ph.D., has been a consultant for Toxicologic Associates Inc., St. Louis, Missouri, since 1993, and has extensive experience as an expert witness in many types of cases. He is also an Associate Professor of Pharmacology at Southern Illinois University, Edwardsville. He is board certified by both the American Board of Toxicology and the Academy of Toxicological Sciences. He has taught toxicology, pharmacology, and pathology at university level for more than 25 years, and over a 10 year period he participated in the treatment of more than 20,000 patients through work at 2 poison control centers. Dr. Martinez is a member of the American Academy of Clinical Toxicology, the American Society for Pharmacology and Experimental Therapeutics, the Society of Toxicology, and many other professional organizations. He has authored more than 90 research papers and abstracts, presented at national and international scientific forums.

Glenn McClister is a Staff Attorney with DPA's Education and Strategic Planning Branch. He was an attorney in the Somerset office for nine years, covering district, juvenile, and circuit court in Russell County. In addition to coaching at Faubush and presenting at the Annual Conference, Glenn has trained public defenders in Missouri and Pennsylvania as well.

Charlotte McPherson began her career as a part-time pretrial officer in the 29th Judicial District, consisting of Adair, Casey, Cumberland and Monroe Counties in 1982. She was promoted to supervisor of the 29th District in 1988. She worked in the capacity of a pretrial officer and supervisor in the district for 22 years. In August 2004, Ms. McPherson was promoted to Field Supervisor and has responsibility of supervision over pretrial programs in 12 Judicial Districts consisting of 30 counties in the Commonwealth, as well as, additional duties related to employee supervision on a statewide basis. In August 2005, Charlotte was promoted to the position she holds today, Operations Supervisor. Ms. McPherson is a graduate of Western Kentucky University with a Bachelor of Arts degree in both Sociology and Journalism

Don Morehead is a graduate of Austin Peay State University and St. Thomas University School of Law, Miami, FL. He was formerly a staff attorney with the Trial Branch in the Murray Office. He currently is with the Appeals Branch.

Richard Neal is a Staff Attorney with the Post-Conviction Branch of the Department of Public Advocacy. He is admitted to practice in the Sixth Circuit Court of Appeals; United States District Court, both Eastern and Western District; Kentucky Supreme Court; Kansas Supreme Court (inactive). A graduate of The University of Kentucky (BA in Psychology, MRC in Rehabilitation Counseling) and Washburn School of Law (Topeka), he has worked for DPA's post-conviction branch since 1999. Prior to his employment at DPA, he worked for two years as an Assistant District Attorney in Wichita, Kansas.

Bette J. Niemi graduated from the University of Louisville School of Law in 1976. From 1978 through 1990 she worked for the Department of Public Advocacy in various positions including Directing Attorney of the LaGrange Trial Office and Regional Supervisor of DPA's Western Kentucky Trial Offices. Bette was employed by the Jefferson District Public Defender's Office between 1994 and 1999 and served as Chief of its Capital Trial Division. Bette returned to DPA in September 1999 as Capital Trial Branch Manager. She is a 1982 graduate of the National Criminal Defense College's Trial Practice Institute, Charter Board Member and Past-President of the Kentucky Association of Criminal Defense Lawyers, and former Chairperson of the Criminal Law Section of the Kentucky Bar Association. Bette was the 2004 recipient of the Department of Public Advocacy's *Furman Award* recognizing her efforts on behalf of capital clients.

Stephanie Page is one of the three attorneys designated "Senior Trial Counsel" in the Public Defender Division of the Committee for Public Counsel Services in Massachusetts. After graduating from Northeastern University School of Law in 1978, Ms. Page joined C.P.C.S. (formerly the Massachusetts Defenders Committee) as a public defender. She has been a member of the C.P.C.S. Murder team since 1985. From 1988 to October 1997, in addition to being a trial lawyer, she was the Forensic Services Director for C.P.C.S. In 1989, she was the first recipient of the Massachusetts Bar Association Defender Award. In 1996, Ms. Page was inducted into and is currently a Fellow of the American College of Trial Lawyers. In 1997 she was awarded the Edward J. Duggan Public Defender Award by C.P.C.S. She received the Lelia J. Robinson Award from the Women's Bar Association in 2004. She is a frequent coordinator, lecturer and writer for Massachusetts Continuing Legal Education, Inc. and other groups throughout the legal community. She is the editor of the award winning MCLE publication: *Trying Drug Cases in Massachusetts*; editor and chapter author of MCLE=s *Trying Sex Offense Cases in Massachusetts***;** and co-editor and chapter author of MCLE's recently released *Trying Homicide Cases in Massachusetts*. Ms. Page is currently the Chair of the Criminal Practice Section of the MCLE Curriculum Advisory Committee and has been Vice Chair of the Massachusetts Bar Association's Criminal Justice Section Council. Ms. Page was one of the three member defense team in the death penalty case of *United States v. Gary Sampson*.

John Palombi is a 1983 graduate of Oberlin College and a 1987 graduate of DePaul College of Law. He has been a licensed attorney since 1987, practicing in Illinois until moving to Kentucky in 1997. He has served as a staff attorney for an appellate court, was a commercial litigation associate at a Chicago law firm, was an assistant appellate defender for the Office of the State Appellate Defender in Springfield, Illinois, and has also worked as an attorney for the Illinois Department of Insurance.

Julia K. Pearson, a graduate of Berea College and the Brandeis School of Law, has supervised Section C of the Appeals Branch since August 16, 2005. From 1989-2000, she was a paralegal in the Capital Resource Center/Capital Post-Conviction Branch. She then spent three years as an attorney in CPB, transferring to Appeals in 2003. Julia met her husband, Paul, at a poker game while they were students at Berea. She and Paul, who returned safely from Iraq in November 2005, share their home with 6 cats, a dog, a lot of laughter and music.

Damon Preston is a full-time baseball fan who happens to spend his days working as the Appeals Branch Manager for the Department of Public Advocacy. After attending Red Sox games while at Harvard Law School, Damon split his time between the Yankees and Mets when he was at the Criminal Appeals Bureau of the Legal Aid Society in New York City. Since returning to Reds country in 1997, Damon has worked in the Richmond DPA trial office and directed the Paducah and Harrison DPA trial offices before joining Appeals in December 2004. He lives in Georgetown (conveniently an hour from Great American Ballpark) with his wife Amy and daughters Abbie and Marissa.

Samuel N. Potter graduated from Eastern Kentucky University with a B.A. in economics in 2000 and took his J.D. from Brandeis Law School at the University of Louisville in 2003. He began working for DPA as a law clerk in 2002. He accepted a full time position in the Appeals Branch in 2003 and has worked in that capacity since then. Outside the practice of law, his main interest lies in theology, which he studies at The Southern Baptist Theological Seminary. He is married to the most beautiful woman in the world, Rebecca, and has two prized children, Andrew and John.

Diana Queen is an investigator for the Department of Public Advocacy serving with *The Kentucky Innocence Project*. Prior to her role in the *Kentucky Innocence Project* she worked with the Capital Trial Branch, and Post Conviction Branch investigating death penalty cases. Diana is a board certified criminal defense investigator. She is a National Advisory Board Member for the CDITC, the National Innocence Project National Advisory Council Member, and is on the 2004-2005 DPA Defender Council. In 2004, Diana received the National Investigator/Philosphers Award, for outstanding contributions to National Criminal Defense education and training. Diana has received the distinguished *Rosa Parks Award* in 2004, for her exemplary service to the poor. She serves in volunteer positions in her community and is a member of the Woodford County Human Rights Commission. Diana serves on the executive committee for *Francisco's Farm* Invitational Fine Art and Craft Show, and a member of the Midway Woman's Club. She is a graduate of Midway College, the Kentucky State Police Academy, and holds specialized certifications from the FBI and DEA. Diana is currently pursuing a post baculerette degree in Public Policy and Administration. During her time with the Kentucky State Police, she served as a trooper and detective and worked special investigations. Diana has approximately 15 years of experience in law enforcement and related fields of Criminal Justice.

Rob Riley joined the Department as a trial attorney in 1982, after graduating from the University of Tennessee. He previously served the Department as the field services director and is now the Northern Regional Trial Manager as well as the Directing Attorney of the LaGrange Trial Office. He has served on the Board of Directors of KACDL. Rob participates extensively in training, having been a frequent seminar lecturer and has been a TPI faculty member. Rob serves as a departmental resource on issues involving DUI and is the editor of the *DUI Trial Practice Manual* published by DPA and updated yearly. Rob argued *Commonwealth v. Raines* and *Commonwealth v. Wirth*, both DUI decisions before the Kentucky Supreme Court.

Gail Robinson is a 1972 graduate of Vanderbilt University and a 1976 graduate of the University of Louisville Law School. She was with the Department of Public Advocacy from 1975 until 1986 in a variety of positions and in private practice from 1988 until 1997 focusing on criminal cases and civil rights litigation. From 1997 to 2001, she was manager of DPA's Juvenile Post-Dispositional Branch. Since 2001, she has been a member of that Branch handling appeals, representing youth in the Department of Juvenile Justice's facilities and filing complex civil actions challenging DJJ practices on behalf of those youth. Gail was a high school teacher and social worker prior to attending law school. She was also a member of Franklin County Board of Education for nearly seven years.

Meredith Robinson is the Marketing Support Manager for Kentucky Higher Education Assistance Authority (KHEAA) and The Student Loan People. She has been with The Student Loan People for eight years and has over 20 years of marketing experience. In her capacity with KHEAA and The Student Loan People, she is responsible for providing marketing materials, advertising, special projects and support to both agencies. Ms. Robinson holds a Bachelor of Science in Communication from Missouri State University in Springfield.

Missy Runyon is a mitigation specialist with the Capital Trial Branch, where she has worked for over 6 years. Missy has a Master of Science degree in Clinical Psychology from Eastern Kentucky University. She has over 12 years of experience in community mental health, where she gained experience working with clients and families who suffered from poverty as well as mental illness.

Karen King Scales is Program Coordinator for the Law Operations Information Resource Branch. A native of Versailles, Kentucky, she attended Berea College. Mrs. Scales has been with DPA since 2000, and currently lives in Frankfort with her husband and two children. Karen is a professional genealogist and historical researcher, as well as an 18th Century living history enactor, and former President of the Fort Boonesborough Foundation.

Peter L. Schuler is a 1972 graduate of Vanderbilt University and a 1975 graduate of the Brandeis School of Law. He has served as a trial attorney with the Jefferson County Public Defender's Office since 1976. Since 1982, his practice has been concentrated in the area of juvenile law and mental health law. In 1983, he became the Chief of his office's Juvenile and Mental Health Division. During his career, he has served on numerous committees and with other groups having the goal of improving the quality of juvenile justice and the mental health system in Kentucky. Currently, he is a member of the Department of Juvenile Justice's Prevention Counsel, the Jefferson County Family Court Advisory Board, and the Kentucky Criminal Justice Council's Juvenile Justice Committee. He has participated in attorney training for the Kentucky Bar Association and the Department for Public Advocacy with respect to juvenile law and mental health issues. He was the 1999 recipient of the Department for Public Advocacy's *In Re Gault* Award, which recognizes excellence in advocacy in the area of juvenile law. He co-authored the chapter on "Juvenile Law and Psychiatry" in the "Handbook of Child and Adolescent Psychiatry" (John Wiley, 1998), Paul Adams, M.D., editor.

Justice Will T. Scott is from the 7th Supreme Court District and is a former Circuit Judge (1984-1988) and Assistant Commonwealth Attorney (1981-1982) and trial attorney from Pike County, Kentucky. In 1986, he was elected as 2nd Vice President of the Kentucky Circuit Judges Association. He was born on July 20, 1947; in Pike County and now resides on Ratliff's Branch, near Pikeville. Scott graduated from Pikeville High School in 1965, then attended Eastern Kentucky University for one year before volunteering for the United States Army in the Fall of 1966. After returning from Service in 1969, he attended and received his College Degree from Pikeville College. He has both a Law Degree and a Masters of Law in Taxation from the University of Miami, Florida (1974-1975) and is licensed to practice Law in both Kentucky and Florida. Scott spent three years (1966-1969) in the United States Army. He enlisted as a Private and finished his tour of duty in Vietnam as a First Lieutenant. He was awarded his airborne wings, the Bronze Star, the Vietnamese Cross of Gallantry, and the Combat Infantryman's Badge, among other military awards and decorations. Justice Scott is a member of the First Christian Church in Pikeville and practiced law in Kentucky's courtrooms for 29 years. Outside the courtroom, Scott is an avid hunter and outdoorsman, who raises and trains his own bird dogs. He also loves camping, whitewater rafting, snow skiing and fishing with friends and family.

Rob Sexton is a graduate of the University of Virginia (BA in English) and University of Louisville School of Law. He was a staff attorney for OPA's Somerset Office from 1990-1998. Since 1999 he has been Director of OPA's Owensboro Office and the Central Regional Manager.

Marguerite Thomas joined DPA in 1979 as a paralegal and then transferred to Kentucky State Reformatory Post-Conviction office where she worked as paralegal for 4 years. After graduating from the U of L Law School in 1985 she returned to DPA in Frankfort as an attorney with the Post-Trial Services Branch. She has been manager of DPA's Post-Conviction Branch since 1995. In 1996, she headed the successful effort to obtain clemency and/or parole for 12 KCIW inmates who were victims of domestic violence. During the past three years, she has been instrumental in the creation and development of the Kentucky Innocence Project. KIP is a cooperative effort with state universities and law schools to obtain the release of innocent persons incarcerated in Kentucky.

Sharon Travis is the investigator in the Henderson Trial Office. Prior to her role as criminal defense investigator she served in the Christian County Sheriff's office with primary responsibility as bailiff for Christian County Circuit Judge James E. Higgins until his retirement. Sharon has approximately 13 years experience in related areas of criminal justice in Kentucky and Alabama.

Sam Weaver is a graduate of Virginia Tech with a BS and MS in mathematics. After a career teaching mathematics he returned to law school at Washington and Lee School of Law, graduating in 2000. Sam has been a staff attorney with the trial division of DPA since 2001. He is currently assigned to the Boyd Field Office in the Northern Region.

B. Scott West — Directing Attorney for Murray Field Office; Married to Beverley and father to Hannah, 8. Scott hails from Eastern Kentucky but was transplanted in Western Kentucky in 2001. A graduate of the University of Kentucky Law School (1988), and Vanderbilt University (1985), Scott practiced for ten years at Texaco Inc., in Houston, Texas, before joining DPA in 1999.

Randall L. Wheeler is a 1975 graduate of the University of Kentucky. He received his J.D. degree from the University of Kentucky College of Law in 1978. He has been an Assistant Public Advocate with the Department of Public Advocacy since 1978. He began his career with DPA as a staff attorney with the Post-Conviction Services Branch, becoming the Directing Attorney of that branch in 1980. From 1984 until 1989 he was a staff attorney with the DPA's Appellate Branch. In 1989 he was named Executive Director the Kentucky Capital Litigation Resource Center and served in that capacity until 1996. From 1996 until 1999 he served as the Directing Attorney of the DPA's Capital Post-Conviction Unit. From 1999 until the present he has been a staff attorney with the Capital Appeals and Appellate Branches of the DPA. Randy served as Chairman of the DPA's Public Information Committee from 1979 to 1980 and DPA's Technology Committee from 1997 to 2000, was a representative on the Governor's Commission on Jail Standards from 1981-1983, the Special Committee on Corrections, Subcommittee on Pretrial Diversion in 1983 and the Advisory Committee for the Civil Justice Reform Act of 1990 for the United States District Court, Eastern District of Kentucky in 1992. He also served on the Advisory Board of Sullivan Junior College Institute for Paralegal Studies from 1983 to 1985. Randy represented the petitioner in a successful Petition for Writ of Certiorari in United States Supreme Court in *Olden v. Kentucky*, 488 U.S. 227 (1988).

Chris Woodall is a 1996 graduate of the University of Kentucky College of Law. He has been with DPA for six years sandwiched around a one year stint in private practice. He is a trial lawyer with the Hopkinsville office and currently works in Christian Circuit Court.

Jim Wren is a graduate of the University of Richmond and the University of Virginia Law School. Following graduation, he served two judicial clerkships, the first in Washington, DC, and the second for the Hon. Eugene E. Siler, Jr., in London, KY. Thereafter, he was in private practice for almost 20 years. After 11 September 2001, he was mobilized by the U.S. Navy, serving first in Italy and then in Bahrain. While in Bahrain, CDR Wren became interested in time management issues for persons carrying a heavy workload, and he brings his wartime training and experience to DPA.

Iversy (Ivy) Velez is an attorney from San Juan, Puerto Rico. She graduated from the University of Puerto Rico with a major in Economics, and got a Juris Doctor Degree at the Law School of the InterAmerican University of Puerto Rico. She is currently admitted to the practice of law in Puerto Rico, Washington D.C., and Kentucky. She moved with her family to the Commonwealth of Kentucky in 1994, but arrived to the Northern Kentucky area in 1998. Since then she has been a resident of Florence, Kentucky, where she also has her office of legal practice. Due to the amazing increase of Hispanics into the Northern Kentucky area, she saw a need to address their needs for which got involved in activities and with organizations that could help to develop programs specifically address to the Hispanic community. Through a program from Northern Kentucky University, she joined Lt. Tim Chesser from the Florence Police Department to establish the very successful Latino Police Academy Program. This program educates Hispanics to understand the differences in culture, and to learn about the rules and customs of their adopted area of residence. She also volunteers with different non-profit organizations to provide legal defense and interpretation services pro bono. She translates into Spanish publications from different non-profit organizations and is often called as speaker upon diversity issues as it pertains to Hispanics. Her main goal in life is keep giving her best to bridge gaps between Hispanics and Americans.

Will M. Zevely is a 1972 graduate of Chase Law School and a partner in the Florence, Kentucky law firm of *Busald, Funk and Zevely*. From 1972-83 he served as the Boone and Gallatin public defender. He has literally tried hundreds of DUI cases since 1972. He is one of the preeminent DUI litigators in Kentucky, presenting to a variety of Kentucky groups on DUI including KATA, KBA, KACDL, and many local Bars. He has an undergraduate degree in chemistry which gives him an extra edge in the intricacies of the breathalyzer. As a member of the Ohio Bar, he has practiced regularly under Ohio's *per se* law. He is a charter board member of KACDL and writes a regular CUI column for their newsletter. He has co-authored, *Kentucky Driving Under the Influence Law* with District Judge Stan Billingsley, the only complete analysis of Kentucky's DUI law. ■

PRETRIAL SERVICE RISK ASSESSMENT

AOC Pretrial Services
Ed Crockett, Tara Boh Klute, and Charlotte McPherson

Introduction

We recognized that judges could make better-informed bond decisions if given information that was statistically shown to predict the likelihood a Kentucky defendant will return to court and will not commit an offense while out on bond. To meet this need, AOC Pretrial Services collected and examined Kentucky data and that of two other states. We used this data to assign a numeric weight to factors in a defendant's history that are statistically shown to reliably predict bond decision success or failure. Applying those factors, we developed a risk assessment model that provides judges a more reliable and scientifically sound basis to decide whether and how to release a defendant. The model also provides judges a means to reduce the risk posed by defendants they release.

Risk Assessment Factors and Instrument

The new risk assessment instrument uses a weighted scale based on current research for both failure to appear in court and the likelihood of re-offending while out on bail. Validation studies show that certain factors, which demonstrate one's ties to the community and prior criminal history, can reliably predict both flight risk and the potential for re-offending. Flight risk prediction factors include having a local address for twelve or more months, prior failure to appear and having active pending cases. Factors proven to measure risk of re-offending and danger to the community include a history of drug or alcohol abuse, prior criminal history, prior violent crime convictions, the severity of the current charge, the status of active pending cases, prior failure to appears, sufficient means of support and expecting someone at arraignment.

The factors statistically shown to be the more accurate predictors of failure were assigned higher risk weighted values. Specifically, prior failure to appears, active pending cases, prior misdemeanor or felony convictions, prior convictions for violent crimes and a history of drug or alcohol abuse. Pretrial Services then used those risk values to develop a model that will be used to make recommendations to judges for release decisions.

After interviewing and gathering data concerning a defendant, pretrial officers will input this data into the computer model and determine whether the defendant should be considered low, moderate, or high-risk. Based on the nature of risk identified, pretrial officers will make a release recommendation. For low risk defendants, pretrial officers will recommend release on OR, unsecured or non-financial surety bond. For moderate risk defendants, the pretrial officer will recommend release on OR, unsecured or non-financial surety bond with conditions that are related to the nature of the risk posed by the defendant. Through identifying factors and supervising the defendant pretrial will attempt to lower the risk posed.

For example, a defendant may not have a local address for twelve months and have a prior failure to appear in court, but he/she has no previous violent criminal history or any pending cases. This person would be considered a moderate risk for flight risk and a low risk for anticipated criminal behavior, meaning they are an overall moderate risk. Using this information the Pretrial Officer would recommend conditions that attempt to lower the flight risk such as reporting and court notification.

Another example would be a situation where the defendant has lived locally for the past twelve months and has no prior failure to appears or pending cases, but has a significant criminal record and history of drug or alcohol abuse. This defendant would have a low flight risk score and a moderate re-offending score and thus rated overall as a moderate risk. Since the highest risk involves re-offending and danger to the community, the Pretrial Officer would recommend conditions that address these issues such as random drug testing and treatment or electronic monitoring.

Those defendants who are high risk in both areas would not be recommended without further assessment for release on recognizance with or without conditions due to the prediction that the defendant is both a flight risk and more likely to re-offend. However, if released by the court on non-financial conditions Pretrial Services would monitor compliance.

Methodology for Validation Study

Pretrial Services used diverse and detailed information to determine the statistical validity of the pretrial risk assessment tool. The validation study for the tool was completed in two phases with two segments in each phase. The jurisdictions chosen for the sample in both phases and segments are representative of the various cultural and geographical differences within the state of Kentucky. The first segment of Phase One included the pretrial interview and case information from 844 defendants arrested in February and March 2005 in Madison, Marshall, Johnson, Lawrence, Letcher and Martin counties. The second sample in Phase One consisted of 2403 defendants arrested in February and

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March 2003 in Campbell, Johnson, Kenton, Lawrence, Letcher, Madison, Marshall and Martin counties. The first segment of Phase Two included the pretrial interview and case information from 1093 defendants arrested in July 2005 in Campbell, Johnson, Kenton, Lawrence, Letcher, Madison, Marshall and Martin counties. The second sample of Phase Two consisted of 1460 defendants arrested in the same jurisdictions.

The first set of data was collected to measure the developed instrument's validity in assessing risk while a defendant is out on bond and his or her case is pending. The risk assessment instrument was completed on each defendant using the information from the pretrial interview and the initial record check. Based on the instrument's weighted scale, defendants were categorized as low, moderate or high risk. Using Courtnet, each case was examined between April and June 2005 to determine if the defendant failed to appear or was charged with another criminal offense while the case was pending.

The second set of data was collected to measure the validity of the risk factors used, especially as they relate to flight risk and criminal behavior. The risk instrument was completed using the information on the pretrial interview and initial record check. Like the first segment, defendants were categorized as low, moderate or high risk. Criminal history checks were completed between April and June 2005 and each case was reviewed to determine if the defendant committed another criminal offense or failed to appear in court at any time during the two years since their original arrest.

For Phase One of the study all cases were counted and placed into one of the following categories:

Clear:
No new charges or failure to appears.

New Charges/Convictions:
Defendant was charged and/or convicted of an additional criminal offense. Traffic cases that are classified as misdemeanors such as DUI, no insurance and no operator's license were considered however, mere traffic violations were not (speeding etc).

FTA:
Defendant failed to appear at a scheduled court proceeding on the initial charge.

FTA + New Charge/Convictions:
Defendant was charged and/or convicted of an additional criminal offense and failed to appear at a scheduled court proceeding on the initial case and/or subsequent cases.

Eliminated Cases:
Defendants who were incarcerated on the initial case and were not released from custody by the completion of this study were eliminated.

For Phase two of the study the data was put into the statistical program SPSS and analyzed to determine the significance of each variable. The results of these studies are found on the following pages, and reflect a high degree of confidence that the pretrial risk assessment is a valid tool to predict the likelihood of success or failure of a release recommendation decision.

Validation Study Phase One Results

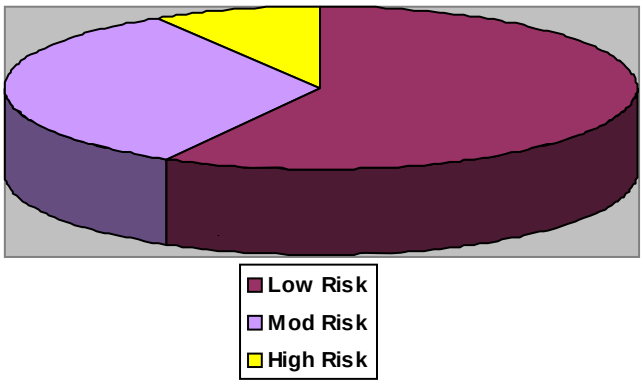
For pending cases:

Low Risk Defendants
- 89.86% Had no new arrests and did not fail to appear
- 2.96% Failed to appear in court
- 6.77% Had a new arrest
- .43% Failed to appear and had a new arrest

Moderate Risk Defendants
- 75.21% Had no new arrests and did not fail to appear
- 8.13% Failed to appear in court
- 14.64% Had a new arrest
- 2.04% Failed to appear and had a new arrest

High Risk Defendants
- 54.40% Had no new arrests and did not fail to appear
- 12.80% Failed to appear in court
- 24.80% Had a new arrest
- 8.00% Failed to appear and had a new arrest

Clear (No New Arrests/Convictions or FTAs)



Validation Study Phase One Results

For cases two years after disposition:

Low Risk Defendants
- 63.18% Had no new arrests and did not fail to appear
- 3.86% Failed to appear in court
- 27.57% Had a new arrest
- 5.41% Failed to appear and had a new arrest

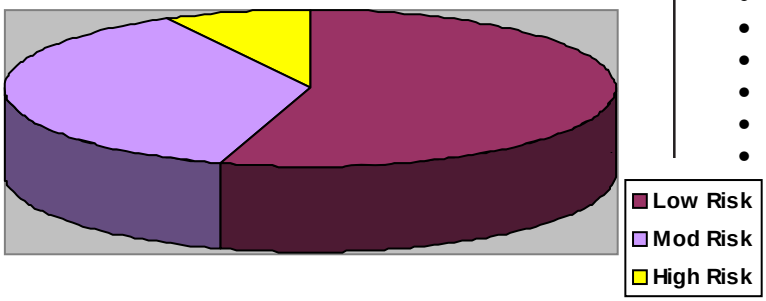
Moderate Risk Defendants

- 43.78% Had no new arrests and did not fail to appear
- 6.06% Failed to appear in court
- 36.26% Had a new arrest
- 13.92% Failed to appear and had a new arrest

High Risk Defendants

- 13.56% Had no new arrests and did not fail to appear
- 6.95% Failed to appear in court
- 57.86% Had a new arrest
- 21.66% Failed to appear and had a new arrest

Clear (No New Arrests/Convictions or FTAs)



Pretrial Services Risk Assessment Factors

Risk factors for both Flight and Anticipated Criminal Conduct

- Active Bench Warrants for failure to appear or prior failure to appear
- Pending Cases

Flight Risk Factors

- Not having a local address for the past twelve months

Anticipated Criminal Conduct Risk Factors

- History of drug or alcohol abuse
- Prior misdemeanor or felony convictions
- Prior violent crime convictions
- Severity of Current Charge
- Not having a sufficient means of support
- No expectation of a friend or family member at arraignment

Interview Recap Report

DOE, JOHN WAYNE FAYETTE

123-45-6789 03/08/2006 **ACCEPTED INTERVIEW** MALE - WHITE - MARRIED

Case Information

3/08/2006 FAYETTE 6H3729379 03/07/2006

Charge Information

03/08/2006 FAYETTE 6H3729379 03/07/2006
0021014 FACILITATION *OBSOLETE* OPER VEH UNDER INFLU,DRUGS,2ND OFF/5YRS

Address Information

Present: 123 MAIN STREET (123) 456-7890 0 year(s) 6 month(s)
ANYTOWN, KY 12345 OWN

Prior: 1223 ELM STREET 3 year(s) 0 month(s)
ANYTOWN, KY 12345 OWN

Income Information

Present: PRETRIAL SERVICES (505) 573-2350 10 year(s) 0 month(s)
100 MILLCREEK PARK FULL-TIME EMPLOYEE
FRANKFORT, KY 40601

Contact Information

SPOUSE	**PARENT**	**OTHER RELATIVE**
DOE, JANE	DOE, MARY 123 PLUM STREET NEW YORK, NY	DOE, BAMBI
456-7890 Can Contact : Yes	(112) 345-6789 Can Contact : Yes	(124) 567-8910 Can Contact : Yes

***** End of File *****

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Criminal History
Low Risk Defendant

02-T-00001 OPERATING MV U/INFLUENCE OF INTOX BEV-1ST OFF
***GUILTY**
COST $217.50; FINE $200.00; A-D-E;
memo; 4/8/02 OWES $437.50 PAY AND RELEASE OL TO BE TURNED IN BY
NOON
2/11/02 5/4/02 PD

Criminal History
Mod Risk Defendant

02-T-00066 OPERATING MV U/INFLUENCE OF INTOX BEV-1ST OFF
***GUILTY**
COST $217.50; FINE $200.00; A-D-E;

02-M-00467 VIOLATION OF KENTUCKY E.P.O./ D.V.O.
***GUIILTY**
COST $125.50; FINE $250.00; 37 DAYS JAIL; 37 DAYS SUSP; OTHER

01-M-00224 LICENSE TO BE IN POSSESSION
***FAILURE TO APPEAR**
FINE $100.00

Criminal History
High Risk Defendant

02-T-00043 OPERATING MV U/INFLUENCE OF INTOX BEV-1ST OFF
***GUILTY**
COST $217.50; FINE $200.00; A-D-E;

00-T-00148 1ST DEGREE POSSESSION OF CS/ COCAINE, 1ST OFF
***GUILTY**
COST $151.00; 1 YRS. PRISON; 183 DAYS CREDIT TIME;

99-T-00766 FAILURE TO OR IMPROPER SIGNAL
***FAILURE TO APPEAR**

00-T-01267 NO INSURANCE
***FAILURE TO APPEAR**

06-M-00023 ALCOHOL INTOXICATION
***PENDING**
memo: Jury Trial 04/15/06

02-M-00123 ALCOHOL INTOXICTION
***GUILTY**
FINE $25.00; COSTS $57.50 ■

Kentucky Constitution Section 16. Right to bail – Habeas corpus. All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.

Crawford v. Washington: Looking Back and Looking Ahead

By Robert G. Lawson, University of Kentucky College of Law

I. Introduction.

A. **Evidence Law Doctrine**: Basic evidence principles predate Confrontation Clause developments and have played a role in those developments. It is helpful to keep them in mind when thinking about confrontation protection.

1. **Rationale:** The hearsay rule is based on the notion that evidence should be tested through cross-examination by the opponent before being used in a courtroom. Of course, confrontation is essentially a right of cross-examination.

2. **Nonhearsay:** The distinction between hearsay and nonhearsay is tied to the need for cross-examination. Hearsay is out-of-court statements used to prove truth of assertions; in such situations, there is a need to cross-examine the declarant to test the evidence. Nonhearsay is out-of-court statement used to prove the making of the statement; in such a situation, if properly applied, there is no need for cross-examination of the declarant and a full chance to test the evidence for the purpose for which it is used through cross-examination of the witness. The key to this distinction, of course, is finding relevance in the making of the statement. *Crawford* leaves this distinction fully intact.

3. **Hearsay Exceptions**: The hearsay exceptions (somewhere between 30 and 40 depending upon what you count) developed over time around two concepts: (a) "necessity" for taking the evidence without an opportunity to cross-examine; and (b) "trustworthiness" in the out-of-court statement that is not found in run-of-the-mill hearsay.

   a. The concept called "unavailability of declarant" evolved from the necessity requirement. It has a well-established meaning now (dead, claim of privilege, beyond the reach of process, etc.) and applies to some important exceptions. Necessity has been found, however, in other ways. Business and public records are admissible without a showing of necessity (on theory that such declarants are "practically" unavailable); excited utterances is based on idea that the hearsay is better than in court testimony.

   b. The more important of the two grounds for exceptions is the trustworthiness element, which is found in a wide variety of ways (e.g., business records are used to conduct business, declarations against interest are not made unless true, statements for medical treatment or diagnosis are reliable because declarant seeks treatment, etc.). This requirement was at the core of pre-Crawford confrontation analysis.

B. **Pre-*Crawford* Confrontation:**

1. **Basic Principles**: The most basic of all principles of 6th Amendment rules is that the provision applies to hearsay statements (a position that was once in doubt); a contrary rule would read "witnesses" literally and give a defendant only the right to confront those who appear to testify and would have no bearing on out-of-court statements made by such witnesses. The second most basic rule is that the constitutional provision does not require the exclusion of all out-of-court statements; in other words, there can be exceptions to the hearsay rule. In some of its earliest analysis of the 6th Amendment, the Supreme Court held that the state (i) is not prohibited from introducing testimony from a prior proceeding where the defendant had an opportunity to cross-examine witnesses who are now unavailable; and (ii) is not prohibited from introducing testimony about a dying declaration (where declarant is dead and unavailable).

2. ***Ohio v. Roberts*:** In its confrontation analysis, the Supreme Court spent much energy determining the circumstances under which out-of-court statements could be admitted without violating the Confrontation Clause. In its pre-Robert cases, the Court relied heavily on the old evidence law doctrine and provided for the use of uncross-examined statements if they had "indicia of reliability" *(i.e.*, evidence of trustworthiness not found in run-of-the-mill hearsay); "indicia of reliability" was seen as a substitute for cross-examination (although often in situations where cross-examination would not have added much to the search for truth). Then the Court rendered its decision in the landmark case of *Ohio v. Roberts*.

   a. In *Roberts*, the Court adopted a two-part test for the admissibility of hearsay statements: (i) declarants must be shown to be unavailable to testify in person; and (ii) the statement must have been made under circumstances providing "indicia of reliability."

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b. With respect to the second (most important as it turned out) of these requirements, the Court embedded much of the law of hearsay into the Confrontation Clause by saying in *Roberts* that a trial judge can find sufficient "indicia of reliability" in statements that are admissible under "firmly rooted" exceptions to the hearsay rule. This would include a very high percentage of the hearsay exceptions that are contained in the Federal and State Rules of Evidence, excluding most notably the residual exception and the declaration against interest for statements subjecting one to criminal liability.

c. With respect to the first requirement of *Roberts* ("unavailability"), it is obvious that taken literally this aspect of the case would have resulted in a major overhaul of the law of hearsay evidence, since most of the well-rooted exceptions to the hearsay rule do not have an "unavailability" requirements (e.g., excited utterances, business records, statements for medical treatment, etc.). A few years later, in the well-known case of *United States v. Inadi*, 475 U.S. 387 (1986), the Supreme Court backed away from its statement in *Roberts* about "unavailability": "*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." *Id.* at p. 394. This case involved an exception to the hearsay rule that had never had an "unavailability" requirement (coconspirator's exception) while the *Roberts* case involved one that did require unavailability (reported testimony exception).

d. This much is clear about *Roberts*. It allowed for the use of a wide range of hearsay without a violation of the Confrontation Clause. In effect, it worked to keep the evidence law on hearsay and the law on confrontation coupled. The most significant thing done by *Crawford* is the separation of the two bodies of law that existed under *Roberts*.

3. **Not Deeply Rooted Exceptions**: In *Roberts*, the Court implied and afterwards held that out-of-court statements that did not fall within the coverage of one of the deeply rooted exceptions could be admitted without violating the Confrontation Clause if the circumstances surrounding the making of the statement contain "particularized guarantees of trustworthiness."

a. This aspect of the case was not nearly as important as the "deeply rooted" aspect because the Rules of Evidence law contain so few of the "not deeply rooted" exceptions. Subsequent developments indicate that the most likely exceptions were the residual exception (which does not exist in the Kentucky Rules of Evidence) and the "declaration against penal interest" exception.

b. Reliance on this part of the case requires an independent inquiry by the trial court about "indicia of reliability" in the out-of-court statement. The reliability needed to support admission must be found in the circumstances surrounding the making of the statement and cannot be based on so-called corroborating evidence. *Idaho v. Wright*, 497 U.S. 805 (1990).

4. **Miscellaneous Rules:**

a. The Supreme Court has ruled that there is no need for an "indicia of reliability" determination when the out-of-court statement is admissible under a hearsay rule which has the declarant present at trial and subject to cross-examination. This would apply, for example, to prior inconsistent statements of a witness, statements of identification, statements by the defendant, and some others. *United States v. Owens*, 484 U.S. 554 (1988).

b. The Supreme Court has ruled that the Confrontation Clause does not apply to out-of-court statements used as nonhearsay, obviously because there is a full opportunity for cross-examination in this situation (of the witness who has testified to the making of the statement). *Tennessee v. Street*, 471 U.S. 409 (1985).

5. **Declarations Against Penal Interest**: It is with respect to these out-of-court statements (which are usually made to police) that the constitutional law was unfolding at the time of *Crawford*. This exception, of course, was not recognized until the 1970s or so and thus was not one of the "well-rooted exceptions." These were the statements that put the *Roberts* approach to the real test.

a. The common law of evidence refused admission to such statements by requiring that declarations be against "pecuniary or proprietary" interest. This old law was aimed more at defendants than it was prosecutors, finding particularly unreliable testimony about a confession of a third party offered by a defendant when the third party was unavailable for trial (as required by the exception).

b. The Federal Rules (relying on the old thought) distinguished between "exculpatory" and "inculpatory" statements against penal interest, allowing the latter with declarant unavailable but requiring for the former a special showing of corroboration. Kentucky's Rules of Evidence never embraced this difference. The Supreme Court rendered an important decision on when statements are admissible under this evidence law that is not crucial to the present discussion. *See Williamson v. United States*, 512 U.S. 594 (1994).

c. The Supreme Court decided an important case involving this exception about five years ahead of *Crawford*. In *Lilly v. Virginia*, the defendant was convicted on the basis of a statement made by an accomplice to a police officer inculpating the defendant. The Virginia courts found the statement admissible under the declaration against interest exception. In a plurality opinion, the U.S. Supreme Court reversed, finding that statements of this type do not have "particularized guarantees of trustworthiness" but instead are "inherently unreliable." The Court left the *Roberts* approach intact, but its concern about these kinds of statements laid the groundwork for *Crawford*.

II. *Crawford v. Washington*.

A. **The Case**: The defendant stabbed the victim and was charged with assault and attempted murder. There was evidence indicating that the victim had attempted to rape the defendant's wife. The prosecution had a confession from the defendant in which he admitted that he and his wife had gone looking for the victim after the alleged attempted rape, that they found him in his apartment, and that a fight ensued in which defendant stabbed the victim. The defense was self-defense (based on claim that victim had pulled a weapon before being stabbed by defendant). Defendant was convicted of assault.

B. **The Hearsay:** The police gave both the defendant and his wife *Miranda* warnings and took recorded statements from them. The wife's statement supported the prosecution's position that the victim had not pulled a weapon before being stabbed by the defendant. At trial, the wife claimed spousal privilege and on that basis refused to testify. The prosecution offered into evidence the statement she had earlier given the police and the trial court found the statement admissible under the declaration against penal interest hearsay exception. The defendant objected on Confrontation Clause grounds, but the court found "particularized guarantees of trustworthiness" and rejected the defense objection. The Supreme Court of Washington affirmed, relying on *Roberts* and its line of authorities.

C. **Decisions:**

1. **Ruling**: The Supreme Court found a violation of the Confrontation Clause and reversed the conviction.

2. **Rejecting *Roberts***: The Court clearly indicated that it would no longer determine Confrontation issues by inquiring as to whether the hearsay falls under a "firmly rooted hearsay exception" or has "particularized guarantees of trustworthiness."

3. **New Approach**: The Confrontation Clause, as adopted, was aimed at ex parte examinations such as affidavits and depositions that were used against defendants without opportunity for cross-examination of the witnesses. The target of the Clause is "testimonial hearsay" and statements obtained by law enforcement fall squarely within this target.

   a. **Basic Requirement**: The Confrontation Clause applies to "testimonial statements" (and presumably does not apply to other statements).

   b. **Prerequisites:** A "testimonial statement" can be admitted against a defendant only if (i) the declarant is unavailable to testify and (ii) the defendant had an opportunity to cross-examine the declarant when the statement was made. Without satisfaction of these two requirements, a "testimonial statement" must be excluded even if it falls within a "well rooted" exception or has "particularized guarantees of trustworthiness."

   c. **Impacts**: At least at first glance, the decision seems to have these two effects:

      (i) The protection of the Confrontation Clause is narrowed by the limitation to "testimonial" statements (seeming thereby to leave huge amounts of hearsay unprotected by the Clause and governed only by evidence law principles). The significance of this could easily be overstated, for under *Roberts* the applicable test was extremely generous in finding hearsay admissible (especially the "well-rooted" exception branch);

      (ii) The protection of the Clause is enhanced by prohibiting use of "testimonial" statements unless the defendant had an opportunity when they were made to cross-examine the declarant. In other words, there must be actual confrontation (or opportunity for such) before the statements may be admitted. The significance of this enhancement will in the end depend upon how the Court defines the term "testimonial."

4. **"Testimonial Statements"**: The Court easily found that the statements in this case were "testimonial" (having been made to police officers during interrogation in the police station). The meaning of "testimonial" is now critical to application of the Confrontation Clause.

   a. **Definition**: The Court said it would leave for another day and another case the matter of defining "testimonial."

   b. **Guidance**: However, the Court made the following statements that would seem to at least draw the outline of its definition:

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(i) "Various formulations of this core class of "testimonial" statements exist: 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial interrogations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially …."

(ii) "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England.

(iii) "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations …."

5. **The Key**: The decision in *Crawford* (or at least its dictum) should be a little alarming to the defense bar, for it seems to exempt so much hearsay from any protection by the Confrontation Clause. While this might not be so troubling presently, since the hearsay rules themselves provide protection against use of unreliable evidence, the decision might be seen by some as an opportunity to modify the evidence law to admit more out-of-court statements (e.g., statements of sex offense victims, especially children, or perhaps statements by victims of domestic abuse). In the end, the importance of the decision will depend upon what the Court ultimately says in further definition of "testimonial statements." Needless to say, the lower court litigation has focused primarily on this subject.

D. **Pending Cases**: The Supreme Court has heard arguments in two cases involving the reach of *Crawford*. They are likely to provide much guidance on unsettled issues:

1. ***Davis v. Washington***: The hearsay in this case was a 911 call by a domestic violence victim naming her assailant. It was admitted into evidence against the defendant (although not subject to cross-examination) as an "excited utterance."

2. ***Hammon v. Indiana***: The hearsay in this case was an oral accusation by a domestic violence victim to an investigating officer at the scene of an alleged crime shortly after the alleged attack.

3. **Court Watchers**: Commentators who heard the arguments opine that members of the Court (led by Scalia) seemed to favor the defense (meaning that they would see these statements as "testimonial."

III. Testimonial Statements

A. *General*: The Court chose not to defined this term in *Crawford*, although it is the defining characteristic of the Confrontation Clause protection. The statement found inadmissible in *Crawford* was made by a person then viewed as a codefendant, was made in the police station, and (to use the Court's words) resulted from "structured … questioning."

1. **Difficulty**: Lower court conflict over the meaning of the term is indicative of the difficulty that confronts lawyers and courts. It may be more complex than the Supreme Court anticipated.

2. **Possibilities**:

a. One possible definition from the opinion would be fairly narrow and limited to "extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." One problem in believing that this would prevail is that the statement in *Crawford* might not fit (and it was ruled inadmissible). This definition would be easy to apply.

b. A second possible definition would focus on statements that are made under circumstances that would lead an objective person reasonably to believe that the statement would be available for use at a subsequent trial. (This sounds testimonial.) The focus here is on the state of mind of the speaker. This would embrace far more hearsay than the first definition and would, of course, cover many statements obtained by police. This definition would be harder to apply.

c. A third possible definition would rely upon the text of the Clause (confronting "witnesses against" defendant) and focus on statements that are at the time made accusations of conduct that is criminal (thus making the declarant a witness against the defendant). The inquiry under this approach would focus on when the statement was made rather than when it was offered as evidence. The content and form of the statement would be determinative. This possibility, needless to say, would be more expansive than either of the prior definitions.

3. **Hypothetical Case**: D holds wife hostage in their house. Police surround house and seize D as he tries to leave. Police free wife from D's control and put him under arrest. Immediately thereafter, wife makes a statement to a police counselor (while under stress of excitement) and in that statement describes what D did to her. She then refuses on privilege grounds to testify. How would her statement be treated under the possible definitions above?

a. It would not be "testimonial" under the first, since it is clearly not "formalized testimonial material."

b. It might have a hard time fitting the second possible definition since there would have to be a finding that wife would have reasonably believed her statement would be used as evidence.

c. It would easily fit the third possible definition since D was under arrest, this was known to wife, and at the time of her statement she was accusing him of criminal conduct.

4. **Conclusion**: There is no consensus yet on definition of "testimonial" and conflict in lower court decisions. Some courts have construed the ruling very narrowly (e.g., treating excited utterances categorically "nontestimonial," same for unstructured questioning by police, etc.). Others have not given it such a narrow reading.

B. **Domestic Violence and Child Abuse Cases**: This is an area where clarification of the applicability of *Crawford* will be needed. In cases of this type, it is not uncommon for the victims to either refuse to testify (wife of the victim) or to be incompetent to testify (young children) and for cases to be made against defendants on the basis of hearsay statements made by the victims (maybe to police, maybe to family members, maybe to physicians).

1. **Testifying Declarant**: In many instances, the alleged victim will appear as a witness against the defendant. In such cases, since the declarant is available for cross-examination, it is arguable that *Crawford* does not stand in the way of the use of that declarant's out-of-court statements; in pre-*Crawford* cases, the Court had ruled that there is no Confrontation violation when defendant has an opportunity for effective cross-examination of declarant at trial. In *Crawford*, the Court had an out-of-court statement of a declarant who refused to testify at trial; at least on its facts, the case would not apply to hearsay from a testifying declarant (meaning that admissibility would depend solely on evidence principles).

2. **Excited Utterances**: This hearsay exception is probably the most commonly used exception for domestic violence cases, with the victim's statement made to police, to family members or friends, or by 911 calls. The circumstances under which the statements are made are likely to govern effect of *Crawford*.

a. **General:** However, it can be argued that such statements (made under stress of excitement generated by a startling occurrence) are categorically "nontestimonial." Some courts have been persuaded by such argument: "[T]he very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial.'" *Hammon v. State*, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004). *See also People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. 2004). Other courts have not been persuaded and conclude that the *Crawford* inquiry must be based on the particular circumstances surrounding the statement; excited statements, these courts say, made to police officers at the scene could be such that the declarant would surely know that they would be used against the defendant at trial. *See e.g.*, *Commonwealth v. Gray*, 867 S.W.2d 560 (Pa. 2005); *Lopez v. State*, 888 So.2d 693 (Fla. App. 2004).

b. **Unstructured Statements:** The statements in *Crawford* were obtained in the police station and recorded and the Court (in the opinion) mentioned "structured questioning" in rendering its decision. Many, if not most, of the "excited utterances" in domestic violence cases will be at the scene in response to calls for help and are not likely to be very "structured." Some courts have relied on this factor to find such statements "nontestimonial." *See e.g.*, *People v. Corella*, 122 Cal.App. 4th 461 (Cal. App. 2004).

c. **911 Calls:** Lower courts have tended to see statements made in the course of 911 calls as nontestimonial. Such statements are certainly not "structured" (in fact initiated not by police but by victims) and at first glance do not seem to be "testimonial" in nature (*i.e.*, not looking toward use of information at trial). *See People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. 2004). However, such calls do have characteristics that might support a different conclusion (e.g., the 911 operator usually asks questions of the caller, the calls are recorded, and we know from experience that they are coming in for frequent use at trial) and there is some authority for treating them as "testimonial." *See People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. 2004). A middle ground might be one that would treat the initial call for help as "nontestimonial" but treat other aspects of it including identification of offender as "testimonial." As indicated above, one of the cases pending in the Supreme Court involves a 911 call and statement and should resolve some of the issues.

d. **Statements to Family or Friends**: It may be very difficult to find that excited utterances made to family members or to others not connected in any way with law enforcement are testimonial. *See State v. Rivera*, 844 A.2d 191 (Conn. 2004).

3. **Statements to Doctors**: There are lots of statements in both domestic violence and child abuse cases made by victims to physicians. These statements have always been difficult for evidence law since they involve both

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treatment and criminal investigation. There is authority indicating that such statements are not "testimonial" and thus not covered by Confrontation. *See United States v. Rashid*, 383 F.3d 769 (8th Cir. 2004); *United States v. Delgado*, 401 F.3d 290 (5th Circuit). The strongest case for finding statements "testimonial" in this situation would be with respect to statements identifying the offender (where it is harder to see this as pertinent to treatment); a case can also be made for such treatment where the physician is acting in concert with state authorities. But it is yet too soon to know how this hearsay exception will play out under *Crawford*.

4. **Forfeiture of Confrontation Right**: In *Crawford*, the Court indicated that there can be a loss of right of confrontation through wrongdoing by the defendant (such as killing or threatening the declarant). In domestic violence cases (and maybe to a lesser extent in child abuse cases), victims often refuse to testify or recant their accusations, opening the door to arguments based on forfeiture. As you know, both the Federal and Kentucky Rules of Evidence now have a hearsay exception based on forfeiture by wrongdoing.

   a. **Causation**: Particularly in domestic violence cases, there are many reasons why the victim might chose to recant or not testify. Only when the trial court could find that the defendant had produced this result can the forfeiture exception be applied. This might not be required for a *Crawford* confrontation analysis where a statement could be admitted under some other exception (for example excited utterance).

   b. **Homicide Cases**: There is already authority supporting use of testimonial statements against defendants who are accused of murder where the declarant is the victim. Murder of the victim is seen as a clear case of forfeiture of confrontation rights. *See People v. Moore*, — Colo. App. — (2004).

   c. **Preliminary Finding**: The facts needed for a finding of forfeiture will have to be made by the trial judge. Under the Kentucky Rules, such facts are judged by a preponderance of evidence standard.

5. **Children's Statements**: Statements made by children to physicians and social workers are commonplace in child abuse prosecutions. There is substantial authority rejecting Confrontation Clause arguments for exclusion of such statements. *See State v. Wright*, 682 N.W.2d 284 (Neb. 2004); *People v. Cage*, 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004). However, there is some authority indicating that statements made to a physician who is part of a child protection team (and thus looks to be playing an investigatory rather than a treatment role) qualify as "testimonial." *See People v. Vigil*, 104 P.3d 258 (Colo. App. 2004). In the settlement of issues involving such statements, it may be important that many individuals are required by statute to report matters of suspected child abuse (a fact that makes the matter look investigatory). One of the difficulties that defense counsel will likely face in dealing with statements by young children is that such witnesses are hardly capable of thinking in terms of the use of such statements as evidence at trial; so, if the definition of "testimonial" focuses on what an objective declarant might believe, it will be difficult to prove than any child would be contemplating trial use of statements.

IV. Lab Reports

A. **General**: From the beginning, courts and authorities have wondered about the applicability of *Crawford* to lab reports offered into evidence against defendants. The issue, of course, will turn upon whether or not the reports are ultimately defined as testimonial. Before that issue is ever reached, however, the reports will have to be found admissible under some hearsay exception. The two exceptions that are most likely to provide this prerequisite are the business records and the public records exceptions.

1. **Public Records Exception**: This exception covers public records containing "factual findings resulting from an investigation made pursuant to authority granted by law." Lab reports (drugs analysis, blood alcohol content, etc.) fit this category and would qualify as public records. However, both the federal and state rules of evidence allow for the use of this evidence against the government in a criminal case but not against the accused. In addition, the public records exception covers records of "matters observed pursuant to duty imposed by law as to which there was a duty to report," which would also seem to cover lab reports; with respect to these public records, there is an exclusion in criminal cases "for matters observed by police officers and other law enforcement personnel."

   a. **Federal Case Law**: Federal courts are split over the applicability of the exception to lab reports. A well-known case, *United States v. Oakes*, 560 F.2d 45 (2d Cir. 1977), treats lab reports like police reports and finds them inadmissible under the exception. Other federal courts and some state courts have distinguished between police reports and "records of routine matters" and have found the latter admissible under the exception. *See e.g., United States v. DeWater*, 846 F.2d 528 (9th Cir. 1988) (intoxilizer test report); *State v. Smith*, 323 S.E.2d 316 (N.C. 1984) (breath analysis test). At least some courts have used a different approach to find admissible autopsy reports, concluding that the medical examiner and his employees are not "law enforcement personnel." *See United States v. Rosa*, 11 F.3d 315 (2d Cir. 1993).

b. **Kentucky Case Law**: There is scant authority on the admissibility under this exception of materials that could qualify as lab reports.

2. **Business Records Exception**: This exception allows for the use of records of regularly conducted activity. Its well-known requirements can generally be met by records that are made routinely by public employees and agents. Importantly, it does not have the limitations or exclusions that exist with respect to the public records exception (*i.e.*, has no provision excluding such records in criminal cases when offered by the prosecution).

a. **Federal Cases**: The well-known *Oakes* case held that the business records exception could not be used to override the restrictions on the use of the public records exception in criminal cases. Other federal courts, probably a majority, have rejected this view and will permit the business records exception (when its requirements can be met) to be used to admit public records.

b. **Kentucky**: The Kentucky Supreme Court had held the business records exception applicable to public records before adoption of the Kentucky Rules of Evidence. After adoption of the Rules, it conformed this view and held that "business" includes "a public agency" and government-made records can be admitted under the business records exception. This should open the door to admissibility of lab reports in so far as the evidence law is concerned.

B. **Confrontation Implications**: Under the *Roberts* analysis of confrontation issues, the litigation over lab reports produced a split of authority, with a large number of cases holding the evidence inadmissible and a large number of cases finding such things as drug tests, factual parts of autopsy reports, breath tests, and others admissible under the *Roberts'* reliability test ("well-rooted hearsay exceptions" or "particularized guarantees of trustworthiness"). Of course, *Crawford* rejects the reliability test in favor of one that guarantees cross-examination but applies only to hearsay that is "testimonial." The big question then is whether this kind of evidence will be called "testimonial."

1. ***Crawford***: The content of the opinion is not conclusive as to the fit between the "testimonial" requirement and lab reports. The Court at one point indicated that the Confrontation Clause did not apply to "casual" remarks made to someone by declarant; the lab report is anything but a casual remark. On the other hand, the opinion specifically mentioned "business records" as something that is not "testimonial." On still another hand, the Court very clearly classified "affidavits" as the kind of statement that would qualify as "testimonial" and lab reports have the appearance of affidavits made by experts expecting that they will be used as evidence at trial. Post-*Crawford* decisions are divided. Litigation over admissibility will continue until the Supreme Court speaks to the issue.

2. **"Testimonial"**: The reports under discussion are usually initiated by police officers and are initiated for the purpose of producing evidence for use at trial. Believing that such reports realistically cannot be seen to have been prepared for any purpose other than for potential use at trial, a number of courts have ruled that they are "testimonial" and cannot be admitted without a violation of defendant's confrontation rights. *See e.g., People v. Rogers*, 780 N.Y.S.2d 393 (N.Y.App. 2004); *City of Las Vegas v. Walsh*, 91 P.3d 591 (Nev. 2004).

3. **Nontestimonial**: Not all courts agree with the conclusion that lab reports fall within the definition of testimonial. Some see the reports as seeking to establish a neutral fact and that they are not made principally for prosecution. *See e.g., People v. Johnson*, 18 Cal. Rptr. 3d 230 (Cal App. 2004); *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005). The thinking runs something like this:

> "A laboratory report of a toxicology test performed on a urine sample neither qualifies as, nor seems analogous to, testimony at a preliminary hearing, before a grand jury, or at a former trial." *State v. Thackaberrry*, 95 P.3d 1142 (Or.Ct.App. 2004).

4. **Others**: It will be more difficult to classify certain kinds of records as "testimonial" since they have other uses and will thus look less like testimony than plain lab reports (which appear more like something prepared for purposes of prosecution). For example, hospital records (which will often if not always have a treatment component) and autopsy reports (which have a variety of purposes other than potential litigation) may have this quality and difficulty. Decisions seem to tilt toward finding these kinds of records as nontestimonial. *See e.g., State v. Dedman*, 102 P.3d 628 (N.M. 2004); *Perkins v. State*, 897 So.2d 457 (Ala.Crim.App. 2004).

5. **Available Cross**: If the analyst testifies at trial and thus is subject to cross-examination by the defendant, there should be no impediment under the confrontation protection to use of the analyst's lab report.

V. **Miscellaneous.**

A. **Opportunity to Cross**: If statements are "testimonial," they may not be admitted unless the defendant had an opportunity for cross-examination. This requirement is likely to generate additional litigation over whether or not a defendant has an adequate opportunity for cross-examination at a preliminary hearing (if victim vanishes or refuses to testify at trial). The case law has always been divided on this issue, with a majority of courts holding that

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the opportunity is adequate for application of the recorded testimony exception (relying to some extent on the need to salvage otherwise unavailable and relevant evidence). Of course, it is easy to argue that the defendant is neither ready nor motivated to cross-examine witnesses at a preliminary hearing.

B. **Nontestimonial Statements and Confrontation**: Is there any Confrontation protection for nontestimonial statements? This has turned out to be more of an issue than it had seemed to be at the posting of the *Crawford* decision.

1. ***Roberts'* Status:** Most authorities thought that *Crawford* overruled the *Roberts* decision. This would have meant that only the evidence law would govern the admissibility of hearsay that is classified as "nontestimonial." As the evidence law presently stands, this would not have been an earth shaking decision since *Roberts* allowed for the use of hearsay that fit "well-rooted" exceptions to the hearsay rule. Outcomes after *Crawford* would presumably have been much the same as before, just based on evidence law rather than on the Confrontation Clause if the hearsay was "nontestimonial." (Of course, there would be need to worry about future changes in the evidence law to make more nontestimonial hearsay admissible against defendants.)

2. ***Crawford* Opinion**: There are statements in the *Crawford* opinion that can be read to say that the Court meant to overrule *Roberts*. Here are the two most obvious ones:

   Majority Opinion: "Members of the Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause…. They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law …. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine—thus eliminating the excessive narrowness referred to above.

   In *White*, we considered the first proposal and rejected it…. Although out analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition." 541 U.S. 36, at 61 (2004).

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   Rehnquist's Concurrence: "In choosing the path it does, the Court of course overrules *Ohio v. Roberts* …., a case decided nearly a quarter of a century ago." 541 U.S. 36, at 75 (2004).

3. **Post-*Crawford* Cases**: There are three views on the question of *Roberts'* status after Crawford:

   a. **Uncertainty**: "If the evidence is non-testimonial, there is uncertainty as to whether the 'indicia of reliability' or firmly-rooted hearsay exception test enunciated in *Ohio v. Roberts* … survives *Crawford*." *United States v. Weiland*, 420 F.3d 1062, 1076 (9th Cir. 2005).

   b. **Survives**: Surprisingly, given the language and tone of *Crawford*, a number of federal circuit courts have ruled that the Confrontation Clause applies to nontestimonial statements and that the governing tests for admissibility are found in the *Roberts* case (most notably the "well-rooted exception" test). *See e.g., United States v. Felton*, 417 F.3d 97 (1st Cir. 2005); *United States v. Hinton*, 423 F.3d 355, 357 (3rd Cir. 2005) ("the Court partially overruled *Ohio v. Roberts*"); *United States v. Baker*, 432 F.3d 1189 (11th Cir. 2005). The Sixth Circuit Court of Appeals has very clearly concluded that the *Roberts* case survived the decision in *Crawford*: "[W]ith respect to non-testimonial hearsay statements, *Roberts* and its progeny remain the controlling precedents." *United States v. Franklin*, 415 F.3d 537, 546 (6th Cir. 2005).

   c. **Overruled**: Many of the post-Crawford decisions are simply silent on this issue but assume and act as though non-testimonial statements are admissible without any restraint by the Confrontation Clause. *See e.g., United States v. Gilbertson*, 435 F.3d 790 (7th Cir. 2006); *United States v. Hansen*, 434 F.3d 92 (1st Cir. 2006).

   d. **Kentucky Cases**: In one of its earliest decision on this matter, the Kentucky Supreme Court said that *Crawford* overruled *Roberts*. *See Terry v. Commonwealth*, 153 S.W.3d 794 (Ky. 2005). In a later case, the Court seemed a little more uncertain on this point, noting that the United States Supreme Court had declined to say that Confrontation Clause applied only to "testimonial" statements but that courts in other states seemed to have restricted the Clause to testimonial statements. *Bray v. Commonwealth*, 177 S.W.3d 741 (Ky. 2005).

C. **"Criminal Prosecutions"**: The Sixth Amendment applies in "criminal prosecutions," language that has been used to hold that the *Crawford* case has no application in cases involving revocation of parole, revocation of supervised release, and sentencing hearings. *See e.g., United States v. Hall*, 419 F.3d 980 (9th Cir. 2005); *United States v. Kirby*, 418 F.3d 621 (6th Cir. 2005); *United States v. Monteiro*, 417 F.3d 208 (1st Cir. 2005).

VI. Selection of Recent Cases

A. *United States v. Hinton*, 423 F.3d 355 (3d Cir. 2005): This was a drug prosecution but the hearsay involved a threat and act by the defendant against the declarant. There were two statements: (1) a 911 call by the declarant in which he stated that a man had put a gun to his head and told him to leave the area; (2) a later statement by the declarant as he road with the police to find the man to effect that defendant was the man who had put the gun to his head.

1. The Court noted the *Crawford* statement that the word "witnesses" within the 6th Amendment embraces all those who "bear testimony" against the accused; it employed the *Crawford* statement that there is "testimonial" hearsay when an objectively reasonable person whould anticipate that his/her statement would be offered as evidence at trial.

2. The Court held the 911 case to be nontestimonial: these statements "neither fall within nor are analogous to any of the specific examples of testimonial statements mentioned in *Crawford*." Id. at p. 362. (The cases pending before the Supreme Court should resolve issues concerning 911 calls and might be at odds with this decision.)

3. The Court held that the statement to police was easily testimonial. And since the declarant was not present for cross-examination the statement had to be excluded. It would not matter if it satisfied a hearsay exception (like present sense impression).

B. *United States v. Johnson*, 430 F.3d 383 (6th Cir. 2005): The events in this case involved multiple criminal acts that were prosecuted under RICO. There were three participants—Johnson, Hardin, and Stone. Hardin made a deal with government and became a confidential informant. He was wired for sound and had a conversation with Stone in which Stone talked in detail about the multiple criminal acts. A recording of this conversation was used as evidence against Johnson (before *Crawford*).

1. The question was whether Stone's statements were testimonial (as recorded by the confidential informant). The proper inquiry, according to the Court, was whether the declarant intended to bear testimony against the accused, citing an earlier case styled *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004).

2. The test, says the Court, is "whether a reasonable person in Stone's position would anticipate his statements being used against Johnson in a criminal investigation or prosecution." *Johnson*, at p. 394. The Court thought this was an easy case since Stone had no idea he was talking to a state agent and no idea his statements were being recorded. Thus, the statements were not "testimonial."

3. Query: Could this have been seen as equivalent to police interrogation which was seen as "testimonial" in *Crawford* (although it was not so-called "structured questioning?"

C. *United States v. Hadley*, 431 F.3d 484 (6th Cir. 2005): This case involved a weapons charge by a convicted felon that arose out of a domestic dispute. The hearsay was a statement made by defendant's wife to police at scene of the dispute just as the police arrived; she ran from the house and said "he has a gun and he is going to kill me." She did not testify at trial and a police officer was permitted to testify as to her statement (which was pertinent to the weapons charge). The trial court admitted the statement as an "excited utterance."

1. In *Crawford*, the Court had indicated that statements taken by police fell within the category of core concerns of the Confrontation Clause. However, the statement in this case was a "volunteered statement" by the wife and not in response to "structured questioning" and "not aimed at production of testimony for trial."

2. Moreover, the statements were hysterical, making it "highly unlikely that a reasonable person in this situation might be capable of reflecting upon the prospect that his or her statement might be used" at trial. So, the statements were held to be "nontestimonial."

3. In applying *Crawford*, the lower courts have expressed differing views on the classification of statements that qualify as "excited utterances." In *United States v. Brito*, 427 F.3d 53 (1st Cir. 2005), the following summary of the case law was offered:

   a. Some cases say that excited utterances can never be testimonial since the declarant responds to a startling utterance and not in anticipation of bearing witness against the accused.

   b. Other cases say that the excited nature of the statement has nothing to do with its classification as testimonial or nontestimonial. They say that the focus must be on the declarant's objectively reasonable expectations.

   c. A third line of cases see the excited utterance inquiry and the inquiry as to testimonial or not as distinct but related. The excitement may be such as to dissipate qualities that might make the statement testimonial. In any event, there must be a case-by-case analysis of the totality of the circumstances.

   d. The hearsay in the *Brito* case was a 911 call by a man reporting that a person had pointed a gun at him as he drove away, giving a description of the man, and reporting an earlier shooting in a nearby

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bar. The Court of Appeals held that this was a nontestimonial statement.

D. *United States v. Peneaux*, 432 F.3d 882 (8th Cir. 2005): D was charged with child abuse of his young son. The hearsay consisted of statements made by the child to various people before charges were filed, including most importantly (i) statements to a doctor to whom the child had been taken after foster parents observed marks on his body; and (ii) statements by the child to foster parents. D tried to argue that the doctor was part of a team for the Child Advocacy Center (including law enforcement) and that the parents were responsible to Child Protective Services. The statements to the doctor were admitted under the hearsay exception for statements for medical diagnosis and treatment and the statements to the foster parents under a different hearsay exception.

1. The statements to the physician were not made as part of a forensic interview but instead were for diagnosis or treatment. It lacked the formality of police inquiries and did not have substantial government involvement. It was easily "nontestimonial." Where statements are made to a physician seeking to give medical aid, they are *presumptively nontestimonial*.

2. The statements to the foster parents were nontestimonial.

E. *United States v. Gilbertson*, 435 F.3d 790 (7th Cir. 2006): D was charged with changing the odometer of cars he held for sale on his used car lot. The hearsay was statements found on recorded certificates of title setting forth mileage numbers, obtained from earlier sellers of the cars and recorded on the certificates. D argued that their use violated *Crawford*.

1. In rejecting D's argument, the Court focused on the part of *Crawford* that framed the question of what an objective reasonable person in the situation would have contemplated with respect to use of the information at trial. These statements were made in advance of the D being charged with anything and could not have been initiated by the government in hope of using them against the defendant. Also, there was no way the declarant could have anticipated that their statements would be used against defendant.

2. Statements were nontestimonial.

3. In a number of cases, courts have held that business records do not qualify as "testimonial" (relying on a statement to that effect in *Crawford*). An example of such a case is *United States v. Hagege*, 437 F.3d 943 (9th Cir. 2006), where the Court held that records from an Israeli bank (admitted under the business records exception) were not "testimonial." In *United States v. Lopez-Moreno*, 420 F.3d 420 (5th Cir. 2005), where the defendant was prosecuted for transporting illegal immigrants, the government was allowed to introduce under the business records exception computer printouts showing the dates upon which the illegals had been deported.

F. *United States v. Martinez*, 430 F.3d 317 (6th Cir. 2005): The charges in this case were drug distributions involving multiple actors. The hearsay was an unsigned letter found in a location frequented by one of the participants in the drug conspiracy. The contents of the letter indicated the existence of the conspiracy and the circumstances connected it to one of the conspirators (although an unidentified one). The letter was admitted under the co-conspirator exception to the hearsay rule. D argued for a violation of *Crawford*.

1. In *Crawford*, the Supreme Court named this exception as an example of statements that would not be testimonial. Lower courts have uniformly adhered to that position. *See e.g., United States v. Sanchez-Berrios*, 424 F.3d 65 (1st Cir. 2005); *United States v. Allen*, 425 F.3d 1231 (9th Cir. 2005).

2. "[A] reasonable person in the position of a co-conspirator making a statement in the course and furtherance of a conspiracy would not anticipate his statements being used against an accused in investigating and prosecuting the crime." Thus, the letter was "nontestimonial."

G. *United States v. Walter*, 434 F.3d 30 (1st Cir. 2006): The defendant was charged with weapons offenses. The hearsay was a tape recorded conversation between an undercover snitch and the defendant (made while the snitch was purchasing a gun from defendant). The conversation included both admissions by the defendant of illegal activities and statements by the snitch needed to put the defendant's admissions into context. The defendant obviously had no *Crawford* argument against his own statements but he tried to use the case to keep out the statements by the snitch.

1. Statements that are made out-of-court that are offered for some purpose other than to prove truth of their contents are not hearsay. More importantly, they are not "testimonial." Many lower court cases so hold. *See e.g., United States v. Jimenez*, 419 F.3d 34 (1st Cir. 2005); *United States v. Logan*, 419 F.3d 172 (2nd Cir. 2005).

2. The statements here were for purposes of putting the defendant's admissions into context, were not used for truth, and were not "testimonial." ■

NLADA American Council of Chief Defenders
Ten Tenets of Fair and Effective Problem Solving Courts

Introduction

"Problem Solving Courts" are spreading across the country. Though the current wave of interest started with the creation of Miami's Drug Court in 1989, the nation's courts had a long prior history of seeking to solve the problems of offenders and communities through the imposition of sentences with rehabilitative conditions or indeterminate sentences with a chance for early release based on rehabilitation. The advent of mandatory minimums and determinate sentencing foreclosed many such options, leading to the establishment of Problem-Solving Courts as a new vehicle for effecting established rehabilitative objectives.

There currently are more than 500 drug courts operating, and more than 280 others currently in the planning process, in all 50 states. Although drug courts have existed the longest and been studied the most, "Community Courts," "Mental Health Courts," and other specialty courts are beginning to proliferate.

Despite Department of Justice and other publications that urge inclusion of defenders in the adjudication partnerships that form to establish "Problem Solving Courts," the voice of the defense bar has been sporadic at best. Although defense representation is an important part of the operation of such courts, more often than not, defenders are excluded from the policymaking processes which accompany the design, implementation and ongoing evaluation and monitoring of Problem Solving Courts. As a result, an important voice for fairness and a significant treatment resource are lost.

The following guidelines have been developed to increase both the fairness and the effectiveness of Problem Solving Courts, while addressing concerns regarding the defense role within them. They are based upon the research done in the drug court arena by pretrial services experts and others and the extensive collective expertise that defender chiefs have developed as a result of their experiences with the many different specialty courts across the country. There is not as yet, a single, widely accepted definition of Problem Solving Courts. For the purposes of these guidelines, Problem Solving Courts include courts which are aimed at reducing crime and increasing public safety by providing appropriate, individualized treatment and other resources aimed at addressing long-standing community issues (such as drug addiction, homelessness or mental illness) underlying criminal conduct.

The Ten Tenets

1. Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in the design, implementation and operation of the court, including the determination of participant eligibility and selection of service providers. Meaningful participation includes reliance on the principles of adjudication partnerships that operate pursuant to a consensus approach in the decision-making and planning processes. The composition of the group should be balanced so that all functions have the same number of representatives at the table. Meaningful participation includes input into any ongoing monitoring or evaluation process that is established to review and evaluate court functioning.

2. Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in developing policies and procedures for the problem-solving court that ensure confidentiality and address privacy concerns, including (but not limited to) record-keeping, access to information and expungement.

3. Problem solving courts should afford resource parity between the prosecution and the defense. All criminal justice entities involved in the court must work to ensure that defenders have equal access to grant or other resources for training and staff.

4. The accused individual's decision to enter a problem solving court must be voluntary. Voluntary participation is consistent with an individual's pre-adjudication status as well as the rehabilitative objectives.

5. The accused individual shall not be required to plead guilty in order to enter a problem solving court. This is consistent with diversion standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 3.3 at 15 (1995). The standards stress, "requiring a defendant to enter a guilty plea prior to entering a diversion program does not have therapeutic value." *Id.*

6. The accused individual shall have the right to review with counsel the program requirements and possible outcomes. Counsel shall have a reasonable amount of time to investigate cases before advising clients regarding their election to enter a problem solving court.

7. The accused individual shall be able to voluntarily withdraw from a problem solving court at any time without prejudice to his or her trial rights. This is consistent with the standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 6.1 at 30 (1995).

8. The court, prosecutor, legislature or other appropriate entity shall implement a policy that protects the accused's privilege against self-incrimination.

9. Treatment or other program requirements should be the least restrictive possible to achieve agreed-upon goals. Upon successful completion of the program, charges shall be dismissed with prejudice and the accused shall have his or her record expunged in compliance with state law or agreed upon policies.

10. Nothing in the problem solving court policies or procedures should compromise counsel's ethical responsibility to zealously advocate for his or her client, including the right to discovery, to challenge evidence or findings and the right to recommend alternative treatments or sanctions.

NOTES

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FAUBUSH

Department of Public Advocacy's Litigation Persuasion Institute

October 15-20, 2006

Kentucky Leadership Center

FILLING OUT THE CLE CARD FOR KENTUCKY:

SPONSER:	KY DEPT. OF PUBLIC ADVOCACY
ACTIVITY:	34th ANNUAL KY PUBLIC DEFENDER CONFERENCE
LOCATION:	ERLANGER, KY
DATE:	06/12/2006
ACTIVITY:	82988
TOTAL CLE CREDITS:	12.50
ETHICS:	8.75 HOURS (MAXIMUM AVAILABLE)

ETHICS CREDITS ARE INCLUDED IN THE TOTAL NUMBER OF CREDITS