The Kentucky Bar Association
Local Government Law Section
Presents:

Hot Topics in Local Government Law CLE Seminar

This program has been approved in Kentucky for 4.00 CLE Credits including 1.00 Ethics Credit.

Compiled and Edited by:
The Kentucky Bar Association
Office of Continuing Legal Education
for
Kentucky Bar Association
Local Government Law Section

Published and Printed by:
The Kentucky Bar Association, April 2007.

Editor's Note: The materials included in this Hot Topics in Local Government Law seminar book are intended to provide current and accurate information about the subject matter covered. The program materials were compiled for you by volunteer authors. No representation or warranty is made concerning the application of the legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how any particular judge or jury will interpret or apply such principles. The proper interpretation or application of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of the Kentucky Bar Association disclaim liability therefor. Attorneys using these materials or information otherwise conveyed during the program, in dealing with a specific legal matter, have a duty to research original and current sources of authority.

Hot Topics in Local Government Law CLE Seminar

Table of Contents

Hot Topics in Local Government Law CLE Seminar Agenda
April 26, 2007

THURSDAY, APRIL 26, 2007

7:30-8:00 a.m.	**Registration & Continental Breakfast**
8:00-9:00 a.m.	**Can We Talk? Privileged Communications, Official Communications and the Government Attorney** (1.00 Ethics credit) Professor Phillip M. Sparkes Salmon P. Chase College of Law
9:00-10:00 a.m.	**ABC Law: The Confusing Maze of Obscure Statutory Language: Regulation, Enforcement & Recently Passed Legislation** (1.00 CLE credit) Stephen B. Humphress Office of Alcoholic Beverage Control
10:00-10:15 a.m.	**Break**
10:15-11:15 a.m.	**Newport on the Levee: A Case Study on the Use of Tax Incentives** (1.00 CLE credit) James E. Parsons Taft, Stettinius & Hollister, LLP
11:15 a.m.-12:15 p.m.	**Local Government Collections from the Bankrupt Taxpayer** (1.00 CLE credit) Richard L. Ferrell, III Taft Stettinius & Hollister, LLP

SPEAKERS

Phillip M. Sparkes
Director and Assistant Professor of Law
Local Government Law Center
Salmon P. Chase College of Law
Nunn Hall 406, Nunn Drive
Highland Heights, KY 41099

PHILLIP M. SPARKES is an assistant professor of law at the Salmon P. Chase College of Law where he teaches state and local government law and administrative law. He also serves as Director for the college's Local Government Law Center. He received his B.S. from Rensselaer Polytechnic Institute, his J.D. from DePaul University College of Law and his LL.M. from the University of Notre Dame School of Law. Professor Sparkes is a former managing attorney in the New York State Department of State and a former administrative law judge. He is a member of the International Municipal Lawyers Association and the American and New York State Bar Associations.

Stephen B. Humphress
Office of Alcoholic Beverage Control
1003 Twilight Trail
Frankfort, KY 40601

STEPHEN B. HUMPHRESS serves as general counsel for the Office of Alcoholic Beverage Control and the Office of Charitable Gaming in Frankfort. He received his B.A. from Kentucky Wesleyan College in 1989 and his J.D. from the University of Louisville's Louis D. Brandeis School of Law in 1993. He serves as Chairman of the Board (2001-present) for the Central Kentucky Crisis Pregnancy Center and is a member of the Kentucky and Marion County Bar Associations (President, 1996-2001).

James E. Parsons
1717 Dixie Highway Ste. 340
Covington, KY 41011-4704

JAMES E. PARSONS is Of Counsel in the Covington office of Taft, Stettinius & Hollister, LLP where he is a member of the firm's Business and Finance Department and the Public Law and Public Finance Practice Groups. He received his undergraduate degree from Northern Kentucky University and his J.D. from the Salmon P. Chase College of Law. He served as Assistant Law Director, Law Director and City Manager for the city of Newport and was involved in developments including the Newport Aquarium and Newport on the Levee. For the last seven years, he has served as the Boone County Administrator. He is a member of the Kentucky Bar Association and serves as chair-elect of its Local Government Law Section.

Richard L. Ferrell III
Taft Stettinius & Hollister LLP
425 Walnut St. Ste. 1800
Cincinnati, OH 45202

RICHARD L. FERRELL is an associate in the Cincinnati office of Taft, Stettinius & Hollister, LLP where he is a member of the firm's Bankruptcy and Debtor/Creditor Rights Practice Group. He is Board Certified in Business Bankruptcy Law by the American Board of Certification. He received his undergraduate degree from High Point University and his J.D. from the University of Akron School of Law. He is a member of the American Bankruptcy Institute, the Tri-State Association for Corporate Renewal, and the Ohio and Kentucky Bar Associations.

GOVERNMENT ATTORNEYS, CONFIDENTIALITY, AND PRIVILEGE: AN UPDATE

Phillip M. Sparkes*

The relationship of attorney to client is that of agent to principal.[1] Every agent owes to the principal duties of loyalty,[2] which include the duty not to use or disclose confidential information.[3] In the performance of those duties, an attorney is held to a standard higher than is the ordinary agent.[4]

For attorneys, the duty of confidentiality has at least three aspects: the ethical duty to preserve client confidences, the attorney-client privilege, and the work product doctrine.[5] While each derives from the agency relationship, each aspect is distinct from the others and has its own characteristics, consequences, and elements.[6] This paper considers some of the applications of the duty of confidentiality and the attorney-client privilege for lawyers in the government setting, paying particular attention to practices in Kentucky and the Sixth Circuit.[7]

---

* Director and Assistant Professor of Law, Local Government Law Center, Salmon P. Chase College of Law, Northern Kentucky University, Professor Sparkes currently chairs the Ethics Section of the International Municipal Lawyers Association. This paper is an expansion of remarks made at the Kentucky Bar Association Local Government Law Seminar, Lexington, KY, April 26, 2007. An earlier version of this paper was given at the Ethics for Municipal Lawyers Seminar, 2006 Kentucky League of Cities Convention, Lexington, KY, October 6, 2006.

[1] Ronald D. Rotunda and John S. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility ("Legal Ethics Deskbook") 211 (2006); Natural Resources & Environmental Protection Cabinet v. Pinnacle Coal Corporation, 729 S.W.2d 438, 439 (Ky. 1987) ("It is a fundamental principle of Kentucky law that an attorney is an agent for his client.").

[2] Restatement (Second) of the Law of Agency §§387-98.

[3] Restatement (Second) of the Law of Agency §395.

[4] *See* Clark v. Burden, 917 S.W.2d 574, 575 (Ky. 1996) *citing* Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. App. 1978) ("The relationship of attorney-client is generally that of principal and agent; however, the attorney is vested with powers superior to those of any ordinary agent because of the attorney's quasi-judicial status as an officer of the court; thus the attorney is responsible for the administration of justice in the public interest, a higher duty than any ordinary agent owes his principal. Since the relationship of attorney-client is one fiduciary in nature, the attorney has the duty to exercise in all his relationships with this client-principal the most scrupulous honor, good faith and fidelity to his client's interest.").

[5] American Bar Association, Model Rules of Professional Conduct, Rule 1.6 Comment 3 (2006) ("MRPC").

[6] *See generally,* Thomas D. Morgan, Lawyer Law 243-370 (2005).

[7] This paper does not focus on the work product doctrine. On the work product doctrine generally, *see* Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine (4th ed. 2001) ("Epstein"). On the work product doctrine in a government context, *see* Marion J. Radson

I. THE DUTY OF CONFIDENTIALITY

The ethical duty to preserve client confidences finds expression in Model Rule of Professional Conduct 1.6(a): A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).[8] The Kentucky analog, Supreme Court Rule 3.130(1.6)(a), reflects an earlier version of the Model Rules: A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).[9]

The attorney's duty of confidentiality and the attorney-client privilege are so closely related that the terms "privileged" and "confidential" are often used interchangeably.[10] Comment 3 to Model Rule 1.6 distinguishes the ethical obligation from the attorney-client privilege and work product doctrine:

> The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to

---

and Elizabeth Waratuke, "The Attorney-Client and Work Product Privileges of Government Entities," 30 Stetson L. Rev. 799, 825-35 (2001). Outside the litigation context, the work product doctrine, codified in Kentucky at CR 26.02(3)), sometimes comes into play under the Open Records Act, KRS 61.870 *et seq*. Work product constitutes "information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly," excluded from the application of the Open Records Act under KRS 61.878(1)(l). *See*, *e.g.*, Ky. Op. Atty. Gen. 06-ORD-032. *See also* Virginia H. Underwood and Richard H. Underwood, "The Attorney-Client and Work Product Privileges: The Case for Protecting Internal Investigations on the University Campus," 90 Ky. L.J. 531, 565-66 (2001).

[8] American Bar Association, Model Rules of Professional Conduct, Rule 1.6(a) (2006) ("MRPC").

[9] Ky. Sup. Ct. Rule 3.130 (1.6)(a). Kentucky's version dates to 1990. For a comparison of the Kentucky rule and the model rule then in effect, *see* Legal Information Institute, "American Legal Ethics Library: Kentucky Legal Ethics," < http://www.law.cornell.edu/ethics/ky/narr/KY_NARR_1_06.html#1.6> (last visited September 28, 2006). Model Rule 1.6 underwent changes in 2002 and again in 2003 in the wake of the Enron bankruptcy and other corporate scandals. *See* Legal Ethics Deskbook 207-10 and Amanda Vance and Randi Wallach, "Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6," 17 Geo. J. Legal Ethics 1003 (2004).

[10] American Bar Association, Annotated Model Rules of Professional Conduct (5th Ed. 2003).

> all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional conduct or other law.[11]

As this shows, the ethical duty is broader than either the attorney-privilege or the work product doctrine.[12] Attorneys have an ethical obligation to maintain client confidences, even if they are not privileged.[13] The purpose of the broader ethical rule is to encourage the client to speak freely with the lawyer and to encourage the lawyer to obtain information beyond that offered by the client.[14]

The obligations imposed by Model Rule 1.6 apply to attorneys for the government as well as to attorneys in private practice.[15] However, the lawyer with a government client is, or soon becomes, keenly aware that his or her situation differs markedly from the lawyer with a private client, even where the private client is an organization.[16] The Model Rules themselves recognize this.

> The duty defined in this Rule [1.13] applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules…. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have

---

[11] MRPC Rule 1.6, Comment 3. *Compare* Ky. Sup. Ct. Rule 3.130(1.6), Comment 5. *See also* Restatement (Third) of the Law Governing Lawyers §59. The Model Rules and the Restatement are largely consistent in their discussion of the protected information.

[12] Legal Ethics Deskbook 212 (2006). Virtually all information relating to the representation is initially within Rule 1.6. Rule 1.6 protects all information relating to the representation unless the disclosures are impliedly authorized, or falls within certain named exceptions, or the client waives his rights.

[13] Epstein, *supra* note 7, at 15.

[14] Legal Ethics Deskbook at 214.

[15] Legal Ethics Deskbook at 223.

[16] *See* MRPC 1.13 (Organization as Client).

> authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority.[17]

This need for a different balance leads Professor James Moliterno to observe that the government lawyer's duty of confidentiality "is much more modest in scope and perhaps even different in kind."[18] As this observation suggests, the law of legal ethics as constituted for the private lawyer is not necessarily a reliable and effective guide for the public lawyer.[19] Professor Patterson explains why: "The ultimate source of the rules of legal ethics is the lawyer-client relationship. The paradigm of that relationship is one lawyer, one client and the lawyer's first duty is to serve and protect the interests of that client…. The structure of the lawyer's relationship to the government client is not so simple."[20] This less than perfect fit between the Model Rules and the situation of the government lawyers is exacerbated by the fact that the Model Rules as a whole tend to emphasize the role of lawyer as advocate and downplay the role of lawyer as counselor.[21] Rule 1.6 is no exception. Nevertheless, the common assumption is that the government lawyer represents his or her client in much the same way a private lawyer represents the individual client and that the rules of ethics apply in much the same way as well.

Government lawyers striving to fulfill their ethical responsibility of confidentiality face two distinct kinds of problems. One pertains to the question of to whom they owe the duty; the other pertains to the nature of the work performed.

---

[17] MRPC Rule 1.13, Comment 9. *See also* Ky. Sup. Ct. Rule 3.120(1.13) Comment 7.

[18] James E. Moliterno, "The Federal Government Lawyer's Duty to Breach Confidentiality," 14 Temple Pol. and Civil Rights L. Rev. 633, 633 (2005) (Policies such as open records and open meetings laws militate in favor or a weaker duty of confidentiality and a weaker attorney-client privilege.).

[19] L. Ray Patterson, Legal Ethics: The Law of Professional Responsibility, Pt.III-4 (1982).

[20] *Id.* at Pt.III-3 (1982).

[21] Note, "Rethinking the Professional Responsibilities of Federal Agency Lawyers," 115 Harv. L. Rev. 1184 (2002).

Lawyers in government often perform functions outside the traditional role of the lawyer. They may hold office, advise on matters of policy, and advise on matters of politics. Indeed, even the lawyer employed in the traditional lawyer's role seldom has the luxury to give only legal advice. The threshold question therefore becomes whether the rules governing lawyer conduct apply to the conduct of lawyers when performing these non-traditional roles. The Preamble to the Model Rules answers the question in the affirmative.[22] The next question concerns the applicability of the rules to non-adversarial functions. As noted above, the rules tend to downplay this aspect of legal practice. Nevertheless, it is generally accepted that the rules apply to lawyers acting in non-adversarial roles.[23]

Clients may always waive their confidentiality rights.[24] Ascertaining who is the client of the government lawyer is a perennial problem. Anyone who asserts with confidence a single right answer probably has not himself or herself worked in government. Many writers have offered suggestions as to the identity of the government lawyer's client. Professor Crampton lists as possibilities "(1) the public (2) the government as a whole (3) the branch of government in which the lawyer is employed (4) the particular agency or department in which the lawyer works and (5) the responsible officers who make decisions for the agency."[25] Treating the officers as clients probably makes for the easiest application of Rule 1.6 and for determining who can waive the right to confidentiality. Working backward through the list makes it increasingly difficult to figure out who has the power to consent to disclosures of confidential information. By the time one gets through the list to the public as client, the question becomes

---

[22] "[T]here are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity." MRPC pmbl. ¶3. Model Rule 8.4, for example, states it is professional misconduct to state or imply an ability to influence improperly a government agency or official. The rationale is that abuses in the nonprofessional context can suggest an inability to fulfill the professional role of lawyers. *See* Kristina Hammond, Note, "Plugging the Leaks: Applying the Model Rules to Leaks Made by Government Lawyers," 18 Geo. J. Legal Ethics 783, 787-88 (2005).

[23] *See* Fred C. Zacharias, "Rethinking Confidentiality," 74 Iowa L. Rev. 351, 393 *cited* in David Lew, Note, "Revised Model Rule 1.6: What Effect Will the New Rule Have on Practicing Attorneys?," 18 Geo. J. Legal Ethics 881, 887 (reporting that a real estate lawyer did not think that confidentiality rules applied to his practice because it did not involve litigation).

[24] Legal Ethics Deskbook at 251.

[25] Roger C. Cramton, "The Lawyer as Whistleblower: Confidentiality and the Government Lawyer," 5 Geo. J. Legal Ethics 291, 296 (1991). *See also* Steven K. Berenson, "Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?," 41 B.C. L. Rev. 789, 797-802 (2000), Robert P. Lawry, "Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question," 37 Fed. B.J. 61 (1978), and Robert P. Lawry, "Confidences and the Government Lawyer," 57 N.C.L. Rev. 625 (1978-79).

whether there is really much that can be truly confidential and whether there is anything to waive.[26]

II. THE ATTORNEY-CLIENT PRIVILEGE

The duty of confidentiality is an ethical rule; the attorney-client privilege is a rule of evidence. In common with the ethical obligation to maintain confidentiality, the attorney-client privilege reflects a deep and long-standing societal commitment to promoting free communication between lawyers and their clients.[27] However, because the attorney-client privilege exists in tension with the adversarial system's search for truth, much that is covered by the ethical duty of confidentiality will not necessarily fall within the evidentiary privilege.[28] Courts construe the privilege strictly.[29]

There is no tradition of a government attorney-client privilege.[30] Nevertheless, courts and practitioners commonly assumed that the attorney-client privilege should apply to government clients.[31] They further assumed that government could assert the attorney-client privilege in much the same way that corporations and other organizational clients could.[32]

---

[26] Hammond, *supra* note 22, at 790-91.

[27] *See generally* Epstein, *supra* note 7. Epstein warns, however, "As the fundamental trust that a society reposes in lawyers erodes, so too will the protection afforded by the attorney-client privilege." *Id*. at 2. The privilege is the oldest of the privileges, dating to the sixteenth century. Originally, the privilege was the attorney's, and its purpose was to protect his honor as a gentleman. The modern privilege is the client's, and its purpose is to promote freedom of consultation. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).

[28] Epstein, *supra* note 7, at 12.

[29] *Id.*

[30] Bryan S. Gowdy, Note, "Should the Federal Government Have an Attorney-Client Privilege?," 51 Fla. L. Rev. 695, 706 (1999). Prior to 1963 only two courts had held that communications between government employees and government attorneys could be protected by the attorney-client privilege. Melanie B. Leslie, "Government Officials as Attorneys and Clients: Why Privilege the Privileged?," 77 Ind. L.J. 469, 476 (2002)

[31] Leslie, *supra* note 30, at 476 *citing* Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure §5474.

[32] *See* Model Rule 1.13 and Epstein, *supra* note 7, at 126-131. *See generally*, Jeffrey L. Goodman and Jason Zabokrtsky, "The Attorney-Client Privilege and the Municipal Lawyer", 48 Drake L. Rev. 655 (2000); Walter Pincus, "No Clear Legal Answer: The Uncertain State of the Government Attorney-Client Privilege", 4 Green Bag 2d 269 (2001); Patricia E. Salkin, "Beware: What You Say to Your [Government] Lawyer May Be Held Against You – The Erosion of Government Attorney-Client Confidentiality", 35 The Urban Lawyer 283 (2003). Compare Melanie B. Leslie, "Government Officials as Attorneys and Clients: Why Privilege the Privileged?", 77 Ind. L.J. 469, 481-94 (2002) (arguing that the analogy of government to corporation does not hold).

The impetus to recognize a government privilege traces to the advent of the Freedom of Information Act. Additional impetus was provided by the Proposed Federal Rules of Evidence and, more recently, by the Restatement (Third) of the Law Governing Lawyers.[33] Some courts and commentators have cautioned against broadly applying the privilege to governmental entities.[34] Others, however, argue for a strong governmental attorney-client privilege.[35]

Kentucky Rule of Evidence 503 establishes the availability of the privilege in Kentucky.[36] Kentucky's rule creates a broad governmental attorney client privilege modeled on Proposed Federal rule of Evidence 503.[37]

Professor Leslie accepts the need for a limited privilege to allow the government to protect its interests in litigation or administrative proceedings.

[33] Leslie, *supra* note 30, at 474.

[34] Epstein *supra* note 7 at 129; Leslie, *supra* note 30*;* Paul R. Rice, Attorney-Client Privilege in the United States 129 (2d ed. 1999) ([T]here would be great confusion in the application of the attorney-client privilege to government agencies if the protection turned on perceived parallels between the legal needs of government agencies and private clients.); In re Witness Before Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002); In re Grand Jury Subpoena *Duces Tecum*, 112 F.3d 910 (8th Cir. 1997); In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998).

[35] *See* Patricia E. Salkin and Allyson Phillips, "Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege"*,* 39 Ind. L. Rev. 561 (2006) and the sources collected at Leslie, *supra* note 30, at 470-72, notes 7 and 8.

[36] Ky. R. Evid. 503 Lawyer-Client Privilege.
(a) Definitions. As used in this rule:
(1) "Client" means a person, including *a public officer*, corporation, association, or *other organization or entity, either public* or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.
(2) "Representative of the client" means:
(A) A person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client; or
(B) Any employee or representative of the client who makes or receives a confidential communication:
(i) In the course and scope of his or her employment;
(ii) Concerning the subject matter of his or her employment; and
(iii) To effectuate legal representation for the client.
(3) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized to engage in the practice of law in any state or nation.
(4) "Representative of the lawyer" means a person employed by the lawyer to assist the lawyer in rendering professional legal services.
(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

The availability of the privilege in the federal courts is less clear. While many states, like Kentucky, codified the privilege, Congress rejected proposed Federal Rule of Evidence 503 and left the development of the privilege to case law.[38] Federal courts, however, came to regard the proposed rule as a restatement of federal common law. Since then, the general assumption among writers[39] and courts[40] has been that the

---

(1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
(2) Between the lawyer and a representative of the lawyer;
(3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein;
(4) Between representatives of the client or between the client and a representative of the client; or
(5) Among lawyers and their representatives representing the same client.
(c) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.
(d) Exceptions. There is no privilege under this rule:
(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction *inter vivos*;
(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;
(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; and
(5) Joint clients. As to a communication relevant to a matter of common interest between or among two (2) or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients. (Emphasis added.)

[37] A model existed for a more limited recognition of the government attorney client privilege in Uniform Rules of Evidence §502. Leslie, *supra* note 30, at 480.

[38] Epstein, *supra* note 7, at 16.

[39] *See* Rice, *supra* note 34, at 124; Legal Ethics Deskbook at 240 (2006). "The general principle is that government lawyers have an attorney-client privilege with their client, but the client is the "government," and not a particular governmental official. The government attorney may assert the attorney-client privilege to third parties, but he or she may not validly assert it when it is the government itself that is seeking the information. Thus, a government lawyer cannot refuse to divulge information relevant to a criminal investigation on the grounds that another government official confided in her, because the government lawyer represents the government, not any official in his or her personal capacity. In short, a government lawyer may not assert the government attorney-client privilege against the government." *Id.* at 241.

attorney-client privilege protects communications between government agencies and legal counsel. The Restatement also adopts this view.

> Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in §73 and of an individual employee or other agency of a governmental organization as a client with respect to his or her personal interest as stated in §§68-72.[41]

Like many other courts, the Sixth Circuit assumed without deciding that government could assert the attorney-client privilege.[42] Reed v. Baxter,[43] for example, involved a claim of attorney-client privilege in a municipal setting. Although the court was willing to assume that the privilege applied, it found that the facts would not support the claim. There, the presence of third parties destroyed the confidence for purposes of the privilege.[44]

In Ross v. City of Memphis, the Sixth Circuit held squarely "that a government entity can assert attorney-client privilege in the civil context."[45] Ross arose out of a suit brought against the city and its former director of police, Walter Crews, who was sued in his individual capacity. Crews raised the advice of counsel as the basis of his qualified immunity defense. The court had to determine whether invocation of the advice of counsel impliedly waived the attorney-client privilege. To answer that question, the court first had to decide if the city could hold the privilege.

In deciding that a city could hold the privilege, the court reviewed the decisions in other circuits and outside authority. The little case law the court found generally assumed the existence of a governmental attorney-client privilege in civil suits between government agencies and private

---

[40] *See, e.g.,* Lexington-Fayette Urban County Government v. Clark, 2005 WL 387434 (Ky. 2005) (implicitly acknowledging existence of government attorney-client privilege). No Kentucky case explicitly holds that the attorney-client privilege extends to a communication of a governmental organization.

[41] Restatement (Third) of the Law Governing Lawyers §74.

[42] Ross v. City of Memphis, 423 F.3d 596, 600 (6th Cir. 2005) *citing* Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998) and In re Grand Jury Subpeona (United States v. Doe), 886 F.2d 135, 137-9 (6th Cir. 1989).

[43] 134 F.3d 351 (6th Cir. 1998).

[44] *Id.* at 356-58. For a discussion of Reed v. Baxter, *see* Jeffrey L. Goodman and Jason Zabokrtsky, "The Attorney-Client Privilege and the Municipal Lawyer", 48 Drake L. Rev. 655, 667-72 (2000).

[45] *Id.* at 601.

litigants.[46] The court then looked to Proposed Federal Rule of Evidence 503. Like other courts, it accepted the proposed rule as a restatement of federal common law and noted that under the rule a city would have been entitled to the privilege.[47] The court took further note of the fact that the Restatement (Third) of the Law Governing Lawyers §74 recognizes the existence of a governmental attorney-client privilege. The court found these authorities persuasive.

Outside the civil context, however, the court noted that a split recently emerged among the circuits as to the availability of the privilege in grand jury proceedings. In re Grand Jury Investigation[48] held that the Connecticut governor's office could assert attorney-client privilege in grand jury proceedings. The Second Circuit reasoned that "the traditional rationale for the privilege applies with special force in the government context."[49] That decision contrasts with In re Witness Before Special Grand Jury 2000-2,[50] In re Grand Jury Subpoena Duces Tecum (the Whitewater Development Corporation case),[51], and In re Lindsey (concerning allegations of sexual harassment in the White House).[52] The Sixth Circuit expressed no opinion on the question dividing the circuits, noting only that "much of the reasoning deployed against recognizing a governmental attorney-client privilege in grand jury proceedings supports its recognition in the civil context."[53] "The risk of extensive civil liability is particularly acute for municipalities, which do not enjoy sovereign immunity. Thus, in the civil context, government entities are well-served by the privilege, which allows them to investigate potential wrongdoing more fully and, equally important, pursue remedial options."[54]

Once one accepts that the privilege exists, the question becomes under what circumstances the privilege might be waived. The privilege, of course, belongs to the client. However, when the client is not a natural

---

[46] 423 F.3d at 601.

[47] *Id.*

[48] 399 F.3d 527 (2d Cir. 2005).

[49] *Id.* at 534.

[50] 288 F.3d 289 (7th Cir. 2002).

[51] 112 F.3d 910 (8th Cir. 1997).

[52] 158 F.3d 1263 (D.C. Cir. 1998).

[53] Ross v. City of Memphis, 423 F.3d at 602.

[54] *Id.* at 603.

person, the problem becomes which individuals ought to be treated as holding the privilege.[55] The difficulty, as was the case with the duty of confidentiality, is in identifying the client. In Ross the district court concluded that Crews himself stood "somewhat in the nature of a client with respect to the advice he received from the City's attorneys."[56] Therefore, it held, Crews could disclose that information in his defense. The court of appeals disagreed.

The appellate court saw what the district court did as balancing the importance of the privileged communications to the defense against the city's interest in maintaining the privilege.[57] "Making the City's ability to invoke attorney-client privilege contingent on litigation choices made by one of its former employees renders the privilege intolerably uncertain."[58] The privilege is the city's to assert. That is not to say that in some instances the individual could not hold the privilege. The court acknowledges that a public officer might claim a personal privilege, but to do so it must be clear that the sought the legal advice in his individual capacity. "Requiring an individual officer to clearly announce a desire for individual advice is critical; it allows the attorney to gauge whether it would be appropriate to advise the individual given the attorney's obligations concerning representation of the [organization.]"[59]

There are, of course, other matters associated with the privilege not at issue in Ross to which the municipal attorney should be alert. The privilege has eight elements:

(1) Where legal advice of any kind is sought
(2) from a professional legal adviser in his capacity as such,
(3) the communications relating to that purpose
(4) made in confidence
(5) by the client,
(6) are at his instance permanently protected
(7) from disclosure by himself or by the legal advisor
(8) except the protection be waived.[60]

---

[55] Epstein, *supra* note 7, at 272-4 (regarding corporate management).

[56] *Id*. at 603.

[57] *But see* Lisa Plush, Note, "A Balanced Approach to Government Attorney-Client Privilege in the Confirmation Setting", 19 Geo. J. Legal Ethics 907 (2006) (arguing for a balancing test in a non-judicial context).

[58] I*d*. at 604.

[59] *Id.*

[60] Reed v. Baxter, 134 F.3d 351, 355-56 *citing* Fausek v. White, 965 F.2d 126, 129 (6th Cir. 1992).

This article has already noted the problematic nature of the first and fifth elements for the municipal attorney. Reed v. Baxter addressed the fourth, and Ross addressed the eighth.

Recently, the Second Circuit had occasion to address the third. In In re County of Erie,[61] the issue concerned policy advice rendered by a government lawyer. The case involved a suit over the practice of strip searching detainees entering the county jail without regard to individualized suspicion or the offense alleged. In the course of discovery the county withheld various documents as privileged attorney-client communications. They reviewed the law concerning strip searches of detainees, assessed the county's current search policy, recommended alternative policies, and monitored the implementation of those policy changes. After *in camera* review, the trial judge ordered the documents disclosed. The county appealed.

Citing the Sixth Circuit's decision in Ross, the Second Circuit said:

> In civil suits between private litigants and government agencies, the attorney-client privilege protects most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance.... At least in civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on par with the claim of an individual or a corporate entity.[62]

The issue here was whether the communications were made for the purpose of obtaining or providing legal advice, as opposed to advice on policy.

The court noted that a parallel issue arises in the context of communications to and from in-house lawyers who also serve as business executives. The question is whether the communication was generated for the purpose of obtaining and providing legal advice as opposed to business advice. The usual statement of the rule is that to qualify as privileged, the communication must be only for the purpose of obtaining or providing legal assistance.[63] The trial judge reasoned that the

[61] 473 F.3d 413 (2d. Cir. 2007).

[62] *Id.* at 418.

[63] *Id.* at 419.

communications went beyond legal analysis and ventured into policymaking, thus losing the claimed privilege.[64] The Second Circuit decided that the appropriate standard was whether the predominant purpose was to render or solicit legal advice.[65]

> The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or severable from it. The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer. The more careful the lawyer, the more likely it is that the legal advice will entail follow-through by facilitation, encouragement and monitoring.[66]

Even after County of Erie*,* it remains important to separate legal advice from policy and political advice. The court reiterated that "general policy or political advice" remains unprotected. The lesson of the case is that, in the context of government, the notion of what constitutes legal advice is broad and not bounded by a bright line. "[A] lawyer's recommendation of a policy that complies with [a] legal obligation – or that advocates and promotes compliance, or oversees implementation of compliance measures – is legal advice."[67]

In closing, I leave with this caveat. As mentioned in the discussion above, the application of the attorney-client privilege in the government context tends to parallel the applications of the corporate attorney-client privilege,

---

[64] *Id.* at 422.

[65] *Id.* at 420.

[66] *Id.* at 420-21.

[67] *Id.* at 422.

but the government attorney must be vigilant against taking the parallels too far. For example, in Upjohn Co. v. United States[68] the Supreme Court rejected the use of the "control group" test with respect to the corporate privilege. However, in Reed v. Baxter[69] the Sixth Circuit did not follow Upjohn. Further, *g*iven the nature of government work, both the recipient of the advice and the lawyer must guard against inadvertent disclosure to others within the organization.

[68] *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).
[69] Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998).

THE ETHICAL IMPLICATIONS OF GARCETTI V. CEBALLOS

Phillip M. Sparkes*

A sharply divided U.S. Supreme Court ruled in May 2006 that statements made by government employees in the course of their official duties are outside the protection of the First Amendment. The case was Garcetti v. Ceballos.[70] Public employee advocates said the result would make it more difficult for government employees to file lawsuits claiming they were the victims of retaliation for going public with allegations of official misconduct. Public employers said the decision would prevent routine internal workplace disputes from becoming federal court cases and avoid judicial intervention in the conduct of governmental operations. The precise scope of the holding is yet unclear. What is clear is that the decision is certain to generate more litigation in this unsettled area of the law.[71]

Although the case holds that employees can no longer rely on the First Amendment for protection, the Court said they could rely on public employers' "good judgment" in being receptive to constructive criticism, reinforced by the "powerful network" of legislative enactments available to those who seek to expose wrongdoing. In addition, the court said, government attorneys could rely on "additional safeguards" in the form of rules of conduct and constitutional obligations that provide checks on supervisors who might order unlawful or otherwise inappropriate actions.[72] The discussion that follows considers particularly what those safeguards might be. To lay a foundation for that discussion, it begins with a review of the law pertaining to employee speech in the public workplace before Garcetti and a review of the decision in Garcetti itself.

I. PUBLIC EMPLOYEE SPEECH CASES BEFORE GARCETTI

In considering how courts apply the First Amendment to the speech of public employees, Professor William Van Alstyne finds three general

* Director and Assistant Professor of Law, Local Government Law Center, Salmon P. Chase College of Law, Northern Kentucky University, Highland Heights, KY. This paper complements remarks made at the Kentucky Bar Association Local Government Law Seminar, Lexington, KY, April 26, 2007. An earlier version of this paper was delivered at the Ethics for Municipal Lawyers Seminar, 2006 Kentucky League of Cities Convention, Lexington, KY, October 6, 2006 and was adapted from a presentation to the Ethics Section and Litigation and Risk Management Section Joint Workshop, 71st Annual Conference, International Municipal Lawyer's Association, Portland, Oregon, September 17, 2006. Prof. Sparkes is chair of the Ethics Section.

[70] 126 S.Ct. 1951, 164 L.Ed.2d 689, 74 USLW 4257 (May 30, 2006).

[71] Tony Mauro, "Head-scratching Follows Garcetti Ruling," http://www.fac.org/analysis.aspx?id=16956.

[72] 164 L.Ed.2d at 703-04.

approaches reflected in the cases.[73] What one might call the "classical approach" treats the government and the individual equally as free agents, mutually competent to determine their own best interests, and measures the terms of the arrangement according to general principles of the common law of contracts. What one might call the "purist approach" regards the common law of contracts as essentially irrelevant. In this view, the First Amendment disallows government from imposing any restrictions on free speech by contract or otherwise. Any terms, conditions, regulations, or restrictions on free speech, insofar as they come from government, are constitutionally void. What one might call the "modern approach" treats the First Amendment as applicable, and then tries to sort out what that means in particular instances.

Well into the twentieth century, the classical approach was dominant. Public employees had no right to object to conditions placed upon the terms of their employment, including conditions that restricted the exercise of constitutional rights. Oliver Wendell Holmes, in the appeal of a policeman who sought reinstatement after his department fired him for violating a rule against political activity, famously summed up this approach:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control.[74]

The law began to change in the 1950s and early 1960s, spurred by challenges to statutes that required public employees, particularly teachers, to swear oaths of loyalty and to reveal the groups with which they associated.[75] By the end of the 1960s, the U.S. Supreme Court confidently asserted that its prior decisions "unequivocally rejected" the premise that government could constitutionally compel public employees to relinquish the First Amendment rights they would otherwise enjoy as

---

[73] *See* William Van Alstyne, The American First Amendment in the Twenty-First Century 293-98 (2002).

[74] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892).

[75] *See, e.g.,* Wieman v. Updegraff, 344 U.S. 183 (1952); Shelton v. Tucker, 364 U.S. 479 (1960); Baggett v. Bullitt, 377 U.S. 360 (1964); Elfbrandt v. Russell, 384 U.S. 11 (1966); Keyishian v. Board of Regents, 385 U.S.589 (1967).

citizens to comment on matters of public interest connected with the operation of the governments in which they worked.[76]

A. Pickering v. Board of Education

Pickering v. Board of Education[77] was a milestone in the recognition of public employees' rights to freedom of speech, the first of the Supreme Court's modern approach cases.[78] Marvin Pickering was a teacher fired after a local newspaper published his letter to the editor. The letter was critical of the school board's handling of a defeated bond issue and of the board's subsequent allocations of school funds between educational and athletic programs. The school board said that the letter was detrimental to the efficient operation and administration of the school; the Supreme Court said that the firing was a violation of the teacher's right to freedom of speech.

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs though its employees"[79]

In balancing those interests, the Court emphasized that the statements in Pickering's letter were critical of the school board and the superintendent and did not affect relations with coworkers or immediate supervisors with whom the teacher regularly worked. Even though some of the statements in the letter were erroneous, that was not enough "absent proof of false statements knowingly or recklessly made by him," to justify his firing.[80] The statements

[76] Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

[77] 391 U.S. 563 (1968).

[78] *See generally* Rodric B. Schoen, "Pickering Plus Thirty Years: Public Employees and Free Speech", 30 Texas Tech. L. Rev. 5 (1999). *Compare* Randy J. Kozef, "Reconceptualizing Public Employee Speech," 99 Nw. U. L. Rev. 1007 (2005) (arguing for a return to the classical approach).

[79] 391 U.S. at 568.

[80] 391 U.S. at 574. *See* Howard C. Nielson, Jr.. Comment, "Recklessly False Statements in the Public-Employment Context," 63 U. Chi. L. Rev. 1277 (1996).

neither "impeded the teacher's proper performance of his daily duties in the classroom" nor "interfered with the regular operation of the school generally."[81] Of particular importance to the Court was that the letter addressed a matter of legitimate public concern and current public attention – the operation of the schools. "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such question without fear of retaliatory dismissal."[82]

Pickering is important in two respects. First, it recognizes that the employer-employee relationship predominates in public employee free speech cases. Second, it establishes that a proper resolution of those cases involves identifying and weighing the competing interests of the public employee and the government employer. This "Pickering balancing test" involves courts in a difficult, highly fact-intensive inquiry where, as subsequent cases show, even Supreme Court justices sharply disagree about how to strike a proper balance.

B. Connick v. Myers

That sharp division appeared in the Supreme Court's next major public employee speech case, Connick v. Myers.[83] Sheila Myers was an assistant district attorney upset over her transfer to a different part of the office. After discussing the transfer and other office matters with a superior, she circulated a questionnaire among her colleagues. It sought their opinions about office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and pressure to work on political campaigns. Harry Connick, the district attorney, considered the questionnaire insubordinate and fired Myers for refusing to accept the transfer. She sued, alleging a violation of her First Amendment rights. The lower courts agreed with her that the questionnaire related to the effective functioning of the district attorney's office

[81] 391 U.S. at 572-73.

[82] 391 U.S. at 572.

[83] 461 U.S. 138 (1983). Between Pickering and Connick, the Supreme Court decided two other public employee speech cases: Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) and Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979). Mt. Healthy holds that a public employee who otherwise would have been fired does not deserve special protection because of the speech. Givhan holds that a public employee's free speech rights are not lost simply because the speech is communicated privately to the employer rather than to the public.

and so addressed matters of public concern within the holding of Pickering. The Supreme Court ruled that the questionnaire "touched upon matters of public concern in only a most limited sense"[84] and that the First Amendment afforded Myers no protection.

> The repeated emphasis in Pickering on the right of a public employee "as a citizen, in commenting upon matters of public concern" was not accidental…. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable…. We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[85]

Connick made the "public concern" inquiry the critical threshold test.[86] Whether an employee's speech addressed a matter of public concern content, the court said, depended upon the content, form, and context of a given statement.

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case. While as a matter of

[84] 461 U.S. at 154.

[85] 461 U.S. at 146-47. *But see* Waters v. Churchill, 511 U.S. 661 (1994) (reasonable investigation of a proposed speech-based termination is required to reduce the risk of inadvertent termination for speech that is protected by the First Amendment).

[86] Kozef, *supra* note 8, at 1016.

> good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.[87]

Although the questionnaire related to the operation of a public office, the Connick majority saw it as an extension of the dispute over the transfer – an employee grievance concerning matters internal to the office, not matters of public concern. Unlike the teacher in Pickering, the attorney in Connick was not seeking to inform the public about anything.

Had the questionnaire touched upon no matter of public concern at all, the analysis would have ended there and the district attorney would have been free to take whatever action he pleased. However, the Court found that the question about forced participation in political campaigns pertained to a matter of public concern. This triggered the Pickering balancing test. The Court said this meant giving "full consideration" to the government's interest in the effective and efficient fulfillment of its responsibilities to the public. Pertinent considerations would include whether the speech impaired discipline by superiors or harmony among co-workers, had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impeded the performance of the speaker's duties, or interfered with the regular operation of the government.[88] The Court held 5-4 that the district attorney did not have to tolerate action he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Connick thus struck the balance in favor of the government employer.

C. Rankin v. McPherson

Rankin v. McPherson[89] provides an example of a 5-4 split that struck the balance in favor of the employee. Ardith McPherson was a clerical worker in a law enforcement agency whose job did not bring her into contact with the public. When she heard on the office radio of the attempted assassination of President Reagan, she

[87] 461 U.S. at 149.

[88] Professor Schoen lists the following among the factors that enter into the Pickering balance: the content of the speech, the time, place, and manner of the speech, the context and motive of the speech, the actual or potential effects of the speech, and the employee's responsibilities within the government. Schoen, *supra* note 8, at 30.

[89] 483 U.S. 378 (1987).

remarked to a co-worker, "If they go for him again, I hope they get him." Another co-worker overheard the remark and reported it to Constable Rankin, the elected official for whom she worked. He confronted her about the remark and, following the discussion, fired her.

The Court began its opinion by warning government employers that they should proceed against employees only for speech that hampers public functions, not for speech with which the employer disagrees. Turning then to the Connick analysis, the Court concluded first that the speech dealt with a matter of public concern. While a threat to kill the president would not be protected, McPherson's statement was not a threat but simply an inappropriate remark. Like the inaccurate statements in Pickering, remarks of this kind have to be tolerated if freedom of speech is to have "the breathing space it needs to survive."[90]

Having concluded that McPherson's statement addressed a matter of public concern, the Court proceeded to the Pickering balancing test. The government provided no evidence that the remark interfered with the efficient functioning of the office, no danger that the employee discredited the office by making the statement in public, and no assessment that the remark demonstrated a character trait that made her unfit to perform her work. Therefore, the government failed to meet its burden of justifying the discharge. "Where, as here an employee serves no confidential, policymaking or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal…. At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee."[91] The dissenters chastised the holding as one that allowed a person to "ride with the cops and cheer for the robbers."[92]

Of the Pickering/Connick rule, Professor Erwin Chemerinsky observes:

> On the one hand, this lessened protection of the speech of government employees can be justified based on the Court's desire to minimize judicial interference with the government's role as employer.

[90] 483 U.S. at 387.

[91] 483 U.S. at 390-91.

[92] 483 U.S. at 394 (Scalia dissenting).

> On the other hand, the test can be criticized for not providing adequate protection for the speech rights of government employees. The requirement that the speech be of public concern can be questioned because the First Amendment generally has no such limitation and because of the narrow definition of public concern in Connick*;* the employee's speech there concerns the functioning of an important public office. Moreover, the simple balancing test – weighing speech interests against the government's interest in administrative efficiency – can be questioned as failing to place sufficient weights on the First Amendment side of the scale.[93]

In Connick, the Court acknowledged the difficulty in its approach. However, it said, "[b]ecause of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."[94]

II. GARCETTI V. CEBALLOS

The preference in the modern cases for a nuanced approach rather than a bright-line rule necessarily leaves many unanswered questions with which lower courts must struggle.[95] It was somewhat unexpected then that in Garcetti v. Ceballos[96] the Court opted for a categorical answer to one of those questions: whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

---

[93] Erwin Chemerinsky, Constitutional Law: Principles and Policies 1112-13 (3d ed. 2006).

[94] 461 U.S. at 154 *quoting* Pickering, 391 U.S. at 569.

[95] *See, e.g.,* Board of Commissioners of Wabaunsee County v. Umbehr, 518 U.S. 668 (1996) (First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of freedom of speech.). "There is ample reason to believe that such a nuanced approach, which recognizes the variety of interest that may arise in independent contractor cases, is superior to a bright-line rule distinguishing independent contractors from employees." *Id.* at 678.

[96] ___ U.S. ___, 126 S.Ct. 1951, 164 L.Ed.2d 689, 74 USLW 4257 (May 30, 2006).

A. The Majority Opinion

Richard Ceballos was an experienced deputy district attorney in the office of the Los Angeles County District Attorney, Gil Garcetti. A defense attorney in a pending criminal case asked Ceballos to review an affidavit used by the police to obtain a critical search warrant. The defense attorney said there were inaccuracies in the affidavit. After examining the affidavit, visiting the location it described, and talking to the deputy sheriff involved, Ceballos concluded that the defense attorney was right. Ceballos told his superiors and followed up by preparing a disposition memorandum recommending dismissal of the case. That led to a heated meeting between representatives of the district attorney's office and the sheriff's department called to discuss the affidavit. Afterwards, the office decided to proceed with the case pending the disposition of a defense motion to challenge the warrant. At the hearing on the motion, the defense lawyer called Ceballos to testify; the trial court rejected the challenge.

Ceballos claimed that subsequently he suffered a series of retaliatory employment actions. He filed a grievance, which was denied, and a lawsuit followed. The federal district court granted summary judgment in favor of the defendants; the U.S. Court of Appeals for the Ninth Circuit reversed. In a 5-4 decision, the U.S. Supreme Court reversed the Ninth Circuit. Justice Kennedy wrote the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

Pickering and the later cases, said Justice Kennedy,

> identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern…. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech…. If the answer is yes, the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee different from any other member of the general public…. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the

> restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.[97]

That Ceballos expressed his view inside his office rather than publicly, and that it concerned the subject matter of his employment, said Justice Kennedy, were not dispositive. The controlling factor, he said, was that his expressions were made pursuant to his duties as a calendar deputy. "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[98]

For Justice Kennedy this was a case about the public employer's ability to control what the employer itself had commissioned or created. "Official communications have official consequences," he said.[99] Supervisors must be able to ensure that those communications were accurate, demonstrated sound judgment, and promoted the employer's mission. From his perspective, the greater danger was that the rule adopted by the Court of Appeals would displace managerial discretion with judicial supervision "to a degree inconsistent with sound principles of federalism and the separation of powers."[100]

In conclusion, Justice Kennedy said,

> Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in Connick, public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." … The dictates of sound judgment are reinforced by the powerful network of legislative enactments -- such as whistle-blower protection laws and labor codes -- available to those who seek to expose wrongdoing…. Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the First Amendment…. These imperatives, as well as obligations arising from any other applicable

[97] 164 L.Ed.2d at 698-99.
[98] 164 L.Ed.2d at 701.

[99] 164 L.Ed.2d at 702.

[100] 164 L.Ed.2d at 702.

> constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.[101]

B. The Dissents

In his brief dissent, Justice Stevens captured the essence of the dissenters' position. The proper answer to the question posed by Justice Kennedy at the outset of the majority opinion, he said, "is 'Sometimes,' not 'Never.' … The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong."[102]

Justice Souter, writing for himself and Justices Stevens and Ginsburg, elaborated.[103] Prior cases, noted Justice Souter, "realized that a public employee can wear a citizen's hat when speaking about subjects closely tied to the employee's own job…."[104] Some government jobs combine the roles of employee and citizen, and Justice Souter pointed to the website of the office for which Ceballos worked as evidence that this was an example. It follows that the need for Pickering balancing does not disappear when an employee speaks on matters that his job requires him to address. For Justice Souter, removing that speech from Pickering protection not only discounts the value of that speech to the individual, but also deprives the community of informed opinions on important public issues.

Justice Souter agreed with the majority that "official communications have official consequences" and that "government needs civility in the workplace, consistency in policy, and honesty and competence in public service."[105] The better solution, he argued, is to adjust the Pickering balancing scheme rather than to exclude speech uttered pursuant to official duties. To warrant Pickering protection, the speech should be "on a matter of unusual importance and satisf[y] high standards of responsibility…. [I]t is fair to say that only comment on official dishonesty, deliberately

[101] 164 L.Ed.2d at 703-04 (internal citations omitted).

[102] 164 L.Ed.2d at 704.

[103] Justice Breyer dissented in a separate opinion.

[104] 164 L.Ed.2d at 706.

[105] 164 L.Ed.2d at 709.

unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in the employees favor."[106] That standard, in the opinion of Justice Breyer, gives insufficient weight to managerial and administrative concerns and is what led him to write a separate dissenting opinion.

Justice Souter criticized two other aspects of the majority opinion. First, he said, it was wrong for the majority to regard any statement made within the scope of government employment as the government's own speech. Under the rule of Rosenberger v. Rector and Visitors of Univ. of Va., "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[107] However, argues the dissent, the employee here "was paid to enforce the law by constitutional action; to exercise the county government's prosecutorial power by acting honestly, competently, and constitutionally."[108] He was not paid "to promote a particular policy." The dissent regarded the majority's view of the scope of employer control over speech that owes its existence to professional responsibilities as too broad.[109]

Second, Justice Souter criticized the majority's assessment of the protection available under whistle-blower statutes. Where the majority saw "a powerful network of legislative enactments," the dissenters saw "a patchwork" that affords individuals different protection depending on the local, state, or federal jurisdictions that employ them. Justice Breyer, in his dissent, focused on the obligation to speak imposed by rules of professional conduct and constitutional obligations. He said such obligations augment the need to protect employee speech, diminish the need for government to control the speech, and make Pickering balancing appropriate.

---

[106] 164 L.Ed.2d at 709-10.

[107] 515 U.S. 819, 833 (1995).

[108] 164 L.ed.2d at 711.

[109] As evidence of this overbreadth, Justice Souter suggested that the rule might have important ramifications for academic freedom in public colleges and universities. About this Justice Kennedy wrote, "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." 164 L.Ed.2d at 703.

III. IS THE EMPLOYEE TRAPPED?

As noted above, the Court leaves the fate of the employee exposing governmental inefficiency and misconduct to the "sound judgment" of public employers, "reinforced by the powerful network of legislative enactments -- such as whistle-blower protection laws and labor codes -- available to those who seek to expose wrongdoing…." In addition, said the court, there are "additional safeguards" for government attorneys in the form of rules of conduct and constitutional obligations apart from the First Amendment. Before considering those "additional safeguards," some brief comments about the protections in which the Court puts it faith are in order.

A. The Duty of Loyalty Trap

Having removed the protection of the First Amendment, the Court sets the first of several traps when it says:

> We have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employee's rights by creating excessively broad job descriptions. … The proper inquiry is a practical one. Formal job descriptions bear little resemblance to the duties of an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.[110]

The Court overlooks the fact that it is not necessary for an employer to create an excessively broad job description in order to impose upon an employee a duty to disclose misconduct within the organization. The law of agency already does so.[111]

Every agent owes to the principal duties of loyalty[112] and duties of service and obedience.[113] Consider these duties in particular:

---

[110] 164 L.Ed.2d at 703.

[111] *See* Restatement (Second) of the Law of Agency, §§376-398.

[112] Restatement (Second) of the Law of Agency §§387-98.

[113] Restatement (Second) of the Law of Agency §§377-86.

> Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with the agency.[114]
>
> Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.[115]

Taken together, they mean that reporting instances of wrongdoing is implicit in every employee's job description. It is a duty that every employer has a right to expect the employee to perform. Concededly, the duty may be more extensive in some positions than in others.[116] If that is what the court means when it refers to the proper inquiry being a practical one, the statement is tautological and offers no effective protection to the employee. Because the court categorically excludes from First Amendment protection "official" communications, the inquiry the Court directs will always work to the employer's advantage.

At least one court has already sprung the duty-of-loyalty trap. In Springer v. City of Atlanta,[117] an employee of the Atlanta Workforce Development Agency claimed he was fired for speaking up about financial mismanagement at the agency. The city argued that Garcetti barred the claim because the employee made the statements pursuant to his official duties. The employee asserted that reporting agency mismanagement was not part of his official duties because his day-to-day activities – policy and system building, member support, external relations, administration, and compliance – did not include fiduciary obligations.

The court acknowledged that the inquiry "was a practical one." Nevertheless, said the court, the law imposes upon employees a

---

[114] Restatement (Second) of the Law of Agency §387.

[115] Restatement (Second) of the Law of Agency §381.

[116] The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made…. Restatement (Second) of the Law of Agency §376.

[117] Springer v. City of Atlanta, No. CIVA 1:05CV0713 GET, 2006 WL 22461888 (N.D.Ga. Aug 4, 2006).

duty to do whatever the employer might do in the protection of his master's property. When the employee spoke out about the wrongdoing of agency officers, he was speaking out of regard for his employer's interest. He thus "had an obligation as an employee to engage in the speech at issue. The expression fulfilled on the plaintiff's job responsibilities and was made in plaintiff's role as an employee."[118] The court accordingly awarded the city summary judgment.[119]

B. The Grievance Procedure Trap

The Court tells us, "A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their view in public."[120] But if this enlightened employer follows the court's suggestion, the employee who uses that procedure falls into yet another trap. Jack Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale, in his blog Balkinization, explains:

> After Ceballos, employees who do know what they are talking about will retain First Amendment protection only if they make their complaints publicly without going through internal grievance procedures. Although the Court suggests that its decision will encourage the creation and use of such internal procedures, it will probably not have that effect. Note that if employees have obligations to settle disputes and make complaints within internal grievance procedures, then they are doing something that is within their job description when they make complaints and so they have no First Amendment protections in what they say. Hence employees will have incentives not to use such procedures but to speak only in public if they want First Amendment protections (note that if they speak both privately and publicly, they can be fired for their private speech). However, if they speak only publicly, they essentially forfeit their ability to stay in their jobs, first because they become pariahs, and second, because they have refused to use

[118] Slip Opinion at *4.

[119] *See also* Price v. Macleish, Nos. 04-956(GMS), 2006 WL 2346430 (D.Del. Aug. 14, 2006) (Police officers were expected to speak out within the chain of command if they noticed any hazardous firing range conditions.). *Compare* Walters v. County of Maricopa, Arizona, No. CV 04-1920-PHX-NVW, 2006 WL 2456173 (D. Ariz. Aug. 22, 2006) ("Any attempt to inflate Walters' job description so as to include blowing the whistle on other officers would likely exceed the 'practical inquiry' suggested by the Supreme Court."), Slip opinion at *14; Batt v. City of Oakland, No. C 02-04975 MHP, 2006 WL 1980401 (N.D.Cal. July 12, 2006) (Evidence supports claim that, notwithstanding any official policy, plaintiff had a duty not to report misconduct.).

[120] 164 L.Ed.2d at 703.

the employer's internal mechanisms for complaint (mechanisms which, if they used them, would eliminate their First Amendment rights). In short, whatever they do, they are pretty much screwed. So the effect of the Court's decision is to create very strong incentives against whistleblowing of any kind. (Another possible result of the case is that employees will have incentives to speak anonymously or leak information to reporters and hope that the reporters don't have to reveal their sources).[121]

C. The Whistleblower Trap

The majority opinion sets yet another trap when it alludes to "the powerful network of legislative enactments -- such as whistle-blower protection laws and labor codes -- available to those who seek to expose wrongdoing." Although legislatures in all fifty states have enacted whistleblower protection statutes, their measure and scope vary greatly.[122] The dissenters have the stronger argument when they say, "the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not showing that worries may be remitted to legislatures for relief."[123]

The whistleblower is in a double bind. As noted above, the law of agency imposes on every employee simultaneous duties of loyalty and care. By reporting suspicious activities, the whistleblower may violate her duty of loyalty to the principal by disclosing confidential information.[124] At the same time the failure to report such activities may be a violation of the duty of care.

A complete exposition of the patchwork nature of the protections afforded whistleblowers is beyond the scope of this paper. One example, however, should suffice to demonstrate the point.

---

[121] Jack Balkin, Ceballos – "The Court Creates Bad Information Policy," http://balkin.blogspot.com/ 2006/05/ceballos-court-creates-bad-information.html.

[122] *See generally,* Elletta Sangrey Callahan and Terry Morehead Dworkin, "The State of State Whistleblower Protection," 38 Am. Bus. L.J. 99 (2000) (showing that coverage varies greatly and that judicial interpretations of similar provisions are inconsistent from state to state.) *See also* Robert G. Vaughn, "State Whistleblower Statutes and the Future of Whistleblower Protection," 51 Admin. L. Rev. 581 (1999) (arguing that many statutes fail to address important, if not crucial, issues). The National Conference of State Legislatures summarizes state whistleblower laws in a table at http://www.ncsl.org/programs/employ/whistleblower.htm.

[123] 164 L.Ed.2d at 713 (Souter dissenting).

[124] An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or a third person. Thus, if the confidential information is to the effect that the principal is committing or is about to commit a crime, the agent is under no duty not to prevent it…. Restatement (Second) of the Law of Agency §395, Comment f.

Huffman v. Office of Personnel Management[125] reveals the inadequacy of that portion of the network that protects employees of the federal government, the Whistleblower Protection Act of 1989.[126]

Kenneth Huffman was an Assistant Inspector General in the Office of the Inspector General (OIG) for the Office of Personnel Management (OPM). In a series of memoranda to his supervisor, he alleged that the supervisor violated personnel practices, that other OIG managers violated personnel practices, that certain contracts constituted a gross waste of funds and gross mismanagement, and that certain conduct within the agency constituted a violation of law, rule, or regulation, gross mismanagement, and abuse of authority. Huffman claimed that these were protected disclosures under the WPA and that they were a contributing factor to the agency's decision to terminate him.

Huffman affirms earlier decisions that complaints to a supervisor about the supervisor's conduct are not "disclosures" for the purpose of the WPA, although disclosures about others' wrongdoing are protected, as are disclosures to the press.[127] Furthermore, the court held, disclosures made as part of the employee's normal duties are not covered. "[A]ll government employees are expected to perform their required everyday job responsibilities 'pursuant to the fiduciary obligation which every employee owes to his employer.'"[128] Huffman, in other words, also springs the duty-of-loyalty trap.

In the instance of the employee who, as part of his normal duties, has been assigned to investigate and report wrongdoing, the WPA affords no protection. Rather it was designed "to protect employees who go above and beyond the call of duty and report infractions of law that are hidden."[129] However, in the instance where that

[125] 263 F.3d 1341 (Fed. Cir. 2001).

[126] *See generally* Thomas M. Devine, "The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent," 51 Admin. L. Rev. 531 (1999) ("The Whistleblower Protection Act is a work in progress. Freedom of employment dissent is continuing to evolve for federal employees, but they still would be foolhardy to rely on the law's promise of strengthened free speech rights." *Id.* at 577.); Rebecca L. Dobias, Note, "Amending The Whistleblower Protection Act: Will Federal Employees Finally Speak Without Fear?," 13 Fed. Circuit B.J. 117 (2003) (examining current problems with whistleblower law and reviewing Federal Circuit decisions that narrow the act).

[127] *Id.* at 1351.

[128] *Id.* at 1351 *quoting* Willis v. Dept of Agriculture, 141 F.3d 1139, 1144 (Fed. Cir. 1998).
[129] 263 F.3d at 1353.

employee, feeling that the normal chain of command is unresponsive, reports wrongdoing outside of normal channels, is protected.[130]

Huffman could not escape discipline for making the very disclosures the majority invites. This creates a perverse incentive for the employee to take his accusations public and receive First Amendment protection rather than seeking to take them up the chain of command and risk retaliation.

As Professor Balkin pointed out above, the effect of the Court's decision is to create very strong incentives against whistleblowing of any kind.[131] Whistleblowers become pariahs. The experience of Jesselyn Radack, a former legal advisor in the Justice Department's ethics unit who advised her agency that it would violate ethics rules to have the FBI interrogate John Walker Lindh without his attorney, serves as a warning.[132] "When I blew the whistle on government misconduct in the Lindh case -- first internally and then in the press, after I was forced out of the Justice Department -- the government publicly branded me a 'turncoat,' got me fired from my private sector job by disparaging me to my new bosses, placed me under criminal investigation, and put me on the 'no-fly' list. And the WPA helped me not at all."[133] Nor did internal grievance procedures help Ceballos.

IV. ADDITIONAL SAFEGUARDS?

As Part III showed, the employer's good judgment and the network of whistleblower statutes turn out to be no safeguards for the public employee. The *additional* safeguards for government attorneys in the form of rules of conduct turn out to be the *only* safeguards, if indeed they exist at all. Upon closer examination, the government lawyer fares no better than his or her non-lawyer counterparts do.

---

[130] *Id.* at 1354.

[131] Supra note 50.

[132] Jesselyn Radack, "Why the Supreme Court Got It Wrong When It Rejected a Government Whistleblower's First Amendment Claim," Findlaw Writ, http://writ.news.findlaw.com/commentary/20060607_radack.html, ("The Whistleblower Protection Act is an abysmal failure.").

[133] *Id. See also* Jesselyn Radack, "The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last," 17 Geo. J. Legal Ethics 125 (2003).

A. The Problem Generally

The Court's confidence in the ability of the canons of legal ethics to protect government lawyers and check their supervisors is misplaced in part because the "rules of the law of legal ethics as constituted for the private lawyer are not reliable and effective guides for the public lawyer…."[134]

> "The ultimate source of the rules of legal ethics is the lawyer-client relationship. The paradigm of that relationship is one lawyer, one client and the lawyer's first duty is to serve and protect the interests of that client…. The structure of the lawyer's relationship to the government client is not so simple."[135]

There is a fundamental tension between the government lawyer's public role and the private relationship basis of traditional conceptions of legal ethics.[136] Moreover, traditional ethics tend to play up the role of lawyer as advocate and play down the role of lawyer as counselor.[137] More so than for his private counterpart, the work of the government lawyer is non-adversarial. In addition, there is a duality in the function of the government lawyer not present in the function of the private lawyer: lawyers are the government's legal experts while at the same time being responsible to perform the legal work necessary to implement government policy.[138]

> Many of the aspects of the government lawyer's role described above coincide with the duties of private attorneys. Private attorneys, much like government attorneys, are responsible for advising clients on the current state of the law, helping them to form legal positions, and then advancing those positions. Beyond this surface similarity, however, the government lawyers' role is considerably different from that of the private attorney. The most important difference is that, as part of the agency decision-making process, the government attorney is

[134] L. Ray Patterson, Legal Ethics: The Law of Professional Responsibility at Pt III-4.

[135] *Id.*, Pt.III-3 (1982).

[136] Note, "Rethinking the Professional Responsibilities of Federal Agency Lawyers," 115 Harv. L. Rev. 1170, 1170 (2002).

[137] *Id.* at 1183.

[138] *Id.* at 1178.

> responsible for the positions the agency takes in a way that private lawyers are not. It is this – admittedly partial – responsibility for the agency's policy that gives rise to additions duties that private attorneys do no share.[139]

B. The Problem Specifically

The Model Rules of Professional Conduct take cognizance of the situation of the government lawyer in certain instances.[140] If we turn our attention from the generally poor fit between the canons of ethics and the role of the government lawyer to specific provisions in the canons, we can see more clearly the lack of a safe harbor.

> **Model Rule 1.6 Confidentiality of Information**
>
> **(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).**
>
> **(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:**
>
> *******
>
> **(4) to comply with other law or a court order.**

Model Rule 1.6 privileges certain disclosures that would otherwise subject a lawyer to discipline for breach of the duty of confidentiality. The obligations imposed by Model Rule 1.6 apply to attorneys for the government as well as to attorneys in private practice.[141] However, the lawyer with a government client is, or soon becomes, keenly aware that his or her situation differs markedly from the lawyer with a private client, even where the private client is an organization.[142]

---

[139] *Id.* at 1180. *See also* Bruce A. Green, "Must Government Lawyers 'Seek Justice' in Civil Litigation?," 9 Widener J. Pub. L. 235 (2000).

[140] Some, like Model Rule 1.7, Conflict of Interest: Current Clients, and Model Rule 1.11, Special Conflicts of Interest for Former and Current Government Officers and Employees, have little relevance to the issue here.

[141] Legal Ethics Deskbook at 223.

[142] *See* MRPC 1.13 (Organization as Client).

Ascertaining the client of the government lawyer is a perennial problem. Many writers have offered suggestions as to the identity of the government lawyer's client. Professor Cramton lists as possibilities "(1) the public (2) the government as a whole (3) the branch of government in which the lawyer is employed (4) the particular agency or department in which the lawyer works and (5) the responsible officers who make decisions for the agency."[143] Treating the officers as clients probably makes for the easiest application of Rule 1.6 and for determining who can waive the right to confidentiality. Working backward through the list makes it increasingly difficult to figure out who has the power to consent to disclosures of confidential information. By the time one gets through the list to the public as client, the question becomes whether there is really much that can be truly confidential and whether there is anything to waive.[144]

Professor James Moliterno observes that the government lawyer's duty of confidentiality "is much more modest in scope and perhaps even different in kind."[145] The law of legal ethics as constituted for the private lawyer is not necessarily a reliable and effective guide for the public lawyer.[146] Professor Patterson explains why: "The ultimate source of the rules of legal ethics is the lawyer-client relationship. The paradigm of that relationship is one lawyer, one client and the lawyer's first duty is to serve and protect the interests of that client…. The structure of the lawyer's relationship to the government client is not so simple."[147] This less than perfect fit between the Model Rules and the situation of the government lawyers is compounded by the fact that the Model Rules as a whole

---

[143] Roger C. Cramton, "The Lawyer as Whistleblower: Confidentiality and the Government Lawyer," 5 Geo. J. Legal Ethics 291, 296 (1991). *See also* Steven K. Berenson, "Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?," 41 B.C. L. Rev. 789, 797-802 (2000), Robert P. Lawry, "Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question," 37 Fed. B.J. 61 (1978), and Robert P. Lawry, "Confidences and the Government Lawyer," 57 N.C.L. Rev. 625 (1978-79).

[144] Kristina Hammond, Note, "Plugging the Leaks: Applying the Model Rules to Leaks Made by Government Lawyers," 18 Geo. J. Legal Ethics 783, 790-91 (2005).

[145] James E. Moliterno, "The Federal Government Lawyer's Duty to Breach Confidentiality," 14 Temple Pol. and Civil Rights L. Rev. 633, 633 (2005) (Policies such as open records and open meetings laws militate in favor or a weaker duty of confidentiality and a weaker attorney-client privilege.).

[146] L. Ray Patterson, Legal Ethics: The Law of Professional Responsibility, Pt.III-4 (1982).

[147] *Id.* at Pt.III-3 (1982).

tend to emphasize the role of lawyer as advocate and downplay the role of lawyer as counselor.[148] Rule 1.6 is no exception. Nevertheless, the common assumption is that the government lawyer represents his or her client in much the same way a private lawyer represents the individual client and that the rules of ethics apply in much the same way as well.

Model Rule 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

[148] Note, "Rethinking the Professional Responsibilities of Federal Agency Lawyers," 115 Harv. L. Rev. 1184 (2002).

> **(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.**

Comment 9 to Rule 1.13 states that the duty defined in the rule applies to governmental organizations. It goes on to say:

> Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules…. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority.

Many writers have offered suggestions as to the identity of the government lawyer's client. Professor Cramton suggests as possibilities "(1) the public (2) the government as a whole (3) the branch of government in which the lawyer is employed (4) the particular agency or department in which the lawyer works and (5) the responsible officers who make decisions for the agency."[149] As

[149] *See, e.g.,* Roger C. Cramton, "The Lawyer as Whistleblower: Confidentiality and the Government Lawyer," 5 Geo. J. Legal Ethics 291, 296 (1991). *See also* Steven K. Berenson, "Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?," 41 B.C. L. Rev. 789, 797-802. (2000), Robert P. Lawry, "Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question," 37 Fed. B.J. 61 (1978), and Robert P. Lawry, "Confidences and the Government Lawyer," 57 N.C.L. Rev. 625 (1978-79).

a prosecutor, subject to the obligations of Berger and armed with information that a police officer took liberties with an affidavit supporting a search warrant, one might fairly say that Ceballos "knows that [another] person associated with the organization is engaged in action … related to the representation that is a … violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization…." Reasonable minds might differ as to whether Ceballos proceeded "as is reasonably necessary in the best interest of the organization" because they will differ as to the identity of the client in this circumstance.

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Several courts found First Amendment problems with DR-107, the predecessor to Model Rule 3.6.[150] In Gentile v. State Bar of Nevada[151], the Supreme Court also found problems with a Nevada rule that was almost identical to the original version of Model Rule 3.6. Amended in response to that decision, the present version of Rule 3.6(b) creates a safe harbor to avoid unconstitutional restrictions on a lawyer's First Amendment right to comment on litigation.[152]

[150] Deskbook at 769.
[151] 501 U.S. 1030 (1991).

[152] *But see* the additional restrictions imposed upon prosecutors by Model Rule 3.8(f): "The prosecutor in a criminal case shall: … (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to

When a lawyer representing government in a criminal or civil case makes the statements allowed by Rule 3.6(b), invariably the lawyer speaks in his or her official capacity. However, the assurance provided by the rule that the lawyer will not face discipline by the bar does not prevent his facing discipline by his government employer, even where the comment is a self-defense type statement contemplated by Rule 3.6(c). It is hard to imagine a matter of greater public concern than the fundamental fairness of the criminal justice system, but after Garcetti the courts never get to reach that question in the case of the prosecutor discharged after making a statement allowed by the rule that is unwelcome to the employer.

> **Model Rule 3.8 Special Responsibilities of a Prosecutor**
>
> **The prosecutor in a criminal case shall:**
> **(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;**
>
> *******
>
> **(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense….**
>
> *******

Ceballos concluded that the defense attorney who approached him to review the affidavit supporting the search warrant was correct in his assertion that the affidavit was inaccurate. In hindsight he was wrong, but at the time he was recommending that the case be dismissed he was acting consistent with the ethical duty imposed on him by Model Rule 3.8(a).

A prosecutor plays a unique role in the justice system; he or she is a “minister of justice.” A prosecutor has a duty “to see that the defendant is accorded procedural justice and that guilt is decided

---

prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.” Comment 5 makes clear that Rule 3.8 supplements rule 3.6 and is not intended to restrict statements that comply with rule 3.6.

upon the basis of sufficient evidence."[153] The classic description of the prosecutor's anomalous role comes from Berger v. United States, 295 U.S. 78 (1935):

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[154]

The ethical obligations delineated in Rule 3.8 are partly grounded in constitutional protections afforded criminal defendants. Rule 3.8(d), for example, gives expression to the rule of Brady v. Maryland. It was his duty under Brady, as Ceballos understood it, that led him to share his disposition memorandum with defense counsel, which in turn led to his being called as a witness at the hearing on the defense motion.

In hindsight, Ceballos was wrong, at least from the perspective of the trial judge, in his conclusion about the affidavit and about the exculpatory value of his investigation into the underlying facts. However, remembering that Ceballos was an experienced prosecutor in his own right, he was acting on what he understood to be his ethical obligation in the circumstances. Subsequent events showed that doing so afforded him no protection from adverse action.

---

[153] Model Rules of Prof'l Conduct R. 3.8 cmt. [1] (2002).

[154] *See* Brenner & Durham, "Toward Resolving Prosecutor Conflicts of Interest," 6 Geo. J. Legal Ethics 514 (1993) (prosecutors charged with three inherently conflicting roles: politician, advocate, and "administrator of justice"). *See generally* Gershman, "The Prosecutor's Duty to Truth," 14 Geo.J. Legal Ethics 309 (2001); Green, "Why Should Prosecutors 'Seek Justice'?", 26 Fordham Urb.L.J. 607 (1999); Lanctot, "The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions," 64 S.Cal.L.Rev. 951 (1991); McMunigal, "Are Prosecutorial Ethics Standards Different?," 68 Fordham L.Rev. 1453 (2000); Uviller, "The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit," 68 Fordham L. Rev. 1695 (2000); Symposium, "Prosecutorial Ethics: The Duty Not 'To Strike Foul Blows'," 53 U. Pitt. L. Rev. 271 (1992).

The reality is that prosecutors need the cooperation and good will of the police to do their job effectively. Once the police lost confidence in an ADA in a sensitive position and who, in effect, had accused them of lying, Garcetti had to take some action to make amends.

> **Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers**
>
> **(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.**
>
> **(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.**
>
> **(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:**
>
> **(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or**
>
> **(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

Although couched in the language of private practice, the duty imposed by this rule applies to other lawyers with general supervisory powers, including heads of government offices. Supervisory lawyers have a duty to see that subordinates act in an ethical manner, but as Rule 5.2 makes clear, the subordinate cannot escape responsibility for unethical behavior simply because the supervisor judges it to be ethical.

Rule 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment 2 to Model Rule 5.2 provides:

> When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

The terms “arguable question of professional responsibility” and “reasonable resolution” are subject to debate and interpretation.[155] Rule 5.2 may provide false comfort to a junior lawyer and certainly provides no protection where the junior lawyer disagrees with his supervisor’s resolution and acts on his own understanding of his ethical obligation.[156]

---

[155] Legal Ethics Deskbook at 897.

[156] Some commentators have taken the rule to task. *See* Fox, “Save Us from Ourselves,” 50 Rutgers L. Rev. 2189 (1998) (decrying failure of Rule 5.2(a) to impart senior lawyers' responsibility for their own actions to newer associates); Keatinge, “The Floggings Will Continue until Morale Improves: the Supervising Attorney and His or Her Firm,” 39 S.Tex.L.Rev. 279 (1998) (suggesting effect of Rule 5.2 may be to reduce vigor of associates' examination of questionable ethics); Rice, “The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers,” 32 Wake Forest L. Rev. 887 (1997) (criticizing Rule 5.2(b) for providing "Nuremberg defense" for subordinate lawyers).

V. CONCLUSION

While many governments exercise the "good judgment" in which the Court puts its faith, lawyers in government know from personal experience that many do not. To suggest then that government employers are adequately protected by whistleblower statutes and rules of conduct turns out to be wishful thinking. The Court's decision in Garcetti will make it even harder than it already is to attract talented, conscientious people to work in government.

ABC LAW: THE CONFUSING MAZE OF OBSCURE STATUTORY LANGUAGE - REGULATION, ENFORCEMENT & RECENTLY PASSED LEGISLATION

Stephen B. Humphress

I. WELCOME TO ABC LAW

A. Case Statute Study: Read KRS 242.125 explaining Local Option Election Rules (Appendix A)

B. Howard v. Salyer, 695 S.W.2d 420, 427 (Ky. 1985): KRS 242.125 and ABC Statutes Generally Explained

> In his dissent, Justice Charles M. Leibson appropriately described the alcoholic beverage statutes as a "maze of obscure statutory language," which were "confusing at best," and whose meaning was "anybody's guess." *Id*. Justice Leibson astutely concluded that, "[p]erhaps they are intentionally so in order to permit this court to [give them whatever meaning the court desired by judicial opinion]." *Id*.

MORAL OF THE STORY: When you read alcoholic beverage statutes and don't have a clue what they mean, be content in the knowledge that you have just obtained intellectual equivalence with one of the greatest legal minds in Kentucky jurisprudence, Justice Leibson, because he didn't know what they meant either.

II. DEFERENCE TO ABC LAWS AND THE ABC BOARD

A. Deference to ABC Laws

In Temperance League of Kentucky v. Perry, 74 S.W.3d 730, 733 (Ky. 2002), the Kentucky Supreme Court reiterated that:

> The "alcoholic beverage business is of such a special character that its treatment as a separate classification for purposes of regulation and license taxation is not subject to question." George Wiedemann Brewing Co. v. City of Newport, 321 S.W.2d 404, 408 (Ky. 1959). Moreover, the sale of alcoholic beverages is the subject of extensive and detailed regulation within the Commonwealth. *See*, *e.g.*, KRS Chapters 241, 242, 243, and 244. Given the unique nature of the regulation and licensing of the sale of alcoholic beverages, almost any content-

> neutral, legislative classification based on the types of businesses or organizations eligible to sell alcoholic beverages would not constitute special legislation within the meaning of §59.

B. Deference to ABC Board

In Alcoholic Beverage Control Bd. v. Woosley, 367 S.W.2d 127 (Ky. 1963), the Kentucky Supreme Court discussed the extremely broad discretion given to the Board:

> The "liquor business" has long been recognized as being in a class by itself, subject to strict regulation and broader discretionary administrative control than other lawful occupations. Kentucky Alcoholic Beverage Control Board v. Klein, 301 Ky. 757, 192 S.W.2d 735 (and cases cited therein). In the protection of the public interest the legislature has delegated to the Alcoholic Beverage Control Board special powers to regulate this industry in the light of variable local factors.

Id., at 128 (*emphasis added*); *see also* Duke v. Commonwealth, 474 S.W.2d 885, 887 (Ky. 1971) (Board has close supervision and inspection authority); Brey v. Alcoholic Beverage Control Board, 451 S.W.2d 647, 650 (Ky. 1970) (Board has wide discretion in regulating the liquor business).

III. KENTUCKY ALCOHOLIC BEVERAGE LAWS

A. Section 61 of Kentucky Constitution

B. KRS Chapter 241 -- Definitions, State Agency Structure and Powers, Local Authority

C. KRS Chapter 242 -- Local Option Election Rules

D. KRS Chapter 243 -- Licensing, Licensee Conduct, Administrative Process, and Penalties

E. KRS Chapter 244 -- Licensee Conduct

F. KAR Chapter 804 -- ABC Regulations

G. Miscellaneous Statutes Relating to Alcoholic Beverages

H. Case Law

IV. SECTION 61 OF KENTUCKY CONSTITUTION -- PROVISION TO BE MADE FOR LOCAL OPTION ON SALE OF LIQUOR; TIME OF ELECTIONS.

The General Assembly shall, by general law, provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken, as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All elections on this question may be held on a day other than the regular election days.

V. KRS CHAPTER 241. DEFINITIONS AND AGENCY ORGANIZATION

A. Definitions. KRS 241.010.

B. Office of ABC -- Generally has duty to administer statutes relating to, and to regulate traffic in alcoholic beverages. KRS 241.015 and KRS 241.020.

C. ABC Board -- Generally acts as an adjudicatory body at administrative hearings for license denials or licensee penalties. KRS 241.030 and KRS 241.060.

D. ABC investigators possess full police powers of peace officer and possess statewide jurisdiction as necessary to accomplish statutory duties. KRS 241.090. ABC has internal policies that require all investigators to be certified as meeting Peace Officers Professional Standards “POPS” set forth in KRS 15.310.

E. ABC investigators possess warrantless inspection powers as necessary to accomplish statutory duties. KRS 241.090.

The following cases recognize the constitutionality of warrantless inspection powers as necessary for closely regulating the alcoholic beverage industry: Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); New York v. Burger, 482 U.S. 691 (1987); Duke v. Commonwealth, 474 S.W.2d 885 (Ky. 1971).

F. Counties, cities of the first four classes, consolidated and urban county governments can establish their own local ABC administrator. KRS 241.110, KRS 241.160, KRS 241.230.

1. Local administrators possess same functions as state ABC administrators. KRS 241.140, KRS 241.190, KRS 241.250.

2. Local administrators for second, third, and fourth class cities and their investigators do not possess full police powers of police officers. KRS 241.170.

3. As a matter of right, all orders by local administrators are appealable to the Board. KRS 241.150, KRS 241.200, KRS 241.260, KRS 243.550. Appealed matters include license denials and accessed penalties for found violations. The Board hears all appealed cases as *de novo* original proceedings in compliance with KRS Chapter 13A. *Id.*

4. As a matter of right, an applicant can appeal an unfavorable Board final order by filing a petition in the Franklin Circuit Court within thirty (30) days after the final order of the agency is mailed or delivered by personal service. KRS 243.560, KRS 13B.140(1). The petition must include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition must also be accompanied by a copy of the final order. KRS 13B.140(1). An applicant has the right to again appeal an unfavorable Franklin Circuit Court Opinion and order to the Kentucky Court of Appeals. KRS 22A.020(1), KRS 243.590.

5. Local governments have no "home rule" authority under KRS 67.083(3)(n) or KRS 82.082 to enact ordinances involving the regulation of the sale of alcoholic beverages. The General Assembly has provided a comprehensive scheme of legislation regulating the manufacturing, sale, and distribution of alcoholic beverages through its enactment of KRS Chapters 241 through 244. As such, local governments cannot pass ordinances unless specifically authorized by either the General Assembly or the Alcoholic Beverage Control Board. Any delegation of that authority must be specific and unequivocal, not merely inferential. *See* Kentucky Licensed Beverage Association v. Louisville-Jefferson County Metro Government, 127 S.W.3d 647 (Ky. 2004); Whitehead v. Bravard, 719 S.W.2d 720 (Ky. 1986); Bickett v. Palmer-Ball, 470 S.W.2d 341, 343 (Ky. 1971); Boyle v. Campbell, 450 S.W.2d 265, 268 (Ky. 1970); Arnold v. Commonwealth at Instance of City of Somerset, 218 S.W.2d 661 (Ky. 1949); City of Ashland v. Kentucky Alcoholic Beverage Control Board, 982 S.W.2d 210 (Ky. App. 1998).

6. Local governments have authority to enact ordinances to create county and city licenses and charge for them (KRS 243.060 and KRS 243.070) and to modify hours of alcoholic beverage sales (KRS 244.290 and KRS 244.480). Certain second class cities and all third and fourth class cities can impose regulatory license fees (KRS 242.1292(8), fourth class cities can pass ordinances declaring "an economic hardship" and authorizing hotels, motels, and restaurants with 100 seats at tables to sell liquor and wine (KRS 242.185(1)-(5)), and local governments can pass ordinances regulating adult entertainment at premises with alcoholic beverage licenses. City of Newport, Kentucky v. Iacobucci, 479 U.S. 92 (1986); Wal-Juice Bar, Inc. v. Elliot, 899 F.2d 1502 (6th Cir. 1990); City of Louisville v. Michael A. Woods, Inc., 883 S.W.2d 881 (Ky. App. 1993).

VI. KRS CHAPTER 242 -- LOCAL OPTION ELECTIONS AND PROHIBITION

A. Petition for Local Option Election

In order to have a local option election, a petition requesting same must be filed with the county clerk. KRS 242.020.

1. Petition must be signed by voters in the territory, equal to 25 percent of the votes cast in last preceding general election. KRS 242.020 (1).

2. Voter signing petition must include name, residence address, Social Security number or date of birth, and date that signed petition. KRS 242.020.

3. Date of the desired election may be stated in petition. KRS 242.030(1).

4. Petition can only be circulated for six (6) months prior to its filing. KRS 242.020.

B. Local Option Election

Unless stated in the petition, the county judge/executive designates the date of local option election.

1. A local option election cannot be held prior to sixty (60) after filing the petition or ninety (90) days after the filing. KRS 242.030 (2).

2. The local option election cannot be held on the same day as a primary or general election being held in the territory or within thirty (30) days of any regular political election. KRS 242.030 (3). KRS 242.185(6) provides an exception to this rule so that limited restaurant elections may be held on the same day as a primary or general election. Temperance League of Kentucky v. Perry, 74 S.W.3d 730 (Ky. 2002).

3. No local option election shall be held in the same territory more than once in every three (3) years. KRS 242.030(5). For purposes of this prohibition, a city is not the same territory as a county and a precinct is not the same territory as city or county.

C. Results of Local Option Election

If the voters change the local option status of the territory, the new "wet" or "dry" status goes into effect sixty (60) days from the date of the entry of the certificate of the county board of election commissioners in the order book of the county judge/executive. KRS 242.190(1) and KRS 242.200.

D. An Entire County Can Have a Local Option Election. KRS 242.125.

E. Cities of the First Four (4) Classes Can Have Local Option Elections. KRS 242.125(1).

1. Prohibition against fifth and sixth class city local option elections is not unconstitutional special legislation. May v. Drake, 219 S.W.2d 31 (Ky. 1949).

2. A fourth class city must have a second local option election to obtain liquor by the drink licenses. KRS 242.127, KRS 242.129 and KRS 243.230(3). To get around this requirement, KRS 242.185(1)-(5) allows fourth class cities to pass ordinances declaring "an economic hardship" and authorizing hotels, motels, and restaurants with 100 seatings at tables to sell liquor and wine.

F. Precinct Only Elections

1. If a city votes wet, a precinct located in the city is allowed to immediately have another local option election to return to dry status. KRS 242.125.

2. KRS 242.125 retains the common law "county unit rule." Howard v. Salyer, 695 S.W.2d 420 (Ky. 1985). Under county unit rule, where precinct or magisterial district had once been made dry by vote of county, it is forever dry unless the entire county has a new vote in favor of discontinuing prohibition. Board of Trustees of Town of New Castle v. Scott, 101 S.W. 944 (Ky. 1907) (Section 61 of Ky. Constitution means that the local units named should control within their own territory the question of prohibition, and that each should have the privilege of saying conclusively that prohibition should prevail, but not conclusively that it should not).

3. Under county unit rule, if a county votes to become wet, a precinct in the county can immediately have another vote in favor of prohibition. Campbell v. Brewer, 884 S.W.2d 638 (Ky. 1994); Fuson v. Howard, 205 S.W.2d 1018 (Ky. 1947); May v. Ferguson, 122 S.W. 208 (Ky. 1909); Eggen v. Offutt, 108 S.W. 333, 334 (Ky. 1908).

G. Special Precinct Elections

1. A golf course in a dry county can have a local option election if there is a wet city located in a county. KRS 242.123.

2. A small winery in any dry territory can have a local option precinct election to sell its wines at the winery. KRS 243.156(3).

3. A licensed racing association can have a local option precinct election if located in a county containing a city of the third or fourth class. KRS 230.350(3).

4. Second class cities can have a local option precinct election if the city determines that an economic hardship exists for a precinct, designates the precinct as a limited sale precinct that needs a local election vote. KRS 242.1292.

H. Annexation/Merger

If a city annexes territory, the annexed territory assumes the same local option status as the local option status of the annexing city. KRS 242.192(2).

I. Prohibition in Dry Territory

If a territory has “dry” status, trafficking in alcoholic beverages is illegal. KRS 242.190 to KRS 243.230 address prohibition issues.

1. KRS 242.230 provides: “(1) No person in dry territory shall sell, barter, loan, give, procure for or furnish another, or keep or transport for sale, barter or loan, directly or indirectly, any alcoholic beverage. (2) No person shall possess any alcoholic beverage unless it has been lawfully acquired and is intended to be used lawfully, and in any action the defendant shall have the burden of proving that the alcoholic beverages found in his possession were lawfully acquired and were intended for lawful use.”

2. KRS 242.990 criminalizes violations of prohibition statutes. First offense is a Class B Misdemeanor, second offense is a Class A misdemeanor, and a third and each subsequent offense is a Class D felony. KRS 242.420 even provides that a witness before a grand jury, court of inquiry or on a trial for any prohibition violation does not have a Fifth Amendment right to “remain silent” and cannot refuse to answer a question because the answer will incriminate him or her.

3. Forfeiture actions.

   If a person illegally and intentionally transports or possesses alcoholic beverages in dry territory, all property (house, real estate, car), used in the illegal activity is to be forfeited to the state. KRS 242.310(2).

   a. Forfeiture action can be filed by a Commonwealth's attorney, county attorney, mayor of a city, or any private citizen. KRS 242.320(1).

   b. If the forfeiture action is filed by a private citizen, it cannot be dismissed except upon a sworn statement made by the citizen and his attorney, setting forth the reasons it should be dismissed. KRS 242.320(1).

   c. Private citizen gets 10 percent of the net proceeds of forfeiture sale, after deducting costs and all valid liens. KRS 242.330(4).

4. Personal use in dry territory.

   Commonwealth v. Trousdale, 181 S.W.2d 254 (Ky. 1944) (KRS 242.260 is read with other sections of local option law it is apparent that legislature did not intend to prohibit a person from carrying into dry territory alcoholic beverages for personal use). Settles v. Commonwealth, 171 S.W.2d 999 (Ky. 1943) (One may keep or transport intoxicating liquor for personal use in local option territory without violating this section).

J. Confusion of “Dryness” and “Wetness”

Successful limited local option precinct elections and city limited restaurant elections are not dry since prohibition is not in effect, but they are not wet for other license types since citizens did not vote for other licenses.

1. "Dry territory" means a county, city, district, or precinct in which a majority of voters have voted in favor of prohibition. KRS 241.010(21).

2. The “dry” definition works well with the normal local option election proposition, “Are you in favor of the sale of alcoholic beverages in (name of county or city)?" KRS 242.050.

3. The “dry” definition does not work well for limited local option precinct elections for specific licensees authorized by KRS 242.123 for golf courses or KRS 243.155(3) for small wineries and limited local option city elections for limited restaurants authorized by KRS 242.185(6).

Illustrations: Are you in favor of the sale of alcoholic beverages by the drink at (name of golf course) in the (name of precinct)?" “Are you in favor of the sale of alcoholic beverages by the drink in (name of city or county) at restaurants and dining facilities with a seating capacity of at least one hundred (100) persons and which derive at least seventy percent (70%) of their gross receipts from the sale of food?"

K. Current Kentucky Wet/Dry Status Map. *See* Appendix B.

VII. KRS CHAPTER 243M -- LICENSING, BUSINESS PRACTICES, ADMINISTRATIVE PROCESS, AND PENALTIES

A. Types of Licenses

1. KRS 243.030 -- Distilled Spirits and Wine Licenses – forty-nine types.

2. KRS 243.040 -- Malt Beverage (Beer) Licenses -- fifteen types.

3. KRS 243.060 and KRS 243.070 -- Local Licenses for Counties, Cities and Consolidated Governments

B. KRS 243.020(1): "[a] person shall not do any act authorized by any kind of license with respect to the manufacture, storage, sale, purchase, transporting, or other traffic in alcoholic beverages unless he holds the kind of license that authorizes the act."

C. License Applications

1. Prior local approval required. If county or city has corresponding local license, local administrator, applicant must obtain local license approval obtaining a state license. KRS 243.370.

2. Mandatory qualifications in KRS 243.100:

a. Persons: (1) no felony convictions for five years; (2) no illegal drug convictions under KRS Chapter 218A for two years; (3) no alcoholic beverage use conviction two years; (4) twenty-one years old or older; (5) no prior ABC licenses revoked or prior convictions for two years; (6) U.S. citizen; and (7) Kentucky resident for one year.

b. Corporations, partnerships, LLCs: Each member, directors, principal officers, or managers must meet same qualification as a private person, same as for private persons except no U.S. citizen or Kentucky residency requirement and no prior conviction/ revocation disqualification.

3. Certain requirements for applications, sworn information and public notice must first be met in applying for a license. KRS 243.380, KRS 243.390, KRS 243.400.

4. Right of possession by deed, lease or permit. KRS 243.220(1).

5. Miscellaneous mandatory requirements -- Certain types of licenses have their own mandatory requirements. Illustrations:

   Restaurant license -- must meet definition of restaurant set forth in KRS 241.010(36) (bona fide kitchen, serve food, 50 percent of its gross receipts from the sale of food); 804 KAR 9:010(4) (Must have seating capacity for 100 people at tables) Commonwealth v. Seabolt, 668 S.W.2d 571 (Ky. App. 1984).

   Private Club License -- KRS 243.270 -- Must have been in existence one year prior to application and must exclude the general public.

D. Application Process

1. The Distilled Spirits Administrator issues licenses authorizing traffic in distilled spirits and wine. The Malt Beverage Administrator issues licenses authorizing traffic in malt beverages. KRS 241.080.

2. Administrators must wait for the thirty day KRS 243.390 Public Notice period to expire before they can issue a license unless the premise operated on the same license during the preceding twelve months. KRS 243.430.

3. Building can be in construction process when notice is published. Barnett v. Portwood, 328 S.W.2d 164, 166 (Ky. 1959)

4. Administrators must grant or deny the application when, in the sound discretion of the administrator, all of the necessary information has been obtained. KRS 243.430(2).

5. Administrators must deny the license if the application is incomplete or fee not paid. KRS 243.430.

6. Mandatory denial. Administrators must deny the application under the following circumstances provided in KRS 243.450(1):

(a) If the applicant or the premises for which the license is sought does not comply fully with all alcoholic beverage control statutes and the regulations of the board; (b) If the applicant or the premises for which the license is sought does not comply with all regulations of a city administrator or county administrator; (c) If the applicant has done any act for which a revocation of license would be authorized; or (d) If the applicant has made any false material statement in his application.

If any KRS 243.450(1) disqualification exists, the state administrator has no authority to issue a license. Beverage Control Bd. v. Woosley, 367 S.W.2d 127, 128 (Ky. 1963).

7. Discretionary denial: Administrators may deny the application under the following discretionary authority provided in KRS 243.450(2):

A license that might be issued under KRS 243.020 to 243.670 may be refused by a state director for any reason which the director, in the exercise of his or her sound discretion, deems sufficient. Among those factors that the director shall consider in the exercise of his or her discretion are: public sentiment in the area; number of licensed outlets in the area; potential for future growth; type of area involved; type of transportation available; and financial potential of the area.

a. Board has very broad discretion in its decisions. KRS 243.450(2), taken cognizance of a twilight zone within which the administrative agency must determine if any particular license should be granted when substantial reasons exist why its issuance would not be in the public interest. Woosley, 367 S.W.2d at 128.

b. State, under its police powers, has delegated very wide discretion and regulatory authority to Board which is only tempered by Const. §2 which prohibits absolute and arbitrary power over citizens' lives, liberty, and property. Alcoholic Beverage Control Bd. v. Hall, 180 S.W.2d 293, 294 (Ky. 1944).

c. A license may not be denied simply because it is protested. If such were the case, few licenses would be issued. It is the reasonableness of the grounds of protest, rather than the fact of protest in itself, which may justify the denial of a license. Dolan v. Shoppers Village Liquors No. 2, Inc., 492 S.W.2d 201, 204 (Ky. 1973); Bickett v. Palmer-Ball, 470 S.W.2d 341, 345 (Ky. 1971).

d. Mere speculations as to fears of what might happen in the future are not sufficiently reasonable grounds to deny a license. Palmer-Ball v. Esquire Liquors, Inc., 490 S.W.2d 472, 474 (Ky. 1973) (speculative traffic problems not reasonable); *see also* Alcoholic Beverage Control Bd. v. Hall, 180 S.W.2d 293, 295 (Ky. 1944) (speculation or moral effect and reduction of property values not reasonable); White v. Payne, 189 S.W.3d 154 (Ky. App. 2006) (speculation of future local option election not reasonable).

e. Reasonable grounds for denying a license include: (1) governmental officials opposed the license; (2) the proposed premises were located in unincorporated isolated area; (3) prior police difficulties for law enforcement in the area; (4) difficulties in connection with supervision of the various taverns spread throughout the county; (5) other alcoholic beverage outlets in the general area which adequately serve the population there; (6) location near heavily traveled road and premises would increase parking and traffic congestion and hazards; (7) location at intersection where five school buses stop and daily unload over 100 children and expose them to a detrimental influence; (8) location close to a church whose faith opposes alcohol sales; (9) large number of public protests; (10) alcohol related misdemeanor conviction over two years old. Brown v. Carey, 442 S.W.2d 566, 568 (Ky. 1969); Moberly v. Berry, 405 S.W.2d 198, 200 (Ky. 1966); Moberly v. Bruner, 382 S.W.2d 406, 407 (Ky. 1964).

8. Administrators are required to examine a licensee's business arrangements/practices to ascertain whether they are a "sham" designed to subvert public policy or to circumvent "regulatory obligations." Commonwealth of Kentucky, Natural

Resources and Environmental Protection Cabinet v. Neace, 14 S.W.3d 15, 19 (Ky. 2000). *See also* Daniel v. Paul, 395 U.S. 298 (1969) (amusement park – private club with a twenty-five cent ($.25) membership fee -- no blacks were allowed to join); Hendricks v. Commonwealth, 865 S.W.2d 332 (Ky. 1993) (adult entertainment club-private club -- pay a five dollar ($5.00) membership card-operational charge, "was established for the sole purpose of avoiding the requirements of a newly enacted city ordinance regarding nudity in a public place.").

9. Administrators may conditionally approve an application but withhold actual issuance of the license until the requirements of a statute have been fulfilled. This practice protects an applicant from assuming a substantial financial outlay or making a contractual commitment before knowing whether a license will be granted. Angel v. Moberly, 425 S.W.2d 538, 540 (Ky. 1968).

10. Administrators can issue a "transitional" license during the time an application for a permanent license is being processed due to the transfer of an ongoing business. The transitional license may be issued for a period not to exceed sixty days with no more than one thirty (30) day extension.

11. If Administrators deny or reject the license application, the Administrators must provide a written statement of the deficiencies contained in the application. KRS 243.430(1). Administrators must notify the applicant by mailing the denial letter by registered mail at the address given in the application or supplement. KRS 243.470(1).

E. Appeal of License Denials

1. Appeals to the Board. Within thirty (30) days after the date of the mailing of the notice of denial letter by the Administrator, an Applicant may appeal in writing and request a hearing before the full Board. KRS 243.470(2) and KRS 243.550. The appeal is processed in accordance with the requirements of KRS Chapter 13B.

2. Applicant has burden of proof in proving entitlement to a license. KRS 13B.090(7).

3. As a matter of right, an applicant can appeal an unfavorable Board final order by filing a petition in the Franklin Circuit

Court within thirty (30) days after the final order of the agency is mailed or delivered by personal service. KRS 243.560, KRS 13B.140(1). The petition must include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition must also be accompanied by a copy of the final order. KRS 13B.140(1).

4. As a matter of right, an applicant can appeal an unfavorable Franklin Circuit Court Opinion and order to the Kentucky Court of Appeals. KRS 22A.020(1), KRS 243.590.

5. An aggrieved citizen or competitor does not have the right to appeal the granting of an alcoholic beverage license. Applicants for Retail Package License in Floyd Co. v. ABC, 674 S.W.2d 22, 24 (Ky. App. 1984); KRS 243.560.

6. When appealing an agency decision, statutory requirements are mandatory and must be strictly followed or the court lacks jurisdiction for an appeal. Board of Adjustments of the City of Richmond v. Flood, 581 S.W.2d 1, 2 (Ky. 1978); B.L. Radden & Sons, Inc. v. Copley, 891 S.W.2d 84, 86 (Ky. App. 1995); Frisby v. Board of Education of Boyle County, 707 S.W.2d 359, 361 (Ky. App. 1986). Timely filing the petition is mandatory and failure to do so is fatal to an appeal." Workers' Compensation Board v. Siler, 840 S.W.2d 812, 813 (Ky. 1992) (appeal dismissed when one day late); City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990).

F. No Multiple Repeat Applications Unless Change in Circumstances

Although KRS Chapter 243 does not prohibit multiple application filings after one is denied, the doctrine of *res judicata* precludes an applicant from filing another application unless he can show changes of condition between the situations at the time of the first and second applications. Dink v. Palmer-Ball, 479 S.W.2d 897 (Ky. 1972); Angel v. Palmer-Ball, 461 S.W.2d 105 (Ky. 1970).

G. Administrative Penalties for Licensee Violations of the Alcoholic Beverage Laws

1. If a licensee violates an alcoholic beverage statute, the Board has the following punishment options: license revocation, license suspension, fine payment in lieu of suspension, or order agency server training. KRS 243.480, KRS 243.490.

2. The Board has the right to revoke for a first offense and even for a common violation. Brey v. ABC Board, 451 S.W.2d 647, 649-50 (Ky. 1970); Ni-Be, Inc. v. Moberly, 425 S.W2d 567 (Ky. 1968).

3. The Board can assess fines in lieu of suspension days at the following rate: (a) Distillers, rectifiers, vintners, brewers, and blenders -- $1,000.00 per day; (b) wholesale liquor and beer licensees -- $400.00 per day; (c) retail licensees selling distilled spirits, wine, or beer by the package or drink -- $50.00 per day; and (d) all remaining licensees -- $50.00 per day.

H. Initiation of the Administrative Action to Assess Penalties

1. The Board cannot revoke or suspend a license unless an administrative proceeding is instituted and the licensee is afforded the opportunity for a hearing conducted in accordance with KRS Chapter 13B. KRS 243.520.

2. The Board issues a show cause order to the licensee that provides the licensee with certain information as required by KRS 13.050(3). The most important information provided to the licensee is a general statement of the factual basis of the violation, the specific statutes and administrative regulations violated, and the date of the hearing to determine whether these violations occurred.

3. Office is not required to parrot or paraphrase the language in a statute, but rather only needs to "set our facts or conclusions sufficiently to identify the basis of the claim." Natural Resources and Environmental Protection Cabinet v. Williams, 768 S.W.2d 47, 51 (Ky. 1989). Due process does not require, "the Board to provide a detailed summary or specify the particular evidence…" Belcher v. Kentucky Parole Bd., 917 S.W.2d 584, 588 (Ky. App.1996).

4. The Board cannot set the hearing date in the show cause order more than twenty (20) days in advance of issuance of the show cause order. KRS 13B.050(1).

5. The show cause order is served by personal service or by certified mail, return receipt requested, sent to the last known address of the licensee. Service by certified mail is

complete upon the date that the Board receives the return receipt or the returned notice. KRS 13.050(2).

I. Administrative Action Process

1. Rules relating to administrative cases are contained in KRS Chapter 13B. The Kentucky Civil Rules of Procedure ("CR") do not apply to administrative hearings. Pollitt v. Kentucky Unemployment Ins. Com'n, 635 S.W.2d 485, 487 (Ky. App. 1982); Department for Human Resources v. Redmon, 599 S.W.2d 474, 475 (Ky. App. 1980).

2. The Board members preside at the hearing and receive administrative hearing training in compliance with KRS 13B.030.

3. The Board issues subpoenas when requested by a party. KRS 13B.080(3).

4. Both the Office and Licensee have the right to inspect, at least five (5) days prior to the hearing, a list of all witnesses every other party expects to call at the hearing, and the available documentary or tangible evidence relating to an administrative hearing either in person or by counsel. KRS 13B.090(3).

5. The Board affords both the Office and Licensee the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence. KRS 13B.080(7).

6. The Office has burden of proof in proving the violation(s) alleged in the show cause order. KRS 13B.090(7).

7. The Licensee has burden of establishing any affirmative defense. KRS 13B.090(7); Mollette v. Kentucky Personnel Bd., 997 S.W.2d 492, 496 (Ky. App. 1999).

8. Hearsay evidence is admissible if it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs. However, hearsay evidence shall not be sufficient in itself to support an agency's findings of facts unless it would be admissible over objections in civil actions. KRS 13.090(1); Cabe v. City of Campbellsville, 385 S.W.2d 51 (Ky. 1964); Wade v. Com., Dept of Treasury, 840 S.W.2d 215 (Ky. App. 1992).

9. An administrative agency, as the trier of facts, is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it. Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406, 409 (Ky. App. 1994); Grant v. Wrona, 662 S.W.2d 227, 229 (Ky. App. 1983) (credibility of witnesses is matter wholly within the province of the finder of fact).

10. Board must issue a final order within ninety (90) days after the hearing. KRS 13B.120(4).

J. Due Process and Constitutional Issues

1. License is a Privilege, Not a Property Right. Bobbie Preece Facility v. Com., Dept. of Charitable Gaming, 71 S.W.3d 99, 102 (Ky. App. 2001); Ladt v. Arnold, 583 S.W.2d 702 (Ky. App. 1979).

2. Due process simply requires a hearing, the taking and weighing of evidence, findings of fact based upon consideration of the evidence, and the making of an order supported by substantial evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329, 330-31 (Ky. 1997).; Kentucky Alcoholic Beverage Control Bd. v. Jacobs, 269 S.W.2d 189, 192 (Ky. 1954).

K. Appeals of Board Final Order Assessing Penalties

1. Appeals to the Board. Within thirty (30) days after the date of the mailing of the notice of denial letter by the Administrator, an Applicant may appeal in writing and request a hearing before the full Board. KRS 243.470(2) and KRS 243.550. The appeal is processed in accordance with the requirements of KRS Chapter 13B.

2. As a matter of right, an applicant can appeal an unfavorable Board final order by filing a petition in the Franklin Circuit Court within thirty (30) days after the final order of the agency is mailed or delivered by personal service. KRS 243.560(1), KRS 13B.140(1). The Board is a necessary party and the petition must include the names and addresses of all parties to the proceeding, and a statement of the grounds on which the review is requested. The petition must also be accompanied by a copy of the final order. *Id.*

3. As a matter of right, an applicant can appeal an unfavorable ruling by the Franklin Circuit Court to the Kentucky Court of Appeals. KRS 22A.020(1), KRS 243.590.

4. When a Board final order is appealed, the standard of review is whether the agency acted arbitrarily or outside the scope of its authority, whether the agency applied the correct rule of law, and whether the decision is supported by substantial evidence on the record. Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298, 300-01 (Ky. 1972); KRS 13B.150(2).

5. When a Board final order is appealed, the final order does not become effective until the appeal period expires. KRS 243.560(5); KRS 13B.140(4).

6. When appealing an agency decision, statutory requirements are mandatory and must be strictly followed or the court lacks jurisdiction for an appeal. Board of Adjustments of the City of Richmond v. Flood, 581 S.W.2d 1, 2 (Ky. 1978); Kentucky Utilities Co. v. Farmers Rural Electric Cooperative Corporation, 361 S.W.2d 300 (Ky. 1962); B.L. Radden & Sons, Inc. v. Copley, 891 S.W.2d 84, 86 (Ky. App. 1995); Frisby v. Board of Education of Boyle County, 707 S.W.2d 359, 361 (Ky. App. 1986). Timely filing the petition is mandatory and failure to do so is fatal to an appeal." Workers' Compensation Board v. Siler, 840 S.W.2d 812, 813 (Ky. 1992) (appeal dismissed when one day late); City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990).

VIII. KRS CHAPTER 244 -- LICENSEE CONDUCT

A. Prohibited Licensee Conduct

KRS Chapter 244 primarily contains statutes relating to licensee conduct. KRS Chapter 243 also contains several statutes specifically relating to licensee conduct. *See* Appendix C for list of common violations.

B. Board has authority to institute administrative penalty proceedings for any violation of law and for "any cause which the Alcoholic Beverage Control Board in the exercise of sound judgment deems sufficient." KRS 243.490(1).

C. Sales to Minors -- KRS 244.080(1).

1. Affirmative defense of purchase induced by false identification. KRS 244.080(1).

2. Operation zero tolerance detail. Use of minor investigative aid is proper and does not constitute entrapment.; Gray v. Alcoholic Beverage Control Board, 485 S.W.2d 502 (Ky. 1972); Duncan v. Commonwealth, 158 S.W.2d 396 (Ky. 1942) (licensee knowledge of minor, intoxicated or habitual drunkard status is not an element); Mabry v. Commonwealth, 258 S.W. 678 (Ky. 1924); Johnson v. Commonwealth, 554 S.W.2d 401 (Ky. App. 1977); KRS 503.040 (assisting police).

3. Easier to buy a pack of cigarettes in Kentucky than a fifth of whiskey.

D. Attempted Purchases by Minors. KRS 244.085(2), (3), (4), and (5).

1. Cops in Shops Program.

2. Parent who buys alcoholic beverages for their minor child violates KRS 244.085(3) even if not a violation of KRS 530.070. A violation of KRS 244.085(3) is a Class B misdemeanor for first offense, and a Class A misdemeanor for a second or subsequent offense.

E. Minors on Premises. KRS 244.085(6), which provides, in pertinent part:

[A] licensee, or his or her agents, servants, or employees shall not permit any person under twenty-one (21) years of age to remain on any premises where alcoholic beverages are sold by the drink or consumed on the premises, unless:

1. Exceptions: “Usual and customary business of the establishment is” a hotel, motel, restaurant, convention center, convention hotel complex, racetrack, simulcast facility, golf course, private club, park, fair, church, school, athletic complex, athletic arena, theater, distillery or brewery or winery tour, establishment where prebooked concerts with advance ticket sales are held, convenience store, grocery store, drug store.

2. Bar v. restaurant.

a. Minimum distance requirement exists in Louisville for bars, but not restaurants. KRS 241.075 and 804 KAR 7:010.

b. Economic hardship ordinances for restaurants, but not bars. KRS 242.185(1)-(5).

c. Local option elections for a limited restaurant. KRS 242.185(6).

d. Sunday liquor and wine sales can be authorized for restaurants, but not bars. KRS 244.290(4) and (6).

e. Minors are allowed in restaurants, but not bars. *See,* KRS 244.085(6).

f. Minors are allowed to work in restaurants, but not bars. *See*, KRS 244.090(c)(3)(a)

g. A quota exists on the number of liquor drink licenses, but restaurant drink licenses are unlimited. *See*, 804 KAR 9:010, Sections 2 and 4.

3. "Restaurant" means a facility where the usual and customary business is the serving of meals to consumers, that has a bona fide kitchen facility, and that receives at least fifty percent (50%) of its gross receipts from the sale of food." KRS 241.010(37).

4. "Limited restaurant" means a facility where the usual and customary business is the serving of meals to consumers, which has a bona fide kitchen facility, which receives at least seventy percent (70%) of its gross income from the sale of food, which maintains a minimum seating capacity of one hundred (100) persons for dining, and which is located in a territory where prohibition is no longer in effect under KRS 242.185(6). KRS 241.010(27).

F. Treating. No retail licensee shall give away any alcoholic beverage in any quantity, or deliver it in any quantity for less than a full monetary consideration. KRS 244.050.

1. Sampling permitted if have a sampling license. KRS 244.050(2)

2. Sampling permitted by small wineries. KRS 243.155.

3. Educational sampling permitted for retail employees. 804 KAR 1:110 (Wine Tastings); 804 KAR 11:030 (Beer Tastings).

G. Gambling is not permitted on licensed premises. KRS 243.500(7). More strict criminal statutes, KRS 528.020 and KRS 528.030 for promoting gambling which also require an additional element of advancing or profiting the gambling activity. KRS 243.500(7) does not require that element.

1. "Gambling" means "staking or risking something of value upon the outcome of a contest, game, gaming scheme, or gaming device which is based upon an element of chance, in accord with an agreement or understanding that someone will receive something of value in the event of a certain outcome. A contest or game in which eligibility to participate is determined by chance and the ultimate winner is determined by skill shall not be considered to be gambling." KRS 528.010(3)(a).

2. Activity authorized by the pari-mutuel betting laws (KRS Chapter 230) or charitable gambling laws (KRS Chapter 238) does not constitute illegal gambling. KRS 243.505.

H. Disorderly Premises. Licensees cannot permit the premises to become disorderly. KRS 244.120. Acts which constitute disorderly premises are:

1. Causing or permitting patrons to engage in fighting or in violent, tumultuous or threatening behavior. KRS 244.120(2)(a); Ni-Be, Inc. v. Moberly, 425 S.W.2d 567 (Ky. 1968).

2. Causing or permitting patrons to make unreasonable noise. KRS 244.120(2)(b).

3. Refusing or patrons refusing to obey an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard or other emergency. KRS 244.120(2)(c).

4. Creating a hazardous or physically offensive condition by any act that serves no legitimate purpose. KRS 244.120(2)(d).

5. Solicitation for prostitution on premises and licensee's encouragement of the practice. Lewis v. Ken-Pad, Inc., 716 S.W.2d 252 (Ky. 1986).

I. Tied House Laws. KRS 244.167, KRS 244.240, KRS 244.440, KRS 244.450, KRS 244.560, KRS 244.570, KRS 244.580, KRS 244.585, KRS 244.590.

Producers/suppliers of spirits and beer (wine being a minor market) frequently owned or controlled retailers by threatening to cut off supply or offering rebates only to those who complied with their marketing or sales demands. This "tied" the retailers to the manufacturers, creating what's known as "tied houses" which were typically forced to sell only one manufacturer's brands or maximize sales without regard to the well being of consumers or the public. Producers/suppliers "tied" the retailers by having ownership ties, sold to them on extended credit terms, furnished equipment and supplies, paid rebates for pushing their brands exclusively, etc.

Competition for control of the retail outlets was fierce and tremendous pressure was exerted on retailers to maximize sales without regard to the well being of customers or the general public. These abusive practices led to a campaign for laws prohibiting all drinking.

Eighteenth Amendment -- Prohibition (1919). Twenty-first Amendment -- Prohibition Ended (1935). Federal and state lawmakers realized that Prohibition did not work, but they did not want a return of the merchandizing and sales patterns that characterized the pre-Prohibition era. Consequently, they put together a three-tier system that uses wholesalers as the insulator between brewers and retailers.

Three tier goals:

1. To avoid the overly aggressive marketing and sales practices of the pre-Prohibition era.

2. To protect consumer choice. Thousands of small brewers and vintners can enter a state and offer their products to consumers. Choice of thousands of brands helps boost state revenue and keep competition healthy. Since no player

in the industry dominates the market, new specialty beer and small suppliers are able to obtain access to the market and shelf space at retail stores.

3. Prevents vertical monopolies in the beer industry and results in the economically efficient distribution of beer – the proof is in the pudding in that beer is consistently among the consumer products having the lowest price increases as measured by the consumer price index.

4. Generate tax revenues that are accurately reported and collected.

5. To facilitate state and local control of alcoholic beverages.

6. To encourage moderate consumption (temperance).

J. Alcohol Sale Times and Sunday Sales.

Licensees can sell alcohol from 6:00 am to 12:00 a.m. unless local government changes the time. KRS 244.290, KRS 244.480.

1. In Liquor Outlet, LLC v. Alcoholic Beverage Control Bd., 141 S.W.3d 378 (Ky. App. 2004), court held that KRS 244.290(3) authorized local governments to enact ordinances to authorize Sunday liquor package sales.

2. The Liquor Outlet court held that KRS 244.290(3)(b) was "intended to allow local governments to regulate the Sunday sale of liquor and wine at retail in all forms, …" *Id.*, at 386. This holding now creates confusion as to whether local governments can enact ordinances permitting Sunday liquor drink sales under subsection (3)(b) authority and bypass restrictions contained in subsections (4) and (6) authorizing Sunday liquor drink sales.

K. Credit Sales. Malt Beverages: KRS 244.040; Roppel v. Shearer, 321 S.W.2d 36 (Ky. 1959); Distilled Spirits/Wine- KRS 244.300.

L. Adult Entertainment

A state law prohibition on nude dancing is within the State's broad power under the Twenty-first Amendment. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981).

IX. KAR CHAPTER 804

A. Advertising -- 804 KAR 1:090, 804 KAR 2:005, 804 KAR 2:015,

B. Quotas -- 804 KAR 9:010.

C. Board has authority to create necessary licenses under KRS 241.060(1), KRS 243.030(42), and KRS 243.040(15). Illustrations:

1. Entertainment destination center license. 804 KAR 4:370.

2. Out-of-state brewers' license. 804 KAR 4:350.

X. MISCELLANEOUS STATUTES RELATING TO ALCOHOLIC BEVERAGES

A. Alcohol Intoxication -- KRS 222.202(1)

A person is guilty of alcohol intoxication when he appears in a public place manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or unreasonably annoy persons in his vicinity.

B. Drinking in a Public Place -- KRS 222.202(2)

A person is guilty of drinking alcoholic beverages in a public place when he drinks an alcoholic beverage in a public place, or in or upon any passenger coach, or other vehicle commonly used for the transportation of passengers, or in or about any depot, platform, or waiting room.

C. Unlawful Transaction with Minor in the Third Degree -- KRS 530.070.

A person is guilty of unlawful transaction with a minor in the third degree when (acting other than as a retail licensee), he knowingly sells, gives, purchases or procures any alcoholic or malt beverage in any form to or for a minor.

D. DUI Laws -- KRS Chapter 189A.

E. Open Container Law -- KRS 189.530(2).

F. Giving Motor Vehicle to Intoxicated Person -- KRS 189.530(1).

XI. 2007 LEGISLATIVE CHANGES

A. Senate Bill 29. This bill allows advertising by mail or hand delivery to a person's house. Also provides that a horse race track can get a horse track license if located in wet, whole or part, territory.

B. House Bill 138

1. Allows a new precinct local option votes for certain historic sites and properties within Historic commercial zones in the Commonwealth.

2. Allows merchandise to be given with the sale of malt beverages if the purchase price of the merchandise is included in total sales price.

3. Allows a city local option election for a restaurant license for establishments with seating for fifty (50) people, 70 percent food, with no bar area, and the requirement that alcoholic beverages are to be served only in conjunction with a meal.

4. Amended KRS 244.090 and KRS 244.095 to provide clarity that Urban County Governments, by ordinance, can permit Sunday sales for all types of alcoholic beverage sales.

XII. ALCOHOLIC BEVERAGE INDUSTRY FUTURE AND TRENDS

A. Globalization and Consolidation

The big just keep on getting bigger.

Top five players in distilled spirits are now estimated to account for about 48 percent of the global premium market (Diageo, Pernod Ricard, The UB Group, Beam Global Spirits & Wine, Bacardi). Top five beer players – 46 percent (InBev, SABMiller, Anheuser-Busch, Heineken, Carlsberg).

Wine producer big "three" – Constellation Brands, E & J Gallo, and the Wine Group – sold a combination of 171 million cases of wine last year, roughly 60 percent of U.S. wine sales.

Producers of distilled spirits are also beginning to produce wine or malt beverages, and vice versa. Constellation and Pernord Ricard produce wines and distilled spirits. Diageo produces distilled spirits and beer (Grolsch) Anheuser-Busch is going to produce a distilled spirit brand.

B. Federalization of Alcoholic Beverage Industry

Granholm v. Heald, 544 U.S. 460 (2005):

The Court held (1) that state laws violating other provisions of the Constitution are not saved by the Twenty-first Amendment, *e.g.,* 44 Liquormart, Inc. v. Rhode Island*,* 517 U.S. 484, (1996) (2) that §2 of Twenty-first Amendment does not abrogate Congress' Commerce Clause powers with regard to liquor, *e.g.,* Capital Cities Cable, Inc. v. Crisp*,* 467 U.S. 691 (1984), and (3) that state regulation of alcohol is limited by the Commerce Clause's nondiscrimination principle, *e.g.,* Bacchus Imports, Ltd. v. Dias*,* 468 U.S. 263, 276 (1984).

However, at one time, not long ago, it was considered elementary that the Twenty-first Amendment created an exception to the normal operation of the Commerce Clause. *See* Craig v. Boren*,* 429 U.S. 190, 206 (1976). As the Court explained shortly after the Amendment's passage, the Amendment "sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." Ziffrin, Inc. v. Reeves*,* 308 U.S. 132, 138 (1939); *see also* State Board of Equalization of Cal. v. Young's Market Co.*,* 299 U.S. 59 (1936).

Long established trade practices are being challenged. Federal judge in Washington recently declared certain Washington trade practice law as in violation of the Sherman anti-trust laws. Costco Wholesale Corp. v. Hoen, 407 F.Supp.2d 1234 (W.D. Wash., Dec 21, 2005).

In aftermath of Granholm and Costco, lawsuits are pending across the nation challenging various state laws.

KRS 242.125 Separate vote on prohibition in cities of first four classes, in dry county or in case of county-wide election – Status of dry precincts in case city votes wet.

(1) In any county in which the provisions of KRS 242.220 to 242.430 are applicable by reason of an election for the entire county having heretofore resulted in favor of prohibition, an election may be held in any city of the first four (4) classes in such county to take the sense of the people of the city as to the discontinuance of prohibition in the city. For this purpose, the election in the city shall not be deemed to be an election in the "same territory" as that in which the county-wide election was held, within the meaning of subsection (5) of KRS 242.030. If, at the election for a city, the majority of the votes cast are against prohibition, the vote makes KRS 242.220 to 242.430 inapplicable to the entire city, but this does not prevent an election from thereafter being held in any precinct of the city, subject to the provisions of KRS Chapter 242, to take the sense of the people of the precinct as to the application of KRS 242.220 to KRS 242.430 in the precinct.

(2) In any election hereafter held for an entire county, which county is not at the time of the election dry territory by reason of a county-wide election heretofore held, for the purpose of taking the sense of the voters as to the application of KRS 242.220 to 242.430 in the county, the voters within each city of the first four (4) classes in the county shall be presented with the question, "Are you in favor of the sale of alcoholic beverages in (name of city)?". The question shall not be presented to the voters of any city of such class, if, less than three (3) years prior to the date of the proposed county-wide election a city-wide election was held in the city at which a majority of the votes cast were against prohibition. The status of such a city is not affected by the result of the county-wide election. The voters outside of the cities of such classes shall be presented with the question, "Are you in favor of the sale of alcoholic beverages in (name of county), outside of the corporate limits of the cities of the first four classes?". The votes of each such city shall be separately tabulated, and the votes of the voters outside such cities shall be separately tabulated. If the majority of votes cast in any such city are for prohibition, KRS 242.220 to 242.430 shall apply to the entire city. If the majority of any such votes cast in any such city are against prohibition, then KRS 242.220 to 242.430 shall be inapplicable, except, that if, at the time of the election, any number of precincts of the city, less than the entire city were dry territories, the votes shall not make KRS 242.220 to 242.430 inapplicable in such precinct. If the majority of votes cast in any city are against prohibition, and if, at the

time of such election, the entire city was dry territory, KRS 242.220 to 242.430 shall be inapplicable to the entire city. If the majority of votes cast in the county outside of such cities of the first four (4) classes are for prohibition, KRS 242.220 to 242.430 shall apply to all of the county outside of the cities. If the majority of the votes cast in the county outside of the cities are against prohibition, the votes shall not make KRS 242.220 to 242.430 inapplicable to any district or precinct outside of the cities that was dry territory at the time of the election.

(3) If, in any city-wide election held in a city of the first four (4) classes for the purpose of taking the sense of the voters as to the adoption or discontinuance of the application of KRS 242.220 to 242.430 to the city, other than an election coming within the provisions of subsection (1) or (2) of this section, the majority of the votes cast are for prohibition, KRS 242.220 to 242.430 applies to every portion of the city. If, in any city-wide election, the majority of the votes cast are against prohibition, and if, at the time of the election, any number of precincts in the city less than the entire city were dry territories, the votes do not make KRS 242.220 to 242.430 inapplicable in such precincts. If, in any city-wide election, the majority of votes cast are against prohibition, and if, at the time of the election, the entire city was dry territory, KRS 242.220 to 242.430 is inapplicable to the entire city.

Effective: July 15, 1982

History: Amended 1982 Ky. Acts. Ch. 360, sec. 66, effective July 15, 1982. – Amended 1966 Ky. Acts ch. 255, sec. 213. – Amended 1966 Ky. Acts ch. 255, sec. 213. – Created 1948 Ky. Acts ch. 47, sec. 1.

Office of Alcoholic Beverage Control

Revised 06/22/06

KENTUCKY COUNTIES

WET / DRY STATUS

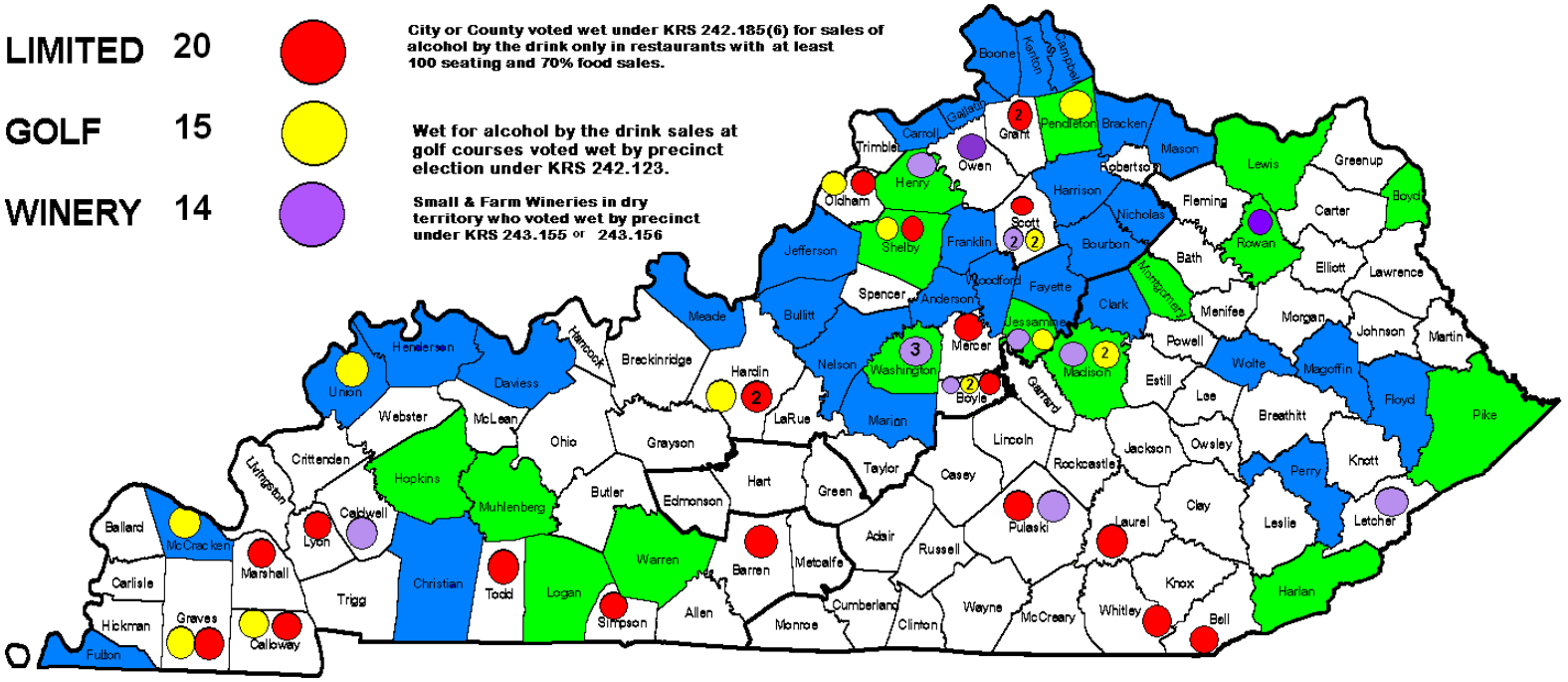
WET	30	
DRY	53	
MOIST	16	
LIMITED	20	
GOLF	15	
WINERY	14	

A Wet City located in a dry county.

City or County voted wet under KRS 242.185(6) for sales of alcohol by the drink only in restaurants with at least 100 seating and 70% food sales.

Wet for alcohol by the drink sales at golf courses voted wet by precinct election under KRS 242.123.

Small & Farm Wineries in dry territory who voted wet by precinct under KRS 243.155 or 243.156



ALCOHOLIC BEVERAGE STATUTORY VIOLATIONS

Revised as of March 17, 2006

STATUTE/ REGULATION	LANGUAGE
KRS 242.1295 **Failure to Maintain 50% Food Sales** (with 804 KAR 9:010 Section 2(4)(a))	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee's gross receipts from the sale of food were less than fifty percent (50%) of the total gross receipts although said percentage or greater is required for a restaurant drink license, in violation of the above statute and regulation.
KRS 241.010(27), and KRS 242.185(6) **Failure to Maintain 70% Food Sales**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee's gross receipts from the sale of food were less than seventy percent (70%) of the total gross receipts although said percentage or greater is required for a limited restaurant license, in violation of the above statutes.
KRS 243.020(1), KRS 241.010(36), 804 KAR 804 KAR 9:010, Sec. 4 **Failure to Act Like a Restaurant**	On or about _____, 20__, at approximately _____.m., the licensee, an agent, servant or employee, at the licensed premises, committed acts and conduct not authorized by a limited restaurant license, and not associated with the business of a limited restaurant, or permitted same, in violation of the above statutes.
KRS 243.020(1), KRS 241.010(27), and KRS 242.185(6) **Failure to Act Like a LR Restaurant**	On or about _____, 20__, at approximately _____.m., the licensee, an agent, servant or employee, at the licensed premises, committed acts and conduct not authorized by a limited restaurant license, and not associated with the business of a limited restaurant, or permitted same, in violation of the above statutes.
KRS 242.230(1) **Sale in Dry Territory (with KRS 242.270)**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto), the licensee, an agent, servant or employee, sold or delivered alcoholic beverages in a dry territory, with payment on delivery, in violation of the above statute.
KRS 242.230(2) **Possession of Moonshine**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto), the licensee, an agent, servant or employee, possessed moonshine, an alcoholic beverage unlawfully acquired and incapable of lawful use, in violation of the above statute.
KRS 242.250 **Advertising in Dry Territory**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, advertised alcoholic beverages in _____, a dry territory, in violation of the above statute.

KRS 242.260 **Transport/Delivery in Dry Territory**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto), the licensee, an agent, servant or employee brought, transferred, delivered or distributed alcoholic beverages into a dry territory, in violation of the above statute.
KRS 242.270 **C.O.D. in dry territory (with KRS 242.230(1))**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto), the licensee, an agent, servant or employee sold or delivered alcoholic beverages in a dry territory, in violation of the above statute.
KRS 243.020(1) (with appropriate license authority statute) **Business Not Authorized by License**	On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee (purchased for sale and/or sold distilled spirits (for consumption) at the licensed premises without an appropriate license by keeping open containers of distilled spirits), in violation of the above statutes. **OR** On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee transported distilled spirits without an appropriate license, in violation of the above statutes. **OR** On or about _____, 20__, at approximately __:___ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee permitted a private party at, and excluded the general public from, the licensed premises without an appropriate license, in violation of the above statutes. (With KRS 243.270)
KRS 243.120 **Business Authorized: Distiller's, Rectifier's or Vintner's License**	On or about _____ __, 20__, (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, _____, in violation of the above statute.
KRS 243.130 **Transactions Permitted: Distiller's, Rectifier's or Vintner's**	On or about _____ __, 20__, (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, ----------, in violation of the above statute.
KRS 243.170 **Transactions Permitted: Wholesalers**	On or about _____ __, 20__, (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, sold, delivered or transported distilled spirits or wine products to an unlicensed retailer, in violation of the above statute.

KRS 243.180 **Transactions Permitted: Distributors**	On or about _____ __, 20___, (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, sold, delivered or transported malt beverage products to an unlicensed retailer, _____, in violation of the above statute.
KRS 243.200 **Transporting**	On or about _____ __, 20___, the licensee, an agent, servant or employee, transported alcoholic beverages from the licensed premises to a location outside the licensure county, in violation of the above statute.
KRS 243.220(1) **Lease Requirements**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee failed to be in possession of the premises under a written lease or permit for a term not less than the current license period, in violation of the above statute.
KRS 243.240 **Business Permitted: LP Premises**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, sold distilled spirits or wine at wholesale to a person who was not a consumer or licensed to buy, receive or sale same, in violation of the above statutes. (With KRS 244.060(2)) (Check KRS 244.490 for separate violation). **OR** On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, sold distilled spirits or wine for consumption on the licensed premises, in violation of the above statute. **OR** On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, made deliveries of distilled spirits or wine away from the licensed premises, in violation of the above statutes (with KRS 244.350). **OR** On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, purchased distilled spirits or wine from a person who was not a licensed to sell same to licensee, in violation of the above statutes (with KRS 244.060(1)). **OR**

	On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee purchased for sale and/or sold distilled spirits (for consumption) at the licensed premises without an appropriate license by keeping open containers of distilled spirits, in violation of the above statutes (with KRS 244.160).
KRS 243.250 **Business Permitted: LD Premises**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, sold distilled spirits or wine by the package (or at wholesale to a person who was not a consumer or licensed to buy, receive or sell same), in violation of the above statute. (With KRS 244.060(2))(Check KRS 244.490 for separate violation). **OR** On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, sold distilled spirits or wine for consumption off the licensed premises, in violation of the above statute. **OR** On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, purchased distilled spirits or wine from a person who was not a licensed to sell same to licensee, in violation of the above statute. (With KRS 244.060(1))
KRS 243.270(2) **Business Permitted: Special Private Club**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, permitted non-members to enter and remain on the licensed premises, in violation of the above statute. **OR** On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee ----------, in violation of the above statute.
KRS 243.280 **Business Permitted: Beer Retailer**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, sold malt beverages at wholesale to a person who was not a consumer or licensed to buy, receive or sell same, in violation of the above statute. (With KRS 244.060(2))(Check KRS 244.490 for separate violation).

	OR On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, sold malt beverages away from the licensed premises, in violation of the above statute. **OR** On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, purchased malt beverages from a person who was not a licensed to sell same to licensee, in violation of the above statute. (check KRS 244.060(1)) **OR** On or about _____, 20__, at approximately __:__ p.m., the licensee, an agent, servant or employee, allowed a patron to bring malt beverages onto the licensed premises, in violation of the above statute. **OR** On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee purchased for sale and/or sold distilled spirits (for consumption) at the licensed premises without an appropriate license by keeping open containers of distilled spirits, in violation of the above statutes. (with KRS 244.160)
KRS 243.280(2) **Gas and Beer Sales: Maintain $5,000.00 in Inventory**	On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee offered malt beverages for sale at the licensed premises where gasoline and lubricating oil are sold, without maintaining food, groceries and related products valued at not less than five thousand dollars ($5,000.00) in inventory on the licensed premises, in violation of the above statute.
KRS 243.390 **Change of Application Facts**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee failed to give notice in writing to the Department of Alcoholic Beverage Control of a change of fact in the licensee's license application regarding the fact that it stood in bad standing with the Kentucky Secretary of State's office, in violation of the above statutes.

	OR On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee failed to give notice in writing to the Department of Alcoholic Beverage Control of a change of fact in the licensee's license application regarding the fact that licensee's gross receipts from the sale of food were less than fifty percent (50%) of the total gross receipts though said percentage or greater is required for a restaurant drink license, in violation of the above statutes. **OR** On or about _____, 20___, and for an undetermined period of time prior thereto, the licensee failed to give notice in writing to the Department of Alcoholic Beverage Control of a change of fact in the licensee's license application regarding the fact that it failed to be in possession of the premises under a written lease or permit for a term not less than the current license period, in violation of the above statutes. **OR** *See* KRS 243.390(1) for other info required.
KRS 243.490(1) **Violation of Law**	On or about _____ __, 20__, the licensee, an agent, servant, or employee, at the licensed premises, violated (USC ____, or KRS _____), said act constituting sufficient cause for license revocation or suspension pursuant to the above statute. **OR** On or about _____ __, 20__, the licensee, an agent, servant, or employee, at the licensed premises, violated KRS 194B.505(3) by accepting U.S.D.A. food coupons in exchange for an alcoholic beverage, said act constituting sufficient cause for license revocation or suspension pursuant to the above statute. (*see also* 804 KAR 3:100)
KRS 243.490(1) **Sufficient Cause**	On or about _____ __, 20__, the licensee, an agent, servant, or employee (sold, gave or delivered alcoholic beverages to an agent of the Department of Alcoholic Beverage Control without asking for identification in violation of Alcoholic Beverage Control Order 99-ABC-105), said act constituting sufficient cause for license revocation or suspension pursuant to the above statute.

	OR On or before _____, 20___, the licensee, an agent, servant, or employee, at the licensed premises, installed, set up, operated and/or kept a warning light system to warn employees and patrons about the presence of Department of Alcoholic Beverage Control agents so as to permit, promote, or allow violations of the alcoholic beverage control statues and/or other statues, said act constituting sufficient cause for license revocation or suspension pursuant to the above statute. **OR** On or before _____, 20___, the licensee failed to comply with the terms of the final order in Kentucky Alcoholic Beverage Control Board Case No. __-ABC-____, said act constituting sufficient cause for license revocation or suspension pursuant to the above statute.
KRS 243.500(1) **Selling Illegal Beverages Conviction**	On or about _____ __, 20__, (date of conviction), the licensee, an agent, or employee, was convicted for selling illegal beverages on the licensed premises, in violation of the above statute.
KRS 243.500(2) with KRS 243.390 **False Statements in Application**	On or about _____ __, 20__, (date application filed), the licensee, an agent, servant, or employee, made a false, material statement in his/her/its license (supplemental license) application, in violation of the above statute.
KRS 243.500(3) with KRS 243.670 **Failure to Pay Own Fee**	On or about _____ __, 20__, (date fee paid) a person other the licensee paid the licensee's application fee, in violation of the above statute.
KRS 243.500(4)(a) **Two (2) ABC Violations in two (2) years**	On or about _____ __, 20__, the licensee, an agent, servant, or employee committed the above violations within two (2) years of two (2) prior violations as found by orders in Alcoholic Beverage Control Board case nos. __-ABC-___ and __-ABC-___, in violation of the above statute.
KRS 243.500(4)(b) **Two (2) alcohol misdemeanor convictions in two (2) years**	On or about _____ __, 20__, (date of second conviction) the licensee, a clerk, agent, servant, or employee was convicted of two (2) misdemeanors directly or indirectly attributable to the use of alcoholic beverages within two (2) consecutive years, in violation of the above statute.
KRS 243.500(4)(c) **Felony Conviction**	On or about _____ __, 20__, (date of conviction), the licensee, a clerk, agent, servant, or employee was convicted of a felony, in violation of the above statute.

KRS 243.500(5) **Failure to Pay Taxes**	On or about _____ __, 20__, and for an undetermined period of time thereto, the licensee failed or defaulted to pay taxes owed to the Commonwealth of Kentucky, Revenue Cabinet, in violation of the above statute.
KRS 243.500(6) **Revocation of Local License**	On or about _____ __, 20__, (date of revocation), the licensee's (county or city) license for the (county or city) of _____(county or city) was revoked, in violation of the above statute.
KRS 243.500(7) **Gambling**	On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, at the licensed premises, set up, conducted, operated or kept a gambling game, device, machine, or paraphernalia, in violation of the above statute.
KRS 243.500(8)(a) **Sale of Controlled Substances Conviction**	On or about _____ __, 20__, (date of conviction), the licensee, an agent, servant, or employee was convicted for the sale or use of a controlled substance, as described in KRS Chapter 218A, upon the licensed premises, in violation of the above statute.
KRS 243.500(8)(b) **Permit Sale of Controlled Substances Conviction**	On or about _____ __, 20__, (date of conviction), the licensee, an agent, servant, or employee was convicted for knowingly permitting the sale or use of a controlled substance, as described in KRS Chapter 218A, by patrons upon the licensed premises, in violation of the above statute.
KRS 243.500(8)(c) **Receiving Stolen Property Conviction**	On or about _____ __, 20__, (date of conviction), the licensee, an agent, servant, or employee was convicted for knowingly receiving stolen property upon the licensed premises, in violation of the above statute.
KRS 243.620(1) **Posting of License**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee failed to post and/or at all times display its alcoholic beverage license in a conspicuous place at the licensed premises, in violation of the above statute.
KRS 243.630 (2)(3)(8) **Unauthorized Transfer or Acquisition Of License Interest**	On or about (or before) _____ __, 20__, (date of sale/transfer/discovery), the licensee transferred or disposed of his/her/its interest in or control of the licensed premises or license issued by the Department of Alcoholic Beverage Control without the prior approval of the state administrator, in violation of the above statutes. **OR** On or about (or before) _____ __, 20__, (date of sale), the licensee acquired an interest in or control of another licensee's licensed premises

	or license issued by the Department of Alcoholic Beverage Control without the prior approval of the state administrator, in violation of the above statute.
KRS 243.630 (9) **Unauthorized Transfer Of License While Pending Proceedings**	On or about (or before) _____ __, 20__, (date of sale), the licensee transferred an interest in his/her/its license while a proceeding was pending before the Alcoholic Beverage Control Board for suspension or revocation of said license, in violation of the above statute.
KRS 243.630 (10) **Unauthorized Transfer Of License When Owed Wholesaler**	On or about (or before) _____ __, 20__, (date of sale), the licensee transferred an interest in his/her/its license when the licensee owed a debt on inventory to a wholesaler responsible for the collection and payment of the tax imposed under KRS 243.884, in violation of the above statute.
KRS 243.630 (11) **Unauthorized Transfer Of License When Owed Revenue Cabinet.**	On or about (or before) _____ __, 20__, (date of sale), the licensee transferred an interest in his/her/its license when the licensee owed the Kentucky Revenue Cabinet for taxes, in violation of the above statute.
KRS 243.640(2) **Continuance of business by defunct licensee**	On or about _____ __, 20__, (date of dissolution), the licensee continued to operate business on the licensed premises after dissolution without prior approval of the state administrator, in violation of the above statute.
KRS 243.660 **Pledging of license as security**	On or about _____ __, 20__, (date of pledge), the licensee pledged or hypothecated its/his/her license(s) with the Department of Alcoholic Beverage Control, in violation of the above statute.
KRS 243.670 (with KRS 243.500(3)) **Pay Own License Fee**	On or about _____ __, 20__, (date when fee paid), a person other the licensee paid the licensee's application fee, in violation of the above statute.
KRS 243.895 **Post Pregnancy Warning Sign**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee failed to post a sign on the licensed premises which warned that drinking alcoholic beverages prior to conception or during pregnancy can cause birth defects, in violation of the above statute.
KRS 244.040(1) **Non-Cash Sales: Brewer or Distributor**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee, an agent, or employee, sold alcoholic beverages to persons for consideration other than by cash paid, in violation of the above statute.
KRS 244.050 **Treating**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee sold, gave or delivered alcoholic beverages to persons for less than a full monetary consideration, in violation of the above statute.

KRS 244.060(1) **Unauthorized Purchase**	On or about _____ __, 20__, and continuing thereafter, the licensee, an agent, servant or employee, purchased alcoholic beverages from a person who was not licensed to sell same to licensee, in violation of the above statute. (with KRS 243.280 or KRS 243.250 or KRS 243.240)
KRS 244.060(2) **Unauthorized Sale**	On or about _____ __, 20__, and continuing thereafter, the licensee, an agent, servant, or employee, sold alcoholic beverages (at wholesale to a person who was not a consumer or licensed to buy, receive or sell same)(to a person who was not legally authorized to buy and receive same), in violation of the above statute. (with licensing statute)(check for KRS 244.490 (beer) as separate charge).
KRS 244.080(1) **Sale to Under 21**	(Aide) On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, at the licensed premises, sold, gave or delivered alcoholic beverages to a minor investigative aide with the Department of Alcoholic Beverage Control, in violation of the above statute. **OR** (Non-Aide) On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, at the licensed premises, sold, gave or delivered alcoholic beverages to _____, DOB __/__/__, a minor, in violation of the above statute.
KRS 244.080(2) **Sale to Intoxicated Person**	On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, at the licensed premises, sold, gave or delivered alcoholic beverages to a person actually or apparently under the influence of alcoholic beverages, in violation of the above statute.
KRS 244.083 **Display Notice to Minors Sign**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee failed to post a printed card on the licensed premises which warned that persons under the age of twenty-one (21) were subject to a fine if they entered the premises to buy, possess, purchase or attempt to purchase, or misrepresented their age for the purpose of purchasing, alcoholic beverages, in violation of the above statute.
KRS 244.085(6) **Allow Under 21 on Premises**	On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, permitted a person under twenty-one (21) years of age to remain on the licensed premises where alcoholic beverages are consumed or sold by the drink, in violation of the above statute.

KRS 244.087 **Employ Under 18** (With KRS 244.090)	On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, failed to have a person who was twenty (20) years old or older supervising an eighteen (18) year old employee who was accepting payment for malt beverages by the package, in violation of the above statutes. **OR** On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, knowingly employed a person under the age of eighteen (18) years to accept payment for malt beverages by the package, in violation of the above statutes.
KRS 244.090(1)(a) **Employ a Felon**	On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, knowingly employed a person who had been convicted of a felony within two (2) years of said date, in violation of the above statute.
KRS 244.090(1)(b) **Employ a Two-time Misdemeanant**	On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, knowingly employed a person who had been twice convicted of misdemeanors directly or indirectly attributable to the use of alcoholic beverages within two (2) years, in violation of the above statute.
KRS 244.090(1)(c) **Employ Under 20**	On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, knowingly employed a person under the age of twenty (20) years at the licensed premises, in violation of the above statute.
KRS 244.110 **Obstructed View**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee failed to furnish a clear or unobstructed view of the licensed premises from its entrance, in violation of the above statute.
KRS 244.120 **Disorderly Premises**	On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, caused, suffered, or permitted the licensed premises to be disorderly whereby patrons engaged in fighting or in violent, tumultuous or threatening behavior, in violation of the above statute. **OR** On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, caused, suffered, or permitted the licensed premises to be disorderly whereby employees or patrons made unreasonable noise, in

	violation of the above statute. **OR** On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, caused, suffered, or permitted the licensed premises to be disorderly whereby employees or patrons possessed or used marijuana (or a controlled substance as described in KRS Chapter 218A), an offensive (and/or hazardous) act which serves no legitimate purpose, in violation of the above statute. **OR** On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, caused, suffered, or permitted the licensed premises to be disorderly whereby employees or patrons _____, an offensive (and/or hazardous) act which serves no legitimate purpose, in violation of the above statute. **OR** On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, caused, suffered, or permitted the licensed premises to be disorderly whereby patrons became manifestly under the influence of alcohol, an offensive and/or hazardous act which serves no legitimate purpose, in violation of the above statute. (check 804 KAR 5:060 for strip club violations if applicable).
KRS 244.150(1) (with 804 KAR 4:100) **Failure to Keep Records**	On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee failed to keep, maintain, or make readily available to the Department of Alcoholic Beverage Control, adequate books, records, invoices, and/or other documentation relating to all transactions involving alcoholic beverages, in violation of the above statute and regulation.
By KRS 244.160 (With KRS 243.020(1) and license authority statute by this statute) **Presumption of intent to sell**	On or about _____ __, 20__, at approximately __:__ __.m., and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee purchased for sale and/or sold distilled spirits (for consumption) without an appropriate license by keeping open containers of distilled spirits on the licensed premises, in violation of the above statutes.

KRS 244.165(1)(c) **Out of state shipments**	On or about _____ __, 20__, (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, ----------, in violation of the above statute.
KRS 244.167 **Retailers Purchase From Improper Distributor/Wholesaler**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, purchased, ordered or received alcoholic beverages from a wholesaler (or distributor) who did not purchase the brand from the primary source of supply (or who is not the designated representative of the primary source of supply in the Commonwealth and who did not purchase the alcoholic beverage from the designated representative of the primary source of supply), in violation of the above statute **OR** On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, purchased, ordered or received alcoholic beverages from a wholesaler (or distributor) who did not purchase the brand from the primary source of supply (or who is not the designated representative of the primary source of supply in the Commonwealth and who did not purchase the alcoholic beverage from the designated representative of the primary source of supply), in violation of the above statute. **OR** On or about _____, 20____, (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, failed to unload and store alcoholic beverages in the licensee's warehouse for a time period of twenty-four (24) hours before being again transported, in violation of the above statute.
KRS 244.290(3) **Open on Sunday Sales/After Hours** (Distilled Spirits and Wine)	On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, permitted the licensed premises to remain open during the twenty-four (24) hours of a Sunday (or after midnight), in violation of the above statute. **OR** On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, permitted the licensed premises to remain open during a Sunday at a time prohibited by the local governmental authority, in violation of the above statute.

KRS 244.300 **Credit Sales for Distilled Spirits and Wine**	On or about _____ __, 20__, and for an undetermined period of time thereto, the licensee, an agent, servant or employee, at the licensed premise, sold, delivered or gave distilled spirits or wine on credit, in violation of the above statute.
KRS 244.310 **Containers that LD licensee may keep**	On or about _____ __, 20__, (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, ----------, in violation of the above statute.
KRS 244.330 **Unlicensed Supplemental Bar** (with KRS 243.020)	On or about _____ __, 20__, (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, maintained more than one (1) bar at the licensed premises without an appropriate license, in violation of the above statutes.
KRS 244.340 **Containers that LP May Keep**	On or about _____ __, 20__, (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, kept, on the licensed premises, distilled spirits or wine in a container other than the original container, in violation of the above statute.
KRS 244.350 **Deliveries by LP**	On or about _____ __, 20__, at approximately __:__ __.m., , (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee delivered distilled spirits or wine, in violation of the above statute. (with KRS 243.240).
KRS 244.360 **Display License Number (with 804 KAR 7:050)**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee failed to have printed on the front window of the licensed premises, the licensee's name together with the licensee's alcoholic beverage license number, in violation of the above statute and regulation.
KRS 244.440 **Selling of Non-Registered Brands**	On or about _____ __, 20__, __, and for an undetermined period of time prior thereto, the licensee purchased alcoholic beverages which were not registered with the Department of Alcoholic Beverage Control, in violation of the above statute.
KRS 244.450 **Importing Without Distributing Rights**	On or about _____ __, 20__, __, and for an undetermined period of time prior thereto, the licensee imported brands offered by a nonresident distiller, rectifier, blender, vintner or wholesaler without being granted distributing rights or obtaining an importer's permit, in violation of the above statute.
KRS 244.461 **Rebate Coupons**	On or about _____ __, 20__, __, and for an undetermined period of time prior thereto, the licensee advertised or promoted the sale of distilled spirits or wine by use of rebate coupons, in violation of the above statute. **OR**

	On or about _____ __, 20__, __, and for an undetermined period of time prior thereto, the licensee advertised or promoted the sale of malt beverages by use of rebate coupons, in violation of the above statute.
KRS 244.480(2) **Sunday Sales** **After Hour Sales** **(Beer)**	On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, at the licensed premises, sold, gave or delivered malt beverages between midnight and 6 a.m. or during the twenty-four (24) hours of a Sunday, in violation of the above statute. **OR** On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, at the licensed premises, sold, gave or delivered malt beverages during the hours the polls were open on a primary or regular election day, in violation of the above statute. **OR** On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, at the licensed premises, sold, gave or delivered malt beverages on a Sunday at a time prohibited by the local governmental authority, in violation of the above statute.
KRS 244.490 **Sales To Unauthorized Seller of Beer (Bootlegger)**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, sold malt beverages to a person engaged in transporting and selling malt beverages in violation of KRS 242.230, in violation of the above statute. (Check KRS 242.270, KRS 242.280 and KRS 244.060(2)).
KRS 244.510(1) **Federal Law Requirements**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee possessed alcoholic beverages without warning required by Federal law, in violation of the above statute.
KRS 244.580 **Exclusive Outlets Brands;** **Refuse to Sale/Provide Reasonable Service**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee, an affiliate, subsidiary, agent, servant or employee, required a malt beverage retailer, directly or indirectly, to purchase malt beverages from it to the exclusion, in whole or in part, of malt beverages sold or offered for sale by other persons, in violation of the above statute
KRS 244.585(1) **Distributor Sales: Non Authorized Brands;**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, sold malt beverage brands without a written agreement with the brand supplier or brewer which authorized the licensee's sales of that brand where sold, in

Refuse to Sale/Provide Reasonable Service	violation of the above statute. **OR** On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, refused to sell or offer reasonable service to a licensed retailer for a malt beverage brand for which the licensee was the exclusive authorized distributor of said brand for the area where said retailer was located, in violation of the above statute. **OR** On or about _____, 20__, and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, refused to sell or offer for sale to licensed retailers a malt beverage brand for which the licensee was the exclusive authorized distributor of said brand for the area where said retailers were located, in violation of the above statute.
KRS 244.585(3) **Distributor Sales: Non Licensed Retailers, Outside Territory, Etc**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, sold malt beverages to a non-licensed retailer, in violation of the above statute. (with KRS 243.020 and KRS 243.180 and KRS 244.060) **OR** On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, sold a malt beverage brand outside the designated geographical territory as set forth in the written agreement between the licensee and the brand supplier or brewer which authorized the licensee's sales of that brand within a designated area, in violation of the above statute. **OR** On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee, an agent, servant or employee, sold a malt beverage brand without the prior written approval of the brand brewer or supplier, in violation of the above statute. (With KRS 244.585(1) as separate charge).
KRS 244.590(3) **Tied Houses (Beer)**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee furnished, gave, rented, lent, or sold to a retailer, equipment, fixtures, signs, supplies, money, services, or other things of value, in violation of the above statute.

KRS 244.600 **Commercial Bribery**	On or about _____ __, 20__, (and for an undetermined period of time prior thereto,) the licensee, an agent, servant or employee, ----------, in violation of the above statute.
KRS 244.600(4) **Paying for Retail Advertising**	On or about _____ __, 20__, at approximately __:__ __.m., (and for an undetermined period of time prior thereto,) the licensee paid or credited a retailer for advertising, display or distribution services, in violation of the above statute.
804 KAR 1.100 **Advertising**	On or about _____ __, 20__, __, and for an undetermined period of time prior thereto, the licensee ran an advertisement in the newspaper, _____, that persons under eighteen years of age were permitted on the licensed premises, in violation of the above regulation. **OR** (Subsection 8). On or about _____ __, 20__, __, and for an undetermined period of time prior thereto, the licensee advertised a product, service or activity which the licensee was prohibited by statute or regulation from selling, providing or conducting, in violation of the above regulation. **OR** (Subsection 7). On or about _____ __, 20__, __, and for an undetermined period of time prior thereto, the licensee ran an advertisement that used the term “free,” “complimentary” and/or other terms which inferred or suggested the giveaway of alcoholic beverages at the licensed premises, in violation of the above regulation. **OR** (*See* 804 KAR 1:100 for other violations)
804 KAR 3:100 **Accepting Food Stamps for Alcohol Sale** **(also add a KRS 243.490(1) charge)**	On or about _____ __, 20__, at approximately __:__ __.m., the licensee, an agent, servant or employee, at the licensed premises, accepted U.S.D.A. food coupons in exchange for an alcoholic beverage, In violation of the above regulation.
804 KAR 4:100 **Failure to Keep Records**	(*See* and join charge with KRS 244.150(1))

804 KAR 4:110, Section 1(1) **Failure to Conduct Business**	On or about _____ __, 20__, __, and for a period not less than ninety (90) days prior thereto, the licensee failed to transact any business, said act constituting sufficient cause for license revocation pursuant to the above regulation.
804 KAR 5:070 Section 3 **Display of No Under 21 to Enter Sign**	On or about _____ __, 20__, and for an undetermined period of time prior thereto, the licensee failed to post a printed card on the licensed premises which warned that persons under the age of twenty-one (21) were not to enter or remain on the premises, in violation of the above regulation.
804 KAR 7:050 **Display License Number**	(*See* and join charge with KRS 244.360)
804 KAR 9:010 Section 2 (4)(a)) **Failure to Maintain 50% Food Sales**	(*See* and join charge with KRS 242.1295)
804 KAR 9:010 Section 2 (4)(b) **Restaurant 100 Seat Capacity**	On or about _____ __, 20__, __, and for an undetermined period of time prior thereto, the licensee failed to maintain a minimum seating capacity of 100 people at tables, in violation of the above regulation.
804 KAR 9:010 Section 2 (4)(c) **Proof that Meet Restaurant Criteria**	On or about _____ __, 20__, __, and for an undetermined period of time prior thereto, the licensee failed to provide satisfactory proof that the licensed premises meet the criteria for issuance of a restaurant drink license, in violation of the above regulation.

ECONOMIC DEVELOPMENT TOOLS FOR DOWNTOWN DEVELOPMENT: NEWPORT ON THE LEVEE: A CASE STUDY

James E. Parsons

I. NEWPORT ON THE LEVEE

488,000 square feet mixed use Entertainment Center:

Investment:	$200,000,000
Jobs created:	1,400
Tax impact:	

State:	$4,087,000 (3.2 million used a TDA incentive)
City:	575,000
Schools:	194,000
County:	173,000
TOTAL:	$5,029,000

Taxes before development: $231,000

Major tenants:

Newport Aquarium
AMC Theatres
Barnes & Noble
Funny Bone Comedy Club
Game Works
Sixteen restaurants
Retail & Office

Location: Approximately ten acres on Newport Riverfront

II. INITIAL STEPS TAKEN BY CITY

A. City undertook visioning session and developed concept for entertainment district.

B. Prepared and adopted a Redevelopment Plan per the provisions of KRS 99.330 to 99.510. Declared the area blighted as provided in KRS 99.340(2). The definition of "blighted area" is as follows:

> "Blighted area" means an area (other than a slum area as defined in this section) whereby reason of the

predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, submergency of lots by water or other unsanitary or unsafe conditions, deterioration of site improvements, diversity of ownership, tax delinquency, defective or unusual conditions of title, improper subdivision or obsolete platting, or any combination of such reasons, development of such blighted area (which may include some incidental buildings or improvements) into predominantly housing uses is being prevented.

C. Redevelopment Plan Allows:

1. City to control development in area -- KRS 99.380;

2. Allows use of eminent domain -- KRS 99.420;

3. Allows the transfer of property by City without receiving fair market value -- KRS 99.450.

Note: The recent amendments to the Eminent Domain Act, KRS 416.675(2)(c), keeps "[t]he acquisition and transfer of property for the purpose of eliminating blighted areas, slum areas, or substandard and unsanitary areas in accordance with KRS Chapter 99", within the definition of "public use" for purposes of using eminent domain. However, there seems to be some confusion with that section and the provision in subsection (3) of the same statute that prohibits the use of eminent domain for the acquisition of private property for the transfer to a private person for the purpose of economic development.

III. AQUARIUM DEVELOPMENT AGREEMENT

A. City Agreed to:

1. Acquire land needed and lease air rights to Aquarium.

2. Clear land and construct pile caps to allow for Aquarium construction.

3. Create parking.

4. Issue taxable bonds for Aquarium construction to exempt Aquarium from property taxes (KRS 132.200(7)).

5. Assist with obtaining $5 million in state funds for needed road improvements to Kentucky Rt. 8.

6. Assist with qualifying project under the Tourism Development Act (TDA).

B. Aquarium Agreed to:

1. Build and operate Aquarium.

2. Pay base lease to city plus a surcharge on tickets to support city debt.

3. Aquarium qualified for Tourism Development Act Credit. KRS 139.536 and KRS 148.851-860.

III. NEWPORT ON THE LEVEE DEVELOPMENT AGREEMENT

A. City Agreed to:

1. Issue $44 million tax exempt funds for public improvements (1,920 car parking garage, etc.)

2. Issue $11 million taxable bonds for Plaza area.

3. Issue IRBs for Levee construction (property tax exemption).

4. Lease all air rights to Levee.

B. Levee Agreed to:

1. Lease and build Levee.

2. Qualified for TDA (needed statutory change), which generated a possible credit adjust sales taxes of $40 million based on total development cost of $160 million.

3. Pledged TDA sales tax credit to payment of debt issued by City.

4. Pay $875,000 in PILOT programs to City to support City debt.

5. Be responsible for any debt service on City debt not covered by parking revenues, TDA pledge, PILOT pledge.

6. Contribute funds to Kentucky Rt. 8 improvements not covered by State funds.

IV. TOOLS USED

A. City Risk

B. Development Plan -- Chapter 99

C. Eminent Domain (only one parcel required a full trial)

D. Tourism Development Act

E. Taxable Bonds

1. Direct incentive for aquarium.
2. Method of capturing property taxes (PILOT) to support debt.

F. State Transportation Funds.

Note: The use of taxable bonds to create property tax exemptions now has certain additional procedural hurdles per KRS 103.210(1) if state revenues are impacted.

V. NEW TOOL AVAILABLE

A. HB 549 (Tax Increment Financing)

1. Local development area.

a. 1,000 acres, undeveloped land per year;

b. City and/or county may pledge 100 percent of incremental real property taxes and occupational taxes to support “project” within meaning of statute;

c. Other local taxing districts, except schools and fire districts, may contribute their incremental real property taxes by agreement.

2. Developmental area Tax Increment Financings (TIFs).

a. Limited to three square contiguous miles of area.

b. Encourage reuse and reinvestment in areas where development not likely to occur without public assistance.

c. City or county must find that area meets two or more of the following conditions:

i. Substantial loss of residential, commercial or industrial activity.

ii. Forty percent or more of the households are low-income households.

iii. More than 50 percent of residential, commercial or industrial structures are deteriorating or deteriorated.

iv. Substantial abandonment of residential, commercial or industrial structures.

v. Substantial presence of environmentally contaminated land.

vi. Inadequate public improvements or substantial deterioration in public infrastructure; or

vii. Any combination of factors that impedes the growth of the City or county; impedes the provision of adequate housing; impedes the development of commercial or industrial property or adversity affects public health, safety or general welfare due to the development area's present condition and use.

d. City or county must also find:

i. That the area is not reasonably expected to develop without public assistance.

ii. That the public benefits of the development area justify the public costs proposed.

iii. That the area immediately surrounding the development area has not been subject to growth and development through private investment.

VI. STATE PARTICIPATION IN TAX INCREMENT FINANCING (TIF) AREAS

In addition to local taxes to support projects within TIF Districts, the Act creates three State participation programs for development area TIF Districts.

A. Commonwealth Participation Program for State Real Property *Ad Valorem* Tax Revenues

1. Allows up to 100 percent of state real property taxes to be pledged to support new public infrastructure to support private investment.

2. Must be new economic activity in Kentucky.

3. Minimum capital investment of $10 million.

4. Not more than 20 percent of square footage or 20 percent of capital investment to retail space.

B. Signature Project Program

1. Up to 80 percent of incremental state revenues, real property, sales taxes, corporate income taxes, and income taxes to support needed infrastructure and approved signature project costs.

2. Incorporates most provisions of development area TIF, with certain exceptions.

3. Minimum investment of $200 million.

C. Commonwealth Participation Program for Mixed Use Redevelopment in Blighted Urban Areas

1. Up to 80 percent of incremental state revenues to pay for:

a. Public infrastructure costs;

b. Costs associated with:

i. Land preparation.

ii. Demolition.

iii. Clearance.

2. Mixed use project (not more than 20 percent retail).

3. Minimum investment of $20 million.

4. No retail establishment that exceeds 20,000 square feet.

BANKRUPTCY COLLECTION AND RELATED ISSUES FOR GOVERNMENTAL AUTHORITIES

Richard L. Ferrell

I. OVERVIEW OF RELEVANT CONSIDERATIONS FOR GOVERNMENTAL AUTHORITIES WHEN A DEBTOR COMMENCES A BANKRUPTCY CASE

A. Nature of the Bankruptcy Proceeding (Chapter 7 vs. 13 vs. 11)

B. Nature of the Debtor (Individual, Spouses, Corporation, Partnership, etc.)

C. Imposition of the Automatic Stay, Precluding Efforts to Collect or Enforce a Debt

D. Continuing Liability of Non-Bankrupt Co-Liable Parties (Insiders, Responsible Officers, Guarantors)

E. Nature of the Governmental Authorities' Claim or Concern

F. Prerequisites and Procedures for Action to Be Taken by Governmental Authority on a Debt, Claim or Obligation Owing by a Debtor which Has Commenced a Bankruptcy Proceeding

G. Potential Preference Exposure

H. Declaring Debts Non-Dischargeable

II. NATURE OF THE BANKRUPTCY PROCEEDING

A. Chapter 7 (liquidation)

1. Who may commence a Chapter 7 case.

a. Section 109(b) of the Bankruptcy Code provides that only a person may be a debtor under Chapter 7.

b. Section 101(41) of the Bankruptcy Code defines "person" as including an individual, partnership or corporation.

c. There are many new, additional eligibility requirements that an individual must satisfy in order to commence and maintain a Chapter 7 bankruptcy case

pursuant to the Bankruptcy Abuse, Consumer Protection Act ("BAPCPA") that went into effect on October 17, 2005, such as "means testing" under Section 707 of the Bankruptcy Code. These additional requirements are beyond the scope of this presentation.

2. Process and proceedings in Chapter 7.

a. Chapter 7 Trustee appointed whom, pursuant to Sections 541 and 704 of the Bankruptcy Code, succeeds to all the Debtor's legal and equitable interests in non-exempt property, is obligated to take charge of and liquidate that property and make distributions to creditors which have filed proofs of claim which are allowed.

b. Pursuant to Sections 501 and 502 of the Bankruptcy Code, creditors who believe they have claims against the Debtor will be required to file proofs of claim with the court by a deadline to be set by the court pursuant to a notice issued to creditors in order to share in any distributions to be made by the Chapter 7 Bankruptcy Trustee.

Governmental entities are authorized and required to file proofs of claim with the court in order to share in distributions made by the Chapter 7 Bankruptcy Trustee.

c. Pursuant to Section 727 of the Bankruptcy Code, an individual debtor is granted a discharge after fulfilling his/her obligations in Chapter 7 unless certain exceptions are triggered (corporate/business entities which file Chapter 7 are not granted a discharge).

B. Chapter 13 (Repayment Plan)

1. Who may commence a Chapter 13 case.

a. Only an individual (not a corporation, partnership or other business enterprise), may commence a Chapter 13 pursuant to Section 109(c) of the Bankruptcy Code.

b. To be eligible to commence a Chapter 13 Bankruptcy case, the individual must have "regular income" and owe, as of the date of the filing of the bankruptcy petition, non-contingent, liquidated, unsecured debts of less than $307,675 and non-contingent, liquidated, secured debts of less than $922,975, or an individual with regular income and such individual's spouse that owe on the date of the filing of the bankruptcy petition, non-contingent, liquidated, unsecured debts that aggregate less than $307,675 and non-contingent, liquidated, secured debts of less than $922,975. (*See* Section 109(c) of the Bankruptcy Code).

2. Process and proceedings in Chapter 13.

a. Pursuant to Section 1306(b) of the Bankruptcy Code a debtor remains in possession of all of his property in Chapter 13.

b. Pursuant to Section 1302 of the Bankruptcy Code, a Standing Chapter 13 Trustee for a given region may be appointed by the Office of the U.S. Trustee to oversee all Chapter 13 cases in that region, and ensure that the debtor complies with its duties and makes the payments required by Chapter 13.

c. Sections 1321, 1322 and 1325 of the Bankruptcy Code require the debtor to file a Chapter 13 plan for the repayment and treatment of its creditors over either a three-year or five-year period.

d. Debtor is not granted a discharge in Chapter 13 until completion of all his/her plan payments is made pursuant to Section 1328(a) of the Bankruptcy Code, and that discharge is subject to exceptions.

C. Chapter 11 (Liquidation or Reorganization)

1. Who may commence a Chapter 11 case?

It must be a "person" -- defined in Section 101(41) of the Bankruptcy Code as including an individual, partnership or corporation (other corporate entities, such as LLC and LLPs have also been permitted to commence a Chapter 11 case).

2. Process and proceedings in Chapter 11.

a. Pursuant to Sections 1107 and 1108 of the Bankruptcy Code, the person or entity which commences the Chapter 11 case is permitted to remain in possession and control of its assets and business and to operate same as a "debtor-in-possession."

b. An "Official Committee of Unsecured Creditors" ("Creditors' Committee") is appointed by the Office of the United States Trustee ("US Trustee") typically consisting of several of the debtor's largest unsecured creditors selected from a list of the top twenty largest unsecured creditors pursuant to Section 1102 of the Bankruptcy Code.

   The Creditors' Committee has various rights and powers of oversight and input into the Debtor's business and the formulation of a plan of reorganization to exit bankruptcy conferred by Section 1103 of the Bankruptcy Code.

c. Section 1102 authorizes the US Trustee to appoint additional or replacement members of the Creditors' Committee if appropriate and to appoint other official committees of other constituencies of the debtor, such as bondholders and/or equityholders.

d. Chapter 11 is the only Chapter where it may not be necessary for a creditor to file a proof of claim to preserve its claim and rights to participate in a distribution which may be made in a Chapter 11 plan. Section 1111(a) of the Bankruptcy Code provides that a creditor is deemed to have filed a proof of claim if the debtor has listed the creditor in its bankruptcy schedules filed with the court as holding a claim, unless the claim is scheduled by the debtor as disputed, contingent or unliquidated (in which case, the creditor must file a proof of claim with the court to preserve its claim in the bankruptcy; likewise, if the creditor disagrees with the amount of the claim scheduled by the debtor, a proof of claim should be filed).

e. A debtor in Chapter 11 may seek to simply liquidate some or all of its assets pursuant to Section 363 of

the Bankruptcy Code by either an auction/public sale or a private sale, following the filing of a motion with the Court seeking approval of such sale and proper notice given to creditors and opportunity to object.

Following such a liquidation sale, the debtor may seek to distribute proceeds to senior, secured creditors and either convert its case to one under Chapter 7, dismiss its case (if no proceeds or assets remain to liquidate), or file a "plan of liquidation" providing for the distribution of the remaining assets.

f. A debtor in Chapter 11 may also propose a plan of reorganization to exit bankruptcy pursuant to Section 1121 of the Bankruptcy Code.

i. This proposed plan must be voted on by creditors and approved by the court as, among other things, "fair and equitable" in its treatment of creditors pursuant to Section 1129 of the Bankruptcy Code.

ii. Pursuant to Section 1141 of the Bankruptcy Code, if the Bankruptcy Court "confirms" or approves a corporate/non-individual debtor's proposed plan, the debtor receives a discharge of its debts, unless the plan calls for the liquidation of substantially all of the debtor's assets. In the case of an individual, the discharge is granted when the debtor completes making payments to creditors required under the plan.

III. IMPACT OF THE BANKRUPTCY CODE'S AUTOMATIC STAY

A. Section 362 of the Bankruptcy Code imposes, by operation of law, a (temporary) automatic stay/prohibition against any entity, including any governmental entity, from proceeding to attempt to collect a "pre-petition debt" against the debtor -- this is referred to as the "breathing spell."

1. The "automatic stay" is very broad, and prohibits the commencement or continuation of any act or proceeding:

a. To recover a claim against the debtor that arose before the bankruptcy filing;

b. To enforce against the debtor or property of the debtor's estate, any judgment obtained prior to the bankruptcy filing;

c. To obtain possession of or exercise control over property of the debtor's bankruptcy estate.

d. To create, perfect or enforce any lien against property of the debtor's estate;

e. To "collect, assess or recover a claim against the debtor that arose prior to the debtor's bankruptcy filing";

f. To setoff any debt owing to the debtor that arose prior to the debtor's bankruptcy filing against any claim against the debtor.

2. It has been held that governmental agencies which place even temporary "freezes" or "holds" on funds/payments otherwise payable to a debtor once the debtor files bankruptcy are in violation of the automatic stay. United States v. Reynolds, 764 F.2d 1004 (4th Cir. 1985); Small Business Administration v. Rinehart, 887 F.2d 165 (8th Cir. 1989).

3. Consequences of a creditor violating the automatic stay are two-fold:

a. Any actions taken in violation of the automatic stay are void or voidable. Easley v. Pettibone Michigan Corp., 990 F.2d 905 (6th Cir. 1993); and

b. Pursuant to Section 362(k)(1) of the Bankruptcy Code, damages may be assessed by the court against the creditor for a willful violation of the automatic stay which may include actual damages, costs and attorneys fees and "in appropriate circumstances", punitive damages.

B. Exceptions to the Automatic Stay

1. Section 362(b)(4) provides that the automatic stay does not apply to acts or proceedings by governmental units "to

enforce such governmental unit's policy or regulatory powers."

a. "Police or regulatory powers refers to the enforcement of laws ***affecting health, welfare, morals and safety,*** but not regulatory laws that conflict with the control of the res [property] of the Bankruptcy Court." In re Dan Hixson Chevrolet Co., 12 B.R. 917 (Bkrtcy. Tex. 1981); Missouri v. Lindsey, 647 F.2d 768 (5th Cir. 1981).

b. Even non-debt collection related governmental actions taken post-bankruptcy which affect a debtor may be deemed a violation of the automatic stay, such as a regulatory agency's decision to terminate a motor vehicle dealer franchise due to the debtor's bankruptcy filing. Dan Hixon Chevrolet, 12 B.R. 917.

2. Eminent domain proceedings as an exception.

General rule is that, where the taking by the governmental entity is for a commercial or profit-oriented purpose, as opposed to a health or safety purpose, the police or regulatory powers exception does not apply and the automatic stay prohibits the eminent domain proceeding from continuing.

a. In re PMI-DVW Real Estate Holdings, L.L.P., 240 B.R. 24 (Bkrtcy.D.Ariz. 1999) (county's proposed condemnation for the purpose of road realignment was subject to automatic stay. It was not shown to be in furtherance of police or regulatory power because traditionally that exception to the automatic stay is applied where there is an "imminent health, safety or welfare issue" such that the government has a special need to protect its citizens, as in the case of a building condemned as a fire hazard).

b. In re Altamirco, 56 B.R. 199 (Bkrtcy.C.D. Cal. 1986) (municipal redevelopment agency's attempt to exercise eminent domain to redevelop debtor's property into a commercial complex with a hotel was not exempt from the automatic stay as an exercise of the agency's police or regulatory power).

c. In re Javens, 107 F.3d 359 (6th Cir. 1997) (municipality could exercise eminent domain to demolish deteriorated buildings posing hazard to neighborhood as police or regulatory power excepted from automatic stay, since the municipality was not acting to further its pecuniary interest).

3. Pursuant to Sections 362(b)(1) and (2) the automatic stay does not bar the commencement or continuation of:

a. Criminal proceedings,

b. Civil proceedings to establish paternity or establish or modify domestic support obligations, dissolution of marriage (except insofar as the dissolution would seek to determine the division of property that is property of the debtor's bankruptcy estate),

c. Proceedings for the ***collection of domestic support obligations***,

d. Proceedings for the withholdings, suspension or restriction of a driver's license, professional or occupational license or recreational license.

4. Pursuant to Section 362(b)(9), the automatic stay does not preclude (i) an audit by a governmental unit to determine tax liability; (ii) the issuance by a governmental unit of a notice of tax deficiency; or (iii) the making of any assessment for any tax, and issuance of a notice and demand for payment.

5. Pursuant to Section 362(b)(18), the automatic stay does not preclude the creation or perfection of a statutory lien for *ad valorem* property taxes or a special assessment on real property, if such tax or assessment comes due after the date of the filing of the debtor's bankruptcy case.

C. Right of Creditor to Seek Relief from the Automatic Stay

1. Section 362(d) of the Bankruptcy Code provides that a party in interest may file a motion asking the Bankruptcy Court to grant it relief from the automatic stay for certain purposes "for cause", including a lack of adequate protection in property in which the party has an interest.

a. Cause is not defined in the Bankruptcy Code and simply involves a facts and circumstances analysis.

b. It has been held that the passage of time is relevant to determining whether granting relief from the automatic stay so that, if through a long passage of time in bankruptcy, the collection rights of the government will be "inappropriately defeated," the government may be granted relief from the automatic stay. In re Nolan, 205 B.R. 885 (Bkrtcy.M.D.Tenn. 1997).

IV. CONTINUING LIABILITY OF NON-BANKRUPT CO-LIABLE PARTIES

A. Except in Chapter 13 cases, it is well-settled that the automatic stay does not apply to non-bankrupt co-debtors or guarantors of an obligation. Winters by and through McMahon v. George Mason Bank, 94 F.3d 130 (4th Cir. 1996); Credit Alliance Corp. v. Williams, 851 F.2d 119 (4th Cir. 1988).

B. In rare cases, where it is shown that certain officers or insiders of a business which has filed Chapter 11 are essential to the re-organization and that defending individual lawsuits for obligations that the officers or insiders are co-liable for would have an extremely adverse impact and distraction on the reorganization effort, the Bankruptcy Court can use its equitable powers granted by Section 105 of the Bankruptcy Code to extend the automatic stay to such officers and insiders. In re Sprint Corp. Securities Litigation, 232 F.Supp.2d 1193 (D.Kan. 2002).

C. Unless the automatic stay is expressly extended, a creditor, including a governmental unit, is free to proceed with collection action against a non-bankrupt co-liable third party.

D. Chapter 13 Co-Debtor Stay

1. The rule that the automatic stay does not apply to non-bankrupt, co-liable third parties is reversed in the case of a Chapter 13 debtor.

2. Section 1301(c) of the Bankruptcy Code states that once a debtor files a Chapter 13 case, "a creditor may not act, or commence or continue any civil action to collect all or any part of a consumer debt of the debtor from any individual that is liable on the debt with the debtor. . ."

3. The Chapter 13 co-debtor stay applies by operation of law as soon as a Chapter 13 case is commenced to void any action taken in violation of the stay and applies to any non-bankrupt party who is jointly liable on the debt with the debtor whether by guaranty or otherwise. Patti v. Fred Ehrlich, PC, 304 B.R. 182, 188 (E.D. Pa. 2003); In re Jones, 106 B.R. 33 (Bkrtcy. W.D. N.Y. 1989); In re Pardue, 143 BR 434 (Bkrtcy.E.D. TX 1992).

4. The Chapter 13 co-debtor automatic stay remains in place until the debtor's plan is completed, at which point, if there is any deficiency still owed to the creditor, it may still pursue the non-bankrupt co-debtor for the deficiency. In re: Bonanno, 78 B.R. 52, 57 (Bkrtcy. E.D. Pa. 1987)

V. NATURE OF CLAIM TO BE FILED OR ASSERTED BY THE GOVERNMENTAL AUTHORITY

A. Secured Claims

1. Section 506(a) of the Bankruptcy Code provides that:

> An allowed claim of a creditor secured by property, in which the estate has an interest or, or that is subject to setoff under Section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. . .

2. The courts have uniformly recognized that a secured creditor with either a consensual or non-consensual lien, including a tax lien, need not, as a general rule, take any action to preserve its security interest/lien in the debtor's bankruptcy; the lien will pass through the bankruptcy unaffected unless the debtor or trustee seeks to specifically modify it by motion or in a plan.

   a. 40235 Washington Street Corp. v. W.C. Lusardi, 177 F.Supp. 2d 1090 (S.D.Cal. 2001) (a tax lien on real property passed through the debtor's bankruptcy unaffected, remaining a secured claim against the property; although the debtor/trustee may, however bifurcate the tax claim into a secured component, which passes through the bankruptcy and an unsecured deficiency component, which is discharged).

b. Kuebler v. IRS, 172 B.R. 595 (E.D. Ark. 1994) (Where debtor's Chapter 13 plan did not specifically address the IRS' tax lien, the lien passed through the bankruptcy, remaining enforceable *in rem* after the debtor was granted a discharge).

c. In re McLarry, 273 B.R. 753 (Bkrtcy. S.D. Tex. 2002) (A secured creditor, including the holder of state statutory lien, need not seek to have its claim either filed in or allowed by the Bankruptcy Court in order for it to survive the bankruptcy unless the debtor has sought to have the Bankruptcy Court disallow it).

d. In re Clark, 205 B.R. 140 (Bkrtcy. S.D. Ill. 1997) (secured lien passes through bankruptcy unaffected and creditor holding such lien may look to its lien to satisfy its debt even after the debtor receives a discharge).

3. Under what has become known as the "Absolute Priority Rule", a secured creditor in a bankruptcy must be paid/satisfied in full ahead of junior creditors of the debtor. In re Armstrong World Industries, Inc., 320 B.R. 523 (D. Del. 2005).

B. Priority Claims

1. Section 507(a)(8) of the Bankruptcy Code creates what is known as a "priority" claim position for unsecured claims of governmental units to the extent that such claims are for:

> (A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition-
>
> (i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;
>
> (ii) assessed within 240 days before the date of the filing of the petition, exclusive of (I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and (II) any time during which a stay or proceedings against collections was in effect in

a prior case under this title during that 240-day period, plus 90 days;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary or commission . . .earned from the debtor before the date of the filing of petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on-

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; . . .

. . . .

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

2. Priority claims, such as priority tax claims, must be paid in full before any distributions may be made to any junior, unsecured creditors of the debtor. In re C.J. Milligan, Inc., 252 B.R. 465 (Bkrtcy. E.D. MO. 2000); In re Vinnie, 345 B.R. 386 (Bkrtcy. M.D. Ala. 2006).

C. Unsecured Claims

Sections 501 and 502 of the Bankruptcy Code provide that a creditor may file a proof of claim for the unpaid amounts it is owed as of the time of the bankruptcy filing and that a properly filed proof of claim is *prima facie* valid unless some party interest, including the debtor or trustee, successfully objects to its allowance in the

bankruptcy case. In re Maylin, 155 B.R. 605 (Bkrtcy. D. Maine 1993).

D. Post-Petition/Administrative Expense Claims

Pursuant to Section 503 of the Bankruptcy Code, ordinary course obligations of a debtor that arise after the debtor files a bankruptcy case (including tax and other governmental claims) are deemed to be "post-petition" administrative expenses which may be paid by the debtor or trustee in the ordinary course when the obligation comes due or, if they are not paid, upon filing of a motion by the creditor for allowance and payment of the claim. In re Westmoreland Coal Co., 213 B.R. 1 (Bkrtcy. D. Colo. 1997); In re Holley Garden Apartments, Ltd., 238 B.R. 488 (Bkrtcy. M.D. Fla. 1999); In re Hyman Freightways, Inc., 342 B.R. 575 (Bkrtcy. D. Minn. 2006).

E. Exercise of Set-off and/or Recoupment Rights

1. While both the set-off and recoupment doctrines share some common ground, there are key differences:

a. Set-off claims are subject to the Bankruptcy Code's automatic stay (and cannot be exercised after a bankruptcy case is filed without obtaining relief from the automatic stay) whereas recoupment is not;

b. Set-off rights are expressly incorporated into the Bankruptcy Code by statute -- Section 362 and 553, while recoupment, in contrast, is an equitable doctrine incorporated into the bankruptcy laws through common law and not by statute; and

c. While set-off allows the offset of mutual, pre-bankruptcy debts which arose from separate transactions, recoupment involves the offsetting of mutual debts which arose from the same set of "integrated transactions", regardless of whether the debts arose before or after the bankruptcy case was filed. In re Malinowski, 156 F.3d 131 (2d Cir. 1998); In re McMahon, 129 F.3d 93 (2d Cir. 1997).

2. Section 553(a) of the Bankruptcy Code regarding set-off provides that:

> Except as otherwise provided in this section and sections 362 [the automatic stay] and 363 [use or disposition of property of the bankruptcy estate], this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title. . . except to the extent that. . .the debt owed to the debtor by such creditor was incurred by such creditor: (A) after 90 days before the date of the filing of the bankruptcy petition, (B) while the debtor was insolvent, and (C) for the purpose of obtaining a right of setoff against the debtor. . .

3. The "improvement in position" exception to setoffs contained in Section 553(b) of the Bankruptcy Code then provides that:

> . . .[I]f a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the filing of the bankruptcy petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of (A) 90 days before the filing of the bankruptcy petition, and (B) the first date during the 90 days immediately preceding the date of the filing of the bankruptcy petition on which there is an insufficiency.

"Insufficiency" is defined in Section 553(b)(2) of the Bankruptcy Code as the amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such claim.

4. Overpayments by the government made to the debtor have been an often litigated subject of set-off and recoupment when the governmental authority later seeks to reduce future payments on a given program as an offset for the earlier overpayments.

   a. Medicare and Medicaid overpayments have been held to constitute a valid basis for the governmental authority to recoup by reducing future payments to be otherwise made to the provider following a

bankruptcy, which would not violate the Bankruptcy Code's automatic stay. In re Holyoke Nursing Home, 372 F.3d 1 (1st Cir. 2004)

b. Similarly, unemployment compensation overpayments have been held to constitute a valid basis to recoup later payments through future reductions. In re Ross, 104 B.R. 171 (E.D.Mo. 1989); *but see* In re Malinowski, 156 F.3d 131 (refusing to permit recoupment of unemployment benefit overpayments against future payments owed in future years)

c. In short, if there is a governmental program otherwise entitling the debtor to future payments from the governmental authority, then, upon filing of the debtor's bankruptcy, the governmental authority will need to determine:

i. Whether any prior overpayments made by the government, if any, would be more properly characterized as arising from separate transactions (set-off) or the same set of transactions (recoupment).

ii. If the payments are more properly characterized as arising from separate transactions (set-off), whether the government should seek relief from the automatic stay to enforce the set-off before the payment becomes due in the ordinary course and could give rise to a claim of violation of the automatic stay if not timely paid.

5. Under the BAPCPA Amendments to the Bankruptcy Code, a new exception to the automatic stay has now been created to allow a ***setoff of a tax refund*** otherwise owed by a governmental unit with respect to a taxable period that ended before the date of the bankruptcy ***against an income tax liability*** for a taxable period that also ended before the date of the bankruptcy.

VI. PREREQUISITES AND PROCEDURES FOR ACTION TO BE TAKEN BY A GOVERNMENTAL AUTHORITY ON A DEBT OWED BY A DEBTOR

A. File a proof of claim for any pre-bankruptcy amounts owed and properly categorize such amounts as secured, priority or unsecured.

B. File an administrative expense application for any amounts which come due after the bankruptcy case is filed and which are not paid timely in the ordinary course.

C. If adequate "cause" exists, file a motion for relief from the automatic stay to enforce the governmental obligation outside of bankruptcy, such as:

1. Exercise of set-off right;

2. Judicial execution/foreclosure of lien against real estate or other property.

D. If unfair or otherwise impermissible treatment proposed of the governmental authorities' claim is proposed in a Chapter 11 or Chapter 13, object to confirmation of the plan.

1. Section 1129(a)(9)(C) of the Bankruptcy Code provides that in order for the Bankruptcy Court to be statutorily authorized to "confirm" (approve) a debtor's proposed plan of reorganization (which allows it to exit bankruptcy), then, with respect to a claim of a kind specified in Section 507(a)(8) of the Bankruptcy Code (*i.e.* those unsecured, pre-petition tax obligations listed therein), the plan of reorganization must provide that, upon approval by the Court of the plan of reorganization:

> the holder of the [tax] claim will receive on account of such [tax] claim, regular installment payments in cash (i) of a total value as of the effective date of the plan, equal to the allowed amount of such claim; (ii) over a period ending not later than 5 years after the date [that the bankruptcy case was commenced]; and (iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan. . .

VII. PREFERENCE EXPOSURE

Until recently, there was a split of authority on whether and how a state governmental authority could be subject to suit in the Bankruptcy Court to require it to return an alleged "preferential" payment or other property of a debtor which the governmental authority received or retained prior to the debtor's bankruptcy filing.

In Central Virginia Community College v. Katz, 546 U.S. 356 (2006), the Court, in a 5-4 decision, held that states/state agencies were subject to lawsuits in the Bankruptcy Court brought by a debtor/trustee to recover alleged preference payments and that sovereign immunity did not bar such suits.

VIII. NON-DISCHARGEABILITY OF GOVERNMENTAL OBLIGATIONS AND/OR TAXES

A. Section 523 of the Bankruptcy Code, which governs the non-dischargeability of certain debts including tax obligations of individuals, provides that a general discharge in bankruptcy will not discharge an individual debtor from any debt:

> (1)(A) for a tax of the kind and for the periods specified in Section 507(a)(8) of the Bankruptcy Code
>
> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty-
>
> (A) relating to a tax of a kind not specified in paragraph (1); or
>
> (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the [bankruptcy].

B. If the tax obligation at issue relates to taxes which qualify as federal or state trust fund taxes, then the Bankruptcy Courts have been fairly uniform that, regardless of whether the debtor actually collected the taxes or not, the personal liability of the responsible officer/insider is non-dischargeable if the insider files a personal bankruptcy. *See, e.g.* DeChiaro v. New York State Tax Comm'n, 760 F.2d 432 (2d Cir. 1985) (state sales tax obligation was a trust fund tax obligation and was non-dischargeable); Matter of Taylor, 132 F.3d 256 (5th Cir. 1998) (personal liability of responsible

officers for pecuniary loss penalties due to IRS for unpaid trust fund taxes is non-dischargeable in the officers' personal bankruptcy); In re Thomas, 222 B.R. 742 (Bkrtcy. E.D. Pa.1998) (IRS's claim under pecuniary loss penalty statute imposing personal liability against responsible officers for unpaid trust fund taxes was a non-dischargeable obligation of the officer); In re Mosbrucker, 220 B.R. 656 (Bkrtcy. D. N.D. 1998) (same); Malcuit v. State of Texas, 134 B.R. 185 (N.D.Tex. 1991) (trust fund tax provision of Bankruptcy Code excepts from discharge taxes required to be collected from third-parties); In re St. Hilaire, 135 B.R. 186 (D. Mass. 1991) (trust fund taxes, including employment taxes the employer must withhold from the employees' wages, such as income and FICA, are never subject to discharge in bankruptcy).