

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
APRIL 2013**

I. ADMINISTRATIVE LAW:

- A. Kentucky Southern Coal Corporation v. Kentucky Energy and Environment Cabinet, Etc.**
[2010-SC-000029-DG](#) April 25, 2013

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. Abramson, Cunningham and Noble concur. Scott, J., dissents by separate opinion in which Venters, J., joins. Keller, J., not sitting. The Kentucky Energy and Environment Cabinet denied Kentucky Southern Coal Corporation's application to renew its surface and underground coal mining permit because a bona fide dispute existed over KSCC's right of entry to 18.1 acres within the permit boundaries. The Court of Appeals affirmed the trial court, which held that the Cabinet properly denied KSCC's renewal application. The Court agreed that a bona fide property dispute exists, which the Cabinet had no legal authority to adjudicate. Accordingly, the Court affirmed the Court of Appeals because the Cabinet did not err in denying KSCC's renewal permit.

II. APPELLATE PROCEDURE:

- A. Michael Joseph Flick v. The Estate of Christina Wittich**
[2010-SC-000664-DG](#) April 25, 2013

Opinion of the Court by Justice Abramson. Minton, C.J.; Cunningham, Scott, Venters, JJ., Frank D. McCartney, Special Justice, and Thomas W. Miller, Special Justice, concur. Keller and Noble, JJ., not sitting. Michael Flick filed a notice of appeal of a multi-million dollar wrongful death judgment. In the notice, Flick named "The Estate of Christina Wittich" as a party to the appeal. The Court of Appeals dismissed the appeal for failing to name the co-administrators of the estate in the notice of the appeal. The Supreme Court concluded that naming "The Estate of Christina Wittich" was sufficient to confer jurisdiction upon Court of Appeals over the co-administrators, to provide the parties fair notice of the appeal, and to identify parties to the appeal.

III. COUNTY ROADS:

- A. Harold Whitley, et al. v. Robertson County; Robertson County Fiscal Court; Maryanna Robinson**
[2011-SC-000612-DG](#) April 25, 2013

Opinion of the Court by Justice Venters. Minton, C.J.; Abramson, Cunningham, Noble, and Scott, JJ., concur. Keller, J., not sitting. Questions Presented – 1) may

a KRS 178.100 appeal be taken from an action of a county fiscal court that simply reasserts the county's ongoing belief that a certain road is a county road; 2) is a declaratory judgment action the proper means for challenging whether a roadway was properly incorporated into the county road system; and 3) does a fiscal court have original jurisdiction over an action concerning whether a disputed passway has previously lawfully been incorporated into the county road system? Held - 1) the fiscal's court's action of reaffirming its ongoing legal position that a roadway in question is a "county road" was not the kind of action that may be appealed under KRS 178.100; 2) a declaratory judgment action is the proper means by which the legal stature of a roadway may be challenged; and 3) a fiscal court does not have original jurisdiction over an action concerning whether a disputed passway has previously lawfully been incorporated into the county road system.

IV. CRIMINAL

A. **Stephon Newcomb v. Commonwealth of Kentucky**
[2009-SC-000726-MR](#) **April 25, 2013**

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. Abramson, Noble, and Scott, JJ., concur. Cunningham, J., dissents by separate opinion in which Venters, J., joins. Venters, J., dissents by separate opinion in which Cunningham, J., joins. Keller, J., not sitting. A circuit court jury convicted Stephon Newcomb of two counts of first-degree rape, first-degree criminal trespass, and intimidating a participant in a legal proceeding. The charges against Newcomb involved two separate allegations of rape by two female victims. The Court affirmed Newcomb's convictions and sentences, holding that (1) the trial court properly denied Newcomb's motion for separate trials; (2) Newcomb was not entitled to a directed verdict on one of the rape charges; (3) the trial court properly denied Newcomb's Batson motion; (4) the trial court did not violate Newcomb's constitutional rights by excluding evidence and limiting cross-examination; (5) the prosecutor's voir dire questions and closing argument did not result in palpable error; and (6) the parole restrictions of the Violent Offender Statute apply to Newcomb, who was a youthful offender.

B. **Jeffrey L. Hale v. Commonwealth of Kentucky**
[2011-SC-000115-DG](#) **April 25, 2013**

Opinion of the Court by Justice Abramson. Minton, C.J; Keller, Noble, Scott, and Venters, JJ., concur. Cunningham, J., not sitting. A jury found Hale guilty of first-degree unlawful transaction with a minor for his having induced a fourteen-year-old girl to have intercourse with him. Rejecting Hale's contention that he should at most have been charged with third-degree rape, the Court of Appeals affirmed. Upholding that affirmance, the Supreme Court held (1) that KRS 530.064, the first-degree unlawful transaction with a minor statute, is not limited to cases in which the minor has been induced to commit a crime, and (2) that Hale's prosecutor was not guilty of misconduct.

**C. Mark Stinson v. Commonwealth of Kentucky
2011-SC-000615-DG April 25, 2013**

Opinion of the Court by Justice Scott. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. Keller, J., not sitting. Appellant, Mark Stinson, was indicted for first-degree sexual abuse under KRS 510.110(1)(d) and subsequently entered a conditional Alford guilty plea while reserving his right to appeal the trial court's judgment. The Court of Appeals affirmed the trial court's decision and the Kentucky Supreme Court granted discretionary review. Appellant made three arguments in support of his appeal: (1) that "lack of consent" is an element of first degree sexual abuse under KRS 510.110(1)(d), (2) that KRS 510.110(1)(d) is unconstitutionally vague, and (3) that KRS 510.110(1)(d) is unconstitutionally overbroad. The Kentucky Supreme Court held that: (1) "lack of consent" can be demonstrated by the fact that the victim was under the age of 18 and was subjected to sexual contact by a person in a position of authority or special trust with whom he or she came into contact as a result of that position, and that the Commonwealth need not prove any additional lack of consent; (2) Appellant lacked standing to challenge the statute based on vagueness, but even if he had standing, the statute in question contained sufficient definiteness to put those targeted by the statute on notice and not encourage arbitrary or discriminatory enforcement; and (3) Appellant also lacked standing to challenge the statute based upon overbreadth, but even if he had standing, the statute sufficiently defines position of special authority or trust such that a person in a position of special authority or trust is aware of what conduct he or she is prohibited from engaging in. Therefore, the Kentucky Supreme Court affirmed Appellant's conviction and sentence.

**D. Timothy Scott Meskimen v. Commonwealth of Kentucky
2011-SC-000709-MR April 25, 2013**

Opinion of the Court by Justice Scott. Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur. Keller, J., not sitting. Appellant, Timothy Scott Meskimen, was found guilty of first-degree manslaughter, first-degree tampering with physical evidence, third-degree alcohol intoxication, and third-degree criminal trespass by a Fayette Circuit Court Jury. For these crimes, Appellant received a twenty-five year prison sentence, which he now appeals as a matter of right, Ky Const. §110(2)(b), alleging that the trial court erred by: (1) allowing the use of Appellant's coerced statements in violation of his constitutional rights, (2) failing to suppress the evidence of subsequent statements made during his hospitalization, (3) denying his motion to suppress evidence of hair comparisons, and (4) summarily imposing a consecutive six-month sentence for indirect contempt. The Kentucky Supreme Court held that: (1) Appellant's statements were not the result of police coercion and were voluntarily made, as a request to go to the hospital was not found to be a "clear and unequivocal" invocation of his Fifth Amendment rights; (2) hospitalization for the treatment of a head injury is the exact type of extraordinary circumstance which *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), allows for a delay in the 48 hours for a probable cause hearing, and therefore admission statements

made to the police in the hospital are admissible, (3) no Daubert hearing was required prior to the admittance of microscopic hair analysis evidence as this type of evidence has been admissible in the state of Kentucky for many years, and a court may take judicial notice of its acceptability as a scientific method . . . however, the Kentucky Supreme Court did note that this is not a rule that is “set in stone,” and thus is subject to change with scientific discovery, and (4) the trial court did abuse its discretion when it held Appellant in direct contempt of court and imposed a consecutive six-month sentence. For these reasons, the Kentucky Supreme Court affirmed Appellant’s conviction and sentence.

**E. Amanda Johnson v. Commonwealth of Kentucky
2011-SC-000365-MR April 25, 2013**

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson and Venters, JJ., concur. Cunningham, J., concurs in part and dissents in part by separate opinion in which Scott, J., joins. Keller, J., not sitting. Appellant was convicted of murder and first-degree criminal abuse. On appeal, she claimed that her first-degree criminal abuse conviction violated her right to a unanimous verdict under the Kentucky Constitution. At trial, the Commonwealth introduced evidence of two possible instances of criminal abuse by Appellant against her two-year old son prior to his death, but charged only one count.

The Court held that Appellant’s conviction for first-degree criminal abuse violated her right to a unanimous verdict, and thus the trial court committed palpable error. In order for a verdict to be unanimous, all jurors must believe that the defendant committed the exact same criminal act.

**F. Troy Kingrey v. Commonwealth of Kentucky
2010-SC-000784-MR April 25, 2013**

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. Abramson, Noble, and Venters, JJ., concur. Cunningham, J., concurs, in part, and dissents in part, by separate opinion in which Scott, J., joins. Keller, J., not sitting. A circuit court jury convicted Troy Kingrey of one count of use of a minor under the age of 16 in a sexual performance and six counts of use of a minor under the age of 18 in a sexual performance. Kingrey contended that the trial court should have granted a mistrial after the erroneous admission of testimony. The Court held that the trial court did not abuse its discretion in denying Kingrey’s motion for a mistrial because admission of the improper statement was harmless. Kingrey also argued that a jury instruction denied him a unanimous verdict. The instruction for use of a minor under the age of 18 in a sexual performance as to victim Sophia required the jury to find that Kingrey committed the crime between January 1, 2007, and May 31, 2008. This time frame included two distinct acts that constituted the crime, and the instruction did not require the jury to specify of which criminal act it found Kingrey guilty. The Court held that the instruction violated Kingrey’s right to a unanimous jury verdict. Accordingly, the Court reversed Kingrey’s conviction and sentence for use of a minor under the age of 18 in a sexual

performance as to victim Sophia and remanded for further proceedings. The Court affirmed the remainder of Kingrey's convictions and sentences.

G. Garr Keith Hardin, et al. v. Commonwealth of Kentucky
2011-SC-000722-TG **April 25, 2013**

Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellants were convicted of murder in 1995, and both sentenced to life imprisonment. In 2009, Appellants, represented by the Innocence Project, sought release of evidence (namely, unidentified hairs found in the victim's hand) for DNA testing not available at the time of trial, with testing to be paid for by the Innocence Project. Trial court denied Appellants' motions for release of the evidence. Held: Appellants entitled to DNA testing. Appellants were convicted based on highly circumstantial evidence, and outcome of DNA test if favorable would meet standard for granting new trial. Evidence admitted into criminal trials belongs to the Commonwealth of Kentucky, not to the Commonwealth's Attorney.

H. Francisco Gilberto Rodriguez v. Commonwealth of Kentucky
2012-SC-000049-MR **April 25, 2013**

Opinion of the Court by Justice Scott. Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. Minton, C.J., Abramson, Noble, and Venters, JJ., concur. Cunningham, J., concurs in part and dissents in part by separate opinion. Keller, J., not sitting. Appellant, Francisco Gilberto Rodriguez, was found guilty of Class A felony incest by a Christian Circuit Court jury. For these crimes, Appellant received a sentence of thirty years' imprisonment and appealed his sentence as a matter of right, Ky. Const. § 110(2)(b), alleging that: (1) the trial court erred by failing to grant his motion for a directed verdict because there was insufficient evidence of the victim's age at the time of the offense, (2) the trial court issued erroneous jury instructions, and (3) retrial of the incest charge would violate his rights guaranteed by the Fifth Amendment's Double Jeopardy Clause. After reviewing the evidence in the light most favorable to the Commonwealth, the Supreme Court found sufficient evidence to support the victim's age at the time of the sexual intercourse began, and thus denied Appellant's motion for a directed verdict. However, the Supreme Court reversed Appellant's conviction, given that the jury instructions failed to require a unanimous determination beyond a reasonable doubt that the victim was under the age of twelve at the time of the offense. The Supreme Court further held that Appellant's retrial for Class A felony incest is not proscribed by the Fifth Amendment's Double Jeopardy Clause, as the jury's conviction based on erroneous instructions does not operate as an implied acquittal.

V. EDUCATION LAW:

A. Board of Education of Fayette County, Kentucky et al. v. Roslind Hurley-Richards
2011-SC-000599-DG **April 25, 2013**

Opinion of the Court by Justice Venters. Minton, C.J.; Abramson, Cunningham, Noble, and Scott, JJ., concur. Keller, J., not sitting. Statutory Interpretation, Administrative Law; Questions presented: 1) Whether an administrative hearing tribunal for the public schools has exclusive authority to determine what constitutes “conduct unbecoming a teacher,” pursuant to KRS 161.790(1)(b); 2) Whether the trial court erred by misinterpreting the Tribunal’s findings of fact and substituting its own judgment; 3) Whether the Court of Appeals improperly applied the rules of statutory interpretation in defining the meaning of “conduct unbecoming a teacher”; 4) Whether a teacher’s conduct in forcibly guiding a student to the principal’s office is “conduct unbecoming a teacher”; and 5) Whether a reviewing court must remand the matter to the Tribunal for a findings of fact and conclusions of law determination in light of a newly created standard for the meaning of “conduct unbecoming a teacher.” Held: 1) Matters of statutory interpretation are matters of law for the courts and therefore a reviewing court is not bound by the Tribunal’s interpretation of a statute; 2) The trial court did re-interpret the findings of fact of the Tribunal, however on judicial review deference will be given to the Tribunal’s findings of fact; 3) The Court of Appeals improperly found the phrase “conduct unbecoming a teacher” to be ambiguous and therefore misapplied the rules of statutory interpretation; 4) A teacher’s conduct arises to the level of conduct unbecoming a teacher if it is unsuitable, indecorous, or improper of a teacher so that it offends the sensibilities of a reasonable person under the circumstances; and 5) Remanding to the Tribunal for a new hearing to determine the findings of facts and conclusions of law is not necessary when the Tribunal’s findings of facts has been fully accepted and applied to the law by a reviewing court.

VI. JUVENILE LAW:

A. N.C., a Child under Eighteen v. Commonwealth of Kentucky 2011-SC-000271-DG April 25, 2013

Opinion of the Court by Justice Noble Reversing and Remanding. Minton, C.J.; Abramson, Cunningham, Keller, Noble, Scott and Venters, JJ., sitting. Minton, C.J.; Abramson, Noble and Keller, JJ., concur. Abramson, J., also concurs by separate opinion in which Minton, C.J., joins. Cunningham, J., dissents by separate opinion in which Venters, J., joins. Venters, J., dissents by separate opinion in which Cunningham and Scott, JJ., join.

Appellant, a 17-year-old high school student, was questioned at school by the school’s principal in the presence of a deputy sheriff assigned as a School Resource Officer about the discovery of a prescription pill bottle with his name on it. Appellant was not given Miranda warnings prior to questioning and, based on information obtained during questioning, was charged with possessing and dispensing a controlled substance. Appellant moved to have his statements suppressed because he was not given Miranda warnings, but that motion was denied and Appellant entered a conditional guilty plea.

The Court held that the statements should have been suppressed because he was

entitled to Miranda warnings before being questioned by a school official in the presence of a law enforcement officer, when he was subject to criminal charges or adult felony charge.

VII. SOVEREIGN IMMUNITY:

A. Commonwealth of Kentucky v. Kentucky Retirement Systems, et al. 2010-SC-000809-DG April 25, 2013

Opinion of the Court by Justice Noble. Cunningham, Scott and Venters, JJ., concur. Minton, C.J.; and Abramson, J., concur in result only. Keller, J., not sitting. Appellees filed an action seeking a declaration that KRS 61.637(1) is unconstitutional, and named Kentucky Retirement Systems and the Commonwealth as defendants. The Commonwealth, through the Attorney General, moved to dismiss on sovereign immunity grounds maintaining its sovereign immunity is not waived in declaratory judgment actions. The trial court denied the Commonwealth's motion to dismiss, holding that sovereign immunity does not bar a declaratory judgment action because such an action does not result in a loss of public funds or property. The Court of Appeals affirmed and this Court granted discretionary review.

The Court held that the Commonwealth waived its sovereign immunity in a declaratory judgment action because the Kentucky Retirement Systems is an “arm, branch or alter ego” of the Commonwealth. Further, the Court held that sovereign immunity does not apply to declaratory judgment actions and that it is not necessary to specifically name the Attorney General in actions against the Kentucky Retirement Systems.

VIII. WORKERS' COMPENSATION:

A. Kentucky Uninsured Employers' Fund v. Julian Hoskins, et al. 2012-SC-000008-WC April 25, 2013

Opinion of the Court. All sitting; all concur. The Uninsured Employers' Fund appealed from a decision which held that injured worker, Julian Hoskins, was not covered under an insurance policy issued by KEMI. The fact pattern in this matter is somewhat complicated. Hoskins was hired as a truck driver by Four Star Transportation. Four Star then allegedly entered into an employee leasing scheme where Hoskins would be considered an employee of a corporation named Better Integrated. Better Integrated, then allegedly leased Hoskins to another corporation named Beacon Enterprises. Beacon was the holder of the KEMI policy in question. Beacon then purportedly leased Hoskins to Four Star. Hoskins testified that he had no idea that Better Integrated or Beacon existed, and considered his only employer to be Four Star. Hoskins was injured while working for Four Star.

The ALJ found that Hoskins was covered under the KEMI policy because there was evidence that KEMI knew Beacon was an employee leasing company and the

policy listed the location of Four Star's office as one of Beacon's worksites. However, the Board reversed the ALJ, finding that there was insufficient evidence that KEMI knew Beacon was leasing employees to Four Star. Further, the Board found that according to the loaned employee doctrine, Hoskins could not be considered an employee of Beacon because he was unaware it even existed. The Court of Appeals affirmed the Board.

The Board and Court of Appeals decided this matter correctly. Hoskins could not have entered into a contract for hire with Beacon because he did not know that entity existed. See KRS 342.640(1); *Rice v. Conley*, 414 S.W.2d 138, 141 (Ky. 1967). As explained in *Lawson's Workers' Compensation*, under the loaned employee doctrine a leasing agreement cannot exist if the employee did not consent to be the employee of an entity. Therefore, Hoskins cannot be covered under the KEMI policy, because it only covered those who were employed by Beacon. Further, the only evidence presented to support the existence of an employee leasing agreement was the self-serving testimony of the owners and directors of the companies involved.

B. Commonwealth of Kentucky, Uninsured Employers' Fund v. Christopher Allen, Sam An Tonio's, et al.
[2012-SC-0000099-WC](#) **April 25, 2013**

Opinion of the Court. All sitting; all concur. Allen was injured while lifting a kettle off of a stove at a now defunct restaurant, Sam An Tonio's. Allen received a settlement from an entity named Crawford & Company as a result of his lower back injury. Several years after the settlement became final, Allen filed a motion to reopen his workers' compensation claim because his physical condition had worsened. After the ALJ determined that Crawford was not a workers' compensation insurer, the UEF was added as a party to the claim, even though it had been dismissed from the original action. The ALJ ultimately found that Allen provided sufficient evidence that his physical condition had worsened, and the claim was reopened. The Workers' Compensation Board and Court of Appeals affirmed the sections of the ALJ's decision pertinent to this appeal.

The UEF appealed several aspects of the reopening of Allen's claim. First, the UEF contended that Allen did not present a prima facie case that his medical condition worsened since the finality of his original settlement. However, the record clearly shows that Allen included with his motion to reopen the medical records from his current treating physician, MRI records showing increased degeneration in his lower back, and a personal affidavit outlining his current disabilities.

As a sub issue to the reopening of Allen's claim, the UEF contended that it should not have been joined as a party because it was originally dismissed from the original claim. Yet, KRS 342.780 allows the UEF to be joined as a party to a proceeding once it has been determined that the defendant employer is uninsured. See *Brown & Williamson Tobacco Corp. v. Harper*, 717 S.W.2d 502 (Ky. App. 1986).

Second, the UEF argued that the ALJ erred by finding that Allen's physical condition had actually worsened. The ALJ based his decision on a comparison of the doctors' reports produced at the time of Allen's injury with the reports produced at the time Allen sought to reopen his claim. The ALJ's finding of a worsened condition was supported by the evidence.

IX. ATTORNEY DISCIPLINE:

**A. Kentucky Bar Association v. Donald H. Morehead
2012-SC-000401-KB April 25, 2013**

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ, concur. Keller, J., not sitting. The Board of Governors considered Morehead's conduct in five separate disciplinary actions and found that he had violated SCR 3.130-1.1 (failure to completely represent a client); SCR 3.130-1.3 (failure to act with reasonable diligence); SCR 3.130-1.4(a)(4) (failure to comply with court order; failure to comply with reasonable requests for information); SCR 3.130-1.16(d) (failure to return an unearned fee); SCR 3.130-3.4(c) (failure to maintain a current Bar roster address); SCR 3.130-4.4(a) (using means that have no substantial purpose other than to burden a third party); SCR 3.130-5.5(a) (engaging in the unauthorized practice of law); SCR 3.130-8.1(b) (failure to respond to a lawful demand from the disciplinary authority); SCR 3.130-8.4(c) (engaging in conduct involving fraud, dishonesty, deceit or misrepresentation).

Based on these violations and Morehead's prior disciplinary record, including a five-year suspension, the Board unanimously recommended that Morehead be permanently disbarred from the practice of law and further recommended that he be required to pay restitution to his clients in the amount of \$17,557.85. The Court found Morehead guilty of all charges and permanently disbarred him from the practice of law. Citing SCR 3.380 and its opinion in *Kentucky Bar Association v. Chesley*, 2011-SC-000382-KB, slip-op. at 36 (Ky. Mar. 21, 2013), the Court declined to order restitution.

**B. Kentucky Bar Association v. Maria A. Fernandez
2012-SC-000471-KB April 25, 2013**

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., concur. Keller, J., not sitting. Fernandez faced seven counts of alleged misconduct as a result of her representation of an estate. Five of the heirs of the estate had previously filed suit against Fernandez, eventually resulting in a Court of Appeals opinion, which concluded that Fernandez breached her fiduciary duty to the estate, that she improperly served as executrix and attorney for the estate, and that her fees of \$175,000 were excessive.

Of the seven charges, the Trial Commissioner found Fernandez guilty of four and recommended suspension from the practice of law for ninety-one days, with sixty-one days probated for one year on the condition that Respondent complete the

KBA's Ethics and Professional Enhancement Program (EPEP). In contrast, the Board found Fernandez guilty of two of the seven charges and recommended a public reprimand and attendance and successful completion of EPEP.

Bar Counsel sought review before the Supreme Court and argued that Fernandez should be found guilty of all seven original counts and that she should be publicly reprimanded and suspended for ninety-one days, with thirty days probated for a year pending completion of EPEP. Fernandez argued that the Trial Commissioner improperly applied the doctrine of collateral estoppel based on the previous Court of Appeals decision and excluded evidence that would support the impositions of a private reprimand rather than a public reprimand.

The Court concluded that collateral estoppel precluded its reconsideration of issues that were litigated and decided by the Court of Appeals. Applying collateral estoppel to those issues and upon its review of the record, the Court found Fernandez guilty of five ethical violations: SCR 3.130-1.2 (acting upon a matter without the client's authority); SCR 3.130-1.5(a) (charging an unreasonable fee); SCR 3.130-1.8(f) (accepting compensation from someone other than a client); SCR 3.130-3.3(a)(2) (failure to disclose a material fact to a tribunal); and SCR 3.130-8.3(c) (engaging in conduct involving fraud, dishonesty, deceit or misrepresentation). The Court agreed with the penalty recommended by the Trial Commissioner and suspended Fernandez from the practice of law for ninety-one days, with sixty-one days probated for one year pending her completion of EPEP within one year.

**C. Kentucky Bar Association v. Jeffrey M. Blum
2012-SC-000825-KB April 25, 2013**

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., sitting. All concur. Keller, J., not sitting. The Board of Governors found Blum guilty of four counts of professional misconduct stemming from Blum's nearly decade-long handling of a teacher-termination dispute, which was litigated in various state and federal forums. Blum's course of conduct consisted of consistent personal attacks against opposing counsel and the court; bombastic threats and arguments; allegations that hearings had been "rigged" and his client "framed;" and vexatious litigation resulting in unnecessary expense and delay. During the handling of the case, the U.S. District Court for the Eastern District of Kentucky sanctioned Blum for improper conduct. Blum appealed the sanction to the U.S. Court of Appeals for the Sixth Circuit, which affirmed the sanctions.

The Inquiry Commission issued a five-count charge against Blum alleging, among other things, violations of SCR 3.130-3.4(c); SCR 3.130-3.4(f); SCR 3.130-3.5(c); SCR 3.130-3.1; and SCR 3.130-8.2(a). Blum filed a response to the charge and a hearing followed before a trial commissioner. Before the hearing, the trial commissioner granted the KBA's motion to apply collateral estoppel, preventing Blum from relitigating the matters that had been litigated in the U.S. District Court and the Sixth Circuit Court of Appeals. After hearing the evidence, the trial commissioner found Blum guilty of four of the five counts in the Inquiry

Commissions charge, specifically SCR 3.130-3.4(c); SCR 3.130-3.4(f); SCR 3.130-3.5(c); and SCR 3.130-8.2(a). The Board of Governors unanimously adopted the Trial Commissioner's report and recommended a 181-day suspension from the practice of law.

Blum appealed to the Supreme Court, which found him guilty of three of the remaining four counts (SCR 3.130-3.4(f); SCR 3.130-3.5(c); and SCR 3.130-8.2(a)). The Court suspended Blum from the practice of law for 181 days and ordered, pursuant to SCR 3.510(1), that Blum undergo a review by the Character and Fitness Committee before resuming practice. The Court further ordered Blum to attend the KBA Ethics and Professionalism Enhancement Program and to undergo an evaluation by the Kentucky Lawyer's Assistance Program.

**D. Kentucky Bar Association v. Clifford Alan Branham
2013-SC-000028-KB April 25, 2013**

Opinion of the Court. All sitting; all concur. Branham was suspended from the practice of law in December 2009 for nonpayment of a late fee for his dues payment. His application for reinstatement was denied and he remained suspended. Thereafter, a disciplinary complaint was filed alleging that Branham had failed to return \$1,000 that was being held in escrow at his title company business. Branham responded by acknowledging that the money needed to be repaid. The Inquiry Commission subsequently charged Branham with violating SCR 3.130-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). Branham did not file an answer to the charge.

The Board of Governors reviewed the allegations against Branham, taking into consideration his suspension for non-payment of bar dues and a prior private admonition for violating SCR 3.130-8.4(c) in September 2012. The Board recommended the suspension of Branham's license to practice law for a period of sixty days, together with restitution in the amount of \$1,000. After reviewing the record and the relevant law, the Court adopted the Board's recommendation and suspended Branham from the practice of law for sixty days and ordered him to pay \$1,000 in restitution.

**E. Kentucky Bar Association v. D. Anthony Brinker
2013-SC-000046-KB April 25, 2013**

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., concur. Keller, J., not sitting. The Board of Governors of the Kentucky Bar Association recommended that this Court suspend D. Anthony Brinker from the practice of law for violating Supreme Court Rule ("SCR") 3.130-5.5(a) (practicing law in violation of a regulation of that jurisdiction and SCR 3.130-8.1(b) (knowingly failing to respond to a lawful demand for information from an admissions or disciplinary authority). Brinker was suspended from the practice of law by this Court on October 21, 2010 for violation of a Supreme Court Order requiring him to pay a \$750.00 fine for failure to comply with CLE requirements. Prior to his suspension, Brinker agreed to

represent a client in a personal injury case. He then communicated with an insurance representative about the case without informing the representative that he had been suspended from the practice of law. Despite being served with the Inquiry Commission's complaint and charge, Brinker failed to respond to the complaint in violation of SCR 3.130-8.1(b). This Court ordered Brinker to serve a one-year suspension to run consecutively with his two previous one-year suspensions.

**F. Kentucky Bar Association v. William Nisbet, IV
2013-SC-000047-KB April 25, 2013**

Opinion of the Court. All sitting; all concur. Nisbet became subject to an emergency suspension in November 2011 when he pleaded guilty to first-degree trafficking in a controlled substance. In May 2012, the Inquiry Commission issued a two-count charge against Nisbet for violating SCR 3.130-1.5(f) (failure to put non-refundable retainer fee in writing) and 3.130-1.16(d) (failure to refund fee or expense that has not been earned or incurred). A second, two-count charge was issued against Nisbet in June 2012 for violating SCR 3.130-8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer) and 3.130-8.1(b) (failure to respond to disciplinary complaint). The Board found Nisbet guilty of violating SCR 3.130-8.4(b) and 3.130-8.1(b) and recommended a one-year suspension, retroactive to the date of the emergency suspension. The Board also recommended that Nisbet register with KYLAP and agree to five years of monitoring. The Court adopted the decision of the Board relating to all matters, suspending Nisbet from the practice of law for one year, retroactive to November 2011 and ordering him to immediately register with KYLAP.

**G. Geoffrey Miller v. Kentucky Bar Association
2013-SC-000104-KB April 25, 2013**

Opinion of the Court. Minton, C.J.; Abramson, Cunningham, Noble, Scott and Venters, JJ., concur. Keller, J., not sitting. Miller moved the court to impose the sanction of suspension for thirty days, probated for three years, subject to conditions, based on his actions following his arrest for DUI, possession of an open alcoholic beverage in a vehicle, and leaving the scene of an accident. Miller was released on his own recognizance but failed to appear for his arraignment the following day, in violation of SCR 3.130-3.4(c). Upon review of the record and applicable law, the Court agreed that the proposed sanction was appropriate and suspended Miller from the practice of law for a period of thirty days, probated for a period of three years, on the condition that Miller continue to participate in KYLAP.

**H. Daniel Warren James v. Kentucky Bar Association
2013-SC-000152-KB April 25, 2013**

Opinion of the Court. All sitting; all concur. James moved the Court to resolve nine pending disciplinary proceedings pending against him by imposing a

sanction of suspension from the practice of law for five years, with conditions. James admitted the majority to the majority of the violations contained in the charges pending against him and cited his diagnosis with bipolar disorder as a contributing factor to his conduct. The Court considered the proposed negotiated sanction and James' previous discipline, which included two private admonitions, and concluded that suspension from the practice of law for five years, with conditions, was the appropriate sanction. The conditions of James' suspension included payment of restitution to his former clients and evaluation and ongoing monitoring by KYLAP regarding his treatment, including medication and therapy.