The Advocate
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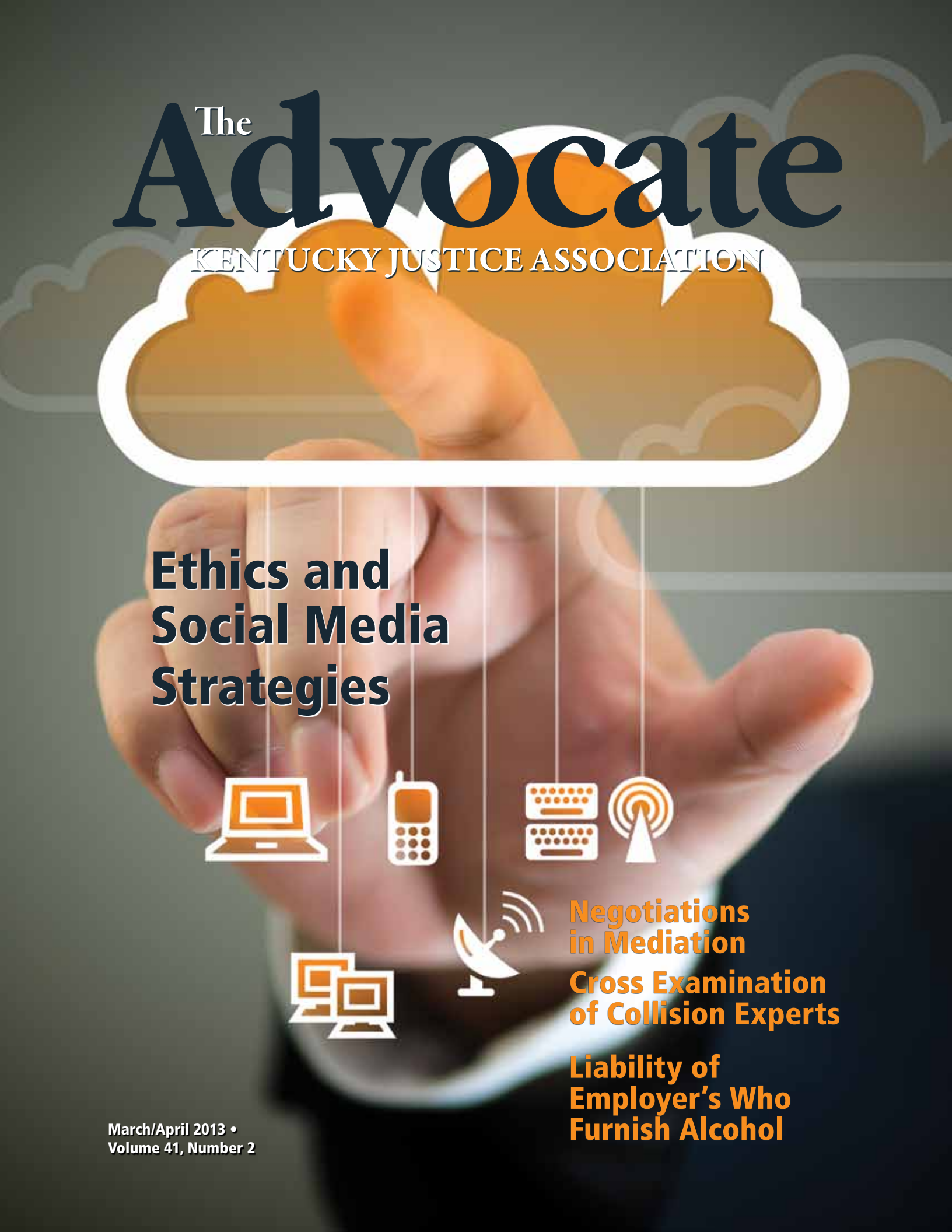

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Liability of Employer's Who Furnish Alcohol

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By Justin Lawrence

Liability for Employers Furnishing Alcohol to Employees

A prospective new client contacts you from the hospital. In December, he was in a catastrophic wreck accident and is still treating for his injuries. He knows the other driver was drunk and had crossed into oncoming traffic at the time of the wreck, but little else. After a thorough investigation, you find that the driver just left his employer's Christmas party where the employer paid a third party for an open bar, free of charge to employees. The employees at the Christmas party served themselves; none of the third party venue's employees handled alcohol. The driver had gotten no more than a quarter mile from the Christmas party before the collision occurred. Unfortunately, the driver did not have automobile insurance at the time of the collision, does not have any significant assets and has been fired due to the incident. You have found no other causative factors related to your client's injuries.

A Gap in Liability

It is axiomatic that the other driver is liable for your new client's injuries, but the inability to achieve fair compensation for your client makes that a dry well. Had the other driver been served at a bar by the employees of the bar, liability would exist by statute. However, this employer was not selling the alcohol it had bought.

A gap exists between a pure social host, who allows guests to drink his or her alcohol for no pecuniary benefit, and a pure alcohol retailer, who exists in whole or part to sell alcohol for a profit. As shown in the hypothetical above, there are some situations where a company will provide alcohol to advance its business interests—i.e., to boost employee morale and retention via a holiday party—but does not derive direct pecuniary benefit from the alcohol served. In doing so, the company becomes neither social host nor alcohol retailer but a third category that is not currently recognized by Kentucky law. We thus have an issue of law that fundamentally determines where the line between the liable and the non-liable should be drawn, and which could affect our clients and our practices for years to come. Although Kentucky's case law has touched on this issue, it has attempted to wrap such situations into the definition of social host and has generally rendered unfavorable decisions as a result.

The Current (But Abbreviated) State of Case Law Nationwide

Nationwide, case law on similar facts is sparse and conflicting, creating a minefield for the practitioner. A few states have expressly recognized a cause of action for the hypothetical facts given above. In the excellently written *Chastain v. Litton Systems, Inc.*, the Fourth Circuit Court of Appeals held that North Carolina law supported a cause of action against an employer under precisely this scenario.[1] In *Chastain*, a Litton employee had attended a company Christmas party that carried on throughout the workday, while employees were on the clock.[2] The employee drank and became intoxicated at the party, left, and then struck Chastain's vehicle some time later.[3] The court held that there was a difference between a social host and a business providing alcohol to advance its business interests and that Litton's categorization presented a jury question.[4] The court further held that Litton did not properly present a defense by showing that its employee was not within the scope of his employment at the time the collision occurred, stating that Litton's relationship with the employee when he became intoxicated was the appropriate time in which to determine this relationship.[5] Ultimately, the case was returned to the lower court for a trial on the merits.[6]

Washington State also handed down good case law in two similar cases, *Dickinson v. Edwards*[7] and *Halligan v. Pupo*,[8] each of which involved an employee leaving an office Christmas party after becoming drunk on employer-provided alcohol and causing a motor vehicle collision while intoxicated. In *Dickenson*, the Washington Supreme Court specifically separated employer hosted events from purely social settings, and stated that it was not a defense that a third party venue made a profit from selling the alcohol if the employer purchased the alcohol for the employees, as

"furnishing" in any manner satisfied the action.[9] Further, the *Dickinson* court held that "the relevant inquiry is who had the authority to deny further service of alcohol when intoxication became apparent."[10] *Dickinson* agreed with *Chastain* that vicarious liability could lie with the employer in addition to direct liability if the proximate cause of the motor vehicle collision—i.e., the employee's intoxication—occurred within the scope of employment.

The sixth circuit has been less kind in similar cases. In Ohio, a court of appeals upheld a lower court's summary judgment for the defendant where employees of Roach, Inc. attended an annual picnic, became intoxicated and collided with an automobile in which Baird was a passenger.[11] The *Baird* court rejected the idea that attendance at the company picnic constituted scope of employment for vicarious liability purposes, and further stated that the complaint did not sufficiently allege that Roach had served its employees while they were obviously intoxicated even if the Court were to recognize the cause of action.[12] Michigan similarly restricted this cause of action in a case where an employee of Plum Hollow Golf Club collided with Millross after the employee's mandatory attendance at a social dinner.[13] The *Millross* court overturned prior case law in holding that "the special relationship between employer and employee does not of itself require the employer to protect third parties from off-premises injuries, either by supervising the consumption of alcohol or providing alternate transportation."[14] While both Ohio and Michigan left the door open to future claims for direct liability against an employer that furnished alcohol to an employee that it knew was intoxicated, the tone of these cases has a chilling effect on any court that is asked to allow a suit with similar facts to proceed.

Kentucky Case Law

Kentucky's social host case law is in a state of infancy, with only two published state cases considering social host liability outside the dram shop context, both occurring since 2011.[15] Kentucky has not yet been offered the opportunity to recognize the entity that provides alcohol for non-pecuniary business interests as a third category of alcohol provider. However, Kentucky has expanded social host liability in the last decade in ways that would assist a cause of action under the hypothetical facts above. For example, the Kentucky Supreme Court acknowledged that a

duty to control a third person might arise where "a special relationship exists between the actor and the third person," and further recognized that an employer/employment relationship qualifies in this regard.[16] The Supreme Court has further stated that drunk driving accidents are a foreseeable result of serving alcohol to intoxicated guests.[17]

Unfortunately, Kentucky's case law has made these points while refusing to find liability as a matter of law in each of the cases the appellate courts have considered. The result is often interpreted as a trend in case law that prevents fair compensation to the innocent and injured plaintiff. For example, the Eastern District of Kentucky recently considered a case where an employer, Insight Communications, held an event during business hours for wooing advertisers and vendors with whom it had a business interest.[18] At the event, Insight paid for alcohol that a third party served to both vendors and Insight's employees.[19] After the event, and after driving only two hundred feet, the Insight employee's vehicle collided with Bingham's vehicle.[20] Although this presented a clear opportunity to distinguish social hosts and traditional alcohol vendors from Insight, which was distributing free alcohol for a distinct business purpose, the federal court refused to do so. Instead, the federal court cited to Kentucky's social host law, finding no duty to provide safe transportation for intoxicated guests.[21] Even more troubling, the federal court refused to recognize vicarious liability on scope of employment grounds, despite the fact that Insight's employee had planned the event, was required to attend, and testified that she drank heavily to calm her nerves associated with socializing at the event.[22] In doing so, the federal court held that the employee's conduct related to driving home, rather than her conduct when drinking, was the time at which scope of employment was to be measured, rejecting *Chastain*. This approach, if adopted at the state level, would considerably restrict the practitioner's ability to pursue justice because it fails to recognize imbibing alcohol as the proximate cause of an alcohol-related crash and thus, excuses the employer's negligence.

Until Kentucky state courts have the opportunity to address the liability of an employer that furnishes free alcohol to employees for business purposes, we stand at a crossroads. Outside forces are already pushing us down the wrong path—one that leads to immunity for tortfeasor employers and no recovery for the deserving, injured bystanders who happen to be nearby when the employer gets its employees drunk and turns them loose on our communities. If a case like this walks into your office, be aware and be wary of the case law so your complaint and discovery will allow your claim to survive under the logic of each of the courts that have rendered opinions on this issue.

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1 694 F.2d 957 (4th Cir. 1982)
2 *Id* at 959.
3 *Id.*
4 *Id* at 960.
5 *Id* at 962.
6 *Id*. This case is more thorough than discussed here, and is worth a read.
7 716 P.2d 814 (Wa. 1986)
8 678 P.2d 1295 (Wa. 1984)
9 716 P.2d 814, 819 (Wa. 1986)
10 *Id.*
11 *Baird v. Roach*, 462 N.E.2d 1229 (Oh. App. 1983)
12 *Id* at 1233-1234.
13 *Millross v. Plum Hollow Golf Club*, 413 N.W.2d 17, 18 (Mich. 1987)
14 *Id* at 25.
15 *See Martin v. Elkins*,—S.W.3d—, No. 2011-CA-862-MR, 2012 WL 3762419 (Ky. App. Aug. 31, 2012) and *Wilkerson v. Williams*, 336 S.W.3d 919 (Ky. App. 2011)
16 *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 852 (Ky. 2005).
17 See *Martin v. Elkins*, *supra*.
18 See *Bingham v. Insight Communications Midwest, LLC*, 2012 WL 4867428 (E.D.Ky. 2012). Note that this author appeared at oral argument for this case but did not file the case or prepare any pleadings.
19 *Id.*
20 *Id.* The major distinguishing fact in this case is that Insight's employee asked someone else to drive her vehicle for her. The driver was not intoxicated, but also was not licensed. Thus, a superseding cause was present in this case that is not present in any other case cited in this article. It was this fact that determined foreseeability in this case.
21 *Id* at 6.
22 *Id* at 7.