

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 11-CI-119



"ABC, INC." d/b/a NATIONAL COLLEGE

PLAINTIFF

V.

OPINION AND ORDER

**COMMONWEALTH OF KENTUCKY, ex rel.
JACK CONWAY, ATTORNEY GENERAL**

DEFENDANT

This matter is before the Court on the Defendants' Motion for Sanctions pursuant to KRS 367.290 Order and CR 11. A hearing was held on October 16, 2013 at which time the Court heard arguments on Defendants' Motion. The Court previously held Defendants' Motion for Sanctions in abeyance, while the parties exchanged, reviewed, and evaluated CID responses and worked to resolve ongoing disputes concerning the adequacy of National College's production in response to the fifty CID Requests. Following the October 16 hearing on sanctions the parties filed additional pleadings related to the Family Educational Rights and Privacy Act (hereinafter "FERPA") and other issues related to the Motion for Sanctions. Both parties were represented at Motion Hour on November 4, 2013, and by Order entered this same day the Court gave the parties until November 6, 2013 to file supplemental pleadings concerning this FERPA issue, and thereafter the Court took the matter under submission.

I. Applicability of the Family Education Rights and Privacy Act to the CID

National College in its Response and at the Hearing held October 16, 2013, argues that the Family Education Rights and Privacy Act (hereinafter "FERPA") restricts National College's ability to produce information, particularly in response to CID Request No. 45. Specifically, National College argues FERPA requires that Plaintiff notify its students prior to releasing any

education records or information. However, upon review of the parties' tendered memoranda of law, the Court finds that this issue can be resolved by entry of the Protective Order tendered by the Attorney General on October 21, 2013.

The Attorney General argues that FERPA was enacted to protect "eligible students"¹ from improper use or disclosure by the educational institutions of "personally identifiable information"² contained in student records. The Attorney General argues that FERPA was enacted to protect *students* privacy; it was not enacted to protect for-profit institutions from lawful scrutiny of their business practices. Moreover, the Attorney General argues that such information can be requested and turned over so long as all personally identifiable information is removed. *Citing U.S. v. Miami U.*, 294 F.3d 797, 824 (6th Cir. 2002)("[Intervening Defendant] may still request student disciplinary records that do not contain personally identifiable information. Nothing in the FERPA would prevent the Universities from releasing properly redacted records."); *Ragusa v. Malverne Union Free School Dist.*, 549 F.Supp.2d 288, 293 (E.D.N.Y. 2008) ("First, there is nothing in FERPA that would prohibit Defendants from releasing education records that had all 'personally identifiable information' redacted Second, FERPA permits Defendants to disclose students' education records to comply with a judicial order."). Furthermore, under 34 CFR § 99.31 prior consent is not required to disclose

¹ "Eligible student" is defined as a student who has reached eighteen years of age or is attending an institution of post secondary education. 34 CFR § 99.3; 20 U.S.C. 1232g(d).

² This term is defined in 34 CFR § 99.3 and 20 U.S.C. 1232g to include:

- (a) The student's name;
- (b) The name of the student's parent or other family members;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number, student number, or biometric record;
- (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

information if “the disclosure is to comply with a judicial order or lawfully issued subpoena” or if the disclosure is in compliance with, “any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena will not be disclosed.” 34 CFR 99.31(9)(a)(i) and (9)(a)(ii)(B).

The relevant CID was plainly issued by the Attorney General for the purpose of enforcing the Kentucky Consumer Protection Act. The Attorney General posits, and this Court agrees, that the CID lawfully issued in December 2010 in and of itself constitutes a subpoena issued for a law enforcement purpose. Furthermore, KRS 367.250 directs that all information obtained through CIDs not be made public, “beyond the extent necessary for law enforcement purposes in the public interest.”

In short, National College's attempt to invoke FERPA is yet another example of a continuing pattern of meritless litigation tactics to obstruct and delay the lawful investigation of the Attorney General. While the Court is satisfied that the lawfully issued CID constituted a “subpoena issued for a law enforcement purpose,” to ensure that certain information remains confidential, the Court shall sign the Protective Order tendered by the Attorney General and filed with this Court on October 21, 2013.

II. The Adequacy of National College’s Response to the Attorney General’s CID

National College finally provided documents in response to all of the Attorney General’s CID interrogatories on August 19, 2013. While the parties did work together to resolve issues with the CID responses, at the hearing held October 16, 2013 there remained a few interrogatory responses which the Attorney General continues to argue are inadequate. These specific

responses were detailed in the Attorney General's Supplemental Memorandum in Support of the Attorney General's Motion for Sanctions, and are discussed as follows.

a. National College Entities Under Apparent Common Ownership and Control

CID Interrogatories No. 2, 5, 6, 11, 16, and 17, request information relating to "National College and any other alias, d/b/a, a/k/a or trade name used by You of Your owners, employees, agents, representatives, successors, assignees, principals, officers and directors." National College maintains that it is only required to produce documents pertaining to its *Kentucky* schools, but the Attorney General argues that because these entities are under apparent common ownership and control, the information must be divulged. The Attorney General notes that the same officers and directors who sit on the Board of National College's Kentucky entity also sit on the board of National College's other entities.³ National College of Kentucky, Inc. also owns and operates campuses in Indiana but Plaintiff refused to supply any CID response information relating to its three Indiana campuses, asserting that such information is beyond the scope of the Attorney General's authority to investigate under the Consumer Protection Act. At the hearing National College argued that information relating to National College's entities outside of Kentucky was irrelevant to the Attorney General's investigation. This Court disagrees. The Court recognizes that "National College of Kentucky, Inc." is the named party to whom the CID was issued, however the Indiana campuses are owned and operated by National College of Kentucky, Inc. and the Virginia and Tennessee entities share the same board of directors.

When businesses operate with interlocking ownership and control, the Attorney General has a valid interest in reviewing the business practices of all related entities in order to determine if the

³ National College of Kentucky, Inc.'s officers and directors also serve on the board of National College of Tennessee, Inc.; National College of Virginia, Inc.; American National University, Inc. National College of Virginia, Inc. and American National University, Inc. are both registered with the Kentucky Secretary of State as foreign corporations. See Exhibits F and G to the Attorney General's Supplemental Memorandum filed October 7, 2013.

Kentucky Consumer Protection Act has been violated, and that interlocking corporate entities are not used to shield consumer fraud from scrutiny. The Court finds that the information requested in the six identified CID questions relating to Plaintiff's "owners, employees, agents, representatives, successors, assignees, principals, officers and directors" are reasonable inquiries within the scope of the Attorney General's investigation, and the Court hereby **ORDERS** National College to turn over all such information immediately.

b. Graduate Placement Calculations and Underlying Data

The Attorney General also takes issue with National College's response to CID Request No. 45, which states "provide any statistical data You may have regarding the employment of job placement for graduates from Your school in their field of study for years 2007, 2008, 2009, and 2010." In response National College claims that it already provided the Attorney General with this information in a Fayette Circuit Court proceeding, and therefore should not have to again supply this information in response to the CID request at hand. The Attorney General maintains that his office has never been provided with information as to how National College calculates the job placement rates it advertises, which the Attorney General asserts in fact differ significantly from the rates National College reports to its accreditors. *See* Defendant's Supplemental Memorandum, Exhibits J, K, L, M, and N. The Court find it is disingenuous for National College to assert that the hard copy spreadsheets produced in Fayette Circuit in November 2012 satisfy CID Request No. 45, and where the voluminous spreadsheet data plainly was maintained in electronic format, National College (if it was acting in good faith) should have provided this information to the Attorney General months ago. National College is hereby **ORDERED** to turn over to the Attorney General any statistical data it has regarding its calculated job placement rates in electronic format immediately. The Attorney General is

entitled to this information, and if already electronically stored or maintained, National College should in good faith turn this information over in electronic format.

c. Issues with Production of Documents in Satisfaction of CID Request No. 17 and No. 25 are Moot

As to CID Request No. 17 (also noted as deficient *supra* in Section I.a.), Defendant also asserts that National College's response was incomplete because at least ten specific emails produced indicated that there were attachments thereto, but no attachments were included in Plaintiff's documents. The Attorney General did advise National College of this deficiency, but National College declined to produce these attachments as they were not materials provided to Plaintiff from an accrediting entity but rather were sent *from* National College to accrediting agencies. By a pleading filed October 21, 2013 National College informed the Court that it did search for these attachments at issue, and was unable to locate any of the requested attachments. Therefore, the Court understands there to be no further materials to produce to the Attorney General concerning these emails. The Attorney General's Supplemental Memorandum also asserts that National College failed to fully respond to CID Request No. 25, specifically failing to provide the content of a certain email with the subject "Fraudulent Credentials." National College attached this email to its Response filed October 14, 2013, which the Court understands to satisfy the Attorney General's request. *See* National College Response, Exhibit B. Accordingly, there is no remaining issue in controversy as to these requests, which are now moot.

III. The Attorney General's Motion for Sanctions pursuant to KRS 367.290 and CR 11 is Granted

At the October 16, 2013 hearing the Attorney General asked this Court to enjoin National College from soliciting any new students until it completely complies with the CID, and that

National College be fined \$10,000 per day for continuing violations of the Consumer Protection Act, pursuant to KRS 367.290. Alternatively National College's counsel maintained that its appeal was not frivolous, demonstrated by the fact that the Court of Appeals remanded the matter to Franklin Circuit Court for a hearing on the scope of the Attorney General's CID. National College also noted that this Court issued its Order on the scope of the CID on July 31, 2013, and that National College then produced responsive documents on August 19, 2013, and that thus the time frame at issue is merely twenty days. The Attorney General maintained that National College mischaracterizes the Court of Appeals' opinion, and that the Court of Appeals unequivocally held that the Attorney General is entitled to responses to the CID.

The Court hereby **GRANTS** the Attorney General's Motion for Sanctions, as detailed herein. National College is correct that case law and the statute entitle the recipient of a CID from the Attorney General to challenge the request when there is a good faith basis for alleging that the Attorney General's request is beyond the scope of his authority, or that there is a valid statutory or constitutional defect in the CID. In this case, after 2 years of litigation, this Court conducted a hearing in July of 2013 to hear all of National College's evidence on its claim that the CID was invalid. At that hearing, it became abundantly clear that National College had no valid, good faith basis to challenge the CID, and that the litigation initiated by National College was an effort to obstruct and delay a valid investigation of the Attorney General.

Pursuant to KRS 367.290(1)(c) this Court has discretion to penalize National College for its failure to obey the investigative demand issued by the Attorney General, until National College obeys the investigative demand. The Court herein specifically orders National College to comply immediately with the Attorney General's CID, as noted *supra*. Until National College fully completes its responses to the Attorney General's CID Interrogatories, National College is

hereby **ORDERED** to pay a fine of \$1,000.00 per day for its failure to fully comply. National College may avoid this penalty by complying immediately with this Court's orders, as detailed *supra*. National College shall be deemed to have completed its responses to the Attorney General's CID upon the Attorney General's certification to this Court that National College's productions are complete. If there is a dispute between the Attorney General and National College over the completeness of the response, either party may bring such dispute back before the Court in a post-judgment motion.

Pursuant to Court Rule 11, this Court may impose appropriate sanctions, including reasonable attorney's fees, where a party has used judicial process for improper purposes such as to harass, to cause unnecessary delay, or to needlessly increase the costs of litigation. Rule 11 Sanctions are to be considered after entry of a final judgment. In reviewing the Defendants' Motion for Sanctions, the Court finds it important to reconsider the timeline of events.

12.17.2010	Attorney General serves a Subpoena and Civil Investigative Demand on National College pursuant to the Consumer Protection Act.
1.24.2011	National College anonymously files a Petition in Franklin Circuit Court under the pseudonym "ABC, Inc." claiming that the investigation was unreasonable and unjustified.
3.4.2011	Court entered Order finding that National College had no right to proceed anonymously, and granting National College leave to file an amended complaint asserting claims "without the cloak of anonymity."
3.25.2011	Opinion and Order entered by the Court dismissing the action with prejudice as National College never filed an amended complaint. By this Order the Agreed Order dated February 25, 2011 which allowed Plaintiff to temporarily proceed anonymously by pseudonym was dissolved.
4.1.2011	Plaintiff filed Notice of Appeal of the Court's 3.25.2011 Order and Opinion.
5.19.2011	Plaintiff files Motion for Contempt against the Attorney General, asserting that his publication of a letter/article in the <i>Lexington Herald-Leader</i> violated KRS 367.250 and deprived National College of any meaningful or effective appeal of the confidentiality issue. The Attorney General's editorial followed commentary published in the <i>Lexington Herald-Leader</i> by National College President Frank Longaker about the consumer protection investigation.

6.14.2011	Order entered denying Plaintiff's Motion for Contempt.
8.24.2012	Court of Appeals issued its Opinion Affirming in Part, Reversing in Part, and Remanding. Therein the Court of Appeals held that "the Attorney General met the threshold for the issuance of the CID in the present matter." However the appellate court remanded the matter back to Franklin Circuit Court for a hearing on the <i>scope</i> of the CID, finding that National College had requested but never had the opportunity to challenge the CID as overly broad and burdensome.
4.17.2013	Kentucky Supreme Court denies discretionary review.
5.11.2013	Attorney General Motion for Order Pursuant to KRS 367.290 and for Protective Order, arguing that such action was necessary as "National's conduct in this case makes it abundantly clear that it will never respond to the lawfully-issued CID absent a court order."
7.1.2013	Hearing on the Scope of the Attorney General's CID, on the Attorney General's Motion for Order Pursuant to KRS 367.290, and on Plaintiff's Motion to Compel Discovery Hearing on the Attorney General's Motion for Order Pursuant to KRS 367.290
7.3.2013	Court's Order finding that because the Attorney General had repeatedly described with great specificity the extent of his litigation, and taking judicial notice of the scope of the investigation. The Court thereby ordered Plaintiff to answer all CID questions, or to file any specific objections to the scope of the Attorney General's investigation on or before July 15, 2013. The Court reserved ruling on the other motions until a determination on the issue of the scope of the CID was made.
7.15.13	National College filed Responses to twenty-five of the CID Interrogatories, maintaining its assertion that it was denied the right to discovery relevant to the reasonableness and scope issues. National College simultaneously filed a Motion to Alter, Amend, or Vacate the Court's July 3 Order, arguing that discovery from the Plaintiff was necessary "so as to permit [National College] to fully and fairly litigate the questions of the CID's reasonableness and scope."
7.24.2013	Court's Order denying National College's CR 59.05 Motion
7.26.2013	Hearing on Plaintiff's objections to the CID, twenty-five in all. Upon hearing National College's arguments the Court stated that all of the CID requests were good faith and reasonable inquiries to investigate violations of the Consumer Protection Act. The Court further indicated that National College was to tender good faith responses to all fifty CID requests, and if Plaintiff failed to timely do so the Court was prepared to impose significant sanctions.
7.31.2013	The Court entered its Order concluding that all of the CID interrogatories were reasonable inquiries, and that "National College's response was unreasonable and obstructionist" in refusing to answer any interrogatory not specifically listed in the Court of Appeals Opinion or this Court's July 3, 2013 Order. At the hearing National College failed to provide any legitimate basis for its insistence that the Attorney General's CID requests were unreasonable in scope, and refused to

	answer some CID questions which are clearly “within the precise scope of the specific examples listed in the Court of Appeals ruling.” The Court thereby Ordered National College to produce full and complete answers to all fifty interrogatories by August 5, 2013.
8.2.2013	National College files Notice of Appeal of the Court’s July 3 and July 31 rulings, seeking emergency interlocutory relief.
8.7.2013	Attorney General’s Notice of Failure to Comply with Court’s Orders and Renewed Motions for Sanctions and CR11 Sanctions.
8.8.2013	National College files Responses to the other twenty five CID Interrogatories previously objected to on scope grounds.
8.9.2013	National College, in compliance with the Court’s July 31, 2013 Order, filed supplemental responses to the CID.
8.9.2013	Hearing to consider sanction scheduled, and the Court recognized that National College’s representative Steve Cotton failed to appear and that National College failed to tender responses by August 5 as ordered.
8.12.2013	The Court issued an Order noting that National College chose to appeal what the Court considered to be a not yet final ruling, and had “again failed to follow the order of this Court and the Court of Appeals by failing to respond to the lawful interrogatories posited by the Commonwealth.”
8.13.2013	Attorney General Motions for CR 65.06 and 65.08 Injunctive Relief, asking the Court to enforce its prior orders and force National College to comply with the Kentucky Consumer Protection Act, pending National College’s appeal.
8.16.2013	Court of Appeals denied National College’s Motion for Emergency Relief
8.19.2013	Hearing on Attorney General’s Motion for Sanctions, or in the alternative for Injunctive Relief. At this time National College informed the Court that it had withdrawn Appeal No. 2013-CA-001336, and tendered three bankers boxes of material which National College asserted satisfied the Attorney General’s CID in full.

The above timeline details how the Attorney General spent more than two years compelling compliance with its lawfully issued and appropriate CID. This Court, in considering whether National College’s conduct warrants sanctions, bears in mind that:

CR 11 “is a procedural rule designed to curb abusive conduct in the litigation process. Clark Equip. Co., Inc. v. Bowman, 762 S.W.2d 417, 420 (Ky. App. 1988). It is intended only for exceptional circumstances. Id. The test to be used by the trial court in considering a motion for sanctions is whether the attorney’s conduct, at the time he or she signed the allegedly offending pleading or motion, was reasonable under the circumstances.

Lexington Inv. Co. v. Willeroy, 396 S.W.3d 309, 312-313 (Ky. App. 2013). The Court finds that National College repeatedly abused the legal system to obstruct a valid investigation by the Attorney General. A review of the comprehensive litigation process makes clear that Plaintiff through counsel sought to obstruct Attorney General from lawful investigation. As CR 11 relates to papers filed in Court by an attorney, this Court notes the following pleadings filed by National College, which also appear in bold highlighted above:

1. For purpose of causing unnecessary delay, National College filed this lawsuit under a pseudonym, which this Court ruled National College had no right to do by its Order entered March 4, 2011.
2. National College filed a Motion for Contempt on May 19, 2011 against the Attorney General for publically naming National College as the Plaintiff in this proceeding, and the Court had already entered an Order finding that National College had no right to proceed anonymously. This pleading constituted abusive conduct.
3. The Court of Appeals held that the CID was lawfully issued and remanded this matter for a hearing on the scope of the CID, which National College again and again maintained was “unreasonable and unjustified.” At the hearing on the scope of the CID, however, National College made no arguments supporting their insistence that the CID was overly broad and burdensome, but instead argued that they were entitled to take discovery from the Attorney General to adequately challenge the scope of the CID. The Court finds that National College had no good faith basis for asserting that the scope of the CID was overly broad or burdensome, and filed pleadings challenging the scope of the CID for the improper purpose of causing unnecessary delay.
4. National College refused to answer any of the CID Interrogatories, all the time asserting that the CID was unreasonable and unjustified. After the matter was remanded back to Franklin Circuit Court, and after the July 1, 2013 hearing on scope at which National College presented no meritorious challenge to the scope of the CID, this Court took judicial notice of the scope of the CID as was stated by the Attorney General in his February 7, 2011 pleading.⁴ Thereafter National College answered twenty-five of the CID Interrogatories, and actually objected to the other twenty-five Interrogatories at a later held hearing. The Court finds that as to the twenty-five CID Interrogatories which

⁴ The Court found that as a matter of law, “the Attorney General issued a subpoena and CID to obtain information about [National College’s] business practices to ascertain whether [National College] has indeed violated or is violating the Kentucky Consumer Protection Act, KRS 367.110 to 367.300, and specifically KRS 367.170. ‘Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce’ are declared unlawful by KRS 367.170.”

National College did not object, National College's refusal to answer these Interrogatories were for the improper purpose of causing unnecessary delay.

5. At the hearing held to discuss the scope of the twenty-five CID Interrogatories which National College actually objected to, National College presented no compelling testimony or evidence challenging scope. The Court ruled that all of the CID Interrogatories were reasonable and made in good faith, and gave National College ten days to complete their answers to the CID. Again, the Court finds National College's refusal to answer the CID to be for the improper purpose of causing unnecessary delay.

The Court hereby makes specific findings of fact that these above named filings by National College's counsel constituted abusive conduct and were filed for the improper purpose of causing unnecessary delay and warrant CR 11 sanctions. The Court's March 25, 2011 Opinion and Order stated, "there is no credible allegation on the part of the plaintiff that the Attorney General does not in good faith 'believe it to be in the public interest' that such an investigation be undertaken with regard to the plaintiff in this case. . . . [U]nless the plaintiff can come forward with some credible evidence to support his allegation, the Attorney General is entitled to judgment affirming his right to obtain evidence sought." (3.25.11 OPOR, p. 3)

Even after this matter was remanded back to this Court for a hearing on the scope of the Attorney General's CID, National College could present no legitimate argument or basis for their challenges to the CID. Upon review of the accumulation of National College's filings, this Court is convinced that the aforementioned pleadings were made for the purpose of delay and harassment, which poisoned the atmosphere of litigation in this case and made it impossible to resolve as it should have been had National College acted in good faith. National College created a pervasive environment of distrust between the parties, provoked by its bad faith filings. In particular, National College's counsel's conduct, in seeking sanctions against the Attorney General, and in filing a meritless bar complaint against the Attorney General, created a climate of ill-will, personal animosity, and distrust which made it impossible for this litigation to be

resolved through the normal process of negotiation and compromise of disputed discovery issues, followed by a good faith contest on the merits of any issue that remain contested after exhaustion of negotiations.

This Court is hesitant to award sanctions under CR 11, and has never made such an award prior to this case. The Court has a high regard for the legal skill and ability of Mr. Grasch and Mr. Thomerson. However, the Court is convinced that the litigation tactics engaged in by Plaintiff's counsel in this case have crossed the line from zealous advocacy into obstruction, delay, harassment, and an unwarranted vendetta against the Attorney General who has done nothing but attempt to fairly enforce the consumer protection laws of this state. The ability of the Attorney General to enforce the consumer protection laws of this state is very much at issue in this case. If the target of a consumer protection investigation can engage in the unwarranted litigation tactics of the plaintiff in this case to obstruct and delay a lawful investigation, the consumer protection law will become a dead letter. Our legal system cannot function if such tactics are employed and tolerated without sanction and accountability.

Conclusion

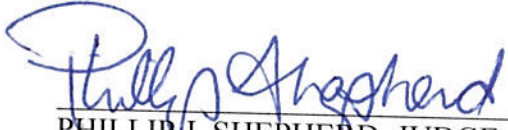
For the reasons stated above, **IT IS ORDERED AND ADJUDGED:**

1. The Attorney General's motion for sanctions under KRS 367.290 is **GRANTED** and the Plaintiff is directed to fully comply with the Civil Investigative Demand (CID) forthwith, but in no event later than 10 days from the entry of this Order;
2. The plaintiff shall pay a fine of \$1,000 per day from July 31, 2013 until full compliance with the CID has been certified to the Court by the Attorney General. If a dispute exists over whether full compliance has been achieved by Plaintiff, the parties may bring that dispute before the Court in a post-judgment motion. If the Plaintiff fully complies with the CID

within 10 days of the entry of this Order, the portion of this fine that exceeds \$10,000 (ten thousand dollars) will be probated.

3. The Attorney General's motion for sanctions under CR 11 is **GRANTED** and the Court imposes a sanction on Plaintiff's counsel, to be paid to the Office of the Attorney General, Consumer Protection Division, in the amount of \$10,000.00 (ten thousand dollars) to partially reimburse the Attorney General's office for the additional costs it has incurred in responding to the unwarranted motions and litigation tactics set forth above. This sanction shall be paid within 30 days of the entry of this Order.

4. This is a final and appealable judgment and there is no just cause for delay.


PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

DISTRIBUTION:

Jack Conway
Attorney General of Kentucky
Capitol Building, Suite 118
700 Capital Avenue
Frankfort, Kentucky 40601

Todd E. Leatherman
Maryellen B. Mynear
Office of Consumer Protection
1024 Capital Center Dr., Suite 200
Frankfort, Kentucky 40601

Al Grasc
James L. Thomerson
Grasc Law PSC
302 West High Street
Lexington, Kentucky 40507