On the Proper State of Things:
Multijurisdictional Practice for the Kansas Practitioner

This is your last issue if you haven't renewed your membership. For your convenience, a membership form is located on page 25.
## Let Your Voice be Heard!

![Kansas Bar Association Districts Map](image_url)

### KBA Board of Governors Representatives

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<th><strong>District 12:</strong></th>
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Music Provides Balance in the Life of Kansas Securities Commissioner

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Our Mission:
The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.

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Evans Ice
Mary F. Lehm</p>
I'm now more than halfway through my one-year term as president of your Kansas Bar Association. I am learning the lesson that many past presidents of the KBA have given me. The year as president goes by very quickly.

My thoughts on the state of the Kansas Bar Association:

Start of the Legislative Session
The 2005 legislative session is now underway. I have heard a lot of unfounded and unjustified criticism of the Kansas Supreme Court for doing its job — interpreting the Kansas Constitution — on school finance.

I was present when the Honorable Robert E. Davis gave the oath of office to the members of the Kansas House of Representatives on Jan. 10. At the conclusion of the swearing in of the House, Justice Davis took a moment to thank the legislators for serving the state and to express his and the Court's respect for the legislative branch of state government. It was a sincere moment. On behalf of the Kansas Bar Association, we join Justice Davis in our thanks and respect for the hard work of the Kansas Legislature. Likewise, our state judiciary deserves respect. We, as lawyers, can help educate the public on the need to respect the judiciary and the unique role that the judiciary plays in our state and in our country.

Legislative Session
The Legislative Committee, the KBA Board of Governors, and the KBA staff will be hard at work this legislative session. So do not hesitate to give us your thoughts, concerns, and support on legislative issues.

Membership
If you have sent in your 2005 membership dues, thanks for your support. If not, please send in your dues. Remind that fellow member down the hall from your office. Urge that nonmember to join. The benefits are very good and growing.

KBA Annual Meeting
Start planning to attend the KBA Annual Meeting in Vail, Colo., June 9-11. This will be a great vacation for your family and a great opportunity for CLE and camaraderie for you.

People who Help
One thing I've learned for sure as your KBA president: The KBA has a great staff under the management of KBA Executive Director Jeffrey Alderman and Assistant Executive Director René Eichem (who have some great ideas on membership), Eric Ward on CLE, and everybody else who helps to make Bar headquarters run so smoothly. While I'm at it, special thanks to Susan McKaskle, managing editor of the KBA Journal, and Becky Massoth Leos, my legal secretary at the law firm, for their editing assistance and all of their support.

Great Job
I enjoy being a lawyer and having the privilege to represent people in court, to analyze and give advice on the law. It is a great privilege. ... But being KBA president has to be the best job ever. As the saying goes, 'time flies when you're having fun.'

Editor's Note: Mike Crow can be reached by phone at (913) 682-0166, fax at (913) 682-2130, U.S. mail at P.O. Box 707, Leavenworth, KS, 66048, or e-mail at mikecrow@ccblegal.com.
Music Provides Balance in the Life of Kansas Securities Commissioner

By Beth Warrington, KBA publications coordinator

When Chris Biggs was only 3 or 4 years old, his mother, Berniece, a secretary at Kansas State University, invited home a graduate student from the physics department to play Woody Guthrie tunes on the guitar. Biggs and his four older siblings were immediately enthralled.

“We were all captivated,” said Biggs. “My older brothers started playing, and my brother, John, became a full-time professional performer for 20 years. He was the greatest influence on me musically.”

Biggs first picked up the guitar in junior high school, and John taught him to play.

“My first guitar was a cheap Lyra with strings like barbed wire,” he said. “I then got an ‘old craftsman’ from a guy who lost his fingers and didn’t need it anymore; the guitar was a slight improvement.”

Biggs switched to and was focused on the banjo while in high school until he heard Doc Watson play “Black Mountain Rag” on guitar on Nitty Gritty Dirt Band’s “Will the Circle Be Unbroken.”

“I said, ‘Wow, I want to do that,’ and I began to focus on playing bluegrass, mostly fiddle tunes, on the guitar,” he said.

Playing and teaching guitar and banjo helped Biggs work his way through both undergraduate and law school. He would give about 25 half-hour guitar lessons on Saturdays and several times during the week. Biggs said he has taught more than 100 people how to play the guitar.

He earned his bachelor’s degree in social work at Kansas State University in 1980 and his juris doctorate at the University of Kansas School of Law in 1983.

Biggs has more than 20 years of criminal law experience, including serving as Geary County attorney. In July 2003, he was appointed by Gov. Kathleen Sebelius to serve as securities commissioner for Kansas.

Before law school, he had a chance to join some touring bands, but he said there is a profound expression among bluegrass musicians, “Keep your day job.”

“Music is mostly for enjoyment, and I thought the fun would go out of it if I had to do it for a living,” he said. “I also wanted to contribute to society; playing the banjo didn’t seem like much of a calling, and my wife, Denise, agrees.”

He said he is the target of both lawyer and banjo jokes; sometimes people manage to work both in at the same time.

Biggs said those who know him as a lawyer are surprised to find he is a musician and vice versa. He believes that music and law complement each other, since both are about communicating to the people.

Biggs can still be seen playing banjo every other Wednesday at the Little Grill, a Jamaican restaurant, in Manhattan, where he is joined by Bob Atchison, a former Arkansas old-time fiddle champion. Biggs, who has lived most of his life in the Manhattan and Junction City areas, currently lives in rural Geary County.

Biggs is no stranger to music competitions. For three consecutive years, from 1979 to 1981, he was a third-place champion at the National Flat-Picking Competition in Winfield. He is also the 1994 titleholder of both the Kansas guitar and banjo picking competitions.

“I played unique tunes not normally flat-picked on a guitar,” he said, “like ‘Maple Leaf Rag,’ in hopes they would stand out.”

Although competitions are great for honing your skills, Biggs said music is really about sharing, not competing. Many competitors are full-time performers, teachers, or studio musicians in a very steep competition, where any error could easily get you eliminated.

Biggs’ interest in music even led him to start building his own guitar, which he never finished because he won three of the instruments in Winfield. After reading books and experimenting until he got it right, Biggs managed to build his own banjo, which he still owns and plays today.

The banjo rim is made of “Timeless Timber” that is reclaimed maple from the bottom of Lake Superior. This lumber was lost on its way to the sawmills and eventually sank in the lake some 200 to 300 years ago. It’s valuable for making musical instruments, like banjos, because all the years underwater opened up the cells of the wood, allowing them to resonate with sound.

Biggs found an artist to engrave the metal parts that were bought from a supplier. He cut and placed the mother-of-pearl and abalone inlay, before he realized precut inlay patterns could be bought.

“The banjo was finished the night before my wedding,” he said. “My wife put ‘Here comes the banjo’ on the inside of my wedding ring.”

His love for music prompted Biggs to record a CD, called “Blue Flannel Friday,” which is almost complete. There are 16 original songs and some traditional fiddle and bluegrass tunes, all acoustic. He even wrote a lullaby on the album for his 2-year-old son, Benjamin, who drags a mandolin around the house.

“Music provides balance in my life,” Biggs said. “Performing has also helped my skill and comfort level with people, which helps in politics and in jury trials. I met my wife, found the place I live, and met most of my best friends through music. I am grateful for the gift.”
About Your Foundation

Who We Are

In 1957, a special committee of the Kansas Bar Association recommended the establishment of the Kansas Bar Foundation (Foundation) to the KBA Board of Governors. They foresaw an organization whose supporters would generously give time, effort, and contributions throughout the years to provide legal services for the disadvantaged, educate the public about the law, and foster the well-being of the profession.

Over the past 48 years, the Foundation has grown to become an organization of more than 650 members with numerous programs that serve the public.

What We Do

The Foundation forges partnerships between the bar, the courts, and the legal aid organizations in Kansas to improve our system of justice and to help low-income and disadvantaged members in our community by ensuring that they have meaningful access to the justice system to protect their rights. The Foundation places special emphasis on issues affecting children and families and also supports exceptional education programs for youth.

Since 1986, the Foundation has provided more than $2.5 million for public services. Through the years the Foundation has been instrumental in the following projects:

- developing law-related education programs for youth, including the statewide mock trial competition for high school students, conflict resolution programs to reduce in-school violence, legal rights and responsibilities booklets for teens, and a clearinghouse of law-related educational resources for educators;
- administering the KBA’s reduced fee and pro bono programs;
- providing legal advice and representation for senior citizens, the poor, and victims of domestic violence; and
- providing mediation services for the poor in discrimination cases.

How You Can Help

There are a number of ways you can help the Kansas Bar Foundation, and it all truly makes a difference. You can support the Foundation by participating in the IOLTA program, by joining the fellows program, or by volunteering your time. If you are interested in lending your support, please contact Janessa Akin, KBA manager of public services, at (785) 234-5696.

Mark your calendars now!

The 2005 Fellows Dinner is tentatively scheduled for Saturday, June 11, 2005, at the KBA’s Annual Meeting in Vail, Colo. Those added to the published roll of fellows and those who have reached a new contribution level will be honored at the dinner. This black-tie gala event of the year provides a wonderful opportunity to salute the new fellows, introduce new officers, and reminisce with colleagues. Invitations will be mailed in April. If you would like more information about the dinner, please contact Janessa Akin, KBA manager of public services, at (785) 234-5696.
Buser Sworn in as 12th Member of Court of Appeals

By Beth Warrington, KBA publications coordinator

Before family and friends, Michael B. Buser, Overland Park, was sworn in as the 12th member of the Kansas Court of Appeals on Jan. 28. This is Gov. Kathleen Sebelius' sixth appointment to the appellate courts.

Gov. Sebelius said Buser's 28 years of trial and appellate court experience in our state and federal system make him well qualified to serve the people of Kansas in this important position.

“...I am grateful to the Supreme Court Nominating Commission and Governor Sebelius for giving me this opportunity to return to public service as a judge,” Buser said. “I look forward to working with the other 11 judges on the court to provide litigants and their lawyers with a fair, impartial, and timely review of their cases.”

In 1991, Buser became of counsel in the Tort and Pharmaceutical and Medical Devices practice groups with Shook, Hardy and Bacon LLP in Kansas City, Mo.

“We are extremely happy for Mike,” said John F. Murphy, chair of the Kansas City, Mo., office. “We are going to miss him terribly. He’s gonna be a great judge, since he is one of the most respected and courteous lawyers we know.”

Murphy said he does not believe Buser has an egotistical bone in his body and his sense of humor is next to none.

“I think Governor Sebelius has made an excellent choice, and the people of Kansas will be well served with Mike on the Kansas Court of Appeals,” said Harvey Kaplan, chair of Pharmaceutical and Medical Device with the firm. “Lawyers on both sides will like him. He will give fair and well-reasoned opinions.”

Buser's legal career began in 1977 as assistant district attorney in Johnson County. He served as senior assistant district attorney and administrative assistant to the district attorney beginning in 1980, before entering private practice in 1988 as general attorney for Union Pacific Railroad Co.

Born in Kansas City, Mo., Buser grew up in Des Moines, Iowa. His family moved to Johnson County in 1968. While attending high school at Shawnee Mission South, he met his future wife, Holly. They have two sons, Mark, a student at the University of Evansville in Evansville, Ind., and Andrew, a student at Gonzaga University in Spokane, Wash.

Buser graduated from Georgetown University, Washington, D.C., in 1974 with his Artium Baccalaureus in theology and American government. He earned his J.D. from the University of Kansas School of Law in 1977, where he was managing editor of the Kansas Law Review.

Although Buser has enjoyed private practice, he decided the Court of Appeals would provide an excellent opportunity to serve the state and make use of his legal abilities and experience.

“I hope to bring to the court my 28 years of trial and appellate experience in both civil and criminal litigation,” he said. “The variety of my litigation experience has provided me with a broad and diverse legal background that, I believe, is essential to the work of an appellate court judge.”

Gary W. Rulon, Kansas Court of Appeals Chief Judge, said Buser came highly recommended as a judge.

“We are pleased to have him with us as we expand to 12 judges,” Rulon said. “He has a wide experience in practicing law, and that will be valuable.”

In addition to practicing law, Buser belonged to a singing trio called Denny and the Doo Dahs, who began making music in 1978. The other members of the band included Dennis Moore, U.S. Representative, and Steve Tatum, Chief Judge of the Johnson County District Court.

“In addition to practicing law, Buser belonged to a singing trio called Denny and the Doo Dahs, who began making music in 1978. The other members of the band included Dennis Moore, U.S. Representative, and Steve Tatum, Chief Judge of the Johnson County District Court.

“Since that time, our fame has spread near and far, but mostly near,” Buser said. “We have never played in the round because, the way we sing, it’s just too dangerous to have our backs to the audience.”

When Tatum was appointed to the district court in 1993 he left the band, leaving Buser and Moore to find other singers to sit in as the third member.

“With my appointment, Moore will now become a solo act; but the way I look at it, at least the Doo Dahs stayed together as a singing group longer than the Beatles,” he said.

Buser is a member of the Kansas Bar Association and is also active in the community. He has previously served as president and as a member of the board of directors of the Stop Violence Coalition. He has been a coordinator and instructor at the Johnson County Police Academy at Johnson County Community College and chairman of the Jefferson Meeting on the Constitution, sponsored by the Johnson County Bicentennial Commission. He is a member of the Georgetown University Alumni Admissions Committee.
Meet Susan McKaskle: The Journal’s Managing Editor

By Diane S. Worth, Board of Editors chairperson

Included in the October 2004 issue of the Journal was a pictorial listing of each of the members of the Journal’s Board of Editors and an article about the duties of this board. As a board, we thereafter agreed that someone very important — in fact essential — was omitted from this list. We feel that in addition to knowing who makes up the Board of Editors, you should also know the person at the Kansas Bar Association who works with the board and is responsible for the publication of the Journal each month. This person is the Journal’s managing editor, Susan McKaskle.

Susan has been with the Kansas Bar Association for slightly more than five years. Throughout her tenure with the KBA, she has been the person responsible for getting the Journal to press. Although her title has recently changed, her job duties have not: She is the staff liaison for both the Board of Editors and the Media Bar Committee; manages the layout of the Journal; works with the printer; communicates and works with the volunteer authors; coordinates the ethics and law school students column; edits and proofreads articles; works with the desktop publishing coordinator on the cover and other graphics; gets bids for printing contracts, solicits advertising, and works with advertisers on ad placement; interviews attorneys and judges for biographies; photographs the Annual Meeting; writes feature articles; and sometimes gets on her “hands and knees” and begs the volunteer authors to meet their deadlines. As Susan says, “If it has to do with the Journal, I do it!”

The members of the Board of Editors can tell you that Susan is a tireless worker who is full of enthusiasm and creative ideas for the betterment of the Journal. Under her leadership, both the appearance and content of the Journal have improved. The “Thinking Ethics” column, the member profiles, and the law student column all are additions that Susan has brought to the Journal.

The energy that Susan brings to the Journal is the kind of energy she has displayed throughout her life. Born and raised in Anadarko, Okla., Susan became a young, single mother when her daughter, Michelle, was only two years old. Michelle is now married, has a 12-year-old son, Ryan, and lives in Florida with her husband, Karl.

When Michelle grew up and left home, Susan decided that it was time to go to college. So, at the age of 38, she enrolled at the University of Science and Arts of Oklahoma (USAO) in Chickasha, moved into the dormitory (where she became a “mom” to all of the girls), and began work on a degree in communications. Due to taking as many as 22 hours a trimester (while working to earn her way through college), it took Susan just two and one-half years to earn a four-year degree. In April of 1988, she graduated cum laude with a Bachelor of Arts degree in communications with professional emphasis in marketing and public information. She also received the USAO Alumni Association’s Distinguished Graduate Award.

After graduating, Susan moved to Kansas to be near her daughter, who was living in Holton at the time, and remained even after her daughter moved to Florida.

Susan worked for a trade association, then the Topeka Transit Authority, did contract work, and even bartended before she came to the KBA in 1999.

Susan could not be happier with the job she found at the KBA. She said that she has never worked with a group more delightful than the Board of Editors. She is proud of the Journal and proud to be a part of the oldest benefit offered to the members of the KBA: The Journal has been published continually since at least 1887.

Susan wants all of the KBA members to know that they are welcome at any time to send ideas for legal articles or columns to her or to let her know of thoughts they have as to ways the Journal could be improved.

Susan supervises two employees: David Gilham, desktop publishing coordinator, joined the KBA staff in December 2000. He creates Journal covers, inside graphics, and in-house and some client ads. Beth Warrington, publications coordinator, who joined the KBA staff in November 2004, compiles the Member-in-the-News column; writes obituaries, the member profile column, and other columns as needed; and assists in proofing and editing the Journal.

“Although I do a good part of the work on the Journal, I could not have brought the Journal to where it is today without the help of David, Beth, and many of the KBA staff,” said Susan. “And without the contributions of all our volunteer authors and the Board of Editors, we would not be able to produce the quality Journal our members deserve.”

Susan McKaskle
KBA Journal Managing Editor

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Oh, the Places Your Juris Doctor Will Go

By Sara Shik, University of Kansas School of Law

Some things never change. The sun will almost definitely rise in the morning, bread will probably fall butter side down, and blondes may just have all of the fun. Law school is full of similarly predictable events. Students will likely chuckle at bizarre scenarios in their first-semester tort classes, complain about Socratic-method-related injustices, and break into a panic around November that does not reside until the last final in December. Although the experience of being a law student is timeless and constant, competing for legal jobs has changed in the last several decades. For many law students, jobs are harder to find, and associates are not always offered partnerships. Additionally, some students emerge from the law school experience realizing that their interests and passions are not a perfect match for the practice of law and that an attorney’s career may not be as fulfilling to them as they expected.

The changing face of the legal profession and the personal interests of some law students lead a small group (11 percent annually, according to one study) to discover satisfying careers that do not directly involve the practice of law. These J.D. recipients utilize both their legal training and nonlegal abilities in alternative career options, ranging from FBI agents to screenwriters. This transition to alternative careers presents several obstacles, including coping with the perceptions of friends and family, discovering the perfect alternative profession, and convincing employers that legal educations are valuable outside of law firms. Overcoming these obstacles is certainly not impossible and can lead to plentiful career options and professional fulfillment for former law students.

Dealing with the reactions of friends and family upon hearing that a perfectly good law student does not want to practice law may seem like a small task, but in some cases it comprises the biggest challenge a J.D. recipient will face upon making the decision to not be an attorney. Because lawyers are seen as special and important, parents, spouses, and friends are often baffled when the J.D. recipient in their lives opts to — gasp — not go to work at a law firm or take a job where they are “the attorney.” Technical writers and trust officers are simply not as glamorous to Americans. Parents cannot impress their friends as easily at parties by bragging that their daughter or son is a human resources manager as they could by exclaiming that their pride and joy has become a lawyer.

Fortunately, the obstacle of perception is largely internal. There is nothing wrong with seeking a nonlegal career, and merely attending law school does not implant any sort of lawyer chip or gene inside the bodies of students. Law school is an experience, not a conclusion. Donna Gerson pointed out in her discussion of nonlegal careers in the 2002 Student Lawyer magazine that alternative legal career seekers join the ranks of Tony LaRusso, manager of the St. Louis Cardinals; Herb Kelleher, chairman of Southwest Airlines; and Sen. Elizabeth Dole, former head of the American Red Cross.

The task of proving to employers that a J.D. is a help rather than a hindrance is vital to actually obtaining an alternative career with a law degree. According to Kirsten Butle-Ritchie and Alison Sikora, directors of Career Services at the Appalachian School of Law, Grundy, Va., and the Capital University Law School, Columbus, Ohio, respectively, the most common hurdle for J.D. recipients in the nonlegal world is “why someone with a law degree would not want to practice law.” Other employers’ fears include perceptions that law school graduates have pretentious attitudes, are poor team players, and their legal skills are worthless outside of the legal realm. Although these preconceptions are false, the J.D. on a resume can curb the enthusiasm of employers looking for the perfect candidate.

However, anti-J.D. bias can be overcome by networking, the demonstration of continued interest in a specified nonlegal field, and incorporating other proven skills into job searches. For instance, in pursuing a career in law librarian-ship, I have incorporated my pre-existing customer service skills and English talents with job experience in law libraries and legal research companies. It is my hope that my dedication and eagerness to work in the law library field will be obvious to employers. By combining skills and interests, and gaining hands-on experience in a nonlegal field, law students should be able to demonstrate their potential to employers.

As law students graduate, leaving student life for the working world, some may receive the famous poem and book by Dr. Seuss called “Oh, the Places You’ll Go.” This popular graduation reading tells students that, “You have brains in your head/you have feet in your shoes/you can steer yourself in any direction you choose/You’re on your own/and you know what you know/and YOU are the guy who’ll decide where to go.” This is certainly true for students leaving law school. While most will opt to enter the exciting and challenging lawyer’s life, this is not the only option for people with a juris doctor who can become important, positive forces in many professional venues.

About the Author

Sara Shik is a third-year law student at the University of Kansas School of Law and is simultaneously completing a Master of Legal Information Management, a joint program of KU Law and Emporia State’s School of Library and Information Management. She fills her remaining time working as a student employee for Westlaw and as a reference assistant at the KU Wheat Law Library.
The KBA Awards Committee is seeking nominations for award recipients for the 2005 KBA Awards. These awards will be presented at the KBA Annual Meeting in Vail, Colo., June 9-11. Below is an explanation of each award, and a nomination form can be found on page 11. The Awards Committee, chaired by Mary May, Wichita, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee’s attention!

**Phil Lewis Medal of Distinction**: The KBA’s Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.
- The recipient need not be a member of the legal profession nor related to it, but the recipient’s service may include responsibility and honor within the legal profession.
- The award is only given in those years when it is determined that there is a worthy recipient.

**Distinguished Service Award**: This award recognizes an individual for continuous longstanding service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.
- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

**Professionalism Award**: This award recognizes an individual who has practiced law for 10 or more years and who, by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession as identified by the KBA Hallmarks of the Profession. (See page 11)

**Outstanding Young Lawyer**: This award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

**Outstanding Service Awards**: These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.
- No more than six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.

Outstanding Service Awards may recognize:
- Law-related projects involving significant contributions of time;
- Committee or section work for the KBA substantially exceeding that normally expected of a committee or section member;
- Work by a public official that significantly advances the goals of the legal profession or the KBA; and/or
- Service to the legal profession and the KBA over an extended period of time.

**Pro Bono Award**: This award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor. In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low and moderate income persons.

**Distinguished Government Service Award**: This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a recipient worthy of such award.

**Courageous Attorney Award**: The KBA created a new award in 2000 to recognize a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. Examples of recipients of this type of award in other jurisdictions include a small town lawyer who defended a politically unpopular defendant and lost most of his livelihood for the next 20 years, an African-American criminal defense attorney who defended two members of the white supremacist movement, and a small town judge who lost his position because he refused the town council’s request to meet monetary quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient.

Note: Nomination form on page 11.
Hallmarks of Professionalism

1. Shows respect for the legal system through appearance, manner, and conduct at all times;
2. Does not discuss client's affairs socially;
3. Does not blame others for the outcome of a case;
4. Recognizes one's income is secondary to serving the best interest of the client;
5. Communicates with clients, other lawyers, and the judiciary in a timely and complete manner and is prompt for all appointments;
6. Does not engage in ex parte communication with the court;
7. Expedites the resolution of disputes through research, articulation of claims, and clarifying the issues;
8. Abides by commitments regardless of whether they can be enforced in a courtroom;
9. Who as a member of the judiciary should avoid speech and gestures that indicate opinions not germane to the case, require lawyers to be comprehensible in the courtroom, and discuss pending cases only when all parties are present;
10. Is always mindful of the responsibility to foster respect for the role of the lawyer in society; and
11. Demonstrates respect for all persons, regardless of gender, race, or creed.

KANSAS BAR ASSOCIATION

KBA Awards Nomination Form

Nominee's name: ____________________________

☐ Phil Lewis Medal of Distinction ☐ Distinguished Service Award
☐ Outstanding Service Award ☐ Professionalism Award
☐ Outstanding Young Lawyer Award ☐ Pro Bono Award/Certificates
☐ Distinguished Government Service Award ☐ Courageous Attorney Award

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award.

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CHANGING POSITIONS

Anne Baker has retired from private practice with Wright, Henson, Clark and Baker LLP, Topeka. She will be working part time as a research attorney for the Topeka bankruptcy judges.

Christopher C. Confer has joined the firm of Fairchild and Buck P.A., Topeka.

Amy L. Coopman has joined the firm of Poland, Wickens, Eisfelder, Roper and Hofer P.C., Kansas City, Mo.

Michelle Daum Haskins has been promoted to partner in the workers’ compensation practice for Evans and Dixon LLC, Kansas City, Mo.

Andrew Marino has joined the Wichita office of Gilliland and Hayes P.A. as an associate.

Denise D. Riemann has joined Fisher Scientific International Inc., Portsmouth, N.H.

David A. Schatz has joined Husch and Eppenberger LLC, Kansas City, Mo., in the firm’s General Business Litigation Practice Group.

CHANGING PLACES

Paul Mengedoth has a new business address, 7007 College Blvd., Ste. 480, Overland Park, KS 66211.

Shelley S. Patterson has formed her own firm, Law Firm of Shelley Schiebel Patterson LLC. The address is 5830 Woodson, Ste. 206, Shawnee Mission, KS 66202.

Fred C. Patton and Geoffrey L. Fogus have become founding members of Patton and Fogus LLC. The firm is located at 2708 N.W. Topeka Blvd., Topeka, KS 66617.

Larry Wall Trial Law, has a new business address, 2024 N. Woodlawn, Ste. 405, Wichita, KS 67208.

MISCELLANEOUS

David Andreas, Winfield, has been named the winner of Corner Bank’s Community Cornerstone Award for November.

Joan K. Archer, Stinson Morrison Hecker LLP, Kansas City, Mo., was appointed to a three-year term on the Bench-Bar Committee of the U.S. District Court of Kansas by Chief Judge John Lungstrum.

Gail E. Bright, Topeka, has been appointed associate general counsel by Kansas Securities Commissioner Chris Biggs.

Linda Constable, an attorney for Fleeson, Gooring, Coulson and Kitch in Wichita, was appointed by Gov. Kathleen Sebelius to the Kansas Pet Animal Advisory Board.

Oliver Kent Lynch, Baxter Springs, has been appointed to the Eleventh Judicial District Court by Gov. Kathleen Sebelius.

Nelson Mann, Stinson Morrison Hecker LLP, Kansas City, Mo., was inducted as chair of the Greater Kansas City Chamber of Commerce.

Kevin F. Mitchelson, Pittsburg, has been re-elected to a fifth consecutive one-year term as chairman of the Kansas Highway Advisory Commission.

Harvey R. Sorensen, a Foulston Siefkin attorney, Wichita, was elected chair-elect of the World Services Groups for 2004-2005.

Stewart T. Weaver, a partner at Foulston Siefkin LLP, Wichita, has been elected a fellow at The American College of Trust and Estate Counsel.

Susan Krehbiel William has been elected to the Board of Governors of the University of Kansas Law Society. William is an attorney and shareholder with Coffman, DeFries and Northern, Topeka.

Editors Note: It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.
Eugene G. Coombs

Eugene G. Coombs, 93, Wichita, died on Dec. 6. Coombs was born March 17, 1911, in Hutchinson and moved to Wichita in 1912. He received his elementary and high school education in Wichita public schools. He received his B.A. from the University of Wichita in 1933 and an LLB from the University of Kansas in 1936. After graduating, he worked as a special agent for the FBI and also worked for the U.S. Department of Justice from 1937 to 1942 (as a driver for J. Edgar Hoover). He practiced law in Wichita for more than 60 years and was a lifetime member of the Kansas Bar Association.

Coombs was a member of the American and Wichita bar associations, American Board of Trial Advocates, American Judicature Society, Kansas Association of Defense Counsel, and Wichita Crime Commission. He was also a member of the Wichita Estate Planning Counsel; Association of Former FBI agents, where he served as national president; and was past president and member of the Wichita Metropolitan Planning Commission.

He was affiliated with the East Heights United Methodist Church Administrative Board, Executive Board of Quivera Council Boy Scouts of America, Hoover Presidential Library Board of Trustees, and the Salvation Army Advisory Board, where he was a life member. He was past president of YMCA Board of Directors and was also a member of its Board of Trustees. He was involved with numerous other community organizations.

Coombs had a commercial pilot instrument rating. He was a lieutenant in the U.S. Navy Reserve from 1943 to 1946 and served on active duty in Europe, the Mediterranean, North Atlantic, North Africa, and the Middle East and on the Executive Office of Armed Guard Contingent, Cairo, Egypt.

Preceding him in death were his parents, Albertus and Sarah Dorch Coombs; son, Eugene G. Coombs Jr.; brothers, Bert, Roy, and Dorch; and a sister, Gratia Coombs Kemp.

He is survived by his spouse, Mary Coombs of the home; son, Russell, Cinnaminson, N.J.; daughter, Judith Coombs Schreiber, Estes Park, Colo.; stepdaughter, Shelley Goeney Bush, Wichita; and eight grandchildren.

Chester Alden Fleming

Chester Alden Fleming, 94, Eudora, died Dec. 4 at the Eudora Nursing Center. He was born Dec. 4, 1910, in Salina, the son of John A. and Bertha Holmes Fleming.

Fleming graduated in 1940 from the University of Kansas School of Law. After law school, he worked for the Social Security Administration. After retiring from the U.S. government, he practiced law in Eudora for five years. He was a lifetime member of the KBA.

He was a 70-year member of the St. Paul United Church of Christ, where he was a choir member and served on the church council. He was a member of the Scottish Rite Mason-Doric Lodge No. 83 AF and AM in Eudora, serving twice as master. He also had been president of the Eudora Township Library board of directors.

He married Violet Gerstenberger on Aug. 29, 1936. She survives. Other survivors include a son, Carl, Eudora; a daughter, Karin McKean, Wichita; a brother, Bill, Falfurrias, Texas; eight grandchildren; and five great-grandchildren.
A Reminder! KBA Officer and Board of Governors Elections in 2005; Petitions due by March 11

The KBA Nominating Committee, chaired by immediate past president Dan Sevart, Wichita, met on Jan. 28, 2005, to consider nominations for KBA officers. Those nominations were not available at press time, but can be obtained by calling KBA Executive Director Jeffrey Alderman at (785) 234-5696. In addition to being nominated by the Nominating Committee, individuals can submit a petition, signed by 50 KBA members, to run for a KBA officer position. Petitions are due by March 11, 2005, and can be obtained from Rebecca Wormington at (785) 234-5696 or by e-mail at rwormington@ksbar.org.

BOARD OF GOVERNORS

There will be six positions on the KBA Board of Governors up for election in 2005. Candidates seeking a position on the Board of Governors must file a nominating petition — signed by at least 25 KBA members from that district — with Jeffrey Alderman by March 11, 2005. If no one files a petition by March 11, 2005, the Nominating Committee will reconvene and nominate one or more candidates for open positions on the Board of Governors. KBA districts with seats on the Board of Governors up for election in 2005 are:

- **District 1**: Incumbent Thomas J. Bath Jr. is eligible for re-election. Johnson County
- **District 3**: Incumbent Hon. Rawley J. “Judd” Dent is not eligible for re-election. Allen, Anderson, Bourbon, Cherokee, Crawford, Labette, Linn, Montgomery, Neosho, Wilson, and Woodson counties
- **District 5**: Incumbent Thomas E. Wright is not eligible for re-election. Shawnee County
- **District 7**: Incumbent Mary Kathryn Webb is eligible for re-election. Sedgwick County
- **District 8**: Incumbent Trish Rose is not eligible for re-election. Barber, Barton, Harper, Harvey, Kingman, Pratt, Reno, Rice, and Stafford counties
- **District 12**: Incumbent Michael Anthony Williams is eligible for re-election. Out-of-State

For more information:

Petitions for the Board of Governors can be obtained by contacting Rebecca Wormington at the KBA office at (785) 234-5696 or at rwormington@ksbar.org.

If you have any questions about the KBA nominating or election process or serving as an officer or member of the Board of Governors, please contact Dan Sevart at (316) 269-4215 or via e-mail at dansevart@aol.com or Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
Some Helpful Advice for Young Lawyers

By Eric Kraft, KBA Young Lawyers Section president

Recently I had the opportunity to help law students prepare for mock trials during an intensive trial advocacy program at Washburn University School of Law. Although I was officially a member of the faculty, I think I learned as much as the students. I am not, by any stretch, "long in the tooth" as a lawyer, but this experience reminded me of how difficult it was to be a new lawyer and how much there is to learn after law school.

In our inaugural issue of "The YLS Forum" (our section's e-newsletter), two distinguished judges, Monti Belot of the Kansas Federal District Court and Robert Fleming of the 11th District Court in Lebette County, wrote to young lawyers and provided invaluable advice and practical tips. (For those of you who did not get our newsletter, you can view it at the KBA members-only Web site at www.ksbar.org.) Although I cannot hope to provide views similar to those expressed by these members of the bench, I can share some of the advice that I have received over the years with young lawyers who are at the dawn of their legal careers.

The very first thing that I, along with a lot of other new lawyers, had to learn, usually the hard way, is that you don't know how to practice law coming straight out of law school. You have probably heard this before, but you may not yet have been humbled by your own ignorance of the practice of law. With that in mind, it is in every new lawyer's best interests to humble oneself before giving that opportunity to another. In his column, Belot advises young attorneys to seek the advice of older, respected lawyers. As a different twist to this advice, young attorneys should look for help from wherever they can find it, including from paralegals, legal secretaries, runners, filing clerks, other office staff, court clerks, and administrative assistants.

I remember starting my practice and being completely unfamiliar with what a legal secretary or a paralegal actually did, let alone how to ask them to do it. You will most likely find that legal secretaries and paralegals in your office have "practiced" law far longer than you and have seen and experienced more than you. They also know how to work the copiers, scanners, and fax machines; they know where the courthouse is and, oftentimes, know a clerk or two; and they know when to let the arrogant young attorney fend for himself. Befriend your support staff, and they will help you look good. It is the most important thing a young attorney can do.

As a new lawyer, I had trouble keeping all of the dates and deadlines straight. Keeping your calendar is a critical part of the practice of law and possibly the most tedious. Major court dates are usually easily kept; it is, however, the deadlines and follow-up dates that require the utmost attention. It is extremely important, therefore, to learn to calendar anything and everything, and make it a habit. Find your favorite way to calendar events and tasks, whether it is on paper, in Outlook, or with a PDA or another device, and utilize a system that ensures the entry of each and every important event, follow-up, response, meeting, and deadline.

Belot also recommends that you be responsive to your clients. Every year, the number one complaint that clients voice to disciplinary administrators is that they were not kept informed about the progress of their case. One of the best pieces of advice that I received as a young lawyer was to keep a log of every phone call on a legal pad near my telephone. This log was not used as a note-taking device and pages were never removed. It was, instead, a log of the calls that I received and that I needed to return. I have now kept that log of phone calls for almost four years, and nearly each and every call is marked so that I know that I have returned it.

Finally, a good lawyer will never stop learning. Just as I saw law students struggling as neophytes with the trial process, I also know that, as a young lawyer, I have much more to learn. Experience usually cannot be hastened, it only comes with time. Each of us must recognize the opportunities that are available to us to increase our experience and, as a result, our knowledge. The KBA and the Young Lawyer's Section provide just that sort of experience through newsletters, social events, and CLE opportunities. The KBA Annual Meeting is one such event that provides the opportunity for younger and older lawyers alike to learn from each other. At this year's Annual Meeting, June 9-11 in Vail, Colo., the YLS will provide CLE and programming opportunities specifically for younger lawyers. I would encourage each of you to attend.
Celebrating 70 years of service to the legal community...

Since 1935, Legal Directories Publishing Company has provided the members of the legal profession with the most accurate reference directory available. That very first paperback was the just the beginning of what has become a nationwide, multivolume staple of law offices everywhere. From one volume to five, from 125 pages to more than 2,000, we have grown up alongside the profession itself. In 2005, we will commemorate the 70th Anniversary of that initial publication, and in the spirit of celebration, we would like to express a heartfelt thanks to all of the men and women who have supported us along the way.

Legal Directories Publishing Company. We're the blue book.
Lawyers' Actions are the Most Effective Weapon in KBA Legislative Arsenal

By Jim Clark, KBA legislative counsel

By the time you read this, the 2005 legislative session will be well underway. Realizing that any attempt to predict legislative activity a month in advance (the time between the Journal deadline and publication) is a tenuous, if not totally foolhardy, activity, I will venture to say that major legislative issues are, or at least should be: health, education, morality, and money (HEMM). This broadly inclusive agenda is not to be confused with the agenda put forward by the more conservative prognosticators, whose agenda includes homosexuals, abortion, and welfare (HAW). While more specific predictions may miss the mark widely, it is virtually certain that there will be much hemming and hawing as the session progresses.

Health — Quality health care includes at least three elements: affordability, availability, and quality. The more familiar, or at least more relevant, issue for lawyers is quality, specifically the effect that the tort law system provides. This positive aspect of litigation is ignored in any discussion of the alleged medical malpractice crisis, or the larger issue of “tort reform.” There are some advocates who would maintain that the high cost, and the resulting lack of availability, of health care is entirely due to the oxymoronic combination of “frivolous lawsuits” and “runaway verdicts.” It should be clear to all sides that litigation costs are not solely responsible for the high cost.

Insurance premiums, the most frequently discussed contributing factor, can also be attributed to declines in the stock market portfolios held by insurance companies. In addition to insurance premiums, there are the increased cost of new technologies and new drugs, not to mention increases in compensation of medical professionals.

Legislative efforts that concentrate on litigation alone will do little to stem the rising tide of health care costs but will impose a tremendous burden on those who have been actually harmed. Any legislative efforts directed toward improving health care must also look closely at improvements in the quality of care and, more importantly, must take a long range look at the availability of that care.

The legal profession is involved, to some degree at least, in two of the three elements of health care: quality and affordability. Our involvement in the third element, availability, remains less obvious. Perhaps this is because availability is more of a political question, not related to the tidy systems of tort or insurance law that we studied in law school.

Nevertheless, lawyers need to be involved in the process of making quality medical care available to all citizens.

Education — While lawyers and judges are often featured in the current controversy over education, it is largely through their role in the reactive mode of litigation. Such efforts are laudable, but not efficient. While the time it takes for a case to wend its way through the court system and through the legislative process may be unremarkable for lawyers, for a school age child it is a lifetime. The debate, both at the state and local levels, on what is adequate funding, or what should be taught, is a debate that must be joined by lawyers.

Most Kansas lawyers are products of excellent public schools. Those few who aren’t may be in an even better position to judge the beneficial effect of public education in Kansas. We now need to become involved to show our appreciation of that education and to ensure the same quality for our children and grandchildren. If we can’t all be school board or legislative candidates, then we can at least use our resources and abilities to support those who are.

Morality — Homosexuality, or fear of same, has joined abortion as a lightning rod of legislative activity. The outcry against gay marriage has reached, and perhaps surpassed, the outcry over gambling and/or alcohol made in the not so distant past. As in the opposition against alcohol, resulting in the 18th Amendment and Article 15, Section 10 of the Kansas Constitution, there is now an effort to invoke constitutional authority over what is basically a morality issue, as if a statutory prohibition is insufficient (won’t former death row inmates be surprised to learn this).

As lawyers, we are trained in the intricacies of constitutional law, and we are used to arguing how it should be interpreted. However, we have little training in the political processes that go into amending the constitution, and it would appear that there are very few clients willing to engage us to do so. Nevertheless, we cannot neglect this debate over amending the constitution to impose the morality of the majority over a minority.

Likewise, the death penalty also thrust into prominence by a recent court decision directly involves only a small percentage of lawyers in their practices. While the policy debate over the death penalty itself is one of concern to all Kansas
citizens, the debate over the procedures to be followed by our state demand the training and experience acquired by lawyers. We cannot abdicate the protection of the innocent to the few dedicated lawyers staffing the Innocence Project.

Money — Underlying much of the current legislative session, and most sessions, is the search for new funding sources, as well as the debate over raising, or lowering, established sources. This issue will be on the front burner of education policy, even though the debate over science curriculum may get more floor time. Money will also be involved in the effort to increase access to health care, as well as to improve its quality. While health care access will probably not get the media coverage it deserves, it does have our governor’s attention and, as a result, will also get the attention of the Legislature. The current morality issues do not appear to be linked to money, but may become so in the future. Witness the debate over major morality issues of the past, now has more to do with economics than with morality.

But enough venting (hemming and hawing!). This article is an effort to discuss the larger role that KBA members have in the function of government.

As new legislation begins flooding the document room at the Capitol, and the legislative Web site, future efforts by the KBA Legislative Committee will be concentrated on analyzing and debating the merits of specific bills or committee activity that affect our profession and rallying KBA members to weigh in on those specific issues. As KBA President Crow stated in his January column, action by member lawyers is still the most effective weapon in the KBA legislative arsenal. But, limiting this weapon to issues that only affect the practice of law would be a disservice to our communities and to ourselves as members of those communities.

---

**Lawyers in the Legislature Committee Assignments 2005**

**Kansas Senate**

**Senate Standing Committee Appointments**

<table>
<thead>
<tr>
<th>District</th>
<th>Senator</th>
<th>Party</th>
<th>Committee Assignments</th>
</tr>
</thead>
<tbody>
<tr>
<td>8th District</td>
<td>Sen. Barbara Allen</td>
<td>R</td>
<td>Assessment and Taxation (chair), Education, and Judiciary</td>
</tr>
<tr>
<td>34th District</td>
<td>Sen. Terry Bruce</td>
<td>R</td>
<td>Agriculture, Assessment and Taxation, Judiciary (vice chair), Natural Resources, and Special Claims Against the State</td>
</tr>
<tr>
<td>35th District</td>
<td>Sen. Jay Scott Emler</td>
<td>R</td>
<td>Commerce, Utilities (chair), and Ways and Means (vice chair)</td>
</tr>
<tr>
<td>4th District</td>
<td>Sen. David Haley</td>
<td>D</td>
<td>Judiciary, Public Health and Welfare (ranking minority), and Health Care Strategies (ranking minority)</td>
</tr>
<tr>
<td>26th District</td>
<td>Sen. Phil Journey</td>
<td>R</td>
<td>Judiciary, Public Health and Welfare, Health Care Strategies, Transportation, and Special Claims Against the State (chair)</td>
</tr>
<tr>
<td>15th District</td>
<td>Sen. Derek Schmidt</td>
<td>R</td>
<td>Agriculture, Assessment and Taxation (vice chair), Confirmation Oversight (chair), Interstate Cooperation, Judiciary, Organization, and Calendar and Rules (vice chair)</td>
</tr>
<tr>
<td>11th District</td>
<td>Sen. John Vratil</td>
<td>R</td>
<td>Education (vice chair), Federal and State Affairs, Interstate Cooperation, Judiciary (chair), Organization, and Calendar and Rules</td>
</tr>
</tbody>
</table>

**Kansas House of Representatives**

**House Standing Committee Appointments**

<table>
<thead>
<tr>
<th>District</th>
<th>Representative</th>
<th>Party</th>
<th>Committee Assignments</th>
</tr>
</thead>
<tbody>
<tr>
<td>48th District</td>
<td>Rep. Eric Carter</td>
<td>R</td>
<td>Insurance (vice chair); Utilities; and Revenue, Judicial, Transportation, and Retirement Budget</td>
</tr>
</tbody>
</table>
The Board of Governors of the Kansas Bar Association held a regularly scheduled business meeting on Friday, Dec. 3, 2004, at the Marriott Country Club Plaza Hotel in Kansas City, Mo. The governors heard and discussed the following items and took the following actions:

• When a quorum was present, President Michael Crow called the meeting to order and welcomed all the board members. The minutes of the last meeting held in September were reviewed and approved. The board also reviewed the October financial statements, which indicated that income and expense were generally in line with the annual budget.

• President Crow reported about the recent hearing held before the Board of Law Examiners regarding the proposed Reciprocity rule. He commented that not one person appeared in opposition to the rule. In addition, a large majority of the comments received were in favor of the rule. The Board of Law Examiners was expected to make an official recommendation to the Supreme Court, which might make a decision as early as January. President Crow then confirmed that he would be meeting with the Court in February to present a mandatory malpractice disclosure proposal, as well as discuss a report by the Unauthorized Practice of Law Committee recommending adoption of a formal definition of the practice of law.

• President-elect Rich Hayse reported on his recent attendance at the Southern Conference of Bar President’s Annual Meeting. Kansas is a member of the SCBP, which is an organization of state bar leaders that provides resource information and support of bar projects. The KBA will be hosting the SCBP Annual Meeting in 2009.

• Executive Director Jeffrey Alderman gave an update regarding the nominating process for the upcoming board elections. He also asked the Governors to encourage their district constituents to participate in the awards process and submit the names of members who they feel are deserving of a particular award.

• The board approved the Fiscal Year 2005 KBA budget as recommended by the Executive Committee.

• A report was received from Legislative Committee Chairperson Jim Bush. The board then adopted or abolished a number of legislative positions at the recommendation of the Committee.

• The board learned that preparations were underway for the 2005 Annual Meeting to be held June 9-11 in Vail, Colo. The Planning Task Force planned to select a theme at its next meeting.

• The board received an update on membership, including renewal timelines and recruitment strategies. A quick review of new member benefits ensued. Many positive comments had been received from members regarding the newly redesigned Web site. In addition, the new bulletin board sites for sections would be unveiled later in the month.

• The board approved conducting a new Kansas Lawyers Economic Study. It was hoped that the survey would be ready in the spring, and the results could be published shortly thereafter.

• Young Lawyer Section President Eric Kraft briefed the board on various initiatives, including the fact that the first issue of the YLS Forum newsletter was in its final draft stage and would be published in early January.

• The “Raising the Bar” campaign was discussed. The campaign had completed the board giving phase and had commenced solicitation of major gifts.

• The ABA Delegates gave a sneak preview of the ABA Midyear Meeting, which will be held in February in Salt Lake City, Utah.

• Lastly, the Board would be hosting its annual dinner that evening with the Executive Committee of the Kansas District Judges Association to discuss items of mutual interest.

With no further business, the meeting was adjourned. The next meeting of the board was scheduled for Friday, Feb. 18, in Topeka. To receive a complete copy of the meeting minutes or if any member should have any questions, please feel free to contact KBA Executive Director Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
Clients of all sizes and types increasingly conduct their businesses and personal affairs without regard to state lines. When they hire a lawyer, they understandably would like to hire someone who can handle their problem or issue in its entirety, not someone who can only handle that problem or issue up to a neighboring state line, where it must then be handed off to another lawyer or firm who will charge them all over again for dealing with it. Moreover, just as the mobility and jurisdictional reach of client matters have increased exponentially, so has the complexity and rapid development of law in particular subject matter or industry-driven areas, with resulting de facto specialization of many lawyers in response to client needs. A client may no longer look for a "good lawyer" to handle their matter — the client may look for the best identifiable “construction lawyer,” “class action lawyer,” “personal injury lawyer,” “public law lawyer,” or “domestic relations lawyer,” without regard to whether that lawyer is on one side or the other of any state line. Larger clients may have national or regional counsel charged with handling particular transactional or litigation matters in various, or more likely, multiple states.

Against this backdrop of client economics and practice realities, lawyers work within one of the most highly developed, but also highly fragmented, professional regulatory frameworks. The Kansas lawyer and law firm handling a matter touching upon other states must determine whether what they are doing runs afoul of the law in those other states. Lawyers from other states also have the same type of problem when their matters touch upon Kansas. In addition, Kansas lawyers must be wary of assisting lawyers from other states to engage in practice that violates Kansas law. Given these realities, is there well-developed guidance available for Kansas lawyers looking beyond state borders and other lawyers looking into Kansas? In a word, no.

This article will highlight some of the multijurisdictional practice issues for both litigation and transactional lawyers and will discuss at least the general authorities and rules available or applicable to respond to those issues. But the practitioner who is philosophically allergic to gray areas is advised to reinsert his or her head into the nearest body of sand — there is precious little clarity to report. The article will conclude with a suggestion for removal of at least some of the uncertainty.
I. The Context: Some Example Multijurisdictional Practice Problems

The following scenarios are examples of relatively common fact situations that implicate multijurisdictional practice considerations. Consider how many of them you've already encountered; possible answers will be discussed in section III.

**Litigation practice**
1. Kansas lawyer has a Kansas-based client that asks her to analyze its position in a dispute about an acquisition of Kansas assets from another company located out of state, under a contract providing for the application of another state's law. May Kansas lawyer advise client about the validity of its legal position under the other state's law?
2. Kansas lawyer has a Kansas-based client that has a dispute with a company from another state. May Kansas lawyer send demand letters and statements of client's position to the adversary in the other state?
3. Kansas lawyer's Kansas-based client has a dispute with a company from another state. A negotiation meeting is arranged between client and its adversary and their lawyers at the office of the adversary. May Kansas lawyer attend the meeting without local counsel?
4. Kansas lawyer's Kansas-based client is sued in another jurisdiction where it has an office. May Kansas lawyer go into that jurisdiction to perform some preliminary investigation, while local counsel is being arranged and before admission pro hac vice in the other jurisdiction?
5. Kansas lawyer represents client in a matter in a Kansas court. It is discovered that a third-party witness to be deposed resides in another state and that her deposition can only be taken in that state. May Kansas lawyer attend the deposition without local counsel?
6. Kansas lawyer represents client in a dispute with another entity. Pursuant to contract the matter is to be arbitrated. The parties agree upon an arbitrator and that the arbitration will be conducted at a neutral site where the arbitrator is located, in a state having nothing to do with the underlying dispute. May Kansas lawyer participate in the arbitration without local counsel?
7. Lawyer is a member of a firm with offices in Kansas and a neighboring state. She is admitted to the federal court bar of the neighboring state, but is not licensed in the state courts of that state. If lawyer limits her practice to federal employment law claims, may lawyer maintain an office in the neighboring state?
8. Law firm hires an experienced lawyer from another state to lead a new energy litigation practice group. The lawyer moves to Kansas in February, unable to be admitted to the Kansas bar upon examination until September. Until he is admitted, may the new lawyer practice as a lawyer from the firm's office in Kansas, using other lawyers of the firm as local counsel?

**Transactional practice**
1. Kansas lawyer is asked for an opinion letter about the enforceability of a contract provision under the law of another state. May she provide that opinion without local counsel from that other state?
2. Kansas lawyer has a Kansas-based client that asks her to represent it in negotiating an acquisition of Kansas assets from another company located out of state. May Kansas lawyer communicate by letter, phone, and e-mail with the other company's out-of-state counsel in negotiating the transaction?
3. Kansas lawyer's Kansas-based client asks her to represent it in negotiating an acquisition of Kansas assets from another company located out of state. May Kansas lawyer attend negotiating sessions and closing in another state?
4. Kansas lawyer has an existing client based in another state that asks him to represent it in negotiating a sale of a group of retail stores located in 25 states, including Kansas, because of Kansas lawyer's particular expertise in that type of transaction. May Kansas lawyer communicate by letter, phone, and e-mail with the other company's out-of-state counsel in negotiating the transaction?
5. May Kansas lawyer representing the client in problem four attend negotiating sessions and a closing in another state?
6. Kansas lawyer and his Kansas-based client are in an airport on the East Coast awaiting a connecting flight. Client asks for advice about a matter of Kansas law. May lawyer answer or must he wait until they are back on Kansas soil?
7. Law firm has an office in a neighboring state. In connection with a large transaction for a client, may four of its transactional lawyers licensed in Kansas report to the neighboring state office for a month to do due diligence?

“Model Rule 5.5, as currently adopted in Kansas, is as elegant in its circular simplicity as it is almost wholly lacking in guidance for the practitioner. In effect, it amounts to nothing more than an admonition to follow the law of any applicable jurisdiction without suggestion of what that might entail ...”
LEGAL ARTICLE: ON THE PROPER STATE OF THINGS ...

8. Law firm maintains a Web site, accessible to potential clients in all 50 states. May it represent that it has expertise in various types of transactional matters, even though it does not have lawyers licensed in other states?

II. The Rules and Recent Developments

A. Existing Model Rule 5.5

Model Rule 5.5, as currently adopted in Kansas, is as elegant in its circular simplicity as it is almost wholly lacking in guidance for the practitioner. In effect, it amounts to nothing more than an admonition to follow the law of any applicable jurisdiction without suggestion of what that might entail, i.e., what conduct is actually proscribed:

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

In the framework of this rule, what constitutes the practice of law within any given jurisdiction? The rule itself is silent. The Comment to the rule makes that silence official, if unhelpful:

The definition of the practice of law is established by law and varies from one jurisdiction to another.

Thus, under the existing rule, Kansas practitioners concerned about whether activities in another state in which they are not licensed would constitute the unauthorized practice of law must (perhaps ironically, if the answer turns out to restrict their activities) analyze the law of that other state. Of course, unless all states had a common rule providing specific guidance, that would be the case in any event. But the rule also provides no guidance to practitioners from other states attempting to avoid difficulty with Kansas regulation of the practice of law.

Moreover, Rule 5.5(b) creates at least the possibility that a Kansas practitioner could be held responsible for "assisting" a lawyer from another state in unauthorized practice within the state, without any guidance in the rule about the conduct that might be the subject of such responsibility.

B. What constitutes the practice of law in Kansas?

In Kansas, as in most states, the law concerning what constitutes the practice of law has developed piecemeal in judicial decisions — and usually in contexts other than multijurisdictional practice, such as disciplinary or criminal proceedings about the actions of suspended or disbarred attorneys; proceedings concerning nonlawyers alleged to be engaging in the practice of law; proceedings to enjoin attorneys not licensed in Kansas but resident in Kansas from practice. In these contexts, the cases have not involved fine nuances, and the courts have focused on the protection of clients and the profession from persons untrained, unprofessional, or already in disciplinary trouble. Accordingly, in describing activities that constitute or fall within the definition of the practice of law, the appellate courts have painted with a broad brush:

This brings us to the question of what is "practicing law." The general meaning of the term is of common knowledge, although the boundaries of its definition may be indefinite as to some transactions...
7. Perkins, 138 Kan. at 908, 28 P.2d at 769-70. The Kansas Supreme Court has said that "no precise all-encompassing definition is advisable," but the Perkins definition has "gained widespread acceptance." Williams, 246 Kan. at 689, 793 P.2d at 240.


12. The only guidance in the current version of the Model Rules as adopted in Kansas appears in the Comment to KRPC 8.5, discussed in section II.F., infra.


14. 70 Cal. Rptr. 2d 304, 949 P.2d 1 (Cal.1998).

15. This California statute also precludes the recovery of fees for services as an attorney unless the attorney is a member of the state bar. 70 Cal. Rptr. at 308, 949 P.2d at 5.


17. 70 Cal. Rptr. 2d 307, 949 P.2d 4.
Make the Most of Your Kansas Bar Association Member Benefits!

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### Form: 2005 KBA Membership Form

**Through December 31, 2005**

#### A. Identification Information
- **First Name** ____________  **Initial** ____________  **Last** ____________
- **Informal Name** ____________  **Supreme Ct #** ____________
- **Firm/Company/Agency** ____________
- **Street Address** ____________
- **P.O. Box** ____________  **City** ____________  **State** ____________
- **ZIP** ____________  **+ 4** ____________  **County** ____________
- **Phone** ( ) ____________  **Fax** ( )

#### B. Practice Information

- **Primary Practice** – Check (✓) one:
  - Private Practice
  - Corporate Law Dept.
  - Judge
  - Government
  - Legal Education
  - Non-Law Related
  - Retired
  - Legal Services

- **Number of lawyers in your office** – Check (✓) one:
  - 1
  - 2-5
  - 6-10
  - 11-20
  - 21-30
  - 31-50
  - More than 50

#### C. Concentration Areas

**Practice Areas** – Check (✓) up to THREE AREAS of concentration that best describes your practice.

<table>
<thead>
<tr>
<th>CATEGORY NAME</th>
<th>CATEGORY NAME</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative Law</td>
<td>Insurance Law (Regulatory)</td>
</tr>
<tr>
<td>Agricultural Law</td>
<td>Intellectual Property Law</td>
</tr>
<tr>
<td>Alternative Dispute Resolution</td>
<td>(Patent, Trademark &amp; Copyright)</td>
</tr>
<tr>
<td>Appellate Practice</td>
<td>International Law</td>
</tr>
<tr>
<td>Bankruptcy &amp; Insolvency</td>
<td>Labor &amp; Employment Law</td>
</tr>
<tr>
<td>Corporate Law Dept.</td>
<td>Litigation (Commercial &amp; Business)</td>
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<tr>
<td>Civil Rights</td>
<td>Litigation (General Civil Practice)</td>
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<tr>
<td>Collections</td>
<td>Municipal Law</td>
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<tr>
<td>Construction Law</td>
<td>Oil, Gas &amp; Mineral Law</td>
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<tr>
<td>Consumer Protection</td>
<td>Public Utility Law &amp; Regulated Industries</td>
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<tr>
<td>Corp., Business &amp; Banking</td>
<td>Real Estate Law</td>
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<tr>
<td>Criminal Law (Prosecution)</td>
<td>School Law</td>
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<tr>
<td>Criminal Law (Defence)</td>
<td>Taxation</td>
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<td>Criminal Law (Indigent Defense)</td>
<td>Tort &amp; Personal Injury</td>
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<tr>
<td>Elder Law</td>
<td>Trade &amp; Professional Associations</td>
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<tr>
<td>Environmental Law</td>
<td>Trust, Estate Planning &amp; Probate</td>
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<td>Family Law</td>
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<td>General Practice</td>
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<td>Health &amp; Hospital Law</td>
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<tr>
<td>Insurance Law (Litigation)</td>
<td>Workers’ Compensation</td>
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#### D. Membership Dues Categories

**(Dues year based on your first admission to any state bar)**

<table>
<thead>
<tr>
<th>Category</th>
<th>Dues</th>
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<tbody>
<tr>
<td>Legal assistant/paralegal</td>
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<tr>
<td>Admitted to any state bar 2004</td>
<td>$60</td>
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<tr>
<td>Admitted to any state bar 2003</td>
<td>$80</td>
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<tr>
<td>Admitted to any state bar 2002</td>
<td>$105</td>
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<tr>
<td>Admitted to any state bar 2001</td>
<td>$135</td>
</tr>
<tr>
<td>Admitted to any state bar 2000 or before</td>
<td>$175</td>
</tr>
<tr>
<td>Full-time government employee (admitted to any state bar 2001)</td>
<td>$135</td>
</tr>
<tr>
<td>Inactive - Kansas license must be inactive with Supreme Court</td>
<td>$60</td>
</tr>
<tr>
<td>Life Membership - Must have been a KBA member or licensed to practice in Kansas for 50 years. (Includes full benefits)</td>
<td><strong>FREE</strong></td>
</tr>
</tbody>
</table>

**Total Membership Dues**

#### E. Section Enrollment (Optional)

- **Administrative Law** $15
- **Alt. Dispute Resolution** $15
- **Bankruptcy & Insolvency** $15
- **Construction Law** $15
- **Corporations, Banking & Business** $15
- **Criminal Law** $15
- **Elder Law** $15
- **Employment Law** $15
- **Family Law** $25
- **Employment Law** $15
- **Government Law** $10
- **Health Law** $15
- **Insurance Law** $15
- **Intellectual Property Law** $15
- **Litigation (Commercial & Business)** $15
- **Litigation (General Civil Practice)** $15
- **Municipal Law** $60
- **Oil, Gas & Mineral Law** $20
- **Public Utility Law & Regulated Industries** $15
- **Real Estate Law** $15
- **School Law** $15
- **Taxation** $15
- **Tort & Personal Injury** $15
- **Trade & Professional Associations** $15
- **Trust, Estate Planning & Probate** $15
- **Workers’ Compensation** $15

**Total Section Dues**

#### F. Demographics (Optional)

- **Birthdate**
- **Gender**
- **Race**

#### G. Kansas Bar Foundation (Optional)

- **Add my tax deductible contribution to the Kansas Bar Foundation:**
  - $50 Sustaining Membership
  - Other $________

**Total Enclosed (Add subtotals of sections D, E, & G)**

#### I. Payment Method

- **Check** ____________  **(made payable to KBA)**
- **VISA**
- **MasterCard**
- **Am. Ex.**

**Credit Card No.** ____________  **Exp. Date** ____________

**Signature**

**Mailing Information**

Return application to: KBA, P.O. Box 1037, Topeka, KS 66601-1037, or use your Visa/MasterCard/American Express and fax to (785) 234-3813. Questions? Call (785) 234-5696.

**Tax Considerations**

Gifts to the Kansas Bar Foundation are tax deductible as charitable contributions. In compliance with the Omnibus Budget Reconciliation Act of 1993, we estimate 12 percent of your KBA membership dues are not deductible as a business expense because they are allocable to lobbying expenditures. Eighty-eight percent of 2005 membership dues and 100 percent of action membership dues remain deductible as a business expense. Dues are not deductible as charitable contributions.
that Birbrower was not entitled to recover its fees to the extent it had practiced law in California without its attorneys being licensed to do so. Ultimately, the California Supreme Court held that the Birbrower firm had conducted the unlicensed practice of law in California and was not entitled to any fees generated from that portion of its work.

Insofar as the key facts are evidenced in the opinion, the Birbrower court appears to have relied upon the following: the client of the lawyers was California-based; the underlying dispute was between two California-based entities; the underlying dispute was over an agreement that provided for the application of California law; none of the lawyers were licensed in California; and the lawyers traveled to California several times to meet with the client and its accountants, to meet with the opposing party, to interview potential arbitrators, to discuss and negotiate settlement terms, and to render legal advice to the client. On the other hand, there are no facts in the opinion evidencing any ties of the matter to New York, where the lawyers were licensed, other than the location of the original meeting and place of entering into an engagement agreement that was later modified. The court recognized that its decision involved an exercise in defining what it means to practice law “in” a state, and that it is not a bright-line test.

In addition to not defining the term “practice law,” the Act [the statute at issue] also did not define the meaning of “in California.” In today’s legal practice, questions often arise concerning whether the phrase refers to the nature of the legal services or restricts the Act’s application to those out-of-state attorneys who are physically present in the state.

... In our view, the practice of law “in California” entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer’s activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law “in California.” The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

This portion of the opinion suggests a weighing of factors, and given the heavy, almost exclusive California basis of the facts before the court, these factors would have been sufficient rationale for the court to reach its result. But it went further, with a statement that must be considered dictum, but that appeared to foreshadow a potentially broader but uncertain reach of California regulation of out-of-state lawyers even for out-of-state conduct:

Our definition does not necessarily depend on or require the unlicensed lawyer’s physical presence in the state. Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated [the statute], but it is by no means exclusive. For example, one may practice law in the state in violation of [the statute] although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law “in California” whenever that person practices California law anywhere, or “virtually” enters the state by telephone, fax, email, or satellite.

A pair of cases that closely followed and discussed Birbrower appeared to ignore or reject the potentially expansive reach of this dictum. In Fought & Co. v. Steel Engineering and Erection, Inc., the Supreme Court of Hawaii rejected the effort of a party opposing an attorney's fee award to the prevailing party in a construction case to argue that the prevailing party’s Oregon law firm’s fees should not be considered because that firm had engaged in unauthorized practice under a Birbrower rationale. The case had been tried and otherwise handled in Hawaii by a Hawaiian law firm, but the client’s Oregon counsel had performed work on the case in and from Oregon, where the client was located. The parties to the case were from five different jurisdictions. The court held that the Oregon firm had not engaged in unauthorized practice in Hawaii:

... [T]he transformation of our economy from a local to a global one has generated compelling policy reasons for refraining from adopting an application so broad that a law firm, which is located outside of the state of Hawaii, may automatically be deemed to have practiced law “within the jurisdiction” merely by advising a client regarding the effect of

19. Id.
20. 70 Cal. Rptr. 2d 316, 949 P.2d 13. That court held that Birbrower could enforce the fee contract to the extent that its fees attributable to work performed in New York could be severed from those performed in California. Id.
21. 70 Cal. Rptr. 2d at 316, 949 P.2d at 306-07, 949 P.2d at 3-4.
22. 70 Cal. Rptr. 2d at 308-09, 949 P.2d at 5.
23. 70 Cal. Rptr. 2d at 309, 949 P.2d at 5-6.
Hawaii law or by “virtually entering” the jurisdiction on behalf of a client via “telephone, fax, computer, or other modern technological means.” See Birbrower [citation omitted]. A case such as this — involving parties domiciled in at least five different jurisdictions — only emphasizes what seems intuitively obvious: a commercial entity that serves interstate and/or international markets is likely to receive more effective and efficient representation when its general counsel, who is based close to its home office or headquarters and is familiar with the details of its operations, supervises the work of local counsel in each of the various jurisdictions in which it does business. Undoubtedly, many Hawaii corporations follow the same practice.25

Similarly, even the California Court of Appeal, interpreting the same statute at issue in Birbrower, appeared anxious to step back from the Birbrower dictum. In Estate of Condon,26 the court was faced with a remand from the California Supreme Court to reconsider, in light of Birbrower, its prior decision reversing a probate court’s holding that an out-of-state lawyer had committed unauthorized practice and was therefore not entitled to fees.27 The Colorado law firm at issue had been engaged by the decedent in Colorado to prepare her will and estate plan and was engaged after the decedent’s death to advise the decedent’s son, one of the co-executors, who was also from Colorado.28 The Colorado coexecutor also engaged California counsel to file papers and make appearances in California probate court.29 The other coexecutor, from California, where the decedent lived and died, engaged California counsel to advise her in the same proceedings.30 Over the course of an acrimonious three-year period, the Colorado law firm implemented an agreement concerning business assets; resolved litigation and disputes about other estate assets; and resolved threatened litigation about life insurance, trust issues, and accountings concerning the estate. In so doing, it spent hundreds of hours, including at least 10 hours while physically present in California, and including communications by telephone, fax, and mail to California.31 Given these facts, the Condon court characterized the rationale of Birbrower as one of protecting California clients, a rationale inapplicable to the Colorado lawyers’ representation of a Colorado client, and at least implicitly tried to limit the Birbrower dictum:

... [B]oth the facts and the issues in Birbrower are distinguishable from those presented in this case. Most significantly, [the co-executor client] was a resident of the State of Colorado. Thus the issue was not “whether an out-of-state law firm, not licensed to practice law in this state, violated section 6125 when it performed legal services in California for a California-based client ....” but whether an out-of-state law firm practicing law on behalf of a resident of the lawyer’s home state violated section 6125 when that lawyer either physically or virtually entered the State of California and practiced law on behalf of that client. Adopting the premise, as articulated in Birbrower, that the goal of section 6125 is to protect California citizens from incompetent or unscrupulous practitioners of law we must conclude that section 6125 is simply not applicable to our case.32

Also it would be presumptuous of this court to assume that in a multi-state business transaction where parties are located in diverse states and represented by counsel in those states, the lawyers are practicing “California law.” Furthermore, it is insular to assume that only California lawyers can be trained in California law. ...

Estate of Condon26

25. 951 P.2d at 497.
27. Id. at 924.
28. Id. at 923.
29. Id. at 924.
30. Id. at 923.
31. Id. at 923-23.
32. Id. at 927-28.
33. Id. at 928 (citation omitted).
D. Toward a standard: the restatement approach

The Restatement (Third) of the Law Governing Lawyers was published in 2000, representing the first Restatement on its subject matter. Its authors recognize that it differs in concept and scope from typical Restatements: it focuses on a particular vocation, the practice of law; and, while it takes into account the ethics codes in effect in various jurisdictions, it sometimes "significantly departs" from those formulations to "clarify the intendment of the code provisions, ... supersede drafting mistakes. ... [or] reflect recognition that experience with the codes revealed that better resolutions were to be had ...."34 Thus, this Restatement represents not only a reflection of what the law is, but the drafters' views of what the law should be. In that sense, its force is both increased and diminished — proponents may properly assert that it reflects the careful thought of influential minds in light of prior experience and existing law, while detractors are able to properly claim that it is not really a true "restatement," reflecting an attempt to influence the future direction of the law.

Whether one agrees or disagrees with the philosophical approach of the Restatement, its provision concerning multijurisdictional practice, coming on the heels of Birbrower, provided a much-needed framework for the issue. It set forth, for the first time, a "rule" for measuring a lawyer's out-of-state activity against the yardstick of unauthorized practice regulatory authority of the other jurisdiction, i.e., a definition of what pushes one over the limit of too much activity in relationship to a jurisdiction in which one is not licensed:

§ 3. Jurisdictional Scope of the Practice of Law by a Lawyer

A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:

(1) at any place within the admitting jurisdiction;

(2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and

(3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2).

The most meaningful part of this rule is subsection (3). Subsections (1) and (2) merely recognize the obvious — a lawyer can legally practice in geographic areas or before particular agencies or tribunals of the bar of which the lawyer is admitted, either fully, "regular admission," or temporarily, such as by admission pro hac vice. Subsection (3) recognizes a penumbra or halo associated with bar admissions, in which zone a lawyer can safely perform legal services that spill over into other jurisdictions, at least to a limited extent. Thus, applied to a lawyer's admission to the Kansas bar, this safe penumbral zone of practice would permit the lawyer to perform legal service for clients "at a place" other than Kansas to the extent that the lawyer's activities "arise out of" or are "otherwise reasonably related to" the lawyer's Kansas practice.

Because subsection (3) uses the disjunctive "or" between the two prongs of "arise out of" and "otherwise reasonably related to," one might reasonably expect them to be separate concepts or at least separately defined parts of a standard. But, in explaining the language of the subsection, the drafters did not choose to specifically describe the separate meaning of these terms. Instead, Comment (e) lists certain activities that should be considered as appropriate, describes a set of relevant factors by which to evaluate other activities, and then augments these with a few hypothetical illustrations. For litigation matters, Comment (e) approves of participation in proceedings and activities in other states "ancillary to" litigation pending in a state where the lawyer is admitted, regularly or pro hac vice, "such as counseling clients, dealing with co-counsel or opposing counsel, conducting depositions, examining documents, interviewing witnesses, negotiating settlements, and the like."35 For transactional and other out-of-court representation (such as arbitrations) where there is no concept of temporary admission pro hac vice, it is permissible for the lawyer, acting from the lawyer's home state, to advise a client or opine (if qualified from a competence standpoint) on the law of another state or about a proceeding or transaction in another state, and to draft documents intended to have effect in another state.36 Similarly, a lawyer may communicate from a home state office to persons or entities in other states by conventional or electronic means.37

For other activities and proceedings not performed in the lawyer's home state or directly connected to litigation pending in a state in which the lawyer is admitted, Comment (e) provides a nonexclusive list of factors to be considered:

... Beyond home-state activities, proper representation of clients often requires a lawyer to con-
duct activities while physically present in one or more other states. Such practice is customary in many areas of legal representation. As stated in subsection (3), such activities should be recognized as permissible so long as they arise out of or otherwise reasonably relate to the lawyer's practice in a state of admission. In determining that issue, several factors are relevant, including the following: whether the lawyer's client is a regular client of the lawyer; or, if a new client, is from the lawyer's home state, has extensive contacts with that state, or contacted the lawyer there; whether a multistate transaction has other significant connections with the lawyer's home state; whether significant aspects of the lawyer's activities are conducted in the lawyer's home state; whether a significant aspect of the matter involves the law of the lawyer's home state; and whether either the activities of the client involve multiple jurisdictions or the legal issues involved are primarily either multistate or federal in nature. Because lawyers in a firm often practice collectively, the activities of all lawyers in the representation of a client are relevant. The customary practices of lawyers who engage in interstate law practice is one appropriate measure of the reasonableness of a lawyer's activities out of state. Association with local counsel may permit a lawyer to conduct in-state activities not otherwise permissible, but such association is not required in most instances of in-state practice. Among other things, the additional expense for the lawyer's client of retaining additional counsel and educating that lawyer about the client's affairs would make such required retention unduly burdensome.

E. Toward a new rule: the ABA's proposed revision of Model Rule 5.5

In mid-2000, the ABA formed the Commission on Multijurisdictional Practice to study existing rules and make recommendations on the subject. The Commission, working contemporaneously with the ABA's "Ethics 2000 Commission," which was examining other aspects of the ABA's Model Rules, ultimately made a series of recommendations in a final report that was approved by the ABA House of Delegates in August 2002. These recommendations include a rewrite of Model Rule 5.5 in response to concerns that "it has become increasingly uncertain when a lawyer's work (other than as a trial lawyer in court) implicates the unauthorized practice of law (UPL) law of a jurisdiction in which the lawyer is not licensed." The new rule, although more detailed and specific than Restatement section 3, adopts the philosophy and in some instances (particularly in subsections (b)(3) and (4)), the language of the Restatement:

Rule 5.5: Unauthorized practice of law; multijurisdictional practice of law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

38. Id. at 28 (emphasis added).
40. Id. at 1-2.
41. Id. at 3.
(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

According to the ABA’s Web site, as of Dec. 9, 2004, 14 states had already adopted a rule identical or similar to new Model Rule 5.5, with recommendations pending before the highest courts of 13 additional states to adopt an identical or similar rule and recommendations by study committees in three additional states to adopt the same or similar rule.

In Kansas, the Kansas Bar Association appointed an ad hoc task force (the author was a member) to study Kansas Rules of Professional Conduct and the new ABA Model Rules approved as a result of the work of the “Ethics 2000 Commission” and Commission on Multijurisdictional Practice. The task force met and voted on recommendations to be made to the KBA Board of Governors. After assembly of a report to reflect the work of the task force, the Board of Governors approved a set of recommendations to ultimately be made to the Kansas Supreme Court. The recommendations as voted by the task force reflected a compromise between those who wished to adopt the new Model Rules wholesale (or nearly so) in the interest of national coherence and ease of interpretation in light of developing case law, and those who wished to only adopt selected new provisions where the existing rules were perceived as in need of improvement. Unfortunately, the report as approved by the KBA Board of Governors did not accurately reflect the task force’s decision to recommend the adoption of new ABA Model Rule 5.5 in its entirety. Apparently as a result of an inadvertent oversight in assembly of the lengthy and detailed report for presentation to the Board of Governors, the report incorrectly reflected that the task force recommended no change to existing KRPC 5.5.

F. Choice-of-law issues

When analyzing any multistate matter of professional responsibility, it is important to remember that choice-of-law analysis can dictate the result when the rules or their interpretation vary by jurisdiction. More problematic, there may be some circumstances in which a lawyer is subject to rules — which may conflict — of both a state where the lawyer is regularly admitted, and another state, such as one in which the lawyer is admitted pro hac vice. These concerns are particularly relevant in multijurisdictional practice situations. In order to know whether you may be violating the unauthorized practice of law authority of another state, you must first understand whether the other state’s rules apply to you. And choice of law rules may vary by context, such as for fee disputes or statutory claims like those at issue in Birbrower.

Much like the existing version of KRPC 5.5, the existing version of KRCP 8.5, the model rule adopted in Kansas concerning jurisdiction for disciplinary purposes, is of little practical help: “A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged to practice elsewhere.” In this case, however, the Comment to the rule is somewhat more helpful. Interestingly, it even circles back to KRPC 5.5 to suggest that activity in another state where not licensed has to be “substantial and continuous” before it may constitute practice of law in that jurisdiction:

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice.

If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

43. The task force meetings were chaired by J. Nick Badgerow of Overland Park. The report, prepared by KBA staff after the task force meetings, was approved by the KBA Board of Governors in July 2004. It is available at www.kshar.org/ethics2000.html. According to KBA staff, the report has not been presented to the Kansas Supreme Court as of mid-December 2004, and has not been published for comment from the bar.
44. At this writing, the author has not attempted to determine whether or to what extent there are other variances between the task force recommendations and the final report submitted to and approved by the KBA Board of Governors.
45. KRCP 8.5.
If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.46

The emphasized ("substantial and continuous") language in the Comment, cited with reference to KRPC 5.5, does not appear as part of either KRPC 5.5 or the Comment to that rule. Accordingly, it must be understood as simply a characterization of that rule.

The ABA’s Commission on Multijurisdictional Practice also recommended changes to Model Rule 8.5 to provide more specific guidance, including specific choice-of-law rules for application of disciplinary authority, and a safe harbor to protect a lawyer acting under a reasonable belief as to the applicable standard.47

G. A NAFTA/GATS overlay?

As if individual state regulation across the United States were not enough of a challenge for the average practitioner, there may also soon be overlays of regulation or permitted activity for attorneys (including legal practitioners from other countries) established by the North American Free Trade Agreement (NAFTA), now in place between the United States and other countries in North America, or the General Agreement on Trade and Services (GATS) between the United States and other members of the World Trade Organization.48 To date, NAFTA, now 10 years old, has not had much of an effect on legal regulation in the signatory countries, because of disagreements over implementation of a model rule concerning cross-border practice.49 GATS has much greater potential for impact. The participants are in “Track 1” negotiations concerning liberalization of trade in legal services, and a subsequent “Track 2” will concern whether standards adopted concerning the accounting sector (relating to licensing, qualifications, technical standards and market access) should be applied to legal services.50 The possibility of these developments is beyond the scope of this article, but certainly worth noting as just beyond the horizon. They have the potential to allow foreign legal practitioners greater access to multijurisdictional practice across state borders within the United States than current American lawyers now enjoy, a prospect that could create some interesting issues. At this writing, the outcome of these matters remains uncertain.

46. Comment to KRPC 8.5 (emphasis added).
47. Rule 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW
   (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

48. For more information on these subjects, see “Materials about the GATS and Other International Agreements,” available on the Web site of the ABA’s Center for Professional Responsibility, at www.abanet.org/cpr/gats/gats_home.html.
50. Id.; see also Larry B. Pascal, “Modernizing the Foreign Legal Consultant Rule in Texas,” 67 TEX. B.J., 792, 792-93 (Oct. 2004).
52. The American Bar Association Center for Professional Responsibility Joint Committee on Lawyer Regulation has published charts summarizing the status in various jurisdictions of admission by motion rules, available at www.abanet.org/cpr/jclr/admission_motion_comp.pdf and www.abanet.org/cpr/jclr/admission_motion_rules.pdf. As of August 20, 2004, 34 states and the District of Columbia now have admission upon motion (without bar examination) rules for experienced practitioners who are admitted in other states. Two-thirds of these jurisdictions require reciprocity.
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III. The Example Problems
Revisited — Are There Answers?

Armed with the information set forth above, can we now answer the not-so-hypothetical hypothetical set forth in section I above? For the most part the answer is: not with much certainty, except for jurisdictions in which the Restatement approach or new Model Rule 5.5 have been adopted.54

A. Discussion of the litigation problems

Problems one through four of above present scenarios of ever-increasing activity in another jurisdiction by a Kansas lawyer in connection with representation of a Kansas client. Each of these scenarios would most likely be found to be acceptable incidental involvement with the foreign jurisdiction under either the Restatement or new Model Rule 5.5, either because specifically provided for or because the activities could be determined to “arise out of or be reasonably related to” the lawyer’s in-state practice for a Kansas client.55 In jurisdictions that have not adopted these provisions, black letter answers are less clear, although modern practice would leave little doubt that these types of incidental activities are commonly considered as appropriate in most jurisdictions, particularly in the interest of a client based in the lawyer’s state of licensure.56 For the same reasons, problem five, involving an in-state case, does not appear to implicate any interests of the foreign state, and should also be acceptable, at least unless intervention of a foreign court to secure process or resolve a discovery dispute is necessary.

Problem six is somewhat more complex. Although it involves an in-state entity, it contemplates a proceeding (arbitration) entirely based in another state. If this were a court proceeding, it would be necessary under any of the applicable rules to become admitted temporarily (pro hac vice) with local counsel. In this example, however, there does appear to be any foreign state interest in the proceeding given that the location was picked arbitrarily. This activity would most likely be acceptable under new Model Rule 5.5(c)(5), as involvement in a proceeding elsewhere without requirement for admission pro hac vice, arising out of the lawyer’s in-state practice. Under other rules, the result appears to be uncertain.

Problem seven presents the issue of whether a lawyer licensed only in federal court may maintain a law practice in the jurisdiction limited only to “federal” matters. This issue has been litigated, with the usual result disapproving of such an arrangement.57 New Model Rule 5.5(d)(2) would recognize an exception for services specifically authorized by federal law.

Problem eight probably has the clearest answer. Under any version of the rules, a lawyer may not regularly maintain an office and practice in a state where not licensed. The lawyer would have to obtain a temporary permit, such as permitted under Kansas Supreme Court rules, or function as a law clerk, performing limited duties under the supervision of licensed attorneys.

B. Discussion of the transactional-practice problems

Problems one through three present various scenarios about a Kansas transactional lawyer performing work for a Kansas-based client with either no activity in another state, only “virtual” activity in another state, or limited physical activity in another state. With the exception of the cautionary note in the Birbrower dictum, as qualified by Condon,58 these limited

54. The discussion that follows is intended as a generalization, and not as an exhaustive 50-state and District of Columbia survey of any cases that may be applicable. Any of these scenarios must be considered in the context of the particular state or states involved.

55. This language is contained in new Model Rule 5.5(b)(4) and Restatement section 3(3).

56. Moreover, even in states that have not formally adopted new Model Rule 5.5, courts have looked to the Restatement and new Model Rule 5.5 as persuasive authority. E.g., Colmar, Ltd. v. Prematuramedia North America, Inc., 801 N.E.2d 1017, 1024-26 (Ill. App. 2003) (in factual situation somewhat analogous to Birbrower, court found no unauthorized practice, relying on Restatement section 3 and new Model Rule 5.5 for guidance about “the modern trend in the law of multijurisdictional practice”).


58. See discussion at section II.C., supra.
activities do not appear to violate existing views of multijurisdictional practice. In addition, they would be proper under the Restatement approach or new Model Rule 5.5, as arising out of or reasonably related to the lawyer's in-state practice.

Problems four and five add the additional wrinkle that the client is not based in the lawyer's state of licensure. On the one hand, that creates a disconnect between the matter and the locus of the lawyer's licensing. On the other hand, the problem is also put forth as a multistate matter, to which the lawyer's state of licensure does have some connection, and the lawyer has represented the client previously and so already has a relationship. Although the answer is not very clear under existing rules, the Comment to new Model Rule 5.5 suggests that the connection may be enough to satisfy the new standard in these circumstances. 59

Problem six is the hypertechnical situation of Kansas lawyer and Kansas client passing through another jurisdiction discussing a Kansas problem. There does not appear to be authority suggesting that this violates existing rules (the state of transition would have no interest in the matter), and it would certainly be permissible under the "arising out of" language of either the Restatement or new Model Rule 5.5. It would be difficult to justify this level of involvement in the foreign jurisdiction (essentially officing there) under existing rules. New Model Rule 5.5 provides that a lawyer may not "establish an office or other systematic and continuous presence" in a jurisdiction where not licensed. Whether these facts would be interpreted as establishing an office or other systematic and continuous presence, or as providing "legal services on a temporary basis," is unclear.

Transactional practice problem eight is probably more of a question concerning law firm advertising than one of multijurisdictional practice. 60 However, there is an intersection with multijurisdictional practice in connection with determining the truth and utility of any such Web site statement — the law firm cannot advertise an expertise that it cannot provide because of licensing issues. In this connection, at least so long as the statement does not state or imply that the lawyers can handle matters in other states in contexts that would be prohibited by law, the statement is acceptable — there are at least some contexts in which the law firm could offer transactional services relating to other states or other states’ law, as previously discussed. Of course, as the safest course of action, in describing its lawyers the law firm should indicate their states of licensure, or at least not make any statements about an ability to handle matters requiring licensure where its lawyers are not licensed.

IV. A Parting Plea for Certainty

The landscape of the practice of law has changed greatly and continues to evolve with modern society and business practices. The existing framework of KRPC 5.5 and 8.5 provide practitioners with little guidance. The modern approaches evidenced by the Restatement and new Model Rules 5.5 and 8.5 would greatly enhance lawyers' ability to judge the propriety of their conduct, and the ability of courts and disciplinary authorities to establish and enforce those boundaries. As many states adopt these provisions, recognized standards of conduct will more readily develop. These approaches should be adopted in Kansas.

About the Author

Mark Hinderks is a partner in the Overland Park office of Stinson Morrison Hecker LLP, practicing business and construction litigation. He also serves as the firm's co-general counsel and is a frequent speaker and author on matters of professional responsibility.

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59. Comment, ¶14 states:
Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions . . . In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

60. See, e.g., KRPC 7.1, 7.2 and 7.4.
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Attorney Discipline

IN RE RICHARD D. LAIRD, SR.
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 17,759 – DECEMBER 10, 2004

FACTS: Respondent, an attorney from Topeka, wrote a letter Dec. 1, 2004, to the Court surrendering his license to practice law pursuant to SCR 217. At the time respondent surrendered his license, a disciplinary hearing was pending. The formal complaint alleged he had violated a court order, made improper ex parte communications to the court in a pending matter, and had engaged in improper conduct with individuals [KRPCs 3.3, 3.4 and 8.4].

HELD: The Supreme Court examined the files and found that the surrender of Respondent’s license should be accepted.

IN RE SCOTT C. STOCKWELL
ORIGINAL PROCEEDING IN DISCIPLINE
PUBLISHED CENSURE
NO. 92,839 – DECEMBER 17, 2004

FACTS: Respondent, an attorney from Lawrence, took over several cases from another attorney who was leaving private practice. One case involved a revocable trust agreement. The grantor died in January 1998, but respondent failed to file timely income tax returns and failed to make any distributions directed by the trust agreement during the time he served as trustee. He was replaced by a successor trustee in August 2001. Subsequently, it was learned that he had paid himself $8,735 in legal fees. Successor trustee negotiated a settlement of the return of the fees plus interest and reported the situation to the disciplinary administrator’s office.

A hearing panel found violations of KRPCs 1.3 (diligence), 1.4(a) (communication), and 1.15(b) (safekeeping property). After considering mitigating and aggravating factors, the panel recommended published censure. Respondent did not file exceptions to the final hearing report.

HELD: The Supreme Court found the findings of fact and conclusions of rules violations of the panel to be supported by clear and convincing evidence and adopted the recommended sanction.

Civil

MEDICAID BENEFITS AND AVAILABLE RESOURCES
BREWER V. SCHALANSKY, ET AL.
JOHNSON DISTRICT COURT – REVERSED
NO. 91,044 – DECEMBER 17, 2004

FACTS: Brewer inherited Southwestern Bell Telephone Company stocks upon her husband’s death in 1991. In 1994, Brewer added her two nieces as joint tenants with right of survivorship of the stock. In 2001, one of Brewer’s nieces filed for Medicaid benefits for Brewer and at the time, the stock, valued at $33,000, could not be sold or otherwise disposed of without the consent of each joint tenant. Both of Brewer’s nieces refused to consent to the sale of the stock. SRS denied the Medicaid application finding that Brewer had nonexempt available resources in excess of regulatory limits because of the value of the stock of $33,000 held in joint tenancy with her two nieces. The SRS hearing officer and the State Appeals Committee upheld the denial of benefits.

ISSUES: Did SRS correctly determine that Brewer was ineligible for Medicaid because of excess resources?

HELD: Court reversed. Court held that under the facts of the case, even though the property was held in joint tenancy there was substantial competent evidence to support the decision of SRS that the full value of the stock account was a resource of Brewer because she had contributed the full amount in the account and evidence was conflicting regarding whether Brewer intended to donate an interest to the other tenants. The determination of how much of the stock’s value was attributable to a Medicaid applicant was a factual one, and a court reviewing the administrative determination could not substitute its judgment for that of the agency. Court stated that Brewer failed to meet her burden to establish that the cost of a partition action would exhaust her
equitable interest in the stock value. Court held that K.A.R. 30-6-106(c)(1) is a reasonable standard for determining Medicaid eligibility and does not conflict with federal statutes or regulations.

STATUTES: K.S.A. 20-3018(c); K.S.A. 39-709(a)(1); K.S.A. 60-1003(a); K.S.A. 77-415 et seq., -526(d), -601, -618, -619, -621(c)

DISSENT: Justice Davis dissented. Justice Davis concluded the transfer of the stock vested an undivided one-third interest in Brewer and an undivided one-third interest in each of her nieces. If Brewer must partition, then the value of her share is one-third. Justice Davis would affirm the decision of the district court that the fees of a partition action would consume Brewer's interest in the stock and should not be counted in her assets for purposes of Medicaid application.

SALES TAXATION, EXEMPTION, AND TELECOMMUNICATIONS EQUIPMENT IN RETAX APPEAL OF SPRINT COMMUNICATIONS COMPANY L.P. KANSAS BOARD OF TAX APPEALS – AFFIRMED NO. 90,663 – DECEMBER 17, 2004

FACTS: This is the consolidation of five cases involving telecommunication companies seeking a refund of the sales tax paid on purchases in Kansas during the time period of March 1994 through March 2000 of telecommunication equipment that “consists of, among other things, switches, computers, and related peripheral equipment (including repair and replacement parts and accessories),” which is “utilized either in engineering a finished telecommunications product or in controlling or measuring the process of manufacturing such a product.” The refunds are based on the manufacturing exemption contained in K.S.A. 79-3606(kk) where machinery and equipment utilized to manufacture tangible personal property for resale or to provide a service is exempt from sales taxation. Board of Tax Appeal (BOTA) issued a 3-2 opinion in favor of the Department of Revenue (DOR), ruling that Sprint’s machinery and equipment did not qualify for the manufacturing exemption from sales tax under K.S.A. 79-3606(kk) because other provisions of the Kansas Retailers’ Sales Tax Act define telecommunications as a service and also that the exclusion of telecommunication equipment did not violate the Equal Protection Clause.

ISSUES: Did BOTA err in determining that Sprint was not eligible for the sales tax exemption under K.S.A. 79-3606(kk)? Did the DOR’s application of K.S.A. 79-3606(kk) to deny refunds violate the Equal Protection Clause?

HELD: Court affirmed BOTA’s decision. Court held the plain and unambiguous language of the Kansas Retailers’ Sales Tax Act defines telecommunications as a service and not tangible personal property. Court concluded that equipment utilized in engineering a telecommunication product or in the process of controlling or measuring the telecommunication process is not exempt from sales taxation under K.S.A. 79-3606(kk), which only applies to machinery and equipment used in the manufacturing of tangible personal property. Court held Sprint failed to establish an equal protection violation. Court also stated BOTA did not err in its application of summary judgment rules.

STATUTES: K.S.A. 20-3018(c); K.S.A. 60-256(c); K.S.A. 77-601 et seq., -621; K.S.A. 79-3602(f), (k), (m)(B), -3606(f), (m), (n), (kk); K.S.A. 2003 Supp. 79-3603(b)


FACTS: Kansans for the Separation of School and State (KSSS) filed a motion to intervene in the Montoy v. State case in the Shawnee District Court. The district court denied intervention because KSSS failed to make a timely application and that they did not have a property interest in the State of Kansas relating to the property or transaction which is the subject of the action.

ISSUES: Did the district court abuse its discretion in denying the motion to intervene by KSSS?

HELD: Court affirmed the district court’s decision to not let KSSS intervene in the action. Court stated the district court correctly found the motion to be untimely. Court addressed KSSS’ argument that the district court failed to make a determination about the adequacy of the representation of the interests of KSSS. KSSS appeared to argue that it opposed a tax increase to finance schools but the State of Kansas favors an increase, yet the Legislature rejected all proposals for tax increases in the last session to finance schools. Court held KSSS failed to show a lack of adequate representation of its interests.

STATUTES: K.S.A. 60-224(a)

SCHOOL FINANCE MONTOY, ET AL. V. STATE OF KANSAS, ET AL. SHAWNEE DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART NO. 92,032 – JANUARY 3, 2005

FACTS: The plaintiffs challenged the constitutionality of the Kansas School District Finance and Quality Performance Act (School Finance Act), K.S.A. 72-6405, et seq. The Shawnee District Court agreed with the plaintiffs and struck down the School Finance Act as an unconstitutional violation of the Equal Protection Clause, and that the Legislature failed in its constitutional mandate to make suitable provision for the finance of public schools. Court also found the Legislature has not usurped the powers of the State Board of Education.

ISSUES: (1) Did the School Finance Act violate the Equal Protection Clause? (2) Did the School Finance Act have an unconstitutional disparate impact on minorities and/or other classes? (3) Did the district court err in finding the Legislature failed to make suitable provision for finance of the public schools? (4) Did the district court err in holding that the Legislature has not usurped the powers of the State Board of Education?

HELD: (1) Court reversed the district court’s holding that the School Finance Act’s financing formula violated equal protection. Court stated that although the district court correctly determined that the rational basis test was the proper level of scrutiny, it misapplied the test. Court concluded that all of the funding differentials as provided by the School Finance Act are rationally related to a legitimate legislative purpose and thus no violation of the Equal Protection Clause of the Kansas or U.S. constitutions. (2) Court reversed the district court’s holding that the School Finance Act financing formula has an unconstitutional impact on minorities and/or other classes. Court stated the plaintiffs
failed to show a discriminatory purpose and thus no equal protection violation on this basis. (3) Court affirmed the district court's holding that the Legislature failed to meet its burden as imposed by Art. 6, § 6 of the Kansas Constitution to “make suitable provision for finance” of the public schools. Court restated that the issue of suitability is not stagnant but requires constant monitoring. Court stated the School Finance Act fails to account for the laundry list of statutory and societal changes which have occurred since the Court's decision in U.S.D. No. 229 v. State, 256 Kan. 232 and how they have affected school financing. Court concluded there is substantial competent evidence to support the district court's decision that the cumulative result of these changes is a financing formula which does not make suitable provision for finance of public schools, leaving them inadequately funded. (4) Court affirmed the district court's decision that the Legislature has not usurped the powers of the State Board of Education. Court stated that it withheld its formal opinion in order for the Legislature to take corrective legislation to comply with the opinion by April 12, 2005.

STATUTES: K.S.A. 2003 Supp. 46-1225(e); K.S.A. 72-6405 et seq., -6439(a), (c)


FACTS: Baby Roe was born to parents who lived in a residential mental health treatment facility. Because staff at the facility were concerned about the parents ability to care for the baby, Social and Rehabilitative Services (SRS) and the Bureau of Indian Affairs (BIA) became involved. It was decided that the BIA would handle the home care, and Indian Social Services agreed to provide daily supervision and be accessible to the parents in caring for Baby Roe. Baby Roe subsequently suffered sever and permanent injuries at the hands of the father despite ongoing monitoring of the family situation by SRS. Baby Roe, his adopted parents, and his conservator sued SRS, the state, and individual case workers to tort. The district court granted summary judgment in favor of the defendants. The Court of Appeals reversed and remanded for trial, ruling that SRS voluntarily and affirmatively undertook a Restatement (Second) of Torts § 324A (1964) duty to monitor delivery of family support services for the care and protection of Baby Roe. The Supreme Court granted SRS's petition for review.

ISSUES: Whether an SRS case worker's promise to monitor the delivery of services by the BIA and mental health center constitutes an undertaking sufficient to meet the requirements for imposing liability under § 324A of the Restatement (Second) of Torts? Did Baby Roe establish the existence of a duty owed to him by SRS?

HELD: Court reversed the Court of Appeals decision and affirmed the district court's ruling that SRS had no duty. Court stated that providing services to protect the welfare of potentially abused or neglected children is a public duty which is not owed to an individual child. Court stated that the monitoring of the delivery of services by the BIA and the mental health center was a step taken to protect the health and welfare of Baby Roe. However, the Court held that SRS's agreement to monitor services was only a limited or incidental undertaking which did not give rise to a § 324A duty.

STATUTES: K.S.A. 38-1524; K.S.A. 75-6101 et seq., -6104(e)

DISSENT: Justice Luckert dissented stating that SRS agreed to undertake a specific function not typical in the providing of services and it was not the statutory duty owed to the public. Justice Luckert stated the undertaking was specifically for the benefit of Baby Roe, not children in general and was a violation of a duty pursuant to § 324A.

WILLS AND TRUSTS AND ORAL AGREEMENTS GARRETT, ET AL., V. CHAMBERS, ET AL. CRAWFORD DISTRICT COURT – AFFIRMED NO. 90,570 – DECEMBER 17, 2004

FACTS: Garrett and her siblings were the children of John Humble. In 1967, Humble married Sarah Puffinbarger, who had two daughters and a son, Gary, from a previous marriage. Gary predeceased his mother Sarah and left three grandchildren. In 1984, Humble and Sarah prepared nearly identical wills directing that one of Sarah’s daughters would receive a grandfather clock and the remaining estate would pass to the surviving spouse “absolutely.” If one spouse pre-deceased the other, or if the spouses died at the same time, each would provide that the rest of the estate was to be divided into sevenths and given to the each of the six children and the other one-seventh split evenly between Gary’s children. Humble died and his entire estate passed to Sarah. Sarah then executed a new will in 1993 revoking her 1984 will reinstating the grandfather clock provision and changing the disposition of her estate in equal shares only to her two daughters. Upon Sarah’s death, Humble’s children sued for a constructive trust of four-sevenths of the estate property. Gary’s children joined as third-party plaintiffs. The attorney that drafted the wills in 1984, Tim Fielder, testified that an agreement existed between Sarah and Humble at the time they executed their 1984 wills that an equal distribution to the seven children would best reflect the assets each brought into the marriage, they wanted the surviving spouse to be prevented from changing the shares designated for the deceased parent’s children, but they wanted the surviving parent to be able to alter the shares of that parent’s own children. Fielder said that when Sarah executed the new will, she told him that Humble’s children had been taken care of outside of the will by means of joint property and investments. The district court denied the defense motion to bar Fielder’s testimony as inadmissible parol evidence. The district court found the agreement between Humble and Sarah was uncontroverted and Sarah could not alter the 1984 will concerning Humble’s children, but she could change the designation of her own children. The court granted summary judgment to Garrett and imposed a constructive trust in amount equal to four-sevenths of Sarah’s estate.

ISSUES: (1) Did the district court err in admitting Fielder’s testimony concerning the contemporaneous oral agreement between Humble and Sarah? (2) Did the district court err in holding that the wills were contractual, rendering a later will executed by the surviving parent ineffective? (3) Did the district court err in imposing a constructive trust on the estate property or proceeds?
Held: Court affirmed. (1) Court held that extrinsic evidence is admissible to show that separate wills, which are mutual and reciprocal in their bequests and devises, were executed pursuant to an agreement between the testators, notwithstanding the absence of recitals in the wills designating or referring to such an agreement. The extrinsic evidence may consist of writings, acts, and declarations of the parties, testimony from other persons, and evidence of all the surrounding facts and circumstances. Court held Fielder’s testimony did not alter the wills, it demonstrated a basic agreement to divide property, and a sensible limitation on the agreement. (2) Court held the uncontroverted evidence established that the 1984 wills were contractual and left entire estate to the surviving parent and then to the children in equal shares, but that Sarah still retained the right to disinherit her own children. (3) Court stated that the agreement imposed a duty upon Sarah, and she breached that duty by executing the 1993 will and disinheriting Humble’s children, and the district court properly imposed a constructive trust.

STATUTES: K.S.A. 20-3018(c); K.S.A. 60-401(b), -407(f)

Criminal

STATE V. DENNEY
SEDGWICK DISTRICT COURT
AFFIRMED IN PART AND REVERSED IN PART
NO. 90,454 – DECEMBER 17, 2004

FACTS: Denney convicted of aggravated sodomy in two cases; one subject to Kansas Sentencing Guidelines Act and the other not. In 2001, he filed motion to correct an illegal sentence, seeking conversion of his indeterminate sentences. Court of Appeals ordered relief. On remand, trial court converted indeterminate sentence. Denney filed second motion, arguing Department of Corrections refused to convert all indeterminate sentences, contrary to Court of Appeals’ mandate. Trial court denied relief, and pursuant to K.S.A. 2003 Supp. 21-2512, denied Denney’s motion for DNA testing, Denney appealed.

ISSUES: (1) Sentence and (2) DNA testing

HELD: No error in summarily denying Denney’s motion to correct an illegal sentence. Under facts, Denney not entitled to conversion of indeterminate sentence for offenses not committed while on parole or conditional release.

K.S.A. 2003 Supp. 21-2512 violates Equal Protection Clause. Applying underinclusion analysis of California v. Westcott, 443 U.S. 76 (1979), remedy is not nullification of the statute but rather to extend it to include testing for a defendant convicted of aggravated criminal sodomy for penetrating a female’s anus with his penis to petition trial court for forensic DNA testing.

STATUTES: K.S.A. 2003 Supp. 21-2512 sections (c) and (f)(2), – 3402, -3502 sections (a)(3) and (4); K.S.A. 21-2511, -3501, -3506, -3506(c), -4701 et seq., -4704(a), -4723, 22-3504(1), -3601(b)(1); K.S.A. 1993 Supp. 22-3717(f) and (f)(2)

STATE V. DRENNAN
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 90,954 – DECEMBER 17, 2004

FACTS: Drennan convicted of first-degree murder of girlfriend. Hard 50 sentence imposed. On appeal, Drennan claimed trial court erred in (1) not instructing jury on lesser included offenses, (2) admitting evidence of Drennan’s prior bad acts, (3) denying motion to suppress evidence obtained after Drennan was restrained, including statements made prior to Miranda warnings, and evidence obtained in warrantless entry of home to check on victim, (4) denying Batson challenges, and (5) imposing hard-50 sentence.

ISSUES: (1) Jury instruction on lesser offenses, (2) evidence of prior bad acts, (3) motion to suppress, (4) Batson challenges, and (5) hard-50 sentence


No abuse of discretion in admission of evidence of Drennan’s prior strikingly similar attack on another victim. Under facts, officer’s warrantless entry into home and questioning Drennan about victim’s whereabouts before reading Miranda rights were justified under emergency doctrine in State v. Mendez, 275 Kan. 412 (2003), and public safety exception in State v. McKesson, 246 Kan. 1 (1990).

State’s explanations for striking three minority persons from jury panel were facially valid. No abuse of discretion in trial court’s finding that Drennan failed to prove purposeful discrimination.

Trial court’s findings that Drennan committed crime in an especially heinous, atrocious, and cruel manner are reviewed. Reasonable factfinders could find by preponderance of evidence that Drennan stalked or made criminal threats to victim, inflicted mental anguish or physical abuse on victim before her death, and that killing was preceded by continuous acts of violence. No abuse of discretion by trial court in refusing to consider Drennan’s intoxication as a mitigating circumstance.

Hard-50 sentencing scheme is constitutional.

STATUTES: K.S.A. 2003 Supp. 21-3402(b), -3404, -4636(f)(1), (3) and (5), 22-3414(3); K.S.A. 21-3403(a), -4637(b) and (f), 60-455

STATE V. HOLMES
SEDGWICK DISTRICT COURT – CONVICTIONS
AFFIRMED, SENTENCES VACATED, CASE REMANDED
NO. 90,420 – DECEMBER 17, 2004

FACTS: Holmes convicted of premeditated first-degree murder and criminal possession of firearm. Hard-40 sentence and convictions were reversed, based on prosecutorial misconduct. State v. Holmes, 272 Kan. 491 (2001). Convicted on same charges in second trial and again sentenced to hard-40 sentence. On appeal he claimed error in: (1) the denial of his renewed motion to suppress evidence, (2) the denial of a second evidentiary suppression hearing, (3) allowing jury to use transcript of redacted video and see picture of victim, and denying Holmes’ discovery requests, (4) denying motion alleging ineffective assistance of counsel, (5) insufficient evidence of premeditation, and (6) not instructing jury to set aside sympathy and prejudice. Holmes also claimed (7) there was insufficient evidence to find aggravated circumstances of
crime committed in particularly heinous manner and for the
defendant's benefit or economic relief, (8) prosecutorial mis-
conduct, and (9) cumulative error.

ISSUES: (1) Motion to suppress, (2) evidentiary suppression
hearing, (3) evidentiary rulings, (4) ineffective assistance of
counsel, (5) premeditation evidence, (6) limiting jury
instruction, (7) hard-40 sentence, (8) prosecutorial miscon-
duct, and (9) cumulative error

HELD: Based on totality of circumstances, trial court cor-
rectly determined that Holmes' consent to search house was
voluntary and seized evidence was properly admitted.

Holmes' confession was freely, voluntarily, and knowingly
made. His waiver of Miranda rights and his ability to com-
 municate were not impaired by drug use, sleep deprivation
or his emotional state. Although Holmes' arguably asserted
right to remain silent, officers followed proper procedure by
further inquiring whether he wanted to talk about some-
thing else.

No merit to petitioner's claim for second evidentiary sup-
pression hearing. State's argument that issue is not properly
before the court because Holmes not entitled to hybrid rep-
resentation is rejected.

No abuse of discretion in allowing jury to use transcript
to comprehend redacted videotape. Record does not support
claim that Holmes was denied discovery.

No error in summary dismissal of posttrial motion alleging
ineffective assistance of counsel. No showing of an inade-
quate investigation, or that the alleged inadequacies did not
result from trial strategy. Failure to challenge forensic pathologist's inconsistent testimony did not impede Holmes' version of events.

Sufficient evidence under the facts to establish premedita-
tion, notwithstanding Holmes' drug intoxication and claim
of accidental shooting.

Circumstances did not warrant instructing jury to set aside
effect of sympathy and prejudice in their decision.

Insufficient evidence supports finding of aggravated circum-
stances under K.S.A. 2003 Supp. 21-4636(c) and (f). Hard-40
sentence is vacated and case is remanded for resentencing.

Prosecutor's comments on self-defense, when viewed in
entirety, were consistent with law and jury instructions.
Prosecutor's reference to redacted transcript did not deny
Holmes a fair trial.

But for error in Holmes' sentence, no significant error sup-
ports Holmes' claim of cumulative error.

STATUTES: K.S.A. 2003 Supp. 21-4636 sections (c) and
(f)(1)-(7), -4638, 22-3717(b), 60-1507; K.S.A. 21-3211,
-3403(b), 22-3216, -3501, 60-455

STATE v. HURST
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 90,571 – DECEMBER 17, 2004

FACTS: Hurt convicted of first-degree premeditated murder
and aggravated assault in shooting death of former girl-
friend. Hard-50 sentence imposed. On appeal Hurt claimed
(1) prosecutorial misconduct in closing argument, (2) hard-
50 sentence is unconstitutional, and (3) insufficient evidence
supported aggravated assault conviction.

ISSUES: (1) Prosecutorial misconduct, (2) hard-50 sen-
tence, and (3) sufficiency of evidence

HELD: Improper for prosecutor to state that voluntary
manslaughter should be considered only if jury was not con-
vinced there was an intentional second-degree murder.
Under facts, error was harmless under both K.S.A. 60-261
and federal harmless error rule in Chapman v. California,
386 U.S. 18 (1967).

Hard-50 sentencing scheme is constitutional.

Sufficient evidence supports aggravated assault conviction.

Viewing victim's testimony as a whole, rational factfinder
could easily find that Hurt placed victim in reasonable
apprehension of bodily harm.

STATUTES: K.S.A. 21-3408, 60-261

STATE v. MARSH
SEDGWICK DISTRICT COURT
AFFIRMED IN PART, REVERSED IN PART, REMANDED
NO. 81,135 – DECEMBER 17, 2004

FACTS: Marsh convicted of capital murder, for which
death sentence was imposed. Also convicted of first-degree premeditated murder, aggravated arson, and aggravated burglary, for which consecutive sentences were imposed including hard-40 sentence. Controlling issues on appeal identified as whether (1) there is substantial competent evidence to sup-
port the convictions, (2) trial court properly excluded evi-
ence connecting another person to the crimes as irrele-
vant, (3) K.S.A. 21-4624 is unconstitutional on its face, (4) there is substantial competent evidence to support hard-40 sentence, and (5) hard-40 sentencing scheme is constitutional.

ISSUES: (1) Sufficiency of evidence, (2) third-party evi-
dence rule, (3) constitutionality of K.S.A. 21-4624(e), (4)
sufficiency for hard-40 sentence, and (5) constitutionality of
hard-40 sentence

HELD: Sufficient direct and circumstantial evidence sup-
ports each conviction.

Third-party evidence rule discussed. Cases arguably sug-
uggesting that third-party evidence rule should be applied more
broadly are disapproved to the extent they are inconsistent with State v. Evans, 275 Kan. 95 (2003). District judge erred in failing to consider whether proffered evidence of another's
motive and connection to the crime was relevant under K.S.A.
60-407(f). Unable to say error was harmless under the
circumstances. New trial ordered for crimes of capital
murder and aggravated arson. On remand, district court to
carefully consider relevancy of challenged evidence to avoid
prejudicing Marsh's right to present theory of defense.

Because jury was instructed that tie in balancing aggravat-
ing and mitigating factors went to state, death sentence
K.S.A. 21-4624(e) as written is unconstitutional under
Eighth and Fourteenth Amendments. That portion of
Kleypas decision that saved statute through judicial construc-
tion is overruled. Doctrines of constitutional avoidance and
stare decisis are discussed.

Although two of the three aggravating factors found by the
trial court are not satisfied, third factor is sufficient based on
trial court's statement that any of the three factors was not
outweighed by mitigating factors.

Argument that State v. Conley, 270 Kan. 18 (2000), was
wrongly decided is rejected.

DISSENT: (Davis, J)(joined by MacFarland, C.J. and
Nuss, J): K.S.A. 21-4624(e) is constitutional on its face.
Equipoise would be rare, and Kansas statute not unconstitu-
tional under U.S. Supreme Court death penalty jurispru-
dence.
DISSENT: (Nuss, J.): Writes separately to argue that Walton v. Arizona, 497 U.S. 639 (1990), mandates that death at equipoise concept in Kansas statute is constitutional.

DISSENT: (MacFarland, C.J.): Weighing equation in K.S.A. 21-4624(e) is constitutional as written. No compelling reason shown for breaching fidelity to doctrine of stare decisis.

STATE V. REMMERS
MARION DISTRICT COURT - REVERSED AND COURT OF APPEALS - REVERSED
NO. 89,721 – DECEMBER 17, 2004

FACTS: In bench trial, Remmers convicted of reckless driving for running stop sign in county intersection and colliding with service truck. On appeal, he claimed more than inattentive driving was required to support his conviction. Court of Appeals affirmed in unpublished opinion. Remmers' petition for review granted.

ISSUE: Sufficiency of evidence

HELD: No Kansas case has dealt with this precise issue. Under facts, where Remmers' conduct was solely the result of inattentiveness, with no realization of imminence of danger to another and no conscious and unjustifiable disregard of that danger, the evidence was insufficient to support a conviction of reckless driving under K.S.A. 8-1566(a). Conviction is reversed.

STATUTES: K.S.A 8-1566(a), 21-3201(c)
Court of Appeals

Civil

DRIVER'S LICENSE SUSPENSION AND DUI
NICKELSON V. KANSAS DEPARTMENT OF REVENUE
THOMAS DISTRICT COURT – AFFIRMED
NO. 92,164 – DECEMBER 17, 2004

FACTS: Officer Schippers was finishing another stop when he saw Nickelson's vehicle one-fourth of a mile away make a circle and stop on a "farm plug" or driveway. There were no farm buildings, outbuildings, businesses or residences in the area where Nickelson had parked. Nickelson turned off his lights. Officer Schippers decided to check on the welfare of Nickelson's car since it was in the middle of nowhere and had turned off its lights. He said it was police policy to do such a welfare check. Officer Schippers blocked Nickelson's car and approached to survey the situation. He said that when Schippers rolled down his window, he immediately smelled alcohol but upon questioning about drinking, Nickelson did not slur his speech. Officer Schippers conducted field sobriety tests on Nickelson and then arrested him for DUI. Nickelson blew a .147 on the Intoxilyzer 5000 at the law enforcement center.

ISSUES: Did the police officer have lawful grounds to stop Nickelson? Was the duration of the stop improperly expanded?

HELD: Court affirmed. Court concluded that Officer Schippers expressed specific and articulable facts for approaching Nickelson's vehicle for public safety concerns. The initial contact between Schippers and Nickelson was justified as a lawful public safety stop. Court held upon the stop, Officer Schippers immediately smelled a strong odor of alcohol upon approaching Nickelson's vehicle. There was no delay between the time that Schippers approached the vehicle and the time he detected the alcohol odor. Court stated the odor of alcohol from the vehicle was sufficient to allow Schippers to detain Nickelson for further investigation.

STATUTES: K.S.A. 8-259(a)

DISMISSAL AND FAILURE TO PROSECUTE
NAMELO, ET AL., V. BROYLES, ET AL.
CRAWFORD DISTRICT COURT – AFFIRMED
NO. 91,361 – DECEMBER 17, 2004

FACTS: In July 1996, Namelo was killed in a house fire. Two days prior to the running of the statute of limitations, Namelo's estate (Namelo) sued the owners of the house for negligence and breach of the implied warranty of habitability. Defendants serve interrogatories and request for damages that Namelo did not answer. The district court dismissed Namelo's action without prejudice in September 1999. In March 2000, on the deadline for the six-months refiling limitation, Namelo refiled suit. Defendants again served interrogatories and requests, but they were not answered. The court record was silent until February 2002, when the court issued a notice of intent to dismiss for lack of prosecution. Namelo never justified its delay, but the court scheduled a status conference in March 2002, and prior to the confer-
ence, the defendants filed a motion to dismiss. Several discovery orders were entered over the next year. Plaintiffs attorney was ordered to associate with another attorney approved by the court. The status conference never happened, depositions were scheduled but then Namelo's attorney became ill and was admitted to the hospital. After being released from the hospital, Namelo's attorney attempted to reschedule depositions, but defense counsel refused and filed a motion to dismiss after the court approved attorney filed another motion to withdraw. In August 2003, the district court dismissed Namelo's lawsuit finding Namelo's attorney failed to prosecute the action and had failed to abide by the court's order to associate with co-counsel who would see that the case proceeded in a timely fashion.

ISSUES: Did the district court abuse its discretion by dismissing Namelo's lawsuit for failure to prosecute the case?

HELD: Court affirmed. Court found the district court put Namelo and their attorney on notice that the court was concerned about the lack of prosecution of the case and the dismissal sufficiently complied with the statutory notice requirements. Court stated the case imposed a significant burden upon the judicial system. Since it was refiled, the district court has had to address a motion to compel discovery; four motions to dismiss for failure to prosecute, either on the court's own motion or upon the defendant's motion; several status conferences; and two motions by co-counsel to withdraw from representation of Namelo. Court stated the only discovery completed in the case was interrogatories. Court firmly concluded the district court did not abuse its discretion in finding the plaintiffs had failed to diligently prosecute the case. Court stated that the district court's order to associate with co-counsel was, in part, a sanction for Namelo's failure to move the litigation forward, and in part, the district court's attempt to assist an attorney whose practice was impaired for some unknown reason. When the district court's effort in this regard failed, the district court was within its discretion to order the case dismissed.

STATUTES: K.S.A. 2003 supp. 60-241(b)

HABEAS CORPUS
HILL V. SIMMONS
BUTLER DISTRICT COURT – AFFIRMED
NO. 91,754 – DECEMBER 10, 2004

FACTS: Kansas Department of Corrections (KODOC) designated Hill as sex offender based on his incarceration misconduct. Resulting prison restrictions included denial of sexually explicit materials (Internal Management Policy and Procedure 11-115 (IMPP 11-115)). Hill filed 1501 petition alleging IMPP 11-115 was ex post facto violation and violated First Amendment and due process clause. He also claimed identification as sex offender denied him due process because he was not convicted of a sexually violent crime. District court dismissed the petition as stating no claim for relief. Petitioner appealed.

ISSUES: (1) Ex post facto, (2) First Amendment, and (3) due process
Held: No ex post facto violation. IMPP 11-115 is administrative measure for enhancing institutional security and rehabilitation of sex offenders. Policy applies to Hill’s conduct while in prison, which occurred after IMPP 11-115 was in effect. IMPP 11-115 is not retrospective, does not increase Hill’s sentence, and does not subject Hill to a significant or atypical departure from normal rights of incarceration.

IMPP 11-115 does not violate First Amendment or due process. All four factors in Turner v. Safley, 482 U.S. 78 (1987), are met. Restrictions on Hill are reasonable and there is valid, rational connection between IMPP 11-115 and legitimate penological interests.

No due process violation in identifying Hill as sex offender under IMPP 11-115. While definition of “sex offender” under K.S.A. 2003 Supp. 22-4902(b) determines which offenders are required to register as sex offenders upon release from prison, IMPP11-115 is administrative measure used to determine the specific management and control an inmate requires while in KDOC custody.

Statutes: K.S.A. 2003 Supp. 22-4902(b), 60-1501

LIMITATION OF ACTIONS
BLUE V. TOS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 91,423 – DECEMBER 23, 2004

FACTS: Blue injured in auto accident with Tos on May 16, 2001. Insurer made partial payment to Blue on Oct. 29, 2001. Blue filed tort action on May 13, 2003, but failed to request service of process on defendants. Counsel claims his request during telephone discovery conference in July 2003 for extension for service of process was granted by administrative assistant. Counsel made first request for issuance of service of process on Aug. 8, 2003, with residential service attempted on Aug. 13, 2003. Tos filed motion to dismiss, based on ineffective service of process resulting in expiration of statute of limitations. District court agreed and dismissed the action. Blue appealed, arguing (1) service was effected within three months, (2) extension for service of process was granted, (3) mailbox rule extended 90-day period by three days, (4) Tos’ joinder of statute of limitations defense with challenge to sufficiency of service of process was impermissible and constituted general entry of appearance and waiver of insufficiency of service of process, and (5) K.S.A. 60-203(b) saved his lawsuit. Blue also argued for first time that partial insurance payment in October 2001 tolled statute of limitations.

Issue: (1) K.S.A. 60-203(a), (2) extension, (3) mailbox rule, (4) joinder, (5) K.S.A. 60-203(b), and (6) K.S.A. 40-275 tolling

Held: Blue filed petition three days prior to expiration of two-year-limitation period, but did not effect service until 92 days later. Where statutes require that act be completed within a period expressly specified by a number of days, it would be inappropriate to circumscribe that period by judicial construction with a rough equivalent in months.

An administrative assistant has insufficient authority to address oral application for 30-day extension contemplated by K.S.A. 60-203(a). Better practice if not required procedure is to request extension by written motion with court ruling.

By its express terms, mailbox rule is not applicable unless period for party to act is triggered by service upon such party by mail.

Joiner of other defenses in K.S.A. 60-212(b) motion is expressly permitted and precludes argument of waiver of those defenses.

Argument under K.S.A. 60-203(b) is deemed abandoned, and no showing of excusable neglect pursuant to that statute.

Where exclusive factual basis for Blue’s K.S.A. 40-275 argument was never properly pled, was not subjected to a complete response, was never subjected to an evidentiary presentation, was never addressed by a district court, and was not in the record on appeal, the argument is not within one of the recognized exceptions to the rule that issues not raised before the trial court cannot be raised on appeal.

Statutes: K.S.A. 2003 Supp. 60-206(a), -303(d)(1), -513(a)(4); K.S.A. 40-275, 60-203(a), -212(b)

TAX APPEAL; VALUATION; OIL AND GAS
IN RE EQUALIZATION PROCEEDING OF AMOCO PRODUCTION COMPANY
KANSAS BOARD OF TAX APPEALS
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 91,253 – DECEMBER 17, 2004

FACTS: Amoco appeals the ad valorem tax valuation for the Jayhawk Natural Gas Processing Plant in Grant County for the tax years 2000 and 2001. The plant is a cryogenic gas processing facility where natural gas is processed in order to “condense” it for sale and to recover valuable constituents contained within the gas stream. Amoco estimated the plant’s value was $50 million in 2000 and $38.5 million in 2001. Grant County assessed its value to be the same as its 1999 value, $70,733,660, for both years 2000 and 2001. The Kansas Board of Tax Appeals (BOTA) approved the values assessed by the county and that decision was affirmed by the district court.

Issues: Did the county meet its burden of supporting its value determination by a preponderance of the evidence? Did the county’s valuation witness qualify as an expert witness? Did the county’s witness meet the generally accepted appraisal standards found in the Uniform Standards of Professional Appraisal Practice (USPAP)? Did the county’s valuation follow the definition of fair market value? Was there evidence presented of the future availability of natural gas supplies? Did BOTA act unreasonable and arbitrary in rejecting Amoco’s opinion of the plant’s value?

Held: Court held there was substantial competent evidence that supports all three valuation conclusions for the year 2000, the county’s assessed value, BOTA’s order, and the district court’s subsequent affirmation. The court held the county’s witness was properly accepted as an expert witness, that he followed the USPAP, that the cost approach provided credible evidence in support of the plant’s valuation, that BOTA’s finding of future gas supply was supported by substantial competent evidence, and that BOTA considered all the evidence in establishing its valuation. The court affirmed the district court’s determination for the year 2000 value. However, because the county merely adopted the same 2000 year value for the 2001 tax year and failed to take any steps to appraise the plant for 2001, the record is devoid of any evidence to support the 2001 value determination. Consequently, the court reversed the district court and BOTA’s findings for 2001 and remanded the case back to the Grant County Appraiser with directions to begin the appraisal process anew for that year.
WORKERS' COMPENSATION
LYONS V. IBP, INC.
WORKERS' COMPENSATION BOARD - AFFIRMED
NO. 92,189 - DECEMBER 17, 2004

FACTS: Lyons was previously injured in 1990 while working at the Bunge Corporation. He had an anterior cervical discectomy and fusion at C5-6, but returned to work full time without restrictions. He was found to have a total impairment of 34 percent. In 1999, he worked for IBP and while lifting equipment, he experienced pain through his arms, shoulder, down his back, across his buttocks, and left leg. He reported the injury and went to the emergency room. Lyons was diagnosed with a herniated disc at C4-5, which Dr. Reed attributed to the 1999 injury. Lyons had an anterior discectomy and fusion at C4-5 in 1999. Lyons worked light duty at IBP until August 1999, then returned to regular duty until September 1999, when he began a leave of absence. He has not worked since. In February 2000, Dr. Reed performed rotator cuff surgery on Lyons and Dr. Reed was unable to determine what caused the rotator cuff tear. In April 2000, Dr. Reed stated that Lyons had reached maximum medical improvement for his neck and back and by June 2000, Dr. Reed was treating the rotator cuff tear. In February 2001, Dr. Reed saw Lyons again and diagnosed a new herniated disc at C6-7. Dr. Reed stated the other disc fusions could have caused the new herniation. Dr. Reed performed a fusion of the discs at C6-7 on Lyons. Dr. Reed rated Lyons with 55 percent whole body impairment, if the rotator cuff injury is not included, and 59 percent whole body with the rotator cuff injury included. The ratings included prior injuries. Dr. Delgado rated Lyons with 69 percent whole person impairment, including his 1990 injury. Based on the information from Lyons about the 1990 injury, Dr. Delgado assigned 15 percent whole body to the earlier injury, making 54 percent of his whole body impairment due to the 1990 injury. The Administrative Law Judge (ALJ) awarded Lyons 118 weeks of temporary total disability and permanent total disability. The ALJ denied a credit for previous payments because the statute was not applicable under a finding of permanent total disability. The Workers' Compensation Board (Board) adopted the ALJ's findings, but slightly modified the number of weeks of temporary total disability compensation.

ISSUES: (1) Did the Board apply an incorrect definition of permanent total disability which resulted in a lesser standard than that required by the current version of the Workers' Compensation Act? (2) Is there substantial competent evidence to support the Board's finding that Lyons was permanently and totally disabled? (3) Was IBP entitled to a credit or offset for prior functional impairment?

HELD: Court affirmed. (1) Court held the Board did not apply an improper legal standard. Court stated that the Board's finding that an injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable" is compatible with legislative intent, comporting with the totality of circumstances approach to factually determining permanent total disability. (2) Court held the Board considered the significant impairment ratings given by
false information, and attempted to obtain control over a motorcycle by deceiving the owner. When the evidence is viewed in the light most favorable to the state, a rational jury could have found that Bland aided and abetted Bell in her crimes and is guilty as charged beyond a reasonable doubt.

(4) Bland argued that the state cannot take one act, the use of Battle's driver's license, and separate it into five different charges. Court held proof of the three counts of making a false information was not required in proving identity theft because identity theft was complete upon mere possession of Battle's information with intent to defraud. Court held the same proof for the false information was not required in proving attempted theft because the acts of false information were not the exclusive overt acts toward obtaining control. Likewise, proof of attempt to gain control of the motorcycle was not required in proving identity theft which required possession of identification with intent to defraud. (5) State conceded that Bland's sentence should have been 58 months, based on a doubling of the based sentence of 29 months for the primary crime of identify theft. Court vacated the sentence and remanded for resentencing. (6) Court held that Bland showed no trial error and his convictions should stand in any event because of overwhelming evidence against him.


STATE V. BRYAN
GREENWOOD DISTRICT COURT – AFFIRMED NO. 90,881 – DECEMBER 23, 2004

FACTS: Bryan convicted of lewd and lascivious behavior for conduct involving a sleeping victim. On appeal he claimed insufficient evidence supported the conviction because there was no completed crime, only an attempt to commit lewd and lascivious behavior. He also claimed trial court erred in not instructing jury on lesser included offense of attempt to commit lewd and lascivious behavior.

ISSUES: (1) Sufficiency of evidence and (2) jury instruction
HELD: “Presence” requirement for lewd and lascivious behavior is K.S.A. 2003 Supp. 21-3508 does not require sensory perception or awareness of victim, only that act be reasonably capable of being seen. This conclusion is based upon (1) common understanding of “expose” and “presence;” (2) common-law element of crime of indecent exposure that act need not be seen but rather “is likely to be seen;” (3) legislative intent in using “expose” and “presence” rather than “engagement,” “seen by,” or “perceived by;” (4) perception requirement would make crime indistinguishable from crime of indecent liberties with a child; and (5) rationale expressed by Virginia and Minnesota courts.

Given court's construction of statute, no error in not instructing jury on lesser offense.

STATUTES: K.S.A. 2003 Supp. 21-3508 sections (a)(2) and (b)(2); K.S.A. 21-3503(a)

STATE V. PATTON
ATCHISON DISTRICT COURT – AFFIRMED NO. 90,906 – DECEMBER 23, 2004

FACTS: Patton assisted in Boyce's shooting of elderly victim. Patton prosecuted as an adult and convicted of attempted first-degree murder, aggravated robbery, and conspiracy to commit first-degree murder. On appeal, Patton claimed (1) clear error by trial court in not instructing jury on definition of “premeditation,” (2) insufficient evidence supported the convictions, and (3) misconduct by prosecutor in closing argument.

ISSUES: (1) Premeditation, (2) sufficiency of evidence, and (3) prosecutorial misconduct
HELD: No Kansas case has addressed this precise situation. Commonly understood definition of “premeditation” is consistent with legal definition, thus while not the better practice, failure to define “premeditation” in jury instructions is not error. Also, Patton unable to show a real possibility the jury would have reached a different verdict.

Under facts, sufficient evidence for rational jury to find beyond a reasonable doubt that Patton aided and abetted Boyce in attempted first-degree murder, and engaged in a conspiracy to commit first-degree murder. Prosecutor's comment that Patton was guilty was improper, but single statement with no showing of ill will was not reversible error. Prosecutor's comments regarding Patton's “consciousness of guilt” constituted fair comment on the evidence.

CONCURRING (Bukaty, J.): Trial court's omission of jury instruction defining “premeditation” is error where defendant is charged with first-degree murder or an attempt or conspiracy to commit first-degree murder. Under facts of case, no reversible error resulted.

STATUTES: K.S.A. 60-261

STATE V. MERCER
LYON DISTRICT COURT – AFFIRMED NO. 91,115 – DECEMBER 10, 2004

FACTS: Mercer was convicted of rape and child abuse of the 2-year-old daughter (B.B.) of his girlfriend. B.B. had a scalding burn on her back, she had a bruised eye caused by blunt trauma, sexual assault injuries, and Mercer's sperm was found in B.B.'s underwear. At trial, Mercer asked the trial court to allow testimony from a state transportation worker regarding statements allegedly made by B.B. when she was 2 years old. The court rejected Mercer's request stating child hearsay statements are allowed to prove a crime, not disprove one. The court did not instruct on misdemeanor battery as a lesser included offense of child abuse. A jury convicted Mercer on both counts.

ISSUES: Did the trial court err in not allowing child hearsay statements to disprove a crime? Was it clearly erroneous for the trial court to not instruct the jury on misdemeanor battery as a lesser included offense of child abuse and to give an additional definition for the term “torture”?
HELD: Conviction affirmed. Court held that since the state did not offer any incriminating hearsay statements made by B.B., then the trial court did not deny Mercer a fair trial by declining his request for B.B.'s statement that disproved the crime. Additionally, the trial court concluded that B.B. was unavailable because her statements were not reliable. Consequently, B.B.'s statements would not have been
admissible, regardless of the purpose of admission. The Court also found it was not clearly erroneous for the trial court to not instruct the jury on the lesser included offense of misdemeanor battery. Court stated that since the jury convicted Mercer of child abuse for the burn injuries and did not mention the eye injury on the verdict form, it supported the conclusion that B.B.'s burn injury constituted torture and amounted to child abuse. Regarding the definition of "torture," the Court held the definition given by the trial court has been used by the Kansas Supreme Court, and the trial court properly instructed the jury on the law relevant to Mercer's charges. Court stated the giving of the instruction on torture did not constitute reversible error.


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If an appellate court has issued a show cause order concerning consolidation, remember to file a response in each case. An original, along with the appropriate number of copies of the response, is needed for each case under consideration for consolidation. See Rule 5.01 for the required number of pleading copies.

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Every filing shall contain the appellate court case number assigned to the appeal. See Rule 1.05(a) and K.S.A. 60-210(a). Having the appeal number on the filing ensures the document is filed in the appropriate case.

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Sign the conclusion of every pleading and have a signed certificate of service attached at the end of the pleading. See Rule 1.05. Certificates of service should show who received a copy of the pleading, how they received the copy, and the date sent. See Chapter 60 of the Kansas Statutes Annotated for form examples.

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## CLE Docket 2005

### FEBRUARY

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| 9 and 10 | Annual CLE Slam Dunk!  
KSU, Manhattan  
12 CLE credit hours, including  
2 hours professional responsibility credit |
| 11 | Juvenile Law  
Hyatt Regency, Wichita  
6 CLE credit hours, including  
1 hour professional responsibility credit |
| 18 | Estate Planning  
Capitol Plaza Hotel, Topeka  
6 CLE credit hours, including  
1 hour professional responsibility credit |
| 25 | Family Law Institute  
Airport Hilton, Wichita  
6 CLE credit hours, including  
1 hour professional responsibility credit |

### MARCH

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| 11 | Bankruptcy Institute  
Double Tree, Overland Park  
6 CLE credit hours, including  
1 hour professional responsibility credit |
| 11 | Heart of America Health Law Institute  
Embassy Suite on the Plaza, Kansas City  
6 CLE credit hours, including  
1 hour professional responsibility credit |
| 18 | Evidence  
Ritz Charles, Overland Park  
6 CLE credit hours, including  
1 hour professional responsibility credit |

### APRIL

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| 1 | Real Estate Institute  
Hyatt Regency, Wichita  
6 CLE credit hours, including  
1 hour professional responsibility credit |
| 8 | Appellate Practice Symposium  
Topeka Holiday Inn Holidome, Topeka  
6 CLE credit hours, including  
1 hour professional responsibility credit |
| 15 | Elder Law / Medicaid  
Double Tree, Overland Park  
6 CLE credit hours, including  
1 hour professional responsibility credit |