KBA ANNUAL MEETING

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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.

The Kansas Bar Association and the members of the Board of Editors assume no responsibility for any opinion or statement of fact in the substantive legal articles published in The Journal of the Kansas Bar Association.

Our Mission: The Journal of the Kansas Bar Association is published monthly with combined issues for July/August and November/December for a total of 10 issues a year. Periodical postage rates paid at Topeka, Kan., and at additional mailing offices. The Journal of the Kansas Bar Association (ISSN 0022-8486) is published by the Kansas Bar Association, 1200 S.W. Harrison, PO. Box 1037, Topeka, KS 66601-1037; Phone: (785) 234-5696; Fax: (785) 234-3813. Member subscription is $25 a year, which is included in annual dues. Nonmember subscription rate is $45 a year. POSTMASTER: Send address changes to The Journal of the Kansas Bar Association, PO. Box 1037, Topeka, KS 66601-1037.

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Independency of the Judiciary

The Kansas Bar Association has a long-standing policy in support of the independency of the judiciary and merit selection of justices of the Kansas Supreme Court.

In 1957, a gravely ill Kansas Supreme Court chief justice resigned. The governor, who had recently lost his re-election bid, resigned. The lieutenant governor became governor and then appointed the resigned governor to the state Supreme Court. This infamous “triple play” was the catalyst for an amendment in 1958 to the Kansas Constitution, strongly backed by the KBA, for merit selection of Supreme Court justices. (See R. Alton, Lee, The “Triple Switch: How the Missouri Plan Came to Kansas,” Vol. 73 JKBA No. 1, pp. 28-37 (2004))

Now, 47 years later, merit selection is being threatened by Kansas Senate Concurrent Resolution (SCR) 1606, which seeks to amend the Kansas Constitution by putting politics back into the selection process by requiring Senate confirmation of justices.

At the Senate hearing in February, former KBA President Jack Focht spoke against the resolution. Retired Justice Fred N. Six, Kansas Supreme Court, also gave testimony explaining to the committee how the current selection process works. Dave Rebein, a member of the Kansas Supreme Court Nominating Commission, discussed the thorough and tedious nominating commission process.

Nevertheless, SCR 1606 was favorably reported out by the Senate Judiciary Committee.

Disagreement by some with a particular decision of the Court is not a valid reason to throw out merit selection.

I would urge you, as a KBA member, to express your views to your legislators and your community. To be placed on the ballot, SCR 1606 would have to garner two-thirds of the vote in the Senate as well as the House.

Jury Appreciation

As lawyers, we respect the dedication and service of jurors and the important role of juries in our system of justice. The KBA supports adequate compensation for jurors for their service, and we are working with the Kansas Supreme Court on a Juror Appreciation Proclamation, which will hopefully coincide with this year’s Law Day in May.

Lawyer Advertising — Is it a Problem?

We all see advertisements by lawyers (mostly from outside of Kansas) on national television. Is lawyer advertising a problem? Do some of the advertisements hurt the public’s image of lawyers in Kansas? Is there anything that can be done about what some may consider inappropriate lawyer advertising?

At its February meeting, the KBA Board of Governors voted to form a task force to study lawyer advertising. If you would like to be on the task force, please let me know.

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.
IN THE SUPREME COURT OF THE STATE OF KANSAS
RULES RELATING TO DISTRICT COURTS
RULE 116

Supreme Court Rule 116 is hereby amended, effective July 1, 2005.

ADMISSION OF ATTORNEY FROM ANOTHER STATE

(a) Any attorney not admitted to the practice of law in Kansas but regularly engaged in the practice of law in another state or territory, and who is in good standing pursuant to the rules of the highest appellate court of such state or territory, who has professional business in the courts or any administrative tribunal or agency of this state, may on motion be admitted to practice law for the purpose of said business only, upon showing that he or she has associated with him or her, an attorney of record in the action, hearing or proceeding, who is a resident of Kansas, regularly engaged in the practice of law in Kansas, and who is in good standing under all of the applicable rules of the Supreme Court of Kansas. The Kansas attorney of record shall be actively engaged in the conduct of the matter or litigation, shall sign all pleadings, documents, and briefs, and shall be present throughout all court or administrative appearances. Service may be had upon the associated Kansas attorney in all matters connected with said action, hearing or proceeding, with the same effect as if personally made on the out-of-state attorney, within this state. Any out-of-state attorney admitted pursuant hereto shall be subject to the order of, and amenable to disciplinary action, by the courts, agencies, or tribunals of this state.

(b) Notwithstanding any of the provisions of the foregoing section (a), any attorney, not a resident of Kansas, who is admitted to practice law in this state and who is in good standing pursuant to the rules of the Supreme Court may appear as attorney of record in any proceeding in any court, tribunal or agency without having associated with him or her a resident Kansas attorney.

(e) No court, agency or tribunal shall entertain any action, matter, hearing or proceeding while the same is begun, carried on or maintained in violation of the provisions of this rule. Nothing in this rule shall be construed to prohibit any party from appearing personally before any said courts, tribunals or agencies on his or her own behalf.

ADMISSION PRO HAC VICE OF OUT-OF-STATE ATTORNEY

(a) Any attorney not admitted to the practice of law in Kansas but who is regularly engaged in the practice of law in another state, territory of the United States, or the District of Columbia, and who is in good standing pursuant to the rules of the highest appellate court in that jurisdiction, may on motion be admitted to practice law in the courts or any administrative tribunal of this state for the purpose of a particular case only, upon showing that he or she has associated an attorney of record in the case who is regularly engaged in the practice of law in Kansas and who is in good standing under all of the applicable rules of the Kansas Supreme Court. The Kansas attorney of record shall be actively engaged in the conduct of the case; shall sign all pleadings, documents, and briefs; and shall be present throughout all court or administrative appearances. Service may be had upon the associated Kansas attorney in all matters connected with the case with the same effect as if personally made on the out-of-state attorney within this state.

(b) The motion filed by the Kansas attorney of record, accompanied by the out-of-state attorney’s verified application, shall be in writing and shall be filed with the court or administrative tribunal where the case is pending as soon as reasonably possible but no later than the date the out-of-state attorney files any pleading or appears personally. The motion and verified application shall be served on all counsel of record and on the out-of-state attorney’s client.

(e) The out-of-state attorney’s verified application shall include:
(1) a statement identifying the party or parties represented;
(2) the name, business address, telephone number, and Kansas attorney registration number of local counsel;
(3) the applicant’s residence address, business address, and business telephone number;

(continued on next page)
RULE 116 Admission Pro Hac Vice

(continued from Page 5)

(4) the bar(s) to which the applicant is admitted, the date(s) of admission, and the applicable attorney registration number(s);

(5) a statement that the applicant is a member in good standing of each bar;

(6) a statement that the applicant has not been the subject of prior public discipline, including but not limited to suspension or disbarment, in any jurisdiction;

(7) a statement that the applicant is not currently the subject of a disciplinary action or investigation in any jurisdiction or, if the applicant is currently the subject of a disciplinary action or investigation, the application shall provide a detailed description of the nature and status of the action or investigation as well as the address of the disciplinary authority in charge; and

(8) the case name, case number, and the court in which the applicant has been granted permission to appear pro hac vice in Kansas within the preceding 12 months.

The applicant has a continuing obligation to notify the court or administrative tribunal if a change occurs in any of the information provided.

(d) A non-refundable fee of $100, payable to the clerk of the district court, shall accompany the motion and verified application in each case. An administrative tribunal may, in its discretion, impose a similar fee. An attorney employed by a governmental agency or an attorney who represents an indigent party may move for waiver of the fee for good cause shown.

(e) Any out-of-state attorney admitted pursuant to this rule shall be subject to the order of, and amenable to disciplinary action by, the courts and administrative tribunals of this state.

(f) A separate motion shall be filed for each case, and the motion may be granted or denied in the discretion of the presiding judge or administrative officer. If the motion is denied, reasons shall be stated.

(g) Nothing in this rule shall be construed to prohibit any party from appearing personally before any court or administrative tribunal on his or her own behalf.

By order of the Court, this 9th day of March 2005.
Kay McFarland, Chief Justice

Appellate Practice Reminders . . .
From the Appellate Court Clerk’s Office

Pro Hac Vice Practice
On July 1, 2005, pro hac vice practice will change in both the district courts and the appellate courts in Kansas. For district court practice, see Rule 116 on Page 5 in this issue of The Journal. Rule 1.10, which governs pro hac vice admission in the appellate courts, contains substantially similar provisions and may be accessed at www ks courts org/ ctruls/2005SC25amended.pdf

In both Rule 1.10 and Rule 116:
- The Kansas attorney of record must be regularly engaged in the practice of law in Kansas but is no longer required to be a Kansas resident.
- The Kansas attorney of record files the motion for pro hac status, accompanied by the out-of-state attorney’s verified application.
- Payment of a nonrefundable $100 fee is required for each case.

In Rule 1.10, which governs appellate practice, the pro hac motion shall be filed at the time of docketing or no later than 15 days before the brief due date or oral argument date. It will no longer be possible to make an oral request for pro hac privileges at the call of the day’s docket. Supreme Court Rules 7.01(e) and 7.02(e) have been amended to delete those provisions, effective July 1, 2005.

If you have any questions about these or other appellate court rules and practices, call the Clerk’s Office at (785) 296-3229 and ask to speak with Carol G. Green, Clerk of the Appellate Courts.
When I get worked up about things, I think about a favorite story that I once heard about Neal Shine, the well-known former publisher and editor of the Detroit Free Press. Now I suppose that most Kansans may have never heard of Neal, but he worked for the newspaper for nearly 50 years, rising through the ranks after starting in the mailroom as an intern.

Although leading a major newspaper was demanding, Neal was someone who always maintained a sense of balance in his life that too few people enjoy in this day and age. He was someone who only focused on the truly important matters and always understood that things usually have a way of working themselves out.

As I remember the story, one afternoon during a last minute negotiating session with a union that represented several thousand people who worked for the newspaper, Neal announced that he had a commitment and he would return in several hours.

As he got up to leave, a member of his legal team frantically raced to catch him before he reached the elevator. "I don't understand what could possibly be more important than this," the attorney said.

"I have a baseball game that I need to see," Neal admitted.

"The strike deadline is in several hours, and you're going to leave and go watch a baseball game?" his lawyer asked incredulously. "You could watch a game anytime."

Neal put his arm on the lawyer's shoulders and replied, "It's not just any game, it's the state semifinals and my grandson is pitching."

This did not make the lawyer feel any better.

"Don't worry," Neal said as the elevator doors began to close. "It will all work out in the end."

With that he was gone, leaving the lawyer standing in the hallway looking as if he had just been fired.

When Neal looks back on that day more than 20 years ago, he does not remember much about the negotiating session, only that they eventually signed a new contract. He fondly remembers, however, every inning of that ball game as he watched his grandson lead the team to victory.

As attorneys, it is easy to get lost in the chaos of a busy law practice and the many responsibilities that we all have in life. Once overwhelmed, it's tempting to forget about and postpone what is most near and dear to your heart — family, friends, and colleagues. I have found that it's helpful to keep asking myself, "What's really important?"

It's interesting when I listen to seasoned practitioners reminisce about the "good old days" when the practice of law was much more civilized and enjoyable.

That is where your bar association "family" comes in.

From June 9–11, the KBA will be hosting its Annual Meeting in Vail, Colo. This year's event promises to be a great conference with unique family-themed events, numerous social gatherings to reminisce with old pals, and, of course, plenty of top-notch CLE. This issue of the Journal includes a registration form that describes all of the fun details.

If you have never attended a KBA Annual Meeting, you are in for a special treat. Several days in Vail may change your whole perspective.

You'll be amazed at how enjoyable life as a lawyer can be when you realize what matters most.
Three Brothers’ Idol

By Matthew Keenan, Shook, Hardy & Bacon, Kansas City, Mo.

Every 8-year-old boy adores his father. That’s no real revelation, obviously. But when the father’s profession is being a lawyer in a small town, it adds another dimension to the equation. And when your dad is one of a handful of attorneys in the entire county, then his level of importance gets bumped up even more. And if he happens to be the former county attorney, he is on a par with the police chief, the county sheriff, and the parish priest. In 1967, in Great Bend, no one was more beholden to one Larry Keenan than I, followed only by my kid brother, Marty, and my older brother, Tim.

As most readers know, in the late 60s, lawyers were the stuff of Atticus Finch, Perry Mason, and Clarence Darrow. “My Cousin Vinnie” was nowhere on the horizon. This was a profession whose role models exemplified true giants in our times. No surprise, then, that many young boys wanted to be a lawyer first and a doctor second. What made it even more appealing was that my dad’s law partner, best friend, and mentor was his older brother, Robert. That was a one-two family punch that no other professional could come close to matching. As an added bonus they had their own office building with the name across the top: “Keenan & Keenan.” It was cool, really cool.

But what made all this adoration a bit unusual was that neither I nor my brothers had any real clue what our dad did on a daily basis. Dad took client confidentiality to an art form. Sure we watched “Perry Mason” every day, except Keenan & Keenan had no Dell Street or Paul Drake on their payroll. While dad did possess a law enforcement badge — which he laid prominently on his dresser — there was very little crime in Barton County, and, as best I recall, there were few high profile trials. Yet this added to the mystery of his ways. There was a huge separation between his world and ours. And that’s the way he wanted it.

On the rare days we were allowed to visit his office, we stared at the Xerox machine like a caveman watching fire for the first time. We hoarded the legal pads, rubber bands, and sugar cubes from the break room. It was joyland meets Office Depot. In the back of the office he had a huge black safe. Taped on the front was the sign: “This safe contains no money or other valuables. Only wills and trusts.” That disclaimer was more than preposterous. It was laughable, Keystone Cops stupidity. We knew that the safe contained the Hope diamond or a bloody knife and pistol used in a murder that had not hit the newstand. This safe contained all the secrets, which is why we tried to crack it, using the time tested techniques we had seen on “Mission Impossible.” This occupied us for hours at a time, which precisely served dad’s purpose.

But there was a rare occasion when dad’s world intersected with ours. And when it did, it was a gift from the gods. That happened when a client needed to see dad at the house. There was trouble in River City. This was sinner meets saint; someone did something horrible and was pleading for redemption. So dad would take the client out to the balcony — the only place he could gain some privacy in our home. We would dash for the basement, and open the windows. We could hear bits and pieces but never enough to connect the dots.

This drove us crazy, of course, and asking dad for the secrets would only give away our rudimentary technique. But then one day all that changed. My dad gained a new client. This man had a penchant for two things: excessive alcohol consumption and late night phone calls to his attorney. And when he dabbled in the former, he always did the latter. And for some strange reason, he always called when my parents were “out for dinner” — typically at the Great Bend Petroleum Club (that’s where every professional went in those days).

And when the phone rang around midnight, it was a 1960s version of caller ID. “Is Larry there?” Those three words required about 30 seconds for full delivery. “I’m sorry, Larry isn’t home. May I take a message?” The man’s reply was identical, every time. It was an expression that starts with “bull” and ends with a word that rhymes with hit. The first word he repeated a couple times. The second word he blurted out only once. The written word cannot do it justice, of course. But the fact that dad had a client who drank and, even worse, cussed, fit perfectly into our wildest notions of his law practice.

So eventually my brothers and I quenched our thirst for information, and we got the full story on Keenan & Keenan. Nothing we learned diminished our admiration for the work of Larry and Robert Keenan, their clients, or this fine profession we all share. Perhaps that explains why today my two brothers, Marty and Tim, practice law with one Larry Keenan and his brother Robert.

About the Author
Matthew Keenan grew up in Great Bend and attended the University of Kansas, where he received his B.A. in 1981 and his J.D. in 1984. Of five children raised by Larry and Mona Keenan, four are attorneys: Marty and Tim practice with Larry in Great Bend, and sister Beth is a tax attorney for Blackwell Sanders in Kansas City, Mo. For the last 20 years Matt has practiced with Shook, Hardy & Bacon. In his spare time he writes columns for the Kansas City Star Neighborhood News, which is published in the Johnson County editions of the paper. He has a Web site with some of his writings over the years, www.matthewkeenan.com. He and his wife, Lori, have four children and live in Leawood. Keenan has been a member of the Kansas Bar Association since 1984.
Walking into the law office of Christopher “Chris” Meek in downtown Baxter Springs is taking a step into Americana. Memorabilia lines the walls and covers every shelf. Items from old campaign bumper stickers and buttons to a stuffed armadillo to items from his Native American heritage catch the eye. One item, a framed poster, does seem to be out of place. This piece of memorabilia is not only a symbol, but also is an actual exhibit from the trial that has been Meek’s total case-load for nearly four years: a trial at the International Criminal Tribunal for the former Yugoslavia (ICTY), The Hague, Netherlands.

Who is Chris Meek?

Meek is a native of Baxter Springs — he currently lives in the house he grew up in — and a third generation Kansas lawyer. He received his juris doctorate as a Dean’s Honor Scholar from Washburn University School of Law in 1979. Graduating from Washburn was a break from a family tradition. His grandfather, father, an uncle, and an aunt all graduated from the University of Kansas School of Law.

After becoming a member of the bar in 1979, Meek served a year as a research attorney for the Kansas Supreme Court and Court of Appeals, then served two years as an assistant attorney general, criminal division, Office of the Kansas Attorney General. He was a founding partner in Lynch, Meek and Battitori, Attorneys at Law, Baxter Springs, in 1982. In 2005, the firm became Meek, Battitori and Gayoso when partner Oliver Kent Lynch was named to the bench in the 11th Judicial District Court.

Meek did follow the example of his grandfather and father when he was elected county attorney of Cherokee County in November of 1984. His grandfather was appointed Wyandotte County attorney in 1912, returning to private practice in 1918. His father was elected Cherokee County attorney in 1964, but only served six months before he was appointed district judge for the 11th Judicial District. Meek himself returned to private practice in 1989.

Meek’s trial record includes first- and second-degree murder cases. He was hired by the Death Penalty Defense Unit, Topeka, as co-counsel in two capital murder cases. In both cases, the defense was successful in removing the possible death sentences from consideration.

He is a member of the Kansas and Cherokee County (past president) bar associations, the National Association of Criminal Defense Lawyers, and the Kansas Association of Criminal Defense Lawyers (president, 1999 to 2001). He is a founding member of the Association of Defense Counsel—International Criminal Tribunal for the Former Yugoslavia (ADC-ICTY) and is a member of the Assigned Counsel list for representation of indicted war criminals before the ICTY, The Hague, Netherlands.

Journey to The Hague

“I got there in a circular route,” Meek said. “I became interested in the war crimes tribunal in the late 90s and did a little research on it.”

(continued on Page 43)
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The Board of Governors of the Kansas Bar Association held its regularly scheduled business meeting on Friday, Feb. 18, 2005, at the Kansas Law Center in Topeka. At the meeting, the board discussed and/or took action on the following business items:

- The agenda began with a joint breakfast with members of the Kansas Court of Appeals. The governors’ meeting immediately followed.

- KBA President Michael Crow called the meeting to order and welcomed the board members. The minutes of the previous meeting were accepted, as was the financial report.

- Crow was very pleased to report that the Kansas Supreme Court had recently voted to adopt reciprocity as well as rules for *pro hac vice* admission. The reciprocity rule will take effect July 1, 2005. For more information, please visit www.kscourts.org.

- In addition, Crow confirmed that he had just met with the Supreme Court to present a mandatory malpractice disclosure proposal, as well as discuss a report by the Unauthorized Practice of Law Committee that recommended adoption of a formal definition of the practice of law. The Court took both matters under advisement and would respond at a later date.

- Crow announced that he was reactivating the KBA’s “Project Call-up” program in which members draft basic wills and/or durable powers of attorney at no charge for families of military reservists or the Kansas National Guard who are called to active duty.

- Lastly, President Crow advised that he planned to appoint a task force to study attorney advertising and its affects on the legal profession.

- Nominating Committee Chairperson Daniel Sevart reported that the committee had met to compose a slate of officer nominations for the board. A complete list of the candidates can be found on Page 28.

- Executive Director Jeffrey Alderman reported that he was in the process of creating a new questionnaire to be used with the Kansas Lawyers Economic Survey. He hoped to have the questionnaire ready for board approval at the next meeting. It was hoped that the survey could be conducted in late spring and the results published in the fall.

- Legislative Committee Chairperson Jim Bush gave a report. The board then adopted or abolished a number of legislative positions at the recommendation of the committee. Members are encouraged to visit the KBA Web site at www.ksbar.org to view official legislative positions of the KBA.

- The board was advised that preparations were being made for this year’s KBA Annual Meeting, which will be held June 9–11 in Vail, Colo. The Planning Task Force had selected “Highway to Vail” as its theme. This issue of the *Journal* has all of the fun details including registration information.

- The board received an update on membership, including renewal timelines and recruitment strategies. Overall, membership was higher when compared to the previous year.

- Young Lawyer Section Chairperson Eric Kraft briefed the board on various YLS initiatives.

- The KBA Delegation in the American Bar Association House of Delegates gave a recap of the Midyear Meeting that was held in Salt Lake City.

- The meeting concluded with a joint luncheon with members of the Kansas Supreme Court and the Board of Trustees of the Kansas Bar Foundation to talk about matters of mutual interest.

With no further business, the meeting was adjourned. The next meeting of the board is scheduled for Friday, April 15, 2005, in Leavenworth. To receive a complete copy of these minutes or if any member should have any questions, please contact Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
The Board of Trustees of the Kansas Bar Foundation held its most recent regularly scheduled business meeting on Friday, Feb. 18, 2005, at the Kansas Law Center in Topeka. At the meeting, the board discussed and/or took action on the following business items:

• The agenda began with a joint luncheon with members of the Kansas Supreme Court and the Kansas Bar Association Board of Governors to talk about matters of mutual interest. The Trustees’ meeting immediately followed.

• President Gloria Farha Flentje began the meeting by welcoming the board and making introductions. The minutes of the last meeting held in September were reviewed and approved.

• The board reviewed the financial report, which included an investment update of the Foundation endowment. The board also approved a budget for the 2005 fiscal year.

• President Flentje discussed a proposal that would reduce the number of Cornerstone issues from four to two per year. Cornerstone is the official publication of the KBF and is mailed to all Foundation members on a quarterly basis. By reducing the frequency to two larger issues per year, including an annual report of the Foundation’s activities, it was hoped that the quality and appearance of the publication could be improved with reduced expenses. The board decided to go forward on a trial basis.

• It was noted that several vacancies would soon exist on the board and a nominating committee would be formed to seek viable candidates.

• President Flentje encouraged all board members to identify deserving individuals for this year’s Robert K. Weary Award, which recognizes lawyers or law firms for exemplary service to the Kansas Bar Foundation.

• The board was given an update on the status of the Law Center building expansion and endowment enhancement project and the related fundraising efforts. The campaign was proceeding as planned.

• The board received a fellows report and discussed a recruitment strategy to increase the number of Foundation members.

• The board reviewed a list of grant requests for the upcoming year and grants totaling $72,000 were approved:

  - Kansas Legal Services, Inc. – Civil legal services for the poor $53,500
  - KBA Law-related Education Committee – Various educational programs $15,000
  - Topeka Youth Project – Peer mediation program $2,000
  - KBA Young Lawyers Section – Statewide mock trial competition $1,500

• Lastly, the board was given updates on the various KBF law-related education projects, including a new classroom video, *Miranda v. Arizona*, which was being spearheaded by Judge Joseph Pierron Jr.

With no further business, the meeting was adjourned with the next meeting scheduled for Friday, April 8, 2005, in Wichita. For more information or to receive a complete copy of the minutes, please call Jeffrey Alderman or Janessa Akin at (785) 234-5696.
The Generosity of Lawyers

By: Gloria Farha Flentje, KBF president

The purpose of the Kansas Bar Foundation (KBF) is to serve Kansans and the legal profession by funding charitable and educational projects that foster the welfare, honor, and integrity of the legal system by improving its accessibility, equality, and uniformity, and by enhancing public opinion of the role of lawyers in our society.

Many years ago the Kansas Bar Association had the foresight to establish the KBF. In its early years the foundation served as a vehicle for establishing tax deductible honorariums for deceased lawyers. The KBF also was the vehicle for donations to construct the Kansas Law Center in the late 70s and remains the owner of the facility.

The foundation came into its own when the Kansas Supreme Court agreed that attorneys could dedicate the interest from their trust accounts to the Interest on Lawyer Trust Account (IOLTA) program and that the KBF would be the vehicle for disbursing those funds. Since 1986, nearly $2,780,000 has been disbursed from the IOLTA funds to a variety of organizations for a variety of good purposes: everything from supporting legal services for low-income clients, legal education, KBA outreach programs and local bar associations, to fund charitable and educational programs.

IOLTA funds will go to the KBA Young Lawyers Section Kansas High School Mock Trial Program, the KBA Law-Related Education Committee, Kansas Legal Services, and the Topeka Youth Project. The KBF has contributed to all programs.

Regrettably with the drop in interest rates the funds available from IOLTA this year were less than half of what they were at their peak. So our ability to support worthwhile projects has been hampered, and we are looking for other ways to continue to support the programs we have supported through the years as well as expand our giving to other worthwhile organizations.

Although IOLTA has been our main source of funding, we also receive support from more than 600 KBF fellows and pledges who contribute annually to the foundation. Through the years, the foundation has supported a number of special requests for one-time funding for a special project (for example, the Kansas Citizen’s Justice Initiative). We hope to expand the number of fellows and the annual giving to the foundation as one way to raise our level of support.

Members of the KBA are generous of their time and money to charitable causes, serving on a myriad of boards of charitable organizations, providing legal advice to those same organizations pro bono, and contributing to many causes throughout the state. As lawyers we should also support our professional organization’s foundation and expand our support of “charitable and educational projects that foster the welfare, honor, and integrity of the legal system …”

Gloria Farha Flentje
KBF president

Mark your calendars now!

The 2005 Fellows Dinner is 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.
Don’t Threaten Me: A Lawyer’s Duties Under Rule 8.3

By J. Nick Badgerow, Spencer Fane et al.

Introduction

In an effort to gain an advantage for a client, or more often in a fit of anger, lawyers sometimes inform opposing lawyers of an intent to file a complaint with the Kansas Disciplinary Administrator. Is it appropriate or ethical to make such threats?

The Model Rules Replaced the Code Regarding Threats

Under the Code of Professional Responsibility (Code), which preceded the current Model Rules of Professional Conduct, threats of criminal charges to gain an advantage for a client in a civil matter were improper.1 Disciplinary Rule-7-105 provided:

A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

When the MRPC were adopted by the Kansas Supreme Court in 1988, the former Code and its disciplinary rules were replaced.2 In particular, DR 7-105 was considered and excluded, as redundant or overly broad,3 in view of other provisions of the Model Rules.”4 Those other rules include:

Rule 4.4: a lawyer has a duty not to use means, which have no substantial purpose other than to embarrass, delay, or burden a third person.

Rule 8.4(b): a lawyer shall not “commit a criminal act [such as extortion] that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.”5

Rule 8.4(d) and (e): a lawyer shall not engage in conduct prejudicial to the administration of justice.6

Rule 4.1: a lawyer shall be truthful when dealing with others on a client’s behalf. Thus, one should not make threats to do something, with no intention to actually do it.7

Rule 3.1: a lawyer shall not assert frivolous claims. “A lawyer who threatens criminal prosecution that is not well-founded in fact and in law, or threatens such prosecution in furtherance of a civil claim that is not well founded, violates Rule 3.1.”8

While a disciplinary complaint is not a “criminal” charge, it does represent a report to a governmental administrative agency, where the results can include professional discipline, up to and including disbarment.9

Duty to Report – Rule 8.3

A lawyer has a duty to report violations of the Rules of Professional Conduct. The former version of Rule 8.3, Kansas Rules of Professional Conduct (KRPC), provided:

“A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.”10

Thus, under the former version of the rules, a lawyer needed to follow a two-step approach: (1) did the conduct of “another lawyer” represent a violation of the Rules of Professional Conduct, and, then, (2) did that conduct raise a “substantial question” as to the other lawyer’s “honesty, trustworthiness or fitness as a lawyer?” In many instances, decisions were made not to report, based on a willingness to overlook the violation as not impugning the lawyer’s “honesty, trustworthiness or fitness as a lawyer.”

However, that loophole was closed in Kansas in 1999, when the rule was amended to remove such considerations:

A lawyer having knowledge of any action, inaction, or conduct, which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.11

FOOTNOTES
1. For reference, the Code of Professional Responsibility, with its ethical considerations and disciplinary rules, may be found at Rule 225, Rules of the Kansas Supreme Court.

2. Even after adoption of the Model Rules, the Code’s provisions were allowed to remain in place for a number of years in Kansas “as general statements of required professional conduct,” Rule 226, Prefatory Rules, Rules of the Kansas Supreme Court, until that sentence was removed in 1999, 99 S.C. 22.


5. Rule 8.4(b), KRPC.

6. Rule 8.4(d), (e), KRPC.

7. Threats of criminal prosecution may be used as negotiating tools, but only if the lawyer genuinely believes that the conduct in question would constitute a criminal act. In re Craddock, 602 P.2d 406 (Alaska 1979)(improper for lawyer to mislead opposing party into believing that she would be subject to prosecution for failing to make restitution).

8. See supra note 7.

9. Rule 203, Rules of the Kansas Supreme Court.


11. Rule 8.3(a), KRPC (1999.)
Thus, under the current version of the rules, every lawyer has a duty to report “an attorney,” (i.e., not just “another lawyer”) whose conduct constitutes misconduct (i.e., a violation) of the Model Rules.12

Nor should comfort be found in the Comments, which refer to the duty to report a “substantial” violation. This is a vestige of the former version of the rule and is not to be taken as a modifier of the rule’s duty to report “any” misconduct.13

**Threatening to Report a Lawyer is Improper**

With this background, is it appropriate or even permissible to threaten an opposing lawyer with a report to the disciplinary administrator in order to leverage a settlement for your civil client? Because an agreement to violate the Model Rules is a violation of Rule 8.4(a),14 it would be improper to make an offer not to report a violation in exchange for a settlement.15

A lawyer has a duty to report another lawyer under Rule 8.3. That duty cannot be traded for an advantage in civil litigation.16 Thus, if a lawyer becomes aware that an attorney (including the lawyer himself or herself) has violated the Rules of Professional Conduct, the lawyer must report it to the disciplinary administrator.

**If You Receive a Threat**

If a lawyer is threatened with a violation of the Model Rules, he or she should take several steps:

1. The lawyer should evaluate the conduct. If the lawyer determines that the conduct did, in fact, violate the KRPC, the lawyer should self-report under Rule 8.3. This will have the added impact of depriving the opposing party of a perceived point of leverage.

2. The lawyer should evaluate the opposing lawyer’s conduct. If he or she determines that the threat violated the MRPC, the lawyer should report the other lawyer under Rule 8.3.

3. The lawyer should consider withdrawing from the representation. Under Rule 1.7(b), a lawyer cannot represent a client if that representation conflicts with the lawyer’s own interests. Would someone later claim that the lawyer forced a settlement in order to avoid an ethics complaint, thereby failing to represent the client zealously?

Filing of a report with the disciplinary administrator, whether about yourself or another lawyer, should not be done lightly. It carries significant potential impact and costs. But, it is improper to threaten such a report to gain an advantage for a client. ■

**About the Author**

**J. Nick Badgerow** is a partner with Spencer Fane Britt & Browne LLP in Overland Park. He is a member of the Kansas State Board of Discipline for Attorneys, the Kansas Bar Association Ethics Advisory Opinion Committee, and the Kansas Judicial Council. He is chairman of the Judicial Council’s Civil Code Advisory Committee, the KBA Ethics 2000 Commission, and the Johnson County Bar Association Ethics and Grievance Committee.

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14. Id. at 8.4(a).

15. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-383 (1994): “a threat to file disciplinary charges is unethical in any circumstance where a lawyer would be required to file such charges by Rule 8.3(a).”


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**LEGAL SERVICES CORPORATION**

**Notice of Availability of Competitive Grant Funds for Calendar Year 2006**

The Legal Services Corporation (LSC) announces the availability of competitive grant funds to provide civil legal services to eligible clients during calendar year 2006. In accordance with LSC’s multiyear funding policy, grants are available for only specified service areas. A listing of those service areas of each state, and the estimated grant amounts are included in Appendix-A of the Request for Proposals (RFP). The RFP and other information pertaining to the LSC grants competition will be available at www.ain.lsc.gov during the week of April 18, 2005. Applicants must file a Notice of Intent to Compete (NIC) to participate in the competitive grants process. Please refer to www.ain.lsc.gov for filing dates and submission requirements. The NIC is available from the RFP. Please e-mail competition inquiries to competition@lsc.gov.
Kansas Young Lawyers Descend on Salt Lake City

By Eric Kraft, KBA Young Lawyers Section president

Recently, the Kansas delegation of young lawyers traveled to Salt Lake City for the American Bar Association's (ABA) Mid-Year Meeting. The Young Lawyers Division (YLD) of the ABA held its mid-year assembly, which is the business portion of our duties as an ABA YLD affiliate.

Of course, the meeting in Salt Lake was not all business; Thursday night we attended a welcome reception. On Friday morning young lawyers from all over the country received some career advice from Jay Foonberg, attorney and author of several books on building and maintaining clients. Foonberg's animated and entertaining speech centered on his "platinum rule" of developing clients: "Treat others as they want to be treated."

The remainder of that meeting centered on CLE that included topics such as "Defending the Unpopular Client," "Practical Tax Advice for Young Lawyers," and "Law Firm Economics 101: Understanding the Business Side of the Profession." The day ended with a Winter Wonderland Dinner and Dance at Log Haven, which is a rustic banquet facility located on a mountainside just outside of Salt Lake City.

Saturday began with the general assembly. Typically, the YLD debates certain issues that the ABA is considering. This meeting was no exception. However, prior to debating two resolutions, we heard from many distinguished speakers. Robert Grey, president of the ABA, spoke to us about the state of the ABA and his need for the YLD's involvement at every level. He congratulated our members on their adoption of his public service project involving jury awareness (a project that I hope to implement in Kansas soon). We also heard from Michael Grecco, president-elect of the ABA. Grecco spoke about his goals to revitalize the legal profession by every level. He congratulated our members on their adoption of his public service project involving jury awareness (a project that I hope to implement in Kansas soon). We also heard from Michael Grecco, president-elect of the ABA. Grecco spoke about his goals to revitalize the legal profession by examining the impact of the billable-hour requirement, the decline of public service within the profession, and the general dissatisfaction that many in our profession experience. Also addressing the delegates were Dennis Drasco, chair of the section of litigation; T.S. Leevo Johnson, president of the American Bar Endowment; professor Peter Winograd of the Legal Education and Admission to the Bar Committee; and Steven Zack, chair of the ABA House of Delegates.

The first resolution opposed the current trend of state and federal lawmakers to allow doctors and health care providers to refuse to provide their patients medical options with which they conscientiously object. For example, current legislative efforts would allow a doctor to omit discussing a treatment option with a patient if the doctor did not believe in that particular treatment by reason of religious or other belief. The debate supporting the adoption of this resolution argued that a patient's beliefs, not the doctor's, should govern the decision to accept a particular course of treatment. The opposition to this resolution argued that the decision to adjust the "informed consent doctrine" should be left to medical professionals and the American Medical Association — that this position was not sufficiently nuanced to allow a balance between the patient's rights and the doctor's beliefs. Both sides were very eloquently presented and the arguments were very good. In the end, the motion to oppose any such legislation was passed.

The second resolution opposed Congress' proposed amendments to Rule 11 of the Federal Rules of Civil Procedure. This proposed amendment involves four substantive changes to the rule: First, it would make sanctions mandatory. Second, the amendment would eliminate the "safe harbor" rule of sanction avoidance. Third, the rule would impose mandatory suspensions from the practice of law for any attorney sanctioned three times (to be applied retroactively). Fourth, the new federal rule would be extended to the states. Again, the debates from both sides were persuasive. My personal view was that most everyone liked one or more parts of the proposed rule change, but that all the amendments (especially the extension of the rule to the states) violated the principals of federalism and also encroached upon the power of the judicial branch. As a result, the motion to oppose this legislation overwhelmingly passed.

The weekend closed with a farewell reception at Port O'Call, a sports bar/dance club just down the street from our hotel. The band was great and many new and old friends found time to socialize before flying out the next morning. Our next trip will be to Miami Beach, Fla., in May, where the YLD will host an Affiliate Outreach Program alongside the General Practice/Solo and Small Firm Section of the ABA.

I would appreciate your questions on any aspect of this trip or the others that we take to represent the KBA YLS. Of course, you are invited to join us, and I can forward you information about any of these valuable meetings. Additionally, if you would like to become a Kansas delegate to these types of meetings, e-mail me at ekraft@kc-dslaw.com, and I'll tell you how.

Access to Justice
Grant Applicants Sought

The Access to Justice Fund is administered by the Kansas Supreme Court and is intended as a source of grant funds for the operating expenses of programs that provide access to the Kansas civil justice system. Its purpose is to support programs that provide persons, who otherwise may not be able to afford such services, with increased access to legal assistance for pro se litigation, legal counsel for civil and domestic matters, as well as other legal advice and dispute resolution services.

Applications for grant funds will be due May 30, 2005. Grant application packets may be requested from the Office of Judicial Administration, 301 W. 10th, Rm. 337, Topeka, KS 66612. Please direct telephone inquiries to Art Thompson at (785) 291-3748.
**Members in the News**

**CHANGING POSITIONS**

Thomas E. Beall, Topeka, has joined Wright, Henson, Clark, Hutton and Gragson LLP as an associate attorney.

John E. Bordeaux and Michael C. Kirkham have been named partners with Sanders Conkright and Warren LLP, Overland Park.

Stacy Buncik, Kansas City, Mo., has joined Polsinelli Shalton Witte and Suelthaus P.C.

Lucille Douglass, Garden City, is now working for Calihan Brown Burgardt Wurst and Daniel P.A.

Joshua Ellwanger, Kansas City, Mo., has joined Blackwell Sanders Peper Martin LLP.

Mark J. Galus, Kansas City, Mo., is now with Fisher and Phillips LLP.

Stephanie Newkirk Hall and Paul Odum, both of Kansas City, Mo., have joined Husch and Eppenberger LLC.

Jack J. Hobbs has joined the Shawnee County District Attorney’s office, Topeka.

Clancy Holeman, Wichita, has been named county counselor for Riley County.

James Howell, Wichita, has joined Prochaska, Craig, Giroux and Howell.

Jennifer Benedict Jones, Independence, has joined Allmayer and Associates P.C.

Michael L. Matula, Jill A. Morris, and Renee Parsons, all of Kansas City, Mo., have joined Ogletree, Deakins, Nash, Smoak and Stewart P.C.

Timothy P. McConville, Topeka, has joined Goodell, Stratton, Edmonds and Palmer LLP as an associate attorney.

Crystal M. Nesheim now works for the Minnehaha County Attorney’s Office in Sioux Falls, S.D.

Christen D. Shepherd, Kansas City, Mo., is now at Martin, Leigh, Laws and Frizlen P.C.

Kyle J. Steadman has joined the Topeka office of Foulston Siefkin LLP.

Judith A. Taylor is now with Taylor Law Firm LLC in Olathe.

Sid Thomas, Montezuma, has joined the Finney County Attorney’s Office.

David A. Williams has joined Covenant Legal Services in Olathe.

**CHANGING PLACES**

Abogado Parker and Parker P.A. has moved to 535 Central Ave., Kansas City, KS 66101.

Corman and Barefield Law Office has moved to 732 Nugget Road, Minneapolis, KS 67467.

Anita L. Kemp has a new business address, P.O. Box 780781, Wichita, KS 67278.

Ronald Kurtz has a new business address, 3933 S.W. 38th Lane, Topeka, KS 66610.

Mike P. Oliver and Norman I. Reichel have formed Oliver and Reichel PA. They are located at 11020 King St., Ste. 215, Overland Park, KS 66210.

Pendleton and Sutton, Attorneys at Law, LLC has moved to 1031 Vermont St., Ste. B, Lawrence, KS 66044.

**MISCELLANEOUS**

Tim M. Alvarez, principal in the Alvarez Law Firm, Kansas City, Kan., has been elected president-elect of the Wyandotte County Bar Association for 2005.

Richard Dearth, Parsons, has been named chairman of the department of management and marketing in the Gladys A. Kelce College of Business at Pittsburg State University.

Crystal Marietta, Pittsburg, has been chosen as a new board member of CLASS Ltd.

Ricklin R. Pierce has been named magistrate judge for Finney County.

Guy R. Steier, Beloit, has been named as Cloud County’s district magistrate judge.

John “Val” Wachtel, Wichita, has been appointed to the state Board of Indigent’s Defense Services by Gov. Kathleen Sebelius.

Evelyn Zabel Wilson, Topeka, has been appointed by Gov. Kathleen Sebelius as a Shawnee County District Court judge.

**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.

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**Dan’s Cartoon** by Dan Rosandich
Ronald D. Albright  
Ronald D. Albright, 83, Anthony, died on Jan. 17. He was born Nov. 26, 1921, the son of Thomas and Lola A. Ivey Albright.

On Oct. 25, 1941, Ronald and Carmen Harper were married at Newkirk, Okla. He served during World War II and as a reserve in the Korean conflict.

He practiced law for 52 years in Anthony. During his practice, Albright was involved in the organization of many community projects, such as the water pipeline from Harper to Anthony, the organization of the Anthony Hospital District, and the organization of the KanOkla Telephone Association.

He was a member of the American and Kansas bar associations and the Assembly of God Church in Anthony; was past president of the Anthony Kiwanis; and was actively associated with Oriental Missionary Society International for 36 years, serving on the Board of Trustees for 21 of those years.

Albright was preceded in death by his parents and a brother, Donald Jean. Survivors include his wife, of the home; a son, Dennis, Anthony; and two daughters, Lynne Gregory, Pine Island, Fla., and Sarah Wickware, Fort Myers, Fla.

Thomas J. Kennedy  
Thomas J. Kennedy, 75, Salina, died Jan. 21. Kennedy was born March 26, 1929, in Salina.

Kennedy was senior partner and president of Kennedy, Berkley, Yarneveich and Williamson Law Firm in Salina.

He was a member of the American and Kansas bar associations, the American Institute of Certified Public Accountants, the American Association of Attorney-CPAs, and the Catholic Diocesan Attorneys Association. He was also chairman of the Taxation Section of the Kansas Bar Association.

He served on the board of directors for the YMCA, the former St. John’s Hospital in Salina, the former Marymount College, the Salina Country Club, the Salina United Way, and St. John’s Military School. He was a member of the Salina Chamber of Commerce, a member of the governing body of the Smoot Foundation, and chairman of the governing body of both the Verla Nesbitt Foundation and the Salina Airport Authority.

Survivors include his wife, Dorothy, of the home; four sons, Bob, Mission Hills, Jim, Bedford, N.H., Don, Wichita, and Bill, Chattanooga, Tenn.; and two daughters, Carol Johnson, Minneapolis, Minn., and Katie Chalfant, Overland Park.

George E. Mallon  
George E. Mallon, 64, Kansas City, Kan., died on Feb. 5. He was born Jan. 7, 1941, in Manhattan, Kan., to Robert and Ruth Marks Mallon.

Mallon attended Rockhurst College, Kansas City, Mo. He graduated from the University of Kansas in 1963 with a B.A. in political science and received his juris doctorate from Washburn University School of Law in 1966.

He was a member of the Kansas and Wyandotte County bar associations and the Kansas Trial Lawyers Association. He was the president of the Legal Aid Society of Wyandotte County in 1975.

He is survived by his wife of 41 years, Kathleen; four daughters, Michaela Sarbach, Martha DeGraw, Eileen Heble, and Anita; his brother, Robert; and his sister, Mary Ellen.

Julius Paul (J. Paul) Maurin III  
Julius Paul (J. Paul) Maurin III, 58, Kansas City, Kan., died Feb. 14 at his home.

Maurin was born Sept. 13, 1946, in Kansas City, Mo., and was a lifelong Kansas City resident. He received his bachelor’s degree and juris doctorate from Creighton University in Omaha, Neb.

He was a clerk for the Douglas County District Court in Omaha and a law clerk for Garvey, Nye, Crawford, Kirchner, and Mozlan, Omaha. He was a deputy clerk with the Wyandotte County District Court and was a member of the Phi Alpha Delta legal fraternity.

Maurin entered private practice on Aug. 21, 1972. He was a judge pro tem in the former magistrate court of Wyandotte County; judge pro tem in Kansas City, Kan., municipal court; and judge pro tem of the Wyandotte County Juvenile Court from 1974 to 1976. He was also a special administrative law judge for the state of Kansas. He served as legislative counsel for the Kansas City, Kan., area Chamber of Commerce in 1983 and was the legal counsel for the Kansas City, Kan., Fraternal Order of Police Lodge No. 4 from 1976 to 1989.

Maurin became a member of the Kansas Bar Association in 1972. He served as District 11 Representative on the KBA Board of Governors from 1998 to 2004, as the board liaison to the Legal Assistants Committee from 2001 to 2004, and on the Unauthorized Practice of Law Task Force from 2001 to 2002.

He was a member of the Nebraska Bar Association and the Wyandotte County Bar Association, where he served as president in 1982 and vice president in 1981. He served on the Board of Governors of the Kansas Trial Lawyers Association from 1975 to 1983 and on the KTBL Grievance and Ethics Committee for the past five years, where he was a recipient of the Special Recognition Award in 1977.

Maurin was preceded in death by his twin baby girls and parents, Julius P. and Tanya Maurin. He is survived by his wife of 32 years, Virginia (Jill), of the home; son, Julius Paul IV, Kansas City, Kan.; and daughter, Ashley, Kansas City, Mo.

Charles M. Tuley  
Charles M. Tuley, 62, died Jan. 23 at his home in Topeka. Tuley was born on March 22, 1942, in Effingham, the son of Carl and Frances Foster Tuley. He graduated from Atchison County Community High School in Effingham and earned a bachelor’s degree in political science from The Citadel in Charleston, S.C. He attended Washburn University School of Law for one year and graduated from Cleveland-Marshall Law School, Cleveland, with a juris doctorate.

He practiced law in many different states and in several counties surrounding Atchison.

He was a member of the Kansas Bar Association; the Johnson, Shawnee, Atchison, Brown, Doniphan, Seneca, Marshall, and Leavenworth county bar associations; the National and Kansas trial lawyers associations. He was a member of the Kansas Criminal Defense Lawyers and The Citadel Alumni Association, and he had served as a municipal judge in Effingham and Atchison.

Survivors include his wife, Valeri Horn, of the home; three sons, Kevin, Chicago, Sean, Nashville, Tenn., and Colin, Topeka; three daughters, Shannon, Lawrence, Jamie, Atchison, and Heather Keener, Topeka; and his mother, Effingham.
Advanced Legal Research: Conquer Your Fears

By Tyler Heffron, University of Kansas School of Law

As I near law school graduation and my entry into the “real world,” there are many things I fear. I fear not having all the answers. I fear that just because my business card will say “attorney” that people will expect me to know everything about every area of the law. At the same time, I realize these are somewhat ridiculous expectations. Law school trained me to find answers.

In today’s world of fast food, text messages, and instantaneous downloads, it is no surprise that legal clients demand immediate results. The dilemma facing attorneys, then, is how to find answers and locate results in an efficient and expeditious manner. The University of Kansas School of Law (KU Law) responded to the challenge of preparing students to conduct legal research in a fast-paced, result-oriented society by placing a greater emphasis on research courses in the law school curricula. Now, KU Law offers students the opportunity to gain a head start on formulating practical research skills by enrolling in one of several one credit hour, seven-week long courses generally titled Topics in Advanced Legal Research.

Topics in Advanced Legal Research, developed and taught by KU Law research librarians, provides a unique learning environment in comparison to traditional law school courses. Each course focuses on advanced legal research in a particular jurisdiction or field, such as Kansas or environmental law. As all attorneys can relate, most law school courses pander a particular rule of law for several days, even weeks. Realistically, though, this approach is not appropriate for training attorneys to find answers for a client who calls from his cellular phone on the way to sign a multimillion dollar contract. Accordingly, the Topics in Advanced Legal Research course I took presented an exercise in researching a legal question with an emphasis on timeliness. There are no casebooks to analyze and no professors questioning students on abstract theory; there is only training on how to find information that will help overcome the fear of not having all the answers.

Weekly class meetings focus on different research techniques and legal resources not specifically discussed in other law school courses. Typical sessions include the practical utilization of legislative history, pattern jury instructions, forms, practice guides, verdict histories, and advanced online search queries. After each class, the student has the task of using the weekly resource to develop a memorandum on a single research topic. This memorandum, however, is not focused on providing the substantive answer, rather the memorandum is focused on how and where to find the substantive answer. As a corollary to this think-outside-the-box approach, students are divided into small groups, provided a complex legal question, and turned loose in the law library to research an answer in a short time period.

The need for attorneys to master advanced legal research skills arises out of the continual specialization of the practice of law and the affect technology and information have on our daily lives. In light of these changes in the legal profession, presently practicing attorneys can also benefit from a reassessment of personal research skills based on a better understanding of the areas covered in KU Law’s course. It’s necessary that students develop a working knowledge of specialized print resources and practical information available via the Internet. Developing the scope and quality of an attorney’s research, while ensuring there is not a substantial degree of wasted time due to poor research patterns, is invaluable. The time saved because of heightened research skills allows attorneys to improve the overall quality of the services delivered to the client.

Effective legal research requires a number of complex conceptual skills. Legal research involves, among other things, planning, implementation, analysis, reasoning, and problem solving. The objective, then, is to instill in students at least two vital skills for the practice of law: (1) an ability to define the problem in order to seek the answer, and (2) the knowledge to know where to look for the answer.

Attorneys can gain a greater understanding of how a thoughtful plan can lead to the eventual answer of any legal question by mastering advanced legal research skills. Learning to contemplate how to find the answer, before driving aimlessly down the information superhighway, will strengthen the ability to deliver efficient and effective results. Perhaps more importantly, however, an attorney comfortable with legal research can put some of their “real world” fears to rest.

About the Author

Tyler E. Heffron will be a May 2005 graduate of the University of Kansas School of Law. While at KU Law, Tyler was co-founder and managing editor of Perspectives on Law and Contemporary Culture. Tyler will join Triplett, Woolf and Garretson LLC in Wichita as an associate attorney practicing civil litigation and business law.

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THE JOURNAL OF THE KANSAS BAR ASSOCIATION
A former member of the U.S. Figure Skating Team, attorney Jeffrey G. Benz will deliver the keynote address at the 123rd KBA Annual Meeting on June 10 in Vail, Colo. Benz is the general counsel and managing director of legal and government affairs for the U.S. Olympic Committee (USOC) in Colorado City, Colo.

Benz was born in Pittsburgh, Pa., and started skating at the age of 7 after watching the 1976 Olympic Games in Innsbruck, Austria. With his sister, Jennifer, now a special needs teacher in Phoenix, the two won the U.S. Junior National Dance Championship in 1987 and competed internationally.

“In feel a proud sense of accomplishment from winning,” Benz said.

If Benz had followed family tradition, he would have been a physician.

“I would have been the fourth generation of doctors, but I broke that chain,” Benz said. “I quickly discovered that speaking and writing were in my repertoire, not mathematics.”

Benz earned his bachelor's degree in political science from the University of Michigan in 1990 and his juris doctorate from the University of Texas School of Law in 1993. He is currently working on his MBA at the University of Michigan, Ann Arbor.

Prior to joining the USOC, Benz worked for Coudert Brothers LLP in their San Francisco office. His legal background focused on commercial and intellectual property rights acquisition and litigation, international legal issues, and advising athletes and sports governing bodies on commercial and intellectual property matters.

“While working at Coudert, I started acquiring sports clients,” he said. “Their needs were more comparable with my background. It became a constant grind to develop that practice, but it eventually paid off.”

As a volunteer athlete member for the U.S. Figure Skating Association, Benz has served on its board of directors, as chair of the Athletes’ Advisory Committee, and on its Executive Committee. He also served as a volunteer member of the USOC’s Athletes’ Advisory Council and board of directors. In 2000, the Court of Arbitration for Sport, based in Lausanne, Switzerland, named Benz as one of the youngest of the 184 arbitrators worldwide.

While working with the USOC, Benz worked on the broadcasting rights for future Olympic Games.

“In late 2002, early 2003, we went to Switzerland to, basically, put up the rights for the 2010 and 2012 games,” he said. “It was the richest, thus far in Olympic history.”

NBC paid some $2 billion for the broadcast rights for those two games. As a result, General Electric, NBC’s parent company, became a sponsor.

After the Salt Lake City Olympic Winter Games in 2002, there was an investigation of allegations of impropriety surrounding the bid process. Benz served as a member of the USOC’s Special Bid Oversight Commission, headed by former Senate Majority Leader George Mitchell, to help make recommendations for reform of the bid process.

“It is in about three or four months, we made recommendations to change the processing of bids,” he said. “Both the International Olympic Committee and the USOC have adopted the recommendations; the results of that process can be seen for 2012 where New York is a contender.”

Benz said he is confident that he has one of the most interesting jobs of any lawyer.

He is a member of the Sports Lawyers Association; the National Sports Law Institute Board of Advisors; the American Corporate Counsel Association; and the American, California, Colorado, and Hawaii bar associations.

Benz is married to Kanako, and they have two young sons, Christopher and Austin.
Unfortunately, when you receive this issue of the Journal, the 2005 Session of the Kansas Legislature will still be in session. In what has become ritualized behavior the last few years, the Legislature continues to struggle for funding right up to the 11th hour — and beyond. This year’s ritual was complicated by the school finance ultimatum issued by the Kansas Supreme Court (Court). The bottom line is, at the time of this writing, that school finance, court funding, and nearly all other state budget issues have no bottom line as of yet.

In contrast to the almost routine funding ritual, the relationship between the legislative branch and the judicial branch offered both a new and unpredictable spectacle. Although school finance had bounced between the Court and the Shawnee County District Court for a number of years, most legislators seemed surprised and perturbed when the Court upheld the lower court and declared portions of the school finance law unconstitutional. However, when the Court declared the death penalty unconstitutional in the Marsh case, reversing its holding in the Kleypas case some 12 years earlier, the sense of surprise was accompanied by outrage. While there was initially a frenzy of bills introduced to rectify the limbo status of the death penalty in Kansas, including one that would have abolished it, these were overshadowed considerably by Attorney General Phill Kline’s filing of a writ of certiorari with the U.S. Supreme Court, as it was the only avenue that would have reinstated the ultimate sanction against the seven already on death row.

Of more significance to attorneys has been the re-examination of the relationship between the two branches of government, even of the separation of powers doctrine itself, by the Legislature in the wake of the two decisions. The most obvious legislative reaction has been SCR 1606, the Senate’s proposal to amend the constitution to require Senate confirmation of Court appointees, and HCR 5012, which would amend the constitution to require direct election of Court justices. While the former passed out of the Senate Judiciary Committee with a favorable recommendation, the latter has received no action, at least at the time of this writing. Similarly motivated by the school finance decision, the Senate passed SB 181, which creates a special three-judge panel to hear future school finance cases. Even though the concept is a radical departure in court design, the Senate was still content to let the Court appoint the three district judges and to place appeal of the panel’s decision back with the Court. The bottom line, as mentioned, has not been decided at the time of this writing. The impact of the relationship between the legislative and judicial branches can not be fully measured, as decisions on the judicial branch budget are still a long way off.

For complete details of bills passing the house of origin, or exempt from deadline, see the inserts below.
CRIMINAL
SB 71 creates new crime of ATM robbery and aggravated ATM robbery, where robbery occurs through accessing victim’s fund through an ATM machine.
SB 72 raises jurisdictional amounts similar to theft and allows aggregation to felony, where more than one check is passed in one week if total of checks is $1,000.
SB 82 extends the rape shield statute’s protection to any hearing, not just trials.
SB 117 makes sex offender registration retroactive to Jan. 1, 1980, and requires the KBI to establish procedures for notifying offenders affected.
SB 147 increases the statute of limitations to five years for crimes currently having a two-year limit. Sex crimes already have a five-year limit.
SB 151 creates new crimes of trafficking and aggravated trafficking, covering instances of slavery or involuntary servitude.
SB 161 provides immunity for those employing adults or juveniles in community service.
SB 180 allows a law enforcement officer to administer a preliminary breath test to persons under 21 based on reasonable suspicion. The results of the test, or refusal, may be the basis for an arrest and admissible into evidence.

EMPLOYMENT
SB 55 allows for breath alcohol tests by employers, results presumptive evidence of misconduct.

FAMILY
SB 7 requires custodial parent to give notice to other parent if: custodial parent or person residing with said parent is subject to sex offender registration requirements, or when parent or person residing with same has been convicted of abuse of a child. Said events are considered a material change of circumstances, and failure to give notice subjects custodial parent to indirect contempt.

GOVERNMENT
SB 24 exempts Kansas Open Records Act (KORA) and Kansas Open Meetings Act (KOMA) as well as proceedings before the Kansas Corporation Commission dealing with confidential information related to security measures.
SB 34 extends the 240-plus exceptions to KORA for another five years, with an additional exception for unwarranted invasion of personal privacy.
Sub. SB 77 creates several procedures to avoid racial profiling by law enforcement officers, including a civil cause of action.

LITIGATION
SB 75 gives immunity to food processors and producers from liability related to obesity and weight gain.

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SB 144, introduced as the Senate’s version of a dram shop act (the House version, HB 2114, failed on the House floor), passed the Senate, but only after having dram shops and other licensees removed in committee. The bill that goes to House Judiciary Committee imposes liability only on those who have been convicted of furnishing alcohol to minors.

SB 161 provides immunity for those employing adults or juveniles in community service.

KANSAS HOUSE

CHILDREN

HB 2284 allows a woman to breast-feed wherever she has a right to be, as long as she does it discreetly. The bill also excludes women who are breast-feeding from jury duty.

HB 2352 is the Judicial Council revision of the Child in Need of Care Code (CINC), with the addition of an anti-discrimination clause for parents with disabilities, effective Jan. 1, 2006.

CIVIL PROCEDURE

Sub. HB 2457 amends the Code of Civil Procedure by replacing “certified mail” with “return receipt delivery.”

COURTS

HB 2113 establishes authority for municipal courts to establish collection procedures similar to those in Chapter 61 for collection of costs, fines, and restitution in municipal cases. Also allows cities to contract with collection services.

HB 2284 allows a woman to breast-feed wherever she has a right to be, as long as she does it discreetly. The bill also excludes women who are breast-feeding from jury duty.

HB 2478 delays the expansion of the Kansas Court of Appeals by one year; expansion bill passed in 2001 would have added one judge per year to maximum of 14.

HB 2262 would include court holidays in definition of legal holidays excluded in computation of time for filing appeal.

CORPORATIONS

HB 2168 amends the Uniform Commercial Code, negotiable instruments, concerning demand drafts, and liability for same.

CRIMINAL

Sub. HB 2004 creates new crimes of trafficking and aggravated trafficking, covering instances of slavery or involuntary servitude, identical to SB 151.

Sub. HB 2087 creates two separate crimes: vital records fraud involves furnishing false information to obtain vital records and counterfeiting vital records (but exempts fake ID for tobacco, alcohol, or porn) and identity fraud involves furnishing false information to obtain identification documents, counterfeiting, or trafficking in identification documents.

HB 2129 increases rate of attorneys for indigent defendants to $80 per hour.

HB 2180 adds the crime of fleeing and eluding to list of inherently dangerous felonies included in the crime of involuntary manslaughter.

Sub. 2261 initially broadened searches incident to arrest under K.S.A. 22-2501 by allowing searches for evidence of any crime, not just the crime on which the arrest is based. The substitute bill repeals K.S.A. 22-2501 altogether, as well as any reference to it in 8-1001.

HB 2304 includes “ingestion” or “injection” of unlawful drugs in the crime of possession, overruling the Flinchbaugh decision.

HB 2385 deletes specific foundation requirements for admission of photographs of stolen property in criminal cases, subjecting them to general foundation requirements.

EMPLOYMENT

Sub. HB 2142 establishes the date of accident or onset for repetitive motion or cumulative injuries. Restrictions on attorney fees were removed in the substitute bill.

FAMILY

HB 2268 is the uniform act for enforcement of domestic violence protection orders. Applies both to in-state and out-of-state orders.

LITIGATION

HB 2016 amends 5-401 by eliminating the prohibition of written arbitration agreements in employment contracts.

EXEMPT BILLS

The following were either introduced by an exempt committee or referred to one, making them immune to deadlines:

SB 179 increases severity level of certain sex crimes and redefines definition of child pornography to exclude material that did not portray an actual child.

HB 2307 revises guardianship and conservatorship appointments to preclude conflicts of interest in rendering billable services to the estate.

HB 2337 makes soliciting, prescribing, delivering, or selling imported, otherwise legal, prescription drugs. Would exempt pharmacists and health care professionals with established patient relationships.

HB 2491 increases docket fees and adds fee for expungements to raise judicial salaries.

HB 2495 would establish a state-wide smoking ban, with local governments allowed to opt out (introduced Feb. 23, no hearings).
The Untapped Potential of the Kansas Consumer Protection Act

By Amy Fellows

The Kansas Consumer Protection Act\(^1\) (KCPA/Act) provides consumers with a unique opportunity to recover the full amount of their damages or, if greater, a civil penalty (and in some instances an enhanced civil penalty or punitive damages), without paying the attorney fees and expenses associated with obtaining that recovery. Pursuant to the Act, a court has the authority to award reasonable attorney fees (on a contingent or hourly basis) and expenses to a prevailing KCPA plaintiff, along with civil penalties of up to $10,000 per violation.\(^2\) The potential for this extensive recovery exists for both individuals and sole proprietors in a wide range of situations. In addition to enumerating several nonexclusive per se violations in the KCPA itself — as well as other statutes\(^3\) — the Kansas Legislature has also encouraged courts to take an expansive view of the application of the protection afforded by the Act. As with most remedial statutes, the KCPA “should be interpreted broadly in favor of the consumer.”\(^4\)

I. Who is Covered by the Act?

The KCPA offers some unique and expansive definitions of parties who may be protected by and subject to the Act’s requirements.

FOOTNOTES

1. K.S.A. 50-623, et seq.
2. See K.S.A. 50-634; see also K.S.A. 50-677 (enhanced civil penalty available to elder or disabled consumers); K.S.A. 50-679 (punitive damages available to elder or disabled consumers).
3. Several statutes enacted or amended after the KCPA identify additional per se KCPA violations such as K.S.A. 61-2714, which makes the filing of more than 10 small claims in the same court during any calendar year a violation and K.S.A. 40-3209, which makes “[a]ny action by a [any physician, hospital or other person which is licensed or otherwise authorized in this state to furnish health care services ("provider") to collect or attempt to collect from a subscriber or enrollee any sum owed by the health maintenance organization to a provider” a violation of K.S.A. 50-627. K.S.A. 40-3209(b).
A. The potential plaintiff

The KCPA protects not only an individual, but also any sole proprietor “who seeks or acquires property or services for personal, family, household, business, or agricultural purposes.” A farmer qualifies as a “consumer.” A principal or member of a corporate entity may qualify as well, depending on the capacity in which the injury was suffered. However, a surety for a loan agreement would not be considered a consumer because the surety does not “seek or acquire” property or services.

B. The possible defendant

Anyone in the chain of production, distribution or sale — a “supplier” — is bound by the Act’s requirements so long as that “person” ... in the ordinary course of business, solicits, engages in, or enforces consumer transactions, whether or not dealing directly with the consumer.” Debt collection agencies and advertising agencies can be included as well. In State ex rel. Miller v. Midwest Service Bureau of Topeka, the Kansas Supreme Court created a specific test for determining whether an independent debt collection agency falls within the Act’s definition of “supplier.”

“(1) The debt sought to be enforced came into being as a result of a consumer transaction;

(2) the parties to the original consumer transaction were a “supplier” and a “consumer” as defined by the Act; and

(3) the conduct complained of, either deceptive or unconscionable, occurred during the collection of, or an attempt to collect, a debt, which arose from the consumer transaction and was owed by the consumer to the original supplier.”

Attorney debt collectors are also subject to the KCPA’s requirements. In fact, “[t]he Kansas Supreme Court has defined the term ‘supplier’ broadly to include entities that merely facilitate transactions.” In Cooper v. Zimmer Holdings, Inc., the U.S. District Court, District of Kansas cited Alexander v. Certified Master Builders Corp. as an example of the expansive nature of this term:

“In Alexander, ... defendant argued that it should not be included in the definition of a supplier because it was a trade agency that merely informed or accommodated its members in a transaction. The Kansas Supreme Court, however, found that defendants played a material role in the transactions in question. The facts indicated that defendant promoted the home building industry, distributed a brochure to the general public encouraging them to contract with defendant’s members, and advertised its programs in newspapers. Under these facts, the court concluded that defendant was a supplier under K.S.A. § 50-624(i). Moreover, the court rejected defendant’s argument that it was merely

“Anyone in the chain of production, distribution or sale — a ‘supplier’ — is bound by the Act’s requirements so long as that ‘person ... in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer’.”

5. K.S.A. 50-624(b).
7. Wayman v. Amoco Oil Co., 923 F. Supp. 1322, 1363-64 (D. Kan. 1996) (Belot, J.). In Wayman, gasoline service station franchisees sued the franchisee, Amoco, for various wrongs, including KCPA violations. The U.S. District Court, District of Kansas found the franchisees were “consumers” under the Act, despite the fact that many of them had incorporated their service station dealerships and the payments made to Amoco were from corporate funds. The court based its decision on the fact that the franchisees had signed the leases in their individual capacities, noting “regardless of whether an associated corporate entity exists, the liabilities plaintiffs assumed are individual in nature ... the nature of the liability undertaken, not who ‘picked up the tab,’ should determine the nature of plaintiffs’ KCPA claims.” Wayman, 923 F Supp. at 1363-64.
9. The Act’s definition of “person” is quite broad. It includes “any individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or other legal entity.” K.S.A. 50-624(f).
10. K.S.A. 50-624(i).
13. Id. at 329.
16. Id.
an accommodating party and, thus, should not be termed to be a supplier in light of the fact that it solicited consumers through its advertising and distribution of brochures.

Based upon the Kansas Supreme Court’s analysis in Alexander, the sales representatives in Cooper were found to be “suppliers” under the KCPA since they “played a material role in soliciting sales from … customers” of the manufacturer.

An individual’s ordinary business or employment activities can render that person a “supplier” even when engaged in a sale or service outside of work. In Heller v. Martin, a licensed real estate salesperson was found to be a “supplier” when she sold her own residence outside of work. Thus, tradesmen who engage in “side jobs” outside of their regular employment — such as residential or automotive repair — can be subject to the Act as well.

The Kansas Supreme Court has also determined that engaging in the first of a planned succession of transactions could make one a “supplier.” In York v. InTrust Bank, N.A., the Court ignored InTrust’s inexperience in selling residential lots and lack of past business in this area, focusing instead on the fact that InTrust intended to engage in this activity in the future. Thus, it appears a consumer could establish the defendant is a “supplier” based upon evidence of the defendant’s future intent, rather than its past activity.

C. The relationship between plaintiff and defendant

The KCPA applies to “consumer transactions” between a consumer and supplier. The Act defines these instances as “a sale, lease, assignment, or other disposition for value of property or services within this state (except insurance contracts regulated under state law) to a consumer; or a solicitation by a supplier with respect to any of these dispositions.” The Act defines “property” to include “real estate, goods, and intangible personal property.” “Services” is defined as:

“(1) Work, labor, and other personal services; (2) privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, and cemetery accommodations; and (3) any other act performed for a consumer by a supplier.”

An interesting extension of the Kansas Act is the inclusion of “solicitation” in the “consumer transaction” definition. In fact, the Kansas Supreme Court has found “[a] solicitation by a supplier may be sufficient to subject a supplier to the requirements and penalties of the Act regardless of whether the solicitation results in a sale, lease, or other disposition of property within the State of Kansas.”

II. What Activities are Prohibited by the Act?

A review of the nonexclusive per se violations listed in K.S.A. 50-626 and 50-627 reveals a wide variety of actions and statements, as well as concealment and omissions, prohibited by the Act. The Legislative Comments following the enumerations offer helpful insight into what the Kansas Legislature had in mind when enacting various sections. For example, “asserting that an installment contract must be paid in full irrespective of a defense, or that a supplier can garnish exempt wages” is an example of a violation of K.S.A. 50-626(b)(8) (“falsely stating, knowingly or with reason to know, that a consumer transaction involves consumer rights, remedies or obligations”), and representing “a sale is for ‘seasonal clearance’ or to facilitate ‘going out of business,’ when such is not the case” is a violation of K.S.A. 50-626(b)(10) (“falsely stating, knowingly or with reason to know, the reasons for offering or supplying property or services at sale or discount prices”). Similarly, “using legal verbiage in a manner that cannot be readily comprehended by a low-income consumer who both reads and speaks English” is an example of a violation of K.S.A. 50-627(b)(1) (“[t]he supplier took advantage of the inability of the
consumer reasonably to protect the consumer’s interests because of the consumer’s physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor”), and “a home solicitation sale of a set of cookware to a housewife for $375 in an area where a set of comparable quality is readily available to such a housewife for $125 or less” is a violation of K.S.A. 50-627(b)(2) (“when the consumer transaction was entered into, the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by similar consumers”).

There is no requirement that a supplier must willfully or intentionally violate the KCPA. However, both K.S.A. 50-626 and 50-627 incorporate the supplier’s knowledge — actual or imputed — in a number of descriptions of per se violations. For example, most of the acts and practices proscribed by K.S.A. 50-626 are statements, actions, omissions, or concealment by a supplier undertaken “knowingly or with reason to know.” Likewise, K.S.A. 50-627 orders courts to “consider circumstances of which the supplier knew or had reason to know” when determining whether an act or practice is unconscionable.

On the other hand, nondisclosure by a supplier without intent to conceal or harm is not a deceptive act under the KCPA. Similarly, provision of information that later proves false is also insufficient to constitute a violation.

A slight variation to these general rules can be found in Haag v. Dry Basement, Inc. In Haag, the Kansas Court of Appeals found a contractor represented his services had benefits or qualities the services did not have. The contractor told the consumer plaintiff he could fix the problem with her leaky basement, and “she would have a dry basement.” He did not, in fact, fix the problem with her basement since the basement continued to leak water after he performed his services. The court ultimately ruled the contractor violated the KCPA. It did not address the contractor’s intent when making these statements, merely the fact that the statements turned out to be untrue.

Another caveat can be found in Kiley v. Petsmart, Inc. In Kiley, an attorney purchased a fence from a Petsmart store. The attorney presumed the fence he purchased was new. However, the fence was a previous purchase, returned with missing and slightly used pieces. Without examining Petsmart’s intent when it returned the fence to the store shelf, the Kansas Supreme Court reversed and remanded the trial court’s dismissal of the attorney’s KCPA claim. The Court pointed out a supplier has a “responsibility of knowing what it is selling, including whether the products are new or used.”

In this instance, the Court considered the consumer’s reasonable expectation — “that something he or she purchases from a retailer’s shelf, which is packaged and sold as new, is indeed new and unused” — rather than the intent behind the supplier’s actions.

While “deceptive” acts and practices seem relatively easy to recognize and explain to jury members, “unconscionable” is a term of art not defined by the KCPA. Kansas courts have interpreted this absence of a definition as a conscious choice by the Act’s drafters to encourage expansive interpretations of the term, because “[i]t define the doctrine is to limit its application, and to limit its application is to defeat its purpose.”

While the Act itself offers little guidance regarding the definition of “unconscionable,” Kansas courts have outlined some elements or factors to consider when determining whether a particular act or practice falls within the meaning of the term:

“(1) The use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establishes industry wide standards offered on a take it or leave it basis to the party in a weaker economic position; (2) a significant cost-price disparity or excessive price; (3) a denial of basic

(continued on Page 36)
Candidates for Kansas Bar Association Officers Positions

**President-Elect:**
David J. Rebein, Dodge City

**Vice President:**
Linda S. Parks, Wichita
Timothy M. O’Brien, Overland Park

**Secretary/Treasurer:**
Earnest C. Ballweg, Overland Park

Candidates for Kansas Bar Association Board of Governors

**District One — Two positions open:**
Christopher J. Angles, Olathe
Kevin M. Bright, Kansas City, Mo.
Deborah D. Hodes, Leawood
Eric G. Kraft, Overland Park
Kip A. Kubin, Kansas City, Mo.
Lee M. Smithyman, Overland Park

**District Three:**
Dennis D. Depew, Neodesha
Eric L. Rosenblad, Pittsburg

**District Five:**
Danton C. Hejmanek, Topeka
Teresa L. Sittenauer, Topeka

**District Seven:**
Kathryn M. Webb, Wichita

**District Eight:**
Gerald L. Green, Hutchinson
Randall C. Henry, Sterling

**District Twelve:**
Michael A. Williams, Kansas City, Mo.
**PRESIDENT-ELECT**

**David J. Rebein**, Dodge City, is a partner in the firm of Rebein Bangert P.A. He practices personal injury, commercial litigation, and complex litigation.

Rebein received his B.A., summa cum laude, from Washburn University in 1977 and his J.D. from the University of Kansas School of Law in 1980. He was admitted to the Kansas bar and became a member of the KBA in 1980.

He is a past member of the KBA Board of Editors and past president of the Litigation Section. He serves on the Professional Ethics Grievance and Bench-Bar committees and is a Kansas Bar Foundation Fellow, an Ethics Investigator, and a member of the Board of Governors (1977-present). He was appointed to the Kansas Supreme Court Nominating Committee in 2003.

Rebein is also a member of the American and Ford-Gray County (past president) bar associations, American and Kansas trial lawyers associations, and Kansas Association of Defense Counsel and is on the KU Law Society Board of Governors. He is also a member of the Southwest Bar Association, where he is director of the Continuing Legal Education program for its annual convention.

Rebein is active in the community. He is a member and past chair of the Dodge City Area Chamber of Commerce, president and board of trustees member of Dodge City Community College, past member of the Dodge City Community College Endowment Board, member and vice president of the Dodge City Rotary Club, member of the board of directors on the Kansas Agricultural and Rural Leadership, past board of directors member for the Kansas Association of Commerce and Industry, member of Leadership Kansas in 1997, past board of directors member of the Manna House, past member of the advisory board of Manor of the Plains, and vice president and board of directors of New Chance Inc.

**VICE PRESIDENT**

**Timothy M. O’Brien** is a partner in the Overland Park office of Shook, Hardy and Bacon LLP. He practiced at the Logan and Martin firm in Overland Park until the firms merged in 1985. Previously, he was a law clerk for the Honorable Earl E. O’Connor. He is a 1980 graduate of the University of Kansas and earned his juris doctorate from the University of Kansas School of Law in 1983.

O’Brien has long been active in bar association activities in Kansas. He has served since 2000 as District 1 Representative to the Kansas Bar Association Board of Governors and also serves on the KBA Bench-Bar and Diversity committees. He co-founded the Johnson County

Young Lawyers Section and served as its first president in 1988. He has served the Johnson County Bar as membership chairman, chair of Law Day, and as editor of The Barletter. He served on the Johnson County Bar Association Board of Directors from 1993 to 1996 and as trustee of the Johnson County Bar Foundation.

He is a master in the Earl E. O’Connor American Inn of Court and was a member of the Inn’s Executive Committee. He served as a member of the KU Law Society Board of Governors from 1998 to 2001, a member and former director of the Kansas Association of Defense Counsel, and a member and state membership chairman of the International Association of Defense Counsel.

He recently completed a term on the Bench-Bar Committee for the U.S. District Court for the District of Kansas. He was appointed to serve as chair of the committee’s Jury Diversification Task Force to lead an effort to study jury pools and selection within the district. He is also a fellow of the Johnson County and Kansas bar foundations.

O’Brien has been a pioneer in the diversity area. In 2000, he co-founded and served as chair, until 2004, of Shook Hardy and Bacon’s diversity committee. Through recruiting, training, retention, and other awareness initiatives, the committee’s efforts were nationally recognized when the firm was twice awarded the Thomas L. Sager Award by the Minority Corporate Counsel Association.

He is the co-author of the Employee Retirement Income Security Act chapter of the second edition of the KBA’s “Kansas Employment Law Handbook.”

He is a past chairman of the Board of Friends of Johnson County Developmental Supports, a 501(c)(3) organization for the developmentally disabled.

He is also active in his church and has recently served on its finance council.

**Linda S. Parks**, Wichita, is a managing partner with Hite, Fanning and Honeyman LLP. She has a range of experience with business transaction and commercial litigation.

She earned her B.A., summa cum laude, in political science from Washburn University in 1979 and her J.D., cum laude, from Washburn University School of Law in 1983, where she was a staff member of the Washburn Law Journal.

Parks is a member of the Kansas and Wichita (WBA) bar associations and the Kansas Women Attorneys Association. With the KBA, she currently serves on the Raising the Bar and Law Related Education committees and the Ethic Grievance Panel. She is a fellow with the Kansas Bar Foundation; is a member of the KBA’s Board of
Governors, as the delegate to the ABA's House of Delegates; and is on the Executive Committee.

She has been a member of the American Bar Association since 1983 and in 1999 became a KBA delegate to the ABA, where she was on the Commission on Mental and Physical Disability Law, State Membership Chair, Select Committee of the House of Delegates, Minority Caucus, and National Caucus of State Bar Associations to the ABA.

She has also served as a board member of Kansas Legal Services Corp. With the WBA, she serves on the Ethics Committee and was on the Nominating Committee. Parks is also the founding member and first president of Wichita Women Attorneys Association.

Parks is involved with numerous charitable and civic organizations, including Wichita Greyhound Charities Inc., Old Cowtown Museum, law advisor to the President's College Board, and the United Way Allocations Committee.

**SECRETARY/TREASURER**

**Ernest C. Ballweg**, Overland Park, is a private practitioner with Johnston, Ballweg and Tuley L.C. He began his legal career in the public arena after receiving his J.D. from the University of Kansas in 1969. He served as assistant attorney general from 1969 to 1971 and as assistant district attorney for Johnson County from 1971 to 1973.

Ballweg has been an active leader as a KBA member since 1969. He served as the president of the Young Lawyers Section, 1971 to 1973, and as the ABA Delegate of the KBA Young Lawyers Section, 1978 to 1981. He was on the Board of Governors from 1996 to 2002 and served on its Executive Committee from 1998 to 2000. Ballweg devotes time to the Legislative Committee and was a member of the Kansas Bar Foundation IOLTA Committee from 1994 to 2000.

He is a fellow of the Kansas and Johnson County bar foundations and a member of the Kansas Trial Lawyers Association. Ballweg is president of the Johnson County Bar Senior Lawyers Section. He is admitted to the Tenth Circuit Court of Appeals and the U.S. Supreme Court.

Ballweg served as a member of the board of directors for Kansas Legal Services from 1996 to 2000. He presently serves on the Director's Board for YMCA Camp Wood, Elmdale; sat on the Johnson County Sheriff's Civil Service Board from 1996 to 2005; and served on the Finance Council for the Holy Rosary Catholic Church.

**Christopher J. Angles**, Olathe, is a trial lawyer with Erker, Norton, Hare and Angles LLC. He is admitted to practice in Kansas, Missouri, the U.S. Supreme Court, the Eighth and Tenth circuit court of appeals, the U.S. District Court for the Western District of Missouri, and the U.S. District Court for the District of Kansas.

He received his B.A., 1993, and J.D., 1996, from the University of Kansas.

He is a barrister for the Ross T. Roberts and Earl E. O'Connor American Inns of Court. He is a member of the Kansas City Metropolitan, Clay and Johnson County, Missouri, and Kansas bar associations. He is also a member of the National Association of Criminal Defense Lawyers, the Hispanic Bar Association, and the Missouri Association of Criminal Defense Lawyers.

Angles is fluent in Spanish.

**Deborah D. Hodes**, Leawood, serves as corporate legal counsel and senior vice president of Gold Banc Corp. Inc. Prior to this, she was assistant general counsel for Commerce Bancshares Inc. and served as legal counsel for the FDIC.

Hodes has extensive banking and corporate counsel experience. She provides hands-on legal counsel to the executive management, the board of directors, and all business units. She also manages the operations of the legal department.

She co-founded and is a past president of the Hispanic Bar Association of Greater Kansas City, now in its 14th year. The bar association was the first of its kind in Kansas and Missouri.

In addition to being a member of the KBA, she is a member of the Kansas City Metropolitan Bar Association, where she serves on various committees, including the Diversity Committee, for which she is co-chair of the Corporate Subcommittee, and the Bar Leadership Academy Steering Committee. Hodes is a member of the Association of Corporate Counsel and is a barrister in the Earl E. O'Connor American Inn of Court.

She has been active in community and professional association activities and has served on various leadership boards, including the Mid-Continent Girl Scout Council, CORO, and the American Diabetes Association. She is a volunteer for the Nelson-Atkins Museum of Art.

She received her B.A. from Avila College in Kansas City, Mo., and her J.D. from the University of Missouri-Columbia School of Law.
Eric G. Kraft practices with Duggan, Shadwick, Doerr and Kurlbaum P.C. in Overland Park in general and civil litigation with an emphasis in real estate litigation.

Kraft earned his bachelor’s degree, cum laude, from Wichita State University in 1995. He earned his juris doctorate from Washburn University School of Law in 1999, where he was a staff member of the Washburn Law Journal and was a member of the Order of Barristers.

He is licensed to practice in Kansas, Missouri, the U.S. District Court for the Western District of Missouri, the U.S. District Court for the District of Kansas, and the Tenth Circuit Court of Appeals.

In addition to being a member of the KBA, Kraft is a member of the American, Missouri, Kansas City Metropolitan, and Johnson County bar associations. He was a "teleparty" team member and later team captain with the American Heart Association.

He is currently president of the KBA Young Lawyers Section and is a member of the KBA Board of Governors as the Young Lawyers Section Representative. He was a member of the KBA CLE Committee and was chair of the CLE Committee for the 2001 KBA Annual Meeting. Since 2003, Kraft has been the KBA YLS Delegate to the American Bar Association. He is a member of the ABA Public Service and Member Service Subgrant Judging Committee.

He has written for the KBA Journal and has presented topics to numerous organizations, including the Institute for Paralegal Education and National Business Institute.

Kip A. Kubin, Kansas City, Mo., is a senior managing member in the law firm of Bottaro, Morefield and Kubin L.C. He has built a successful practice primarily in the areas of workers’ compensation, employment, Native American, administrative, and personal injury law.

Kubin has successfully represented clients through all phases of litigation involving jury and court trials on both the state and federal levels in Kansas and Missouri. He has argued cases before the appellate courts in Missouri and Kansas as well as in the Tenth Circuit Court of Appeals. He has also handled cases in the administrative courts of Kansas and Missouri, the Bureau of Indian Affairs, the National Indian Gaming Commission, and the NCAA.

Kubin completed his bachelor’s degree at the University of Kansas in 1980. He earned his juris doctorate from the University of Kansas School of Law in 1983.

He has been an active member of the Kansas Bar Association since 1983. He has served on the KBA Civil Bench-Bar Committee and has been a member of the KBA Nominating Committee since 1995. He has been actively involved with the National Association of Bar Presidents and has served on the Kansas Workers’ Compensation Advisory Board.

He is a member of the Johnson County Bar Association, where he served as president from 1993 to 1994.

Kubin speaks frequently at seminars and continuing legal education conferences. As a result of his experience and abilities, he has been selected for the past seven years by his peers as one of the “Best Lawyers in America” as well as being named by “Kansas City Magazine” as one of the 100 Best Lawyers in Kansas City.

Lee M. Smithyman, Overland Park, practices corporate and insurance litigation with Smithyman and Zakoura Chtd. He earned his B.S. in 1970 at Carnegie-Mellon University in Pittsburgh, Pa., and his J.D. from Washburn University School of Law in 1976.

Smithyman is admitted to practice in Kansas, Missouri, U.S. District Court for the District of Kansas, Tenth Circuit Court of Appeals, U.S. Tax Court, and the U.S. Supreme Court.

He is a member of the Wyandotte and Johnson county, Kansas, and American (member of the Litigation Section) bar associations. He is a certified arbitrator and mediator with the American Arbitration Association, master emeritus with Earl E. O’Connor American Inn of Court, member-at-large with the Kansas Board of Discipline, member of the Johnson County Kansas Ethics Committee, and member of the Tenth Judicial Circuit Nominating Committee. He is board certified by the National Board of Trial Advocacy in civil litigation.

Dennis D. Depew, Neodesha, has been in private practice with Depew Law Firm since 1983. His primary practice includes family law, estate planning, real estate, corporate, municipal, and alternative dispute resolution.

He received his B.S. in business administration in 1980 and his J.D. in 1983 from the University of Kansas.

Depew is a member of the Wilson County, Southeast Kansas, 31st Judicial District, and Kansas bar associations. He is admitted to practice with the Kansas Supreme Court, U.S. District Court for the District of Kansas, Tenth Circuit Court of Appeals, and the U.S. Supreme Court.

He is president of the KBA Alternative Dispute Resolution, and a member of the KBA Family Law; and Real Estate, Probate and Trust sections and the former Domestic Case Management Committee. He is a State ADR Committee Representative for the 31st Judicial District. Depew is an approved domestic case manager, an approved CLE presenter on the topic of practical ethics for attorneys, a Kansas Bar Foundation Fellow, and an assistant Neodesha City attorney.
He is an approved mediator for the Kansas Supreme Court; an approved domestic case manager in the 11th, 14th, and 31st judicial districts; and approved for and conducts Dispute Resolution Conferences services in the 13th Judicial District. He was appointed by judges in several judicial districts as guardian ad litem for children, appointed by Judge Lorentz to the Professional Negligence Screening Panel to act as chairman in the 31st Judicial District, and appointed by several judges as special master in the 14th Judicial District.

Depew was a board member, president, and vice president of USD 461; past member of the Kansas Association of School Boards (KASB), National School Boards Association Federal Relations Network, and Kansas School Attorneys Association and KSAA board of directors; and past speaker at KASB conventions and seminars on school law and negotiation issues. He is a member of the Kansas Association of School Administrators Model Superintendent's Contract Committee and was a past member of the Kansas Education Excellence Grant Selection and Kansas Teacher of the Year Selection committees.

Eric L. Rosenblad, Pittsburg, is the managing attorney of the Kansas Legal Services program serving Southeast Kansas with offices in Pittsburg and Independence. He began his career in 1982 as a staff attorney for Kansas Legal Services and has directed those efforts in the Southeast Kansas region since 1984.

Rosenblad earned a bachelor's degree in 1979 at Kansas State University and a juris doctorate in 1982 at the University of Kansas School of Law.

Admitted to practice in Kansas in 1982, he is also admitted to practice in Missouri and Oklahoma, the Tenth Circuit Court of Appeals, and the U.S. Supreme Court.

Rosenblad has served on the KBA Law and Media Committee. He is a member of the Crawford and the Cherokee county bar associations.

Community activities include serving as a member of the board of directors and past chair of the Community Mental Health Center of Crawford County, the Crawford County Health Department Advisory Board, and the USD 250 George Nettels Elementary School Steering Committee. He volunteers as legal counsel to Habitat for Humanity of Crawford County and is an active adult volunteer for the Boy Scouts of America.

Dantons C. Hejtmanek, Topeka, has practiced with Bryans Lykins Hejtmanek and Fincher, P.A. since 1975.

Hejtmanek earned his bachelor's degree from Washburn University in 1973 and his juris doctorate from Washburn University School of Law in 1976. He was a member of Alpha Delta Fraternity and Sagamore, a men's honorary fraternity, and is a life member of Washburn Alumni Association.

He is a member of the Kansas and Topeka bar associations. He became a member of the KBA in 1976 and currently serves on the Nominating and Awards committees. He is a member of the American Bar Association and the Kansas and American trial lawyers associations; he is also an eagle member of Kansas Trial Lawyers, where he serves on its Legacy Campaign Committee. He served as president of the KBA Young Lawyers' Section, was a member of the Executive Committee, and was chairman of State Law Day. He has also served on the ABA's Executive Council for the ABA/Young Lawyers Division for Kansas and Nebraska and as judge pro tem in the probate division of the Shawnee County District Court in Topeka.

Hejtmanek is chairman of the Sertoma Great Topeka Duck Race (1995-present), serves on the Board of Directors of the Knife and Fork Club of Topeka, is an elder and chair of the Finance Committee of the First Presbyterian Church, Topeka; he is also an adult leader of Boy Scouts of America. He served as legal counsel to the board of the East Topeka Senior Center (2000-2003), as president of Sertoma International (1998-1999), as treasurer of the Randolph Elementary School PTO (1987-1988), and as a member of the Shawnee County Family Planning Advisory Council (1984-1986).

Teresa L. Sittenauer, Topeka, is an attorney with Fisher, Patterson, Sayler and Smith, where she specializes in civil rights and employment litigation, government liability, and appellate practice. She is a former research attorney for the Kansas Supreme Court and the Hon. J. Patrick Brazil, retired chief judge of the Kansas Court of Appeals. She also practiced with the firm of Polsinelli, White, Vardeman and Shanoff in its Topeka office.

She graduated summa cum laude from Washburn University with her bachelor's degree in 1991 and magna cum laude from Washburn University School of Law with her juris doctorate in 1994. She served as notes editor of the Washburn Law Journal.
Sittenauer has been active in state and local bar associations since 1994. She currently serves as president-elect of the KBA’s Insurance Law Section and was one of the original members of the KBA’s Government Lawyers Section, serving as the section’s newsletter editor and secretary/treasurer. Sittenauer has also been a member of the KBA’s Criminal Law Section and its Media-Bar Committee. She has written and coordinated the opinions digest in the KBA Journal and has published two articles in the Journal. She has authored a number of articles in a variety of other legal publications.

Sittenauer is currently the president of the Kansas Women Attorneys Association (KWAA) and has served on the KWAA Council for seven years. She is past president of the Women Attorneys Association of Topeka. She is currently the treasurer of the Topeka Bar Association (TBA) and has served on the TBA Board of Directors for five years. She was the recipient of the TBA’s Outstanding Young Lawyer Award in 1998 and was editor of the TBA newsletter for three years.

She served for three years as an officer and director on board of the Capital Area Chapter of the American Red Cross and served two years on the Mayor’s Commission on the Status of Women in Topeka.

**District Seven**

M. Kathryn Webb, Wichita, is completing her first term on the KBA Board of Governors. She is a director and shareholder in the Wichita law firm of McDonald, Tinker, Skar, Quinn and Herrington P.A. She practices in the areas of employment law, insurance defense, and general litigation.

Webb received her BSE (with highest distinction) and M.A. degrees from the University of Kansas and her J.D. (with honors) from Washburn University School of Law.

Webb is a member of the Wichita Bar Association and served on its Board of Governors from 2001 to 2003. She has served the past two years as chair of the Professional Diversity Committee, which was awarded a KBA Outstanding Service Award and a WBA President’s Award last year. She is also a member and past president of the Kansas Women Attorneys Association and the Wichita Women Attorneys Association, receiving the Louise Mattox Attorney of Achievement in 2002, and is a member of the Kansas Association of Defense Counsel and the American Bar Association.

Webb served on the Supreme Court Nominating Commission from 1997 to 2001 and on the Kansas Board of Indigents Defense Services, which she chaired in 1999. The Wichita Business Journal selected her this year as one of the top 20 Women in Business. She also currently serves on the Board of Directors of the YWCA of Wichita.

**District Eight**

Gerald L. Green, Hutchinson, practices personal injury defense, general commercial and business litigation, employment law, and health care law with Gilliland and Hayes P.A., where he is a shareholder.

Green graduated summa cum laude with his B.A. in political science and history from Washburn University in 1969. He earned his J.D., summa cum laude, from Washburn University School of Law in 1976.

He is a member of the Kansas and Reno County bar associations, American Health Lawyers Association, Association of Defense Trial Attorneys, and Defense Research Institute and is a fellow of the American College of Trial Lawyers. He is a current member and past president of the Kansas Association of Hospital Attorneys and the Kansas Association of Defense Counsel.

Green is a board member of the Hutchinson Community Foundation, an advisory board member of the Legal Assistant Program at Hutchinson Community College, and a past member of the Washburn University School of Law Association Board of Governors.

Green is also a member of the KBA Ethics Grievance Panel. He was a member of the KBA’s Professional Ethics Grievance Committee, Ethics Grievance Committee, and the Judicial Resources Task Force.

Randall C. Henry is a partner with Mitchell and Henry Law Offices in Sterling. He earned his B.S. from Sterling College in 1972 and his J.D. from Washburn University School of Law in 1974.

Henry is a member of the Rice and Reno County, Southwest Kansas, and Kansas bar associations. He is also a current member of the 20th Judicial District Ethics Panel.

He is currently a trustee and secretary of the board at Sterling College. He was a trustee for First United Methodist Church in Sterling, former president of the Sterling Chamber of Commerce, former leader of Cub Scout Pack No. 369, and former president of Sterling High School Booster Club.
Michael A. Williams, Kansas City, Mo., was appointed to fill the vacant seat for District 12 in 2004.

He practices with Lathrop and Gage L.C. and represents employers in investigating, responding to, and handling charges of discrimination.

Williams is admitted to practice in Kansas, Missouri, the U.S. District Court for the Western District of Missouri, and the U.S. District Court for the District of Kansas.

He is experienced at litigating age, sex, race, disability, and retaliation claims before local, state, and federal agencies. Williams also represents employers in arbitrations and is an experienced litigator of workers' compensation and retaliation claims.

Williams earned his bachelor's degree from the University of Missouri-Columbia in 1995 and his juris doctorate from the University of Missouri-Columbia School of Law in 1998.

He is an experienced speaker to employees, management, and human resource officers on various employment law topics. He is also a requested presenter at employment law seminars for continuing legal education and human resource professional organizations.

He is an active member of the Diversity Committee for his firm, the local bar association, and the National Defense Research Institute. Additionally, he serves as an adjunct professor of labor law at the University of Missouri-Columbia School of Law.

He is a member of the Missouri Bar Association’s Board of Directors and Young Lawyers’ Section and was a Leadership Fellow (2000-2001). He is also a member of the ABA’s Labor and Employment and Litigation sections and is a member of the Earl E. O’Connor American Inn of Court. Williams was on the Young Leaders Board of Directors of the Kansas City Metropolitan Bar Association (2000-2001), where he also served as chair (2002-2003) and vice chair (1999-2002) for Community Service. He was a member of the board of governors (1999-2001) and membership chair (1999-2000) of the Lawyers Association of Kansas City.

Williams is very active in the Kansas City community, where he works with several local organizations to mentor and educate disadvantaged youths. He is a member of the United Way Young Leaders Society and is a centurion with the Greater Kansas City Chamber of Commerce.

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Improved Health Coverage Available for KBA Members

By Stuart Pase, president
Health Benefits Professionals & Association Health Programs

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rights and remedies to a buyer of consumer goods; (4) the inclusion of penalty clauses; (5) the circumstances surrounding the execution of the contract, including its commercial setting, its purpose and actual effect; (6) the hiding of clauses, which are disadvantageous to one party in a mass of fine print trivia or in places, which are inconspicuous to the party signing the contract; (7) phrasing clauses in language that is incomprehensible to a layman or that divert his attention from the problems raised by them or the rights given up through them; (8) an overall imbalance in the obligations and rights imposed by the bargain; (9) exploitation of the underprivileged, unsophisticated, uneducated, and the illiterate; and (10) inequality of bargaining or economic power.\footnote{41}

While still relevant, these factors have been condensed over the years. In \textit{State ex rel. Stovall v. DVM Enterprises, Inc.},\footnote{42} the Kansas Supreme Court reviewed several Kansas court opinions in an effort to distill the fundamentals of unconscionability. After this review, it determined "there must be some element of deceptive bargaining conduct present as well as unequal bargaining power to render the contract between the parties unconscionable."\footnote{43}

The U.S. District Court, District of Kansas has reviewed and relied upon other states’ categorization of unconscionability into two types — procedural and substantive — when interpreting the Uniform Commercial Code’s use of the term:

“The indicators of procedural unconscionability generally fall into two areas: (1) lack of knowledge and (2) lack of voluntariness. A lack of knowledge is demonstrated by a lack of understanding of the contract terms arising from inconspicuous print or the use of complex, legalistic language, ... disparity in sophistication of parties, ... and lack of opportunity to study the contract and inquire about contract terms, ... A lack of voluntariness is demonstrated in contracts of adhesion when there is a great imbalance in the parties’ relative bargaining power, the stronger party’s terms are unnegotiable, and the weaker party is prevented by market factors, timing, or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all. ... Substantive unconscionability is found when the terms of the contract are of such an oppressive character as to be unconscionable. It is present when there is a one-sided agreement, whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party’s nonperformance or breach, ... a large disparity between the cost and price or a price far in excess of that prevailing in the market, ... price or terms, which bear no reasonable relationship to business risks assumed by the parties, ... All of these concepts are applicable to leases in particular and all contracts in general. ... Courts utilizing the procedural/substantive distinction find the presence of either type of unconscionability enables a court to use its discretion to refuse to enforce the entire contract or a particular provision under 2-302 [of the UCC].\footnote{44}"

The Kansas Court of Appeals recently expanded this observation in \textit{Hatke v. Heartland Homecare Services, Inc.}\footnote{45} Hatke involved a supplier who had sold the plaintiff medication “at a price that, at times, was triple the price at which similar customers could purchase the same medication.”\footnote{46} The court held this, alone, was insufficient to establish

\begin{itemize}
    \item [46.] Hatke, at *2.
\end{itemize}
unconscionability, and cited State ex rel. Stovall v. DVM Enterprises, Inc.\textsuperscript{47} and State ex rel. Stovall v. ConfiMed.com\textsuperscript{48} for the proposition that "an act is not unconscionable absent any indication of deceptive bargaining conduct or unequal bargaining power; a transaction that merely appears unfair, or in retrospect was a bad bargain, does not state a claim under the KCPA."\textsuperscript{49}

Probably the clearest example of unconscionability — and, once proven, one that can provide the consumer with the most lucrative recovery — involves implied warranty disclaimers and limitations. If a supplier "excluded, modified, or otherwise attempted to limit either the implied warranties of merchantability and fitness for a particular purpose or any remedy provided by law for a breach of those warranties," it committed an unconscionable act.\textsuperscript{50} The only exception is if "the supplier establishes that the consumer had knowledge of the defect or defects, which became the basis of the bargain between the parties."\textsuperscript{51}

A supplier can unlawfully attempt to limit implied warranties, or remedies provided by law for breach of those warranties, in a number of ways, often without even realizing it. For instance, a supplier may limit implied warranties when it restricts a consumer's remedy to a narrow express warranty, such as a "repair or replace" warranty. If a supplier refuses to accept the consumer's lawful revocation of acceptance of the goods, or attempts to force the consumer to allow the supplier to repair the nonconforming goods instead of offering a replacement, the supplier has limited a remedy at law for breach of the implied warranty of merchantability.\textsuperscript{52}

The Legislative Comment to K.S.A. 50-627 clearly states a supplier may not substitute express warranty remedies for those provided at law:

"Subsection (a)(2) prohibits any exclusion or modification of the remedies the consumer otherwise has at law. Nothing, of course, prohibits a supplier from giving additional remedies, such as replacement or repairs. These, however, may not displace the other remedies found in the UCC and elsewhere. Under the UCC (K.S.A. 84-2-719(3)), limiting consequential damages for personal injury is prima facie unconscionable; subsection (a)(2) extends this concept to remedy limitations generally."\textsuperscript{53}

While a supplier's warranty policy may not be unconscionable on its face, its application to the consumer may well be. For example, in Ford Motor Company v. Mayes,\textsuperscript{54} the Mayes purchased a truck manufactured by Ford Motor Co. Ford gave the Mayes a written warranty for this vehicle, which provided Ford would repair or replace any defective parts and excluded recovery of any consequential or incidental damages. The truck had a number of defects that were not properly repaired. When the Mayes attempted to revoke their acceptance of the truck, and requested Ford either replace the truck or repurchase it, Ford refused. "Ford took the position that repair and replacement of the defective parts was the only remedy available to Mr. and Mrs. Mayes."\textsuperscript{55}

The Kentucky Court of Appeals ruled Ford could not "insist that its only liability was to repair or replace defective parts even when the defects could not be corrected within a reasonable time," and Ford "use[d] the strict language of the express warranty to deprive Mr. and Mrs. Mayes of the benefits of their purchase."\textsuperscript{56} The court further explained:

"Although the limitation of the buyer's remedies was not unconscionable on its face, Ford's warranty policy was unconscionable as applied to Mr. and Mrs. Mayes. After breach of its duty under the express warranty to repair or replace defective parts within a reasonable time, Ford could not, in good conscience, attempt to hide behind any provision making the express warranty the sole remedy of the buyer.

Because the truck could not be repaired within a reasonable time, Ford acted 'unconscionably' when it insisted that Mr. and Mrs. Mayes had no remedy other than to allow Ford and its dealer to continue indefinitely in their efforts to correct the problem. Ford followed a warranty policy, which refused to recognize the rights of buyers under the Uniform Commercial

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\textsuperscript{48} 272 Kan. 1313, 1323, 38 P3d 707 (2002).
\textsuperscript{49} Id.
\textsuperscript{50} K.S.A. 50-627(b)(7); K.S.A. 50-639 (emphasis added).
\textsuperscript{51} K.S.A. 50-639(c). However, even this exception does not extend to limiting liability for personal injury or property damage. Id.
\textsuperscript{52} When a consumer rejects the goods for nonconformities, the supplier has the right to cure these nonconformities. This right does not exist with a revocation of acceptance of the goods. Fleet Maintenance, Inc. v. Barke Energy Midwest Corp., 11 Kan. App. 2d 523, 524, 728 P2d 408, 410 (Kan. App. 1986) ("[t]herefore, if the buyer has accepted the goods tendered by the seller, the seller has no right to cure."); Kansas Comment 1 to K.S.A. 84-2-608; Kansas Comment 5 to K.S.A. 84-2-508. Even with rejection, however, the cure must be timely, proper ('the goods offered as a cure must be conforming and 'cure' by which the seller attempts to give the buyer a chattel not within the agreement or contemplation of the parties is invalid') and must also cure any reasonable worries the consumer may have about the "dependability and safety" of the goods after cure. 67 Am. Jur. 2d Sales § 583 (1985). See Stair v. Gaylord, 232 Kan. 765, 776, 659 P2d 178 (1983).
\textsuperscript{53} K.S.A. 50-627, cmt. 2.
\textsuperscript{54} 575 S.W.2d 48 (Ky. App. 1978).
\textsuperscript{55} Id. at 485,
\textsuperscript{56} Id.
III. Special Rules in KCPA Actions

In addition to the broad, inclusive nature of the Act, special rules applicable to KCPA actions further extend the Act’s coverage. Application of these can both strengthen a consumer’s cause of action and defeat defenses commonly raised in contract disputes.

A. Statutory rights or benefits under the KCPA are mandatory

The protections granted to consumers under the KCPA cannot be contracted around or waived, except in settlements (which are subject to review for unconscionability by the courts) and certain limited instances specified in the Act. The Legislative Comment to this Section notes:

Unlike the UCC (K.S.A. 84-1-102(3)), which broadly permits variation by agreement, this act starts from the premise that a consumer may not in general waive or agree to forego rights or benefits under it. Compare K.S.A. 84-9-501(3). Waiver or other variation is specifically provided for in some sections, such as section 50-640(a)(5) relating to home solicitation transactions in an emergency; in the absence of such a provision, however, waiver or agreement to forego must be part of a settlement and settlements are subject to review as provided in this section.69

This provision may call into question certain terms of form contracts, such as an arbitration or forum selection clause, especially since the KCPA specifically gives the consumer a private right of action in the district courts of Kansas.61

Kansas courts have also held a jury, rather than the court (or, arguably, an arbitrator), makes the determination of whether an act or practice is deceptive.62 The Act itself specifies that a court adjudicates claims of unconscionability.63 While a forum selection clause would not impact these provisions, a forced arbitration certainly would.

Furthermore, many of the elements of “unconscionability” outlined by the Kansas Supreme Court in Willie v. Southwestern Bell Tel. Co. seem to be drawn on a supplier’s use of these clauses in its form contracts.65

While inclusion of these clauses, on its face, may not appear to constitute “deceptive bargaining conduct,” their operation can create a hardship for the consumer. For instance, the forum specified may be inconvenient for the consumer, or the cost of arbitration may be prohibitive. The Act allows a prevailing consumer to recover attorney fees, but it does not mention arbitration costs.66 While it is certainly arguable that these costs should be recoverable as well, without a statutory authority, the consumer (and the consumer’s attorney) may not wish to take that chance.

B. Privity of contract is not required in a breach of warranty claim under the KCPA

Another unique exception applicable to KCPA claims is the fact that neither horizontal nor vertical privity is required in a breach of warranty claim.

57. Id. at 485-86 (internal citations omitted) (the Kentucky Consumer Protection Act prohibits “[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce,” and construes “unfair” “to mean unconscionable.” K.R.S. 367.170). See also Eckstein v. Cummins, 321 N.E.2d 897, 904 (Ohio App. 1974) (finding the manufacturer’s attempt to limit the plaintiffs’ remedy to repair or replacement “substantially deprived[d] the buyer of the benefit of his bargain and [was] unconscionable”).


59. See K.S.A. 50-625(a).

60. K.S.A. 50-625(a), cmt.

61. K.S.A. 50-634(a). “Every action pursuant to this act shall be brought in the district court of any county in which there occurred an act or practice declared to be a violation of this act, or in which the defendant resides or the defendant’s principal place of business is located. If the defendant is a nonresident and has no principal place of business within this state, then the nonresident defendant can be sued either in the district court of Shawnee county or in the district court of any county in which there occurred an act or practice declared to be a violation of this act.” K.S.A. 50-638(b).


65. “The use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establish industry wide standards offered on a take it or leave it basis to the party in a weaker economic position,” “a denial of basic rights and remedies to a buyer of consumer goods,” and “inequality of bargaining or economic power” all seem to apply. Willie, 219 Kan. at 758-59.

66. See K.S.A. 50-634(c).
arising out of a consumer transaction. The Legislative Comment to this particular section states the removal of a horizontal privity requirement opens the door to “bystander” suits and points out, for example, an “owner of a parked car, which is damaged by another parked car whose hand brake was defective” can sue a supplier because that person “would be a third party beneficiary of the implied warranty of merchantability which arose as a result of a prior consumer sale.”

Notwithstanding this comment, “bystander” suits may not actually be that simple under the KCPA. A “bystander” may still have to meet the definition of a “consumer” under the Act. That is, someone who “seeks or acquires property or services ...”

C. The Parol Evidence Rule may not apply in KCPA actions

Due to the very nature of the acts prohibited by the KCPA — such as deceptive bargaining and statements made about the property or services to induce the consumer to enter the contract — parol evidence may be at the very heart of the consumer’s KCPA claim. Its exclusion could destroy a consumer’s chance of prevailing.

While Kansas state appellate courts have not addressed the issue, judges of the U.S. District Court, District of Kansas have reached opposite conclusions. In Bailey v. Morgan Drive-Away, Inc., the court recognized an exception to the general rule of exclusion when evidence of deceptive practices or misrepresentations surrounding a written contract is involved:

“The parol evidence rule only applies when the written contract evidences the final agreement of the parties. Exceptions to the rule exist, which allow such evidence to show that there had been misrepresentations or concealments as to what the contract contained or to show mutual mistake or fraud.”

However, in Whittenburg v. L.J. Holding Co., the court reached an opposite result without mentioning Bailey. In Whittenburg, the court upheld a decision in a previous (non-KCPA) case, Ritchie Enterprises v. Honeywell Bull, Inc., wherein it held the parol evidence rule excludes evidence of negligent misrepresentations with an integrated contract that disclaims prior representations and warranties.

 Bailey notwithstanding, a consumer may have a better chance of persuading a court to allow a jury to consider parol evidence if the consumer uses the evidence to establish that misrepresentations were in fact made, rather than attempting to use the prior statements to modify the contract terms.

D. KCPA claims may have to be plead with particularity

In a recent, unreported case, the U.S. District Court, District of Kansas found KCPA claims “are also subject to [Federal Rule of Civil Procedure] 9(b)’s particularity requirement.” The court based its decision on the fact that “[t]he elements of an action under the KCPA are identical to an action for fraud except for the intent requirement.” While this obligation does not prevent a consumer from alleging a violation that does not fit within one of the per se violations listed in the Act, it does mean the consumer must “satisf[y] the who, what, where, and when of the alleged ... KCPA violations” in her initial pleading.

E. Notification to the Kansas attorney general’s office

The Act requires consumers to notify the Kansas attorney general’s office of any private KCPA actions — individual or class actions — commenced. This requirement can be satisfied by sending any petitions, complaints, journal entries, and notices of appeals to:

Mr. Bryan Brown
Deputy Attorney General
Consumer Protection/ Antitrust Division
120 S.W. 10th Ave., 4th Fl.
Topeka, KS 66612
Phone: (785) 296-3751
Fax: (785) 291-3699
E-Mail: brownb@ksag.org

While this notification will probably not affect the prosecution of the consumer’s action, it does give the attorney general’s office a chance to consider filing an amicus brief in the event the matter is appealed.

(continued on next page)
F. Statute of limitations
KCPA claims are subject to the three-year statute of limitations in K.S.A. 60-512, in that liability under the KCPA is created by statute.79

IV. Damages and Civil Penalties
Under the KCPA

Before a consumer can recover any monetary damages or civil penalties under the KCPA, that consumer must prove “aggrievement” by the KCPA violation. That is, the consumer must prove a loss or injury was suffered as a result of the KCPA violation.80

This does not mean a consumer must establish measurable monetary damages.81 In Lowe v. Supas Resource Corp.,82 the U.S. District Court, District of Kansas found the plaintiff was aggrieved because the defendant’s “collection calls imposed upon Ms. Lowe the burden of retaining the assistance of third parties to respond to [the defendant’s] inquiries.” The court explained:

Ms. Lowe specifically directed [the defendant’s] agents to contact [her attorney] regarding the collection matter. Though Ms. Lowe was not a party to all of the collection calls and voice messages, her agents and family members received these communications and responded to them on her behalf. Moreover, as her attorney, James Renne had a duty to communicate the subject matter of these collection efforts to Ms. Lowe. As such, the court cannot conclude, as a matter of law, that the calls to her attorney and other family members and the voice messages retrieved by her attorney did not incrementally add to Ms. Lowe’s ‘burden.’ As such, she has demonstrated a genuine issue of material fact that she was ‘aggrieved’ by these telephone calls.83

In Caputo v. Professional Recovery Services, Inc.,84 the U.S. District Court, District of Kansas offered additional advice regarding interpretation of the “aggrieved” requirement:

A party is aggrieved whose legal right is invaded by an act complained of or whose pecuniary interest is directly affected by the order. The term refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of some burden or obligation. In this sense it does not refer to persons who may happen to entertain desires on the subject, but only to those who have rights which may be enforced at law and whose pecuniary interest may be affected.85

A variety of damages can be claimed under the KCPA, including out-of-pocket expenses (repair, towing, rental car, storage fees), loss of bargain (the difference in value between the value of the item for which the consumer paid and the item received), consequential damages (loss of use of the item), or repair or replacement of the item.86

In lieu of (or, with breach of warranty claims, in addition to87) actual damages, a consumer may receive a civil penalty of up to $10,000 for each violation.88 While the trial court does not have discretion regarding whether to award a

81. Parker v. Wesley Medical Center, LLC, Sedgwick County Case No. 01 C 1010 (November 5, 2002) (Wooley, J.) (the plaintiff attempted through a court order to obtain the hospital’s itemized bill for its services so the plaintiff could file a claim with his health insurance for those services); Lowe v. Supas Resource Corp., 253 F. Supp. 2d 1209,1229, n.16 (D. Kan. 2003) (Lungstrum, J.) (“[t]he KCPA does not suggest that a consumer must suffer a pecuniary loss to be aggrieved.”).
83. Id. at 1229.
85. 261 F. Supp. 2d at 1261.
86. Pursuant to K.S.A. 84-2-714(1), consumers may recover “as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller’s breach as determined in any manner which is reasonable.” Kansas Comment 2 to that statute specifies that, “[w]hen repair of the goods is possible, the best measure of damages for breach of warranty is the cost of repair.” (citing Int’l Petroleum Serv., Inc. v. S&N Well Serv., Inc., 230 Kan. 452, 639 P2d 29 (1982)).
87. Damages and a civil penalty are available when “a consumer prevails in an action based upon breach of warranty, and the supplier has violated this section.” K.S.A. 50-639(e).
88. See K.S.A. 50-636(a).
civil penalty, it does have discretion in the amount of the civil penalty to award. If a violation is continuing, each day on which the act or practice exists/occurs is a separate violation. A supplier can also commit more than one violation of the KCPA in one telephone call, contract, advertisement, brochure, etc. if more than one misrepresentation is made.

“A showing of actual damages is not required to support recovery of a civil penalty.” In fact, the justification behind the civil penalty is the fact that sometimes damages are hard to quantify:

“In some cases under the KCPA, however, the consumer suffers damages which may be difficult to quantify monetarily. In such circumstances, the amount of actual damages, which may be proven by the consumer, might well be insufficient to completely compensate the consumer for the damages suffered. To remedy this situation, the KCPA provides for a civil penalty as an alternative to actual damages. It is significant that the [Legislature in providing for a remedy did not provide for a penalty separate and distinct from damages. Rather the [Legislature allowed a consumer aggrieved under the KCPA to recover either damages or a civil penalty, whichever is greater. The KCPA does not provide for a separate civil penalty in addition to the consumer’s damages. In this respect, although couched in terms of a penalty, the civil penalty provided by the KCPA is actually more remedial in nature than punitive.”

The KCPA does not offer any guidelines in determining the amount of civil penalties to award. On at least one occasion, the Kansas Supreme Court has looked to other relevant statutes for direction in this area. In State ex rel. Morrison v. Oshman Sporting Goods Co., the supplier allegedly violated the KCPA as well as Kansas’ weights and measures statute. The Court looked to the factors outlined in K.S.A. 83-501, which are to be considered when awarding civil penalties for violations of Chapter 83, for guidance in imposing penalties under the KCPA.

Another advantage the KCPA provides is an enhanced penalty for a consumer who meets the Act’s definition of an “elder” or “disabled” person. If a supplier violates the Act, and the consumer falls within one of these two categories, a court can award “an additional civil penalty not to exceed $10,000 for each such violation.” Interestingly, “a defendant’s knowledge of the plaintiff’s status [as an elderly or disabled person] is not a necessary precondition for imposing the penalty, but instead, it is merely one of several factors the court must consider before imposing the enhanced civil penalty.”

Additional factors to consider in awarding this penalty are listed in K.S.A. 50-678. Furthermore, an “elder or disabled” consumer can recover punitive damages, in addition to actual damages and reasonable attorney fees.

Consumers may also bring a class action for damages, injunctive relief, or declaratory judgment under the KCPA, but the Act does not provide for an award of civil penalties in a class action. However, consumers in a class action do not have to establish they were “aggrieved” or suffered damages to obtain injunctive relief or a declaratory judgment.

V. Attorney Fee Awards Under the KCPA

A court can award reasonable attorney fees to a prevailing party in a KCPA action, under the following circumstances:

(1) The consumer complaining of the act or practice that violates this act has brought or maintained an action the consumer knew to be groundless and the prevailing party is the supplier;

or a supplier has committed an act or practice that violates this act and the prevailing party is the consumer; and

(2) an action under this section has been terminated by a judgment or settled.

(continued on next page)
LEGAL ARTICLE: THE UNTAPPED POTENTIAL...

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This includes fees on appeal. The Kansas Court of Appeals recently held that the entire action brought by the consumer was not just the KCPA claim, but was “groundless,” before a supplier would be entitled to recover attorney fees. The KCPA does not define “prevailing party.” However, Kansas case law provides a few definitions. In Munck v. Kansas Public Employees Retirement System, the Kansas Court of Appeals defined the term to mean “a party who succeeds on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit.” The Kansas Supreme Court has developed a narrower interpretation, limiting the term to “the person who has an affirmative judgment rendered in his favor at the conclusion of the entire case,” or, even, “the party awarded the net judgment.”

If possible, fees awarded in pursuit of KCPA claims are to be segregated from fees earned in pursuing other claims against the supplier or consumer, or claims against co-defendants. The exception to this rule is when “the causes of action involved in one suit are dependent upon the same set of facts or circumstances and thus are intertwined to the point of being inseparable.” In Despiegelaere v. Killion, the Kansas Court of Appeals relied upon the exception to segregate attorney fees. In Stewart Title Guar. Co. v. Sterling, “[A] recognized exception to this duty to segregate arises when the attorney's fees rendered are in connection with claims arising out of the same transaction and are so interrelated that their ‘prosecution or defense entails proof or denial of essentially the same facts.’ Therefore, when the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are ‘intertwined to the point of being inseparable,’ the party suing for attorney's fees may recover the entire amount covering all claims.

In York v. InTrust Bank, N.A., the Kansas Supreme Court went even further than the Court of Appeals in Despiegelaere. In York, the plaintiffs sued InTrust Bank for fraud, civil conspiracy, aiding and abetting to defraud the plaintiffs and violation of the KCPA. The jury found for the plaintiffs on all counts but fraudulent inducement. The basis for the plaintiffs’ KCPA claim was that InTrust Bank had committed a deceptive act or practice because its “purchase contract erroneously stated InTrust would pay a real estate commission to [the real estate agent] based on the list price when in fact it would not do so.” The Supreme Court upheld the full award of attorneys fees in York and found:

It was clearly necessary for all of the underlying facts of the transaction to be fully developed in order to prosecute the KCPA claim. Those services may have also resulted in findings of other tortious conduct sufficient to justify a judgment, but the KCPA claim is inextricably intertwined with the single transaction, which is the subject of this litigation.

VI. Conclusion

Considering its breadth and the recovery provided, the KCPA can prove to be a valuable weapon in the consumer arsenal. The next time a client presents a matter involving seemingly unfair or misleading actions or representations in connection with a transaction for goods or services, consider whether the conduct might fall within the Act's coverage. You just may be surprised — and so will your client when the client learns the violator may be required to pay for your services.

About the Author
Amy Fellows is an associate with the Wichita law firm of Triplet, Wolff & Garretson LLC. Fellows received her Juris Doctor from the University of Kansas School of Law and was admitted to the Kansas Bar in 2000. Her practice focuses on consumer law and employment issues. Fellows is also the current chair of the KBA Young Lawyer Section's Pro Bono/Public Service Committee.
Small Town Kansan
(continued from Page 9)

Then the journey began on a trip to Cairo, Egypt, in the spring of 2000, where Meek met with a professor about a possible summer teaching job. He was told the university did not have a position available and, although they had summer teaching positions open in the past, the positions had been filled through Creighton University School of Law, Omaha, Neb. Meek was also told that they had a professor from Canada, Jean Alliane, and Meek agreed to meet him.

Meek met with Alliane and explained, “I have been practicing for 21 years and have so many clients that sometimes I go to the courthouse with three, four, maybe five different files, and I can’t remember what my clients look like.”

Alliane told Meek that he should do what one of his old law professors, Eugene O’Sullivan, was doing, which was representing alleged war criminals at The Hague.

Meek said Alliane qualified this information by saying, “The good thing about it is you only have one client at a time. The bad part is the trials last one or two years.”

Alliane put Meek in touch with O’Sullivan and, while Meek was traveling in Europe several days later, they met. Meek then took the necessary steps to get his name on the Rule 45 list for assigned counsel at the ICTY. (A copy of this rule with its requirements may be found at www.icls.de/dokumente/icty_rules.pdf.)

Meek’s wife, Sheryl, worked for TWA at the time, so they were able to travel free. This allowed Meek to travel to the Netherlands several times, where he met counsel from Great Britain and other places.

In July 2001 Meek received an e-mail from O’Sullivan letting him know that O’Sullivan knew of a Croatian attorney whose client wanted an American as co-counsel, but the trial was to begin in September 2001. O’Sullivan asked if he was interested and Meek replied, “Yes, I am.”

Meek flew to The Hague in early August to meet with Kresimir Krsnik, the Croatian counsel for the accused, Mladen Naletilic, aka “Tuta.” A few days later Meek met Krsnik in Paris. Krsnik told Meek that he and Tuta wanted him as co-counsel, but Meek would have to be in Bosnia in about 10 days.

Meek flew home and talked with his partners and current clients to figure out what to do. “I decided I just couldn’t pass up the opportunity,” Meek said. So, his partners divided up his client files, with his clients’ support.

During his preparation time at home, several of Meek’s attorney friends from Kansas and Oklahoma came to visit.

“They were interested in doing what I was doing,” Meek said. “The problem is that when you get the call you may only have 10 days to two weeks to be there. If you have young children it is really difficult.”

Meek said he was lucky because his two sons were no longer living at home. Casey had just graduated from high school and was at the University of Kansas, and Dylan had taken his General Education Diploma (GED) and was also living in Lawrence.

“I was able to show up in Bosnia in 10 days,” Meek said.

At The Hague

The client

Mladen Naletilic, aka “Tuta,” was charged with 17 counts of alleged crimes committed in the area of Mostar, Bosnia-Herzegovina (BH) during the conflict between the BH Croats and BH Muslims that took place after their independence in 1992. Naletilic was accused of participating in a systematic attack against Bosnian Muslims during the time period from April 1993 to January 1994. “I really liked Tuta,” Meek said. “He was a nice guy who was in the wrong place at the wrong time.”

Security

When Meek first arrived at The Hague, the defense counsel went through two security checks the same as the public. Later, through the efforts of the ADC-ICTY, they were able to pass the second checkpoint by simply swiping their badges through an electronic viewer. After entering the building, defense counsel are only allowed to go up one floor to the defense counselor room, to the cafeteria, and to the trial chamber (courtroom). If they were caught in any other area they would get their status (credentials) pulled.

“It was as if the defense counsel was being identified with the alleged crimes of the accused,” Meek said. “We were treated kind of like pariahs in a way.”

The trial chamber is completely secured behind floor-to-ceiling bulletproof glass. Witnesses testifying are often concealed from view and, in some instances, their voices are distorted for their safety. Some witnesses testified in “closed session,” which was totally under seal.

Type of law — common or civil

The law practiced at the ICTY is a combination of common and civil law. Meek explained that all of the lawyers from the former Yugoslavia were at a disadvantage because they came from a civil law system. No matter how long they had practiced, they have no basic understanding of a trial

(continued on next page)
because in their system the investigative judge asks all the questions.

“I had to learn the facts of the case as quickly and as best I could,” Meek said. “Then I had to teach my colleagues the procedural aspects of it. It is not a bad combination to have a lawyer from a common law country alongside a Yugoslav lawyer.”

The language used

The official languages of the ICTY are English and French, and all attorneys must be fluent in one of the two. The prosecution always asked questions in English, but the answer would be in Bosnian/Croatian/Serbian (BCS).

“I would hear the question in English and the answer would be in BCS,” Meek said. “The translation would come through immediately in English. Then it would come up on the screen. We had live notes.”

The Croatian lawyers on Meek’s team were fluent in English. Sometimes after a translation, they would object by saying “we object because the witness did not say ...” and then read the translated answer from the screen. They would explain to the judges that they spoke this language (BCS) fluently and the witness did not say this. The question would be asked again, and the witness would have to give the answer again. Sometimes the answer would be the same, and sometimes it would be different.

Meek said the interpreters had to be good to get to the level they were at, but some were better than others. There were always two interpreters for English and two for French at all times. One interpreter for each language would work for 20 minutes, and then they would switch off. It is very hard on them to simultaneously translate.

“Cross examination was the hardest part,” Meek said. “In America, we are used to speaking with a witness who speaks English, so we can go back and forth fairly rapidly. You can get on a roll. In this tribunal, because of the interpreters, the court reporters, and the switching of languages, someone was always saying ‘slow down.’”

The judges

At the beginning of the trial, Meek was surprised to see case managers for the prosecution wheeling in three carts, each containing 17 large binders, and delivering one set to each of the three judges. The judges may take them home to read, but it is not assured that all of these documents will be admitted at trial.

“It is almost in reverse,” Meek said. “Everything is admitted, and you have to pull it back out or make sure that they tender it into evidence and that there is foundation for it. And the foundation can be very little in this court.”

The bench was comprised of Judge Liu Daqun, China; Judge Maureen Clark, Ireland; and Judge Fatoumata Diarra, Mali. Liu was a permanent judge, and Clark and Diarra were appointed ad litem for this case.

Any objections had to be made to Judge Liu, but Meek said that many times he would defer to Judge Clark because she was from a common law country.

At the ICTY, a judge may ask questions at any time. Meek explained one of the most frustrating things was when the defense had objected to a prosecution question as being improper. The objection was sustained. After the cross and recross one of the judges asked the very same question, and the answer was in the record. He added that you “do not” object to a question from the judges.

The compensation

As co-counsel, Meek receives $80 per hour, no matter the number of years of his experience. He is paid the fee for the number of hours he is in court and an additional 115 hours per month.

Meek received $275 a day for Daily Standard Assistance (DSA) for the first 60 days and then 75 percent thereafter. When he agreed to sit as co-counsel for Naletilic and went to Bosnia, he immediately put in for his appointment as counsel in August 2001. The trial started on Sept. 10, and his appointment was signed at 4 p.m. on Sept. 7. Prior to Sept. 7 he did not receive any compensation from the ICTY.

Meek is a co-founder of the bar association known as the Association of Defense Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia. The association was formed to address some of the inequities the defense counsel were subjected to.

The verdict

Naletilic was convicted on eight counts and acquitted on nine. An appeal is automatic, but there must be specific grounds put down in the Notice to Appeal. At the time of this writing Chris Meek is at The Hague for a Status Hearing. It has been 3 years and 9 months since the beginning of the trial, and Meek is not sure when this case will be over.

In summation about his experience at the ICTY, Meek said, “It is like ‘Alice in Wonderland’ when you are over there practicing. Like falling down the rabbit hole, every day you don’t know what is going to happen.

“I would have to say that this has been one great experience and one great adventure. I am often asked what I liked the best about working at the Tribunal. The most enjoyable aspects are the defense lawyers I have met from the former Yugoslavia and elsewhere. The defense counsel from Serbia, Croatia, Bosnia-Herzegovina, and elsewhere are all colleagues in a common cause, to find some justice within a system that oftentimes seems utterly devoid of any justice.”

Members of the prosecution and defense teams in the trial of Mladen Naletilic, aka "Tuta" and co-defendant Vinko Maratinovic, aka "Stela" (1-r front row) Kenneth Scott, Office of Prosecutor (OTP), USA; Douglas Stringer, OTP, USA; Vasily Poroiuvaev, OTP; and Nika Pinter, Tuta’s defense team, Zagreb, Croatia. (1-r back row) Roeland Bos, OTP, The Hague, Netherlands; Chris Y. Meek, Tuta’s co-counsel, USA; and Zelimir Par, Stela’s co-counsel, Zagreb, Croatia. (1-r 2nd row) Krystal Thompson, Registry, USA; Branko Seric, Stela’s lead counsel, Zagreb, Croatia; and Kresimir Krsnik, Tuta’s lead counsel, Zagreb, Croatia. (1-r last row) Judge Liu Daqun, China; Judge Maureen Clark, Ireland; and Judge Fatoumata Diarra, Mali. Liu
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Supreme Court

Attorney Discipline

IN RE GORDON M. ROCK, JR.
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 93,128 – FEBRUARY 18, 2005

FACTS: Respondent, who practiced in Johnson County, was notified of a disciplinary hearing on complaints filed by five former clients but failed to appear for the hearing. The cases generally covered personal injury claims for which the clients had advanced expenses for filing fees, medical records, expert reports, and a video production. In each case, the client had difficulty communicating with respondent, had nothing accomplished in the legal matter, and did not receive a return of any medical records or funds.

The hearing panel found in one case that respondent kept $50,000 rather than disbursing it to the treating doctors and the client as agreed, resulting in a criminal investigation. The Lawyers Fund for Client Protection has reimbursed the clients for many of these claims. The panel found clear and convincing evidence of violations of KRPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.15(a,b) (safekeeping property), 1.16 (terminating representation), 3.4(d) (fairness to opposing party), 8.1 (disciplinary matters) and 8.4(b, c, d, g) (misconduct), and SCR 207 (assisting the disciplinary administrator) as alleged in the Formal Complaint. The panel further found a violation of SCR 211 for failure to file an answer to the Formal Complaint.

Numerous aggravating factors and one mitigating factor were considered. Based on the ABA Standards for Imposing Lawyer Sanctions, the panel recommended disbarment and restitution to the clients and the Lawyers Fund prior to filing any petition for reinstatement.

HELD: Respondent failed to file exceptions to the panel's final hearing report and failed to appear before the Supreme Court for the scheduled oral argument. The Court affirmed and adopted the panel's findings of fact and conclusions of law and ordered Respondent disbarred with complete restitution required prior to filing for reinstatement.

Civil

BREACH OF THE PEACE AND CONSTITUTIONAL LAW
SMITH V. MARTENS
JOHNSON DISTRICT COURT – AFFIRMED IN PART,
DISMISSED IN PART
NO. 91,827 – FEBRUARY 18, 2005

FACTS: Smith filed action under civil Protection from Stalking Act (Act), seeking protective order against her former husband (Martens). District court ruled the Act was constitutional, imposed a one year protection from stalking order (PSO), and awarded Smith $5,000 in attorney fees. Martens appealed. Notwithstanding expiration of PSO, Supreme Court considered constitutional challenge to Act as matter of public importance capable of repetition. All other issues are moot.

ISSUE: Constitutionality of Protection from Stalking Act

HELD: Criminal and civil stalking statutes examined and compared. K.S.A. 2003 Supp. 60-31a02 is not unconstitutionally vague on its face because two objective standards are used to modify terms “alarms,” “annoys,” “torments,” or “terrorizes;” the statute conveys a sufficiently definite warning as to proscribed conduct when measured by common understanding and practice; and term “legitimate purpose” is subject to an objective standard. No is the statute overbroad. The inclusion of objective standards, in conjunction with express statement to exclude constitutionally protected activity and its legitimate purpose of allowing persons to protect themselves from recurring intimidation, fear-provoking conduct, and physical violence, demonstrates the statute is sufficiently tailored so that is does not substantially infringe upon First Amendment speech.

STATUTES: K.S.A. 2003 Supp. 21-3438, 60-31a02, -31a06(a)(2); K.S.A. 21-3438, 60-31a01 et seq.
CONVERSION AND STANDING
MID-CONTINENT SPECIALISTS, INC. V. CAPITAL HOMES, L.C.
JOHNSON DISTRICT COURT – AFFIRMED
NO. 91,069 – FEBRUARY 18, 2005

FACTS: Capital Homes entered a custom home contract with Harry and Lynn Smith for $688,000, excluding the cost of the lot. After Mrs. Smith told David Broockerd that she had purchased the subject lot for $155,000, but it had a $110,000 mortgage against it, Broockerd advised that the custom home contract could not be closed, Capital Homes would have to purchase the lot and pay off the mortgage, they would need a second sales contract, and Smith would need to pay a $50,000 nonrefundable earnest money deposit. Smith wrote a $50,000 check from Mid-Continent Specialists Inc., payable to “Capital Homes” and signed “J. Lynn Smith.” Broockerd knew Mid-Continent was a residential construction and roofing company and that Mid-Continent was not a party to the sales contract, but Smith told Broockerd that the check was drawn on Mid-Continent’s corporate account, and the $50,000 proceeds were from an unpaid company draw that was due her. Smith indicated she was a partner in Mid-Continent. Broockerd endorsed and deposited the check. Capital Homes began construction. The parties entered a second sales contract. Approximately a month later, Broockerd received a phone call from the president of Mid-Continent indicating Smith had been embezzling company funds. Capital Homes stopped construction and sold the lot. Mid-Continent demanded return of the $50,000, but Capital Homes declined. Smith was a bookkeeper with the accounting firm that did accounting services for Mid-Continent and was entitled to write checks up to $50,000 for Mid-Continent’s business purposes. It was later discovered that Smith had embezzled $800,000 from Mid-Continent. Smith was judgment proof so Mid-Continent sued Capital Homes for conversion of the $50,000. The trial court granted judgment in favor of Capital Homes finding that Mid-Continent was barred by K.S.A. 84-3-420(a) for a cause of action for conversion of the check.

ISSUES: (1) Does K.S.A. 84-3-420(a) bar Mid-Continent’s cause of action for conversion of the check? (2) Does K.S.A. 84-3-420(a) bar Mid-Continent’s cause of action for conversion of the check when its representatives merely acted outside the scope of her authority? (3) Does Mid-Continent have a separate, valid claim for conversion of the $50,000 in its bank account?

HELD: Court affirmed the trial court’s judgment in favor of Capital Homes. (1) Court held the statutory language of K.S.A. 84-3-420(a) is clear that Mid-Continent is the drawer, maker, or issuer of the check in question and as issuer of the check they have no cause of action for conversion. The Court also held that because K.S.A. 84-3-420(a) bars an issuer from bringing a conversion action, Mid-Continent had no standing to bring such an action against Capital Homes. However, since standing is jurisdictional and can be raised at any time, Capital Homes’ raising the issue for the first time during closing arguments was not too late for it to serve as a basis for the trial court’s decision. (2) Court rejected Mid-Continent’s arguments that K.S.A. 84-3-420(a) applies only to forgery situations and that it certainly does not apply to prohibit a claim for conversion when the claim is premised on a signature that simply exceeds the scope of an agent’s authority. (3) Court stated that Mid-Continent offered no authority for its position that even if the conversion action for the check is prohibited under the Uniform Commercial Code (UCC), that action is allowed for conversion of the $50,000 drawn on the check out of Mid-Continent’s bank account. Court cited authority that the UCC does not draw a distinction between checks and the proceeds received from the checks.

STATUTES: K.S.A. 20-3018(c); K.S.A. 2004 Supp. 60-208(c), -209(a); K.S.A. 75-4317 et seq.; K.S.A. 84-3-103(2), (3), (5), -105(c), -302, -420(a); K.S.A. 84-4-105(3)

DIVORCE, TERMINATION OF SPOUSAL MAINTENANCE AND COHABITATION IN RE MARRIAGE OF KUZANEK
JOHNSON DISTRICT COURT – JUDGMENT OF THE COURT OF APPEALS REVERSING THE DISTRICT COURT IS REVERSED. JUDGMENT OF THE DISTRICT COURT IS AFFIRMED.
NO. 90,478 – FEBRUARY 18, 2005

FACTS: David and Karen Kuzanek were divorced in 1999 after 18 years of marriage. David was required to pay Karen $1,500 per month in spousal maintenance for 110 months or until the occurrence of several events, one of which was “cohabitation of wife with an unrelated adult member of [the] opposite sex for more than 30 days.” “Cohabitation” was not defined. David moved to terminate spousal maintenance alleging Karen was cohabitating with her boyfriend, Robert Potemski. Potemski paid rent to live in the basement of Karen’s house and had a lease, but the lease had expired by the time of David’s motion. The trial court heard evidence regarding the relationship and situation between Karen and Potemski and held that David failed to meet his burden of proving cohabitation based on the judicial definition of cohabitation as “living together as husband and wife and mutual assumption of marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations.” The Court of Appeals reversed under a substantial competent evidence standard and found that after re-examining the evidence, the lease was a sham, and the trial court’s reliance on the parties’ lease to refute the finding of cohabitation was misplaced.

ISSUES: Did the Court of Appeals apply the proper standard of review? Did the trial court err in making a negative finding that David failed to meet his burden of proof to demonstrate cohabitation?

HELD: Court reversed the opinion of the Court of Appeals and affirmed the trial court’s judgment that David failed to prove cohabitation between Karen and Potemski. Court held the proper standard of review involves a negative finding by the trial court. That negative finding will not be rejected on appeal unless the party challenging the finding proves arbitrary disregard of undisputed evidence, or some extrinsic consideration such as bias, passion, or prejudice. Court stated it was abundantly clear that the Court of Appeals improperly took it upon itself to reweigh the evidence and credibility of the witnesses. Court stated divorcing parties, lawyers, and judges should be able to rely on the judicial definition of cohabitation utilized by the trial court and based on this definition, there was no evidence the trial court disregarded undisputed evidence or was influenced by some extrinsic consideration. Court stated that although certain evidence
favored David's view of his ex-wife's living arrangement, that testimony did not go unchallenged. Court held the Court of Appeals erred in selecting the applicable standard of review, in reweighing the evidence before the trial court, and in modifying the definition of cohabitation.

STATUTES: No statutes cited.

DUI AND ADMINISTRATIVE SUSPENSION
PIEREN-ABBOTT, DAY, EARLYWIN V. KANSAS
DEPARTMENT OF REVENUE,
DIVISION OF MOTOR VEHICLES (KDR)
SEGDWICK AND RILEY DISTRICT COURTS –
JUDGMENT OF THE COURT OF APPEALS IS
AFFIRMED IN PART AND REVERSED IN PART.
JUDGMENT OF THE SEGDWICK DISTRICT COURT
IN APPEAL NO. 90,165 IS REVERSED AND THE
CASE IS REMANDED WITH DIRECTIONS. JUDG-
MENTS OF THE RILEY DISTRICT COURT IN
APPEAL NOS. 90,530 AND 90,531 ARE AFFIRMED.
NOS. 90,165, 90,530, 90,531 – FEBRUARY 18, 2005

FACTS: The Kansas Department of Revenue (KDR) suspended the driver's license of all three defendants for refusing or failing a breath test. Pieren-Abbott filed a petition for review in Sedgwick County District Court. Day and Earlywine filed petitions in Riley County District Court. Pieren-Abbott served the KDR with a copy of the petition for review by certified mail, but did not serve the Secretary of Revenue (Secretary). The KDR answered the petition but did not raise the failure to serve summons on the Secretary. The KDR later requested dismissal for failure to serve the Secretary, and the district court dismissed Pieren-Abbott's petition for lack of jurisdiction. Day and Earlywine served the KDR by mail. The KDR filed an answer asserting that neither Day nor Earlywine served summons on the Secretary or the KDR. The district court dismissed for lack of jurisdiction. The Court of Appeals consolidated all three appeals and reversed both district courts, finding K.S.A. 8-1020(o) does not require service of a summons.

ISSUES: Must a licensee desiring to appeal to the district court from the administrative suspension of his or her driver's license serve the Secretary of Revenue with a summons as is specifically required by K.S.A. 8-1020(o)? If a summons must be served and the Code of Civil Procedure applies, does the filing of an answer to a licensee's petition by the KDR without raising the contention of insufficiency of process or service of process waves such a defense?

HELD: Court stated that in order for a district court to acquire jurisdiction over the appeal of an administrative suspension of a driver's license, the licensee's appeal must be timely and give the statutorily required notification. Court stated that the provisions of K.S.A. 8-1020(o) that require a licensee appealing his or her driver's license suspension to file a petition for review and "serve the secretary of revenue with a copy of the petition and summons" is mandatory legislative directive and must be followed. Court held in Pieren-Abbott's appeal, the KDR waived its defense of lack of service of process as allowed by K.S.A. 60-212(b)(1), the licensee's petition was erroneously dismissed, the Sedgwick County District Court's ruling is reversed, and this case is remanded for further consideration. Court held in Day and Earlywine's appeal, the KDR timely asserted its defense of lack of timely service of process, neither licensee acted in a manner to validate his respective attempted appeals as allowed by K.S.A. 60-203(b), and both appeals were properly dismissed.

EMPLOYERS AND EMPLOYEES
JONES V. KANSAS STATE UNIVERSITY
RILEY DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 90,475 – FEBRUARY 18, 2005

FACTS: Jones terminated as Kansas State University (KSU) police officer for gross misconduct or conduct grossly unbecoming a state officer, based on his handling of a traffic stop. University stated Jones submitted false information in his report and violated an in-car camera policy. Civil Service Board upheld the termination. District court affirmed that decision. Court of Appeals reversed, 32 Kan. App. 2d 313 (2004), finding no evidence of intentional falsification of the police report. Also as issue of first impression, Court of Appeals determined "gross misconduct" standard and found it was not satisfied. Supreme Court granted KSU's petition for review.

ISSUES: (1) Falsification of report, (2) violation of in-car camera policy, and (3) interpretation of K.S.A. 75-2949(f)(a)

HELD: Substantial competent evidence that Jones' report of the incident included erroneous or inaccurate information that vehicle was "legally parked," and circumstantial evidence supports a conclusion the error was intentional. Court of Appeals disregarded its limited standard of review and reweighed evidence.

Substantial competent evidence that Jones violated policy by terminating video camera prior to end of traffic stop.

Court of Appeals improperly interpreted "gross misconduct" and "conduct grossly unbecoming a state officer or employee" by applying definition in Employment Security Law. While that is a factor to consider, terms are best defined by dictionary meanings and within context of K.S.A. 75-2949(f) under totality of circumstances. Appointing authority must decide on case-by-case basis, and severity of the misconduct includes ramifications on that state officer or the employee's ability to perform duties. Totality of circumstances to be examined no matter what branch of state service is involved. In this case, Court of Appeals should have considered serious effect on Jones' integrity and credibility. Substantial competent evidence supports Board's conclusion that Jones' actions constituted gross misconduct or conduct grossly unbecoming a state officer and employee sufficient to support his termination as KSU police officer.

CONCURRENCE (Lucken, J.): Agrees with rationale but disagrees with majority’s conclusion that KSU policy required intentional falsification of the police report. As written, policy violated by making a false or inaccurate report, regardless of whether error was intentional.

CONCURRENCE (McFarland, C.J., and Beier, J.): Concur in result.

STATUTES: K.S.A. 2003 Supp. 44-706(d)(1), 75-2949(a), (f); K.S.A. 2002 Supp. 44-706(b)(1); K.S.A. 44-701 et seq., 60-2101(b), 75-2925 et seq., -2929h, -2949d, -2949e, -2949f, -2949f(a), -2949f(b)-(s), 77-601 et seq., -621(a)(1), -621(c), -623; K.S.A. 75-2949 (Weeks)
OIL AND GAS
THE TREES OIL COMPANY V.
STATE CORPORATION COMMISSION, ET AL.
HASKELL DISTRICT COURT – AFFIRMED
NO. 91,733 – FEBRUARY 18, 2005

FACTS: Several oil and gas operators, Chesapeake, OXY-USA Inc. (OXY) and Anadarko Petroleum Corporation (Anadarko), own 16 oil and gas wells that produce oil out of a 3.7 mile long and 500- to 1,500-foot wide incised Chester and Morrow formation channel and desired to inject water into the Chester formation to produce substantial additional oil production beyond that possible with conventional pumping methods. The Trees Oil Company (Trees) operates one oil and gas well on 80 acres within the southern boundary of the proposed water flood project and, after attending two planning meetings in mid-2000, informed the other operators it did not wish to voluntarily participate in the project. Planning continued. Chesapeake filed an application with the State Corporation Commission (Commission) that sought unitization and unit operations of the area. OXY and Anadarko intervened. Trees protested. The Commission conducted a hearing, took the matter under advisement, and then reopened the record as to whether the terms of the Unit Operating Agreement were fair and equitable to all parties. The Commission granted Chesapeake's application for unitization and unit operations of the South Eubank Waterflood Unit. Trees sought judicial review in the district court. The district court confirmed the orders and rulings of the Commission.

ISSUES: (1) Interpretation of the term "pool" in K.S.A. 55-1302 of the Kansas Unitization Act, K.S.A. 55-1301 et seq. (2) Is the Commission's finding that the Unit Operating Agreement was fair and equitable supported by substantial competent evidence? (3) Is the inclusion of the Trees' tracts in the South Eubank Unit clearly supported by substantial competent evidence? (4) Did the Commission err in denying Trees' motion to present supplemental technical testimony?

HELD: Court affirmed the district court and Commission. Court held that under the facts of this case, (1) the K.S.A. 55-1302 definition of "pool" is construed to include Chester and Morrow formations, which constitute a single and separate natural reservoir characterized by a single pressure system so that production of petroleum from one part of the pool affects the reservoir pressure throughout its extent; (2) there was substantial competent evidence to sustain all of the Commission's findings and orders that were made in compliance with K.S.A. 2003 Supp. 55-1304 and K.S.A. 2003 Supp. 55-1305; (3) inclusion of the tracts of an unwilling minority participant in the unit was necessary to protect correlative rights and was supported by substantial competent evidence; and (4) denying the unwilling minority participant's request to present supplemental technical geological evidence at an interim hearing held to consider only the fairness of the Unit Operating Agreement was not unreasonable, arbitrary, or capricious.

STATUTES: K.S.A. 55-1301 et seq., -1302(a), (b); K.S.A. 2003 Supp. 55-1304, -1305; K.S.A. 77-601 et seq., -621 (a)(1), (c)(1), (4), (7), (8)

DISSENT: Justices Luckert, Allegretti, and Beier dissented finding the majority's interpretation of K.S.A. 55-1302 effectively deleted the word "natural" from the definition as written by the Legislature.

CRIMINAL
STATE V. CALVIN
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 91,651 – FEBRUARY 18, 2005

FACTS: Calvin convicted of felony first-degree murder and attempted robbery. On appeal he claimed (1) insufficient evidence supported his felony-murder conviction because there was no evidence an actual robbery took place, (2) several instructional errors, and (3) the amended information was fatally defective because it was not properly verified.

ISSUES: (1) Sufficiency of the evidence, (2) jury instructions, and (3) defective information

HELD: Felony murder is supported if a killing was committed during an attempt to commit a robbery. Robbery does not need to be completed to support an attempt. Element of attempt to commit an underlying felony may be proven by circumstantial evidence so long as jury could draw reasonable inference of guilt from the evidence. In this case there is sufficient evidence the killing happened during the attempt to commit the underlying felony of robbery.

Under facts, no clear error in district court's failure to give unrequested lesser-included second degree murder instruction, or failure to define "overt act." No reasonable possibility that jury would have reached a different verdict if amended felony murder instruction had been given. Pursuant to State v. Mann, 274 Kan. 670 (2002), no cautionary eyewitness identification instruction was required where witness knew the defendant.

Calvin failed to object to verification defect in the amended information prior to trial and thus waived his right to raise this issue on appeal.

STATUTES: K.S.A. 2003 Supp. 21-3436; K.S.A. 21-3301(a)-3401(b), -3426, 22-3208(3)

STATE V. CAMPBELL
RENO DISTRICT COURT – REVERSED AND COURT OF APPEALS – REVERSED
SENTENCE VACATED AND REMANDED WITH DIRECTIONS
NO. 88,654 – MODIFIED OPINION FILED JANUARY 31, 2005

FACTS: Campbell found guilty of multiple drug offenses. Court of Appeals affirmed the convictions and sentences, State v. Campbell, 31 Kan. App. 2d 1123 (2003), declining to follow State v. Frazier, 30 Kan. 2d 398 (2002). Supreme Court granted review on single issue of whether Campbell's sentence for possession of ephedrine was illegal pursuant to Frazier. Campbell argued his possession of ephedrine with intent to manufacture controlled substance was identical to possession of drug paraphernalia with intent to manufacture a controlled substance, a lower penalty crime. Original opinion, State v. Campbell, 278 Kan. 410 (2004), affirmed Court of Appeals' decision on this sentencing issue as correct for the wrong reason.

ISSUE: Identical and overlapping statutes

HELD: Original opinion filed Dec. 23, 2004, is ordered withdrawn. Decisions by district court and Court of Appeals on sentencing issue under review are reversed. Full discussion of Frazier, relevant legislative history, and subsequent case law. With regard to guidance in prosecutorial charging deci-
sions, statutes at issue are overlapping rather than duplicative. Conduct prohibited by K.S.A. 65-7006(a) is defendant's act of knowingly possessing ephedrine or pseudoephedrine with intent to use the product to manufacture a controlled substance. Conduct prohibited by K.S.A. 65-4152(a)(3) is defendant's act of knowingly possessing drug paraphernalia with intent to use it to manufacture a controlled substance. Definition of drug paraphernalia in K.S.A. 65-4150(c) includes "products and materials of any kind which are used or intended for use in ... manufacturing ... a controlled substance, ..." thus conduct prohibited by K.S.A. 65-4152(a)(3) may include defendant's act of knowingly possessing a product with intent to use it to manufacture methamphetamine. Ephedrine and pseudoephedrine are products used in the manufacture of a controlled substance, methamphetamine. In K.S.A. 65-7006(a) the term "product" is used as synonym for ephedrine or pseudoephedrine. Under circumstances of this case, elements of the offense were knowingly possessing ephedrine or pseudoephedrine with intent to use it to manufacture a controlled substance. Elements were the same whether Campbell had been charged with ephedrine statute or drug paraphernalia statute, thus he must be sentenced under lesser penalty provisions for violation of K.S.A. 65-4152(a)(3). Campbell's sentence for violation of K.S.A. 65-7006(a) is vacated, and case is remanded for resentencing as violation of K.S.A. 65-4152(a)(3).

STATUTES: 18 U.S.C. §§ 922(h) and 1202(a); K.S.A. 2003 Supp. 65-4101(e) and (n); K.S.A. 2001 Supp. 65-4152(a), -7006(a); K.S.A. 60-1507, 65-4107(d)(3), -4150(c), -4152, -4152(a)(3), -4152(c), -4159(a), -4161(a), -7006, -7006(a), -7006(d)

**STATE V. HARRIS**

**SEDGWICK DISTRICT COURT - AFFIRMED NO. 90,709 - FEBRUARY 18, 2005**

FACTS: Harris convicted of first-degree felony murder. On appeal he claimed (1) his confession was not voluntary, (2) prosecutor improperly commented on Harris's decision not to testify, (3) improper hearsay evidence was admitted, (4) he was entitled to a new trial based on newly discovered evidence.

ISSUES: (1) Voluntariness of confession, (2) prosecutorial misconduct, (3) hearsay evidence, and (4) new trial

HELD: Confession was voluntary under totality of circumstances. Factors individually examined. Confession not invalidated by seven-hour interrogation while shackled to floor, by denial of phone access to call someone about alibi, by ambiguous or false statements by police, by not advising accused during interrogation of potential exculpatory evidence, by using themes and options as interrogation techniques, or by informing accused about potential charges and sentences without threats or promises. Under facts, prosecutor's comments were not so gross and flagrant as to prejudice jury and deny Harris a fair trial. Failure to object to admission of co-defendant's incriminating statements did not preserve this issue for appeal. No abuse of discretion to deny motion for new trial where newly discovered evidence was inadmissible hearsay.

STATUTES: K.S.A. 2003 Supp. 60-460(a), (f), and (j); K.S.A. 60-404

**STATE V. ELMICKI**

**SHAWNEE DISTRICT COURT - REVERSED COURT OF APPEALS - REVERSED NO. 89,003 - FEBRUARY 18, 2005**

FACTS: Elnicki convicted of rape and aggravated criminal sodomy. Court of Appeals affirmed, 32 Kan. App. 2d 266 (2003). Supreme Court granted Elnicki's petition for review. Issues on appeal included (1) whether trial court erred in allowing jury to hear a detective's opinion about Elnicki's lack of credibility in videotaped interrogation, (2) prosecutorial misconduct in closing argument, (3) whether cumulative error denied Elnicki a fair trial, and (4) sufficiency of the evidence.

ISSUES: (1) Videotaped comments on credibility, (2) prosecutorial misconduct, (3) cumulative error, and (4) sufficiency of evidence

HELD: Issue of first impression in Kansas. District court has no discretion on whether to allow a witness to express an opinion on the credibility of another witness. Such evidence must be disallowed as a matter of law.

Based on prosecutor's repeated negative comments during closing argument about Elnicki's "yarns," "fairest tales," and "tall tales," and her positive comments about credibility of victim and state's "truthful" evidence, both the state test and federal test for reversible error are satisfied. Although a close call, convictions are reversed and case is remanded for new trial.

Under facts, cumulative errors denied Elnicki a fair trial.

Sufficiency of the evidence claim is considered to determine if retrial is permissible under Double Jeopardy Clause. Court of Appeals correctly determined that sufficient evi-
STATE V. MCCURRY  
JOHNSON DISTRICT COURT – AFFIRMED  
COURT OF APPEALS – REVERSED  
NO. 90,221 – FEBRUARY 18, 2005

FACTS: McCurry convicted on three charges consolidated for trial. Consecutive 64-month sentences imposed for a controlling 192-month term. On motion to correct sentence, McCurry argued the consolidated charges should be considered multiple counts on a single complaint. District court denied the motion. Court of Appeals reversed, 32 Kan. App. 2d 806 (2004), applying the double-rule in K.S.A. 2003 Supp. 21-4720(b)(4) with a resulting 128-months’ sentence.

ISSUE: Sentencing

HELD: District court is affirmed. Double rule in K.S.A. 2003 Supp. 21-4720(b)(4) does not apply to cases consolidated for trial.

STATUTES: K.S.A. 2003 Supp. 21-4720(b)(4); K.S.A. 21-4710(a), 22-3203

STATE V. SCHROEDER  
SALINE DISTRICT COURT – AFFIRMED  
COURT OF APPEALS – REVERSED  
NO. 90,188 – FEBRUARY 18, 2005

FACTS: Schroeder charged in Norton County with forgery and theft by deception based on forged check given for 47 cattle. He was arrested days later in Saline County when he attempted to sell the cattle. After he was acquitted in Norton County, Saline County charged him with possession of stolen cattle and filed amended complaint to charge attempted theft by deception. Saline district judge dismissed both charges on double jeopardy grounds and found crimes were part of a single enterprise. Court of Appeals reversed the dismissal of the Saline County attempted theft by deception conviction. Petition for review granted.

ISSUES: (1) Compulsory joinder and (2) single enterprise

HELD: District court erred in dismissing attempted theft by deception charge on the basis of compulsory joinder. Under conventional reading of K.S.A. 21-3108(2)(a), Norton County would not have been proper venue for prosecution of attempted theft by deception charge brought against Schroeder in Saline County. All other acts alleged to have constituted the crime were committed in Saline County. Additionally, the alleged attempted theft by deception was not integral to its companion charge of alleged possession of stolen property that could have been prosecuted in Norton County.

First interpretation and application of general double jeopardy provision in K.S.A. 21-3108(2)(b). Under facts, crimes alleged to have been committed in Norton County and crimes alleged to have been committed in Saline County did not qualify as constituent parts of a single criminal enterprise amenable to prosecution in either county. Compulsory joinder is not extended to crimes that are merely “inextricably intertwined.” Plain language of K.S.A. 21-3108(2)(b) barred prosecution of attempted theft by deception charge brought in Saline County because earlier acquittal in Norton County on other charges resulted in a determination inconsistent with a fact necessary to conviction in the Saline County prosecution.

STATUTES: K.S.A. 21-3108(2)(a) and (b), -3301(a), -3701(a)(2), 22-2603, -2609, -2614, -3202

STATE V. SWANIGAN

SALINE DISTRICT COURT – REVERSED  
COURT OF APPEALS – REVERSED  
NO. 88,347 – FEBRUARY 18, 2005

FACTS: Swanigan convicted of aggravated robbery. Court of Appeals affirmed in unpublished opinion. Supreme Court granted Swanigan’s petition for review. Swanigan claims his two statements to police should have been suppressed because they resulted from coercive and deceptive police tactics.

ISSUES: (1) Voluntariness of confessions and (2) harmless error

HELD: Kansas courts have not addressed coerciveness of an officer’s threat to convey a suspect’s lack of cooperation to the prosecutor, or officer’s threat to charge a suspect with multiple robberies instead of one unless suspect confesses. Such threats are inconsistent with suspect’s Fifth Amendment right against self-incrimination. Neither make a confession involuntary per se, but are factors to be considered in totality of circumstances. Here, combination of Swanigan’s low intellect and anxiety, officer’s repeated use of false information, and officer’s threats and promises resulted in Swanigan’s first statement not being voluntary. State failed to sustain burden of showing Swanigan’s second statement was untainted by the first coercive interrogation. Case by case evaluation is required to make such determinations. Broad reading of this opinion is discouraged.

Harmless error rule applies to erroneous admission of an involuntary confession. Any language to the contrary in Esquivel-Hernandez, 266 Kan. 821 (1999), and Cellier v. State, 28 Kan. App. 2d 508, rev. denied 271 Kan. 1035 (2001), is disapproved. Under facts, no firm belief beyond a reasonable doubt that inclusion of Swanigan’s involuntary statements had little likelihood of changing result at trial. Reversed and remanded for new trial at which Swanigan’s involuntary statements are not admissible.

STATUTES: K.S.A. 2004 Supp. 60-460(f)(2)(B); K.S.A. 20-3018(b), 60-460(f)

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FACTS: Bayless was injured in a car accident on Feb. 7, 2001, when Dieckhaus ran a stop sign and hit the car that Bayless was driving. At that time, Dieckhaus was residing with her parents at 8828 Candlelight Lane in Lenexa. Dieckhaus began attending Northwest Missouri State University in the Fall of 2001, where she lived in an apartment. She lived with her parents during breaks, summers, and one weekend a month. Dieckhaus' family moved to 15228 Woodson in Overland Park in May 2002, and the family took all appropriate change of address measures including updating their address with the post office, updating their driver's licenses, and informing their insurance company. Bayless filed suit on Feb. 3, 2003, four days before the 90-day deadline had expired. Summons was issued on June 11, 2003, to be by certified mail to Dieckhaus at the Woodson address, but it was returned unclaimed. An investigation firm hired by Bayless reported on March 31, 2003, that Dieckhaus' address was still on Candlelight Lane. An alias summons was issued on June 11, 2003, to be by certified mail to Dieckhaus at the Candlelight Lane address. The post office returned the certified letter with a notation that the forwarding time had expired and there was a new address in the name of Michael J. Dieckhaus at the Woodson address. A letter was sent to Dieckhaus at the Woodson address, but it was returned unclaimed. On Nov. 26, 2003, a special process server accomplished residential service on Dieckhaus by serving her mother at the Woodson address. Dieckhaus answered the petition, raising the affirmative defense of statute of limitations. The trial court granted the motion, finding the return on Feb. 7, 2003 stated subject no longer lived at 254, 256 15228 Woodson in Overland Park in May 2002, and the 170. The Prices objected and asserted that the court should require the Bank to file a motion for summary judgment. The Bank responded that summary judgment was not necessary because the facts were undisputed and the bankruptcy had been resolved. The district court signed the journal entry of foreclosure granting the Bank a $106,500 personal judgment against Judy Price and ordered the foreclosure of the property. The Prices were denied attorney fees and the Bank was awarded fees and costs of $1,310.

ISSUES: Did the trial court err in finding Bayless’ claim barred by the statute of limitations?

HELD: Court affirmed. Court stated that Bayless’ service on Dieckhaus was six months after the 90-day deadline for service of process had expired. Court rejected Bayless’ argument that the statute of limitations was tolled while Dieckhaus was at college and found Bayless failed to exercise due diligence in attempting to obtain service on Dieckhaus. Court stated the record failed to show that Bayless made any efforts to locate Dieckhaus other than employing the investigations service. Bayless made no contacts of appropriate entities or individuals that would have easily revealed the new address and discovered Dieckhaus’ whereabouts and served her with summons before the 90-day deadline had expired. Court stated there was no evidence that Dieckhaus or her parents actively sought to hinder service. Court stated the statute of limitations was not tolled due to Dieckhaus attending an out-of-state college because had Bayless exercised due diligence, service of process could have been accomplished by either locating and serving Dieckhaus in Missouri under the long arm statute or by serving her at her Kansas address.


FORECLOSURE, SUMMARY JUDGMENT, AND JOURNAL ENTRY
LYNDON STATE BANK V. PRICE, ET AL., SHAWNEE DISTRICT COURT
REVERSED AND REMANDED
NO. 92,285 – FEBRUARY 25, 2005

FACTS: Lyndon State Bank (Bank) foreclosed on the Prices property claiming default on a promissory note. In the Prices’ answer, they admitted the allegations in the petition and requested a stay pending Charles Price’s bankruptcy. Through an exchange of letters in November 2003, the Bank contended the bankruptcy was resolved and the Prices should sign a proposed journal entry of foreclosure for submission to the court. In February 2004, the Prices’ attorney moved to withdraw, but the motion was denied. At a status conference, counsel for the Prices explained that his clients would not authorize him to approve the proposed journal entry. In March 2004, the Bank submitted the proposed journal entry to the court pursuant to Supreme Court Rule 170. The Prices objected and asserted that the court should require the Bank to file a motion for summary judgment. The Bank responded that summary judgment was not necessary because the facts were undisputed and the bankruptcy had been resolved. The district court signed the journal entry of foreclosure granting the Bank a $106,500 personal judgment against Judy Price and ordered the foreclosure of the property. The Prices were denied attorney fees and the Bank was awarded fees and costs of $1,310.

ISSUES: Can Supreme Court Rule 170 be used as an alternative to summary judgment proceedings?

HELD: Court reversed and remanded. Court stated that in some cases the district court can easily draft its own judgment form in conformity with K.S.A. 60-258. In other cases it is more efficient for the lawyers to draft the journal entry that memorializes the court’s judgment. Supreme Court Rule 170 is designed to facilitate the latter situation. Court stated that Supreme Court Rule 170 applies to the preparation of journal entries that memorialize judgments that have already been ordered by the court. Here, the court stated the record did not disclose that the trial court ever made a final determination of the rights of the parties in the action before signing the journal entry submitted to it over the Prices’ objection. The Prices filed a timely answer and were otherwise not in default so as to permit the Bank to invoke default judgment provisions. Court held there is no authority for the proposition that Supreme Court Rule 170 may be used as an alternative to summary judgment proceedings.

FACTS: Loeffelbein and others purchased one million shares of stock in Rare Medium Group, Inc. (Rare Medium), a Delaware corporation. After Rare Medium announced a proposed merger, the plaintiffs sought to sue Rare Medium for fraud. Loeffelbein contacted the law firm of Milberg Weiss in its New York office based on the firms’ reputation as securities counsel. Loeffelbein began working with David Rosenfeld, a Milberg Weiss attorney. Loeffelbein signed a class action certification. Rosenfeld told Loeffelbein to not sell any of his Rare Medium stock and the value of the stock declined steadily. Robert Mitchell, who worked with Loeffelbein in his stock trading, signed the letter authorizing Milberg Weiss to represent Loeffelbein. On June 1, 2001, Milberg Weiss filed a class action suit against Rare Medium in Delaware alleging breach of fiduciary duty. The action was settled and Milberg Weiss received legal fees of approximately $1.1 million, but the settlement was of little benefit to the common stockholders. Plaintiffs sued Milberg Weiss, Rare Medium, and Mitchell in state court for fraud, negligence, breach of fiduciary duty, and a violation of the Kansas Consumer Protection Act alleging Milberg Weiss falsely represented its willingness to investigate a fraud claim against Rare, that Milberg Weiss wanted to position itself as lead counsel, that Milberg Weiss lacked authority to name plaintiffs in the class action, and that Mitchell did not have authority to hire counsel on Loeffelbein’s behalf. Milberg Weiss removed the case to federal court, but the federal court severed plaintiffs’ claims against Milberg Weiss and remanded them to state court. Milberg Weiss moved to dismiss plaintiffs’ petition for lack of personal jurisdiction arguing it lacked sufficient “minimum contracts” with Kansas to satisfy due process, it did not have an office or registered agent in Kansas, none of its 225 attorneys were licensed to practice in Kansas, and that Kansas was not appropriate under the doctrine of forum non conveniens. The trial court denied Milberg Weiss’ motion and Milberg Weiss filed an interlocutory appeal.

ISSUES: Did the trial court have jurisdiction over Milberg Weiss on both statutory and due process grounds?

HELD: Court affirmed the trial court’s jurisdiction over Milberg Weiss. Court stated that considering plaintiffs are required only to make a prima facia showing of jurisdiction at this point in the proceedings, plaintiffs’ allegation of economic injury resulting from Milberg Weiss’ fraudulent misrepresentations was sufficient to bring Milberg Weiss within the purview of the Kansas long arm statute, K.S.A. 2003 Supp. 60-308(b)(2). Court held due process is also satisfied. Court stated that plaintiffs’ intentional tort claims arose from the content of Milberg Weiss’ communications with Loeffelbein in Kansas and these communications were sufficient to establish minimum contacts as Milberg Weiss purposefully directed the alleged misrepresentations toward the plaintiffs in Kansas. Milberg Weiss misrepresented its willingness to investigate plaintiffs’ fraud claims against Rare Medium and purposefully availed itself of the privilege of conducting activities in Kansas. Court used virtually the same analysis in determining that plaintiffs’ claims arose out of or resulted from Milberg Weiss’ forum-related activities. Court held it is also reasonable for the court to have jurisdiction. Court stated the evidence strongly favors conducting the present litigation in Kansas, including Milberg Weiss’ national exposure, other lawsuits involving Milberg Weiss in Kansas and the allegation of a tort committed within the state.

STATUTES: K.S.A. 50-623 et seq; K.S.A. 2003 Supp. 60-308(b)

OIL AND GAS AND LEASE TERMINATION
BARKER V. KRUCKENBERG, ET AL.
PRATT DISTRICT COURT – AFFIRMED IN PART
AND REVERSED IN PART
NO. 91,648 – FEBRUARY 4, 2005

FACTS: Hirt farms entered an oil and gas lease (Hirt lease) with B&N Enterprises (Kruckenberg’s predecessor in title) and the property had one producing well. The lease provided that it would terminate if royalty was less than $5 per acre per annual year, and since the lease covered 160 acres, the minimum royalty was $800 per year, but there was no specific time by which the minimum royalty was to be paid to avoid a forfeiture. Barker acquired the lease in 1997. The Hirt lease did not pay the minimum royalty between 1997 and 1999 (1997 – $750.78, 1998 – $536.38, 1999 – $650.07). However, the $800 minimum royalty was exceeded for the years 2000, 2001, and 2002; and in 2001, B&N paid $8,575.16 to several different contractors in order to increase production. Barker entered an oil and gas
lease (Barker lease) in 2001 with Kruckenber covering different property that contained language, “If production is established, lessor shall be paid a minimum royalty of $150 per month.” The parties stipulated that Barker did not receive the royalty payment of $150 per month, but they received annual royalties that exceeded $1,800 per year. Barker sued to terminate both leases for failure to pay the minimum royalty. The district court terminated the Hirt lease finding the failure to pay the minimum royalty automatically terminated the lease. The district court did not terminate the Barker lease even though the minimum royalty of $150 was not paid per month because the lease did not contain a forfeiture provision and the annual royalty exceeded the total of the monthly royalties for the year.

ISSUES: Did the district court err in terminating the oil and gas leases?

HELD: Court reversed the termination of the Hirt lease and affirmed the refusal to terminate the Barker lease. Regarding the Hirt lease, the court stated that Barker knew about production under the Hirt lease when he purchased the real estate in 1997, and he surmised at that time that he was not properly receiving the royalty. Court found that if the lease is terminated, Barker will receive a windfall from the investment to improve the well. Court concluded it would be inequitable to allow Barker to terminate the Hirt lease in 2002 based upon lessee’s failure to pay the minimum royalty three years earlier, especially since the lessee made an additional investment in the well during the interim. Barker failed to promptly assert his right of forfeiture and accordingly, he waived his right to terminate the Hirt lease. Court found forfeiture was unnecessary because money damages was a sufficient remedy. Regarding the Barker lease, the court concluded the district court correctly explained that practicality dictates a flexible payment schedule for royalties and that a modest well does not produce enough oil to be sold on a monthly basis. Court held the district court correctly held the Barker lease should not be forfeited for failure to pay the royalties on a monthly basis since the year royalty average exceeded the combined total of the monthly payments.

STATUTES: No statutes cited.

REAL PROPERTY AND COVENANTS
SCHLUPT V. BOURDON
DOUGLAS DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 92,450 – FEBRUARY 11, 2005

FACTS: Smith owned 40 acres of land. In 1986, he leased 10 acres to Midland Enterprises for drilling a gas well. The well was not commercially productive and Midland abandoned it to Smith for personal use. In 1988, Smith sold 7.2 acres to Schip with a provision in the contract that Schip had free natural gas so long as the gas well on Smith’s property supplied sufficient gas for both houses. The contract also had a provision that the covenant/agreement would be extended to and be obligatory on future parties to the property. The contract for deed was not recorded at that time. Instead, an affidavit of equitable interest was recorded in 1988 that gave notice of the Schups’ interest in the property they were acquiring but not their interest in free gas from the well. There was a recorded easement over Smith’s property in 1997, but again the document made no mention of the gas well interest. After the Schups completed payments on the contract, the deed again made no mention of the gas well interest. In 2000, the Bourdon’s purchased Smith’s property and there was no visible notice of the Smith’s gas well interest and they were not informed of the gas well interest, nor did a title search reveal any encumbrances concerning the gas well. In 2002, the Bourdons saw the Schups near the gas well and learned for the first time about the Schups’ gas well interest. The Bourdons told the Schups they would terminate the gas supply on Dec. 31, 2002. In January 2003, the Schups filed the old 1988 contract for deed. After settlement was unsuccessful, the Schups were eventually awarded a permanent injunction.

ISSUES: Did the Schups put the world on notice of their gas well interest? Does the notice statute apply to covenants running with the land? Did the trial court err in determining that the contract for deed did not merge with the deed?

HELD: Court reversed and remanded with directions to vacate the permanent injunction. Court stated the late filing of the Schups’ contract for deed had no retroactive application and the world received notice of the contract for deed on the date of filing, January 2003. Court stated the covenant for free gas in Schup’s contract for deed was a covenant that runs with the surface estate. However, the court held that a covenant running with the land is not binding upon successors in interest who have no notice of the covenant. Court also held that merger did not apply. The deed did not contain the free gas provision that was contained in the contract for deed. Thus, the presumption is that the free gas provision was waived and superseded by the deed. However, the district court held that the parties intended the free gas provision to continue in effect after the deed was executed. Court held that while the evidence supported the district court’s opinion that the parties intended the covenant to continue and it survived the deed, since the deed imparted no notice to the world of their interest in gas from the well, it was not binding upon and enforceable against the Bourdons who later purchased the Smith property.

STATUTES: K.S.A. 58-2221, -2222, -2223

WORKERS’ COMPENSATION
SMITH V. WINFIELD LIVESTOCK AUCTION, ET. AL.
WORKERS’ COMPENSATION BOARD – AFFIRMED
NO. 92,246 – FEBRUARY 18, 2005

FACTS: Smith worked for Winfield Livestock Auction (Auction) one day a week moving cattle off the scales during the auctions. He was paid hourly for this work. Smith also leased a trailer from the owner of Auction to haul cattle to and from the auction. Smith charged the cattle owner a fixed rate plus mileage and the owner of Auction would receive 20 percent of that amount for the lease. On the day of the injury, Smith hailed three cows to auction for Poovey. He clocked in at Auction at 10:53 a.m. and clocked out at 3:21 p.m. After clocking out, Smith went to the Cafe and at approximately 5:00 p.m., he drove his truck and trailer to the loading area to load the one Poovey cow that did not sell. Two Auction employees were responsible for loading livestock. Smith was knocked down and trampled by the cow during loading. Smith suffered multiple fractured ribs and died four days later from a pulmonary embolism. The administrative law judge and the workers’ compensation board denied the claims of Smith’s widow finding the accident did not arise out of and in the course of Smith’s employment with Auction.
ISSUES: Did the Board err in finding that Smith's injuries did not arise out of his employment with Auction?

HELD: Court affirmed. Court stated that both the administrative law judge and the board made a negative finding that Smith's injuries were not covered by workers' compensation. Court stated that loading and unloading cattle was not part of Smith's work for Auction and his accident occurred approximately one and one-half hours after Smith clocked out of his job with Auction. Court recognized the compensable injuries under the dual-purpose rule, but found it did not apply. Court held two facts put Smith's claim outside of his hourly job with Auction: (1) he had clocked out and gone off-site; and (2) Smith's loading the cow could easily have been interpreted as part of his job of hauling cattle back to the owner and not his job duties with Auction.

STATUTES: K.S.A. 44-501 et seq.; K.S.A. 44-501(a)

Criminal

STATE V. ANDERSON
SHAWNEE DISTRICT COURT
REVERSED AND REMANDED
NO. 91,791 – FEBRUARY 18, 2005

FACTS: Anderson stopped for making an improper right turn, and subsequently convicted of the traffic offense and of driving under the influence (DUI). On appeal, Anderson claimed (1) evidence from the traffic stop should have been suppressed because there was no traffic violation, (2) insufficient evidence supported the convictions, and (3) alleged defects in the verdict and procedure employed to clarify the verdict.

ISSUES: (1) Motion to suppress, (2) sufficiency of evidence, and (3) clarification of defective verdict

HELD: Issue not properly preserved for appellate review because Anderson did not object to admission of the evidence he had sought to suppress. Even on merits, a "technical" traffic violation can justify a traffic stop.

Sufficient evidence supports the convictions.

K.S.A. 22-3421 is construed and applied. When court seeks assent of jury in correcting a defective verdict form, it may not suggest a preference or persuade jurors toward one or another of possible verdicts. Whenever possible, jury should be allowed to resolve problem by resubmission on written instructions. Here, irregularities in the verdict were compound. Under the circumstances, a fair trial was denied. Conviction of improper right turn is affirmed. Conviction for DUI is reversed and remanded for new trial.

STATUTES: K.S.A. 2002 Supp. 8-1567(a)(1)-(3), -1567(f); K.S.A. 22-2402, -3421

STATE V. KERMOADE
JOHNSON DISTRICT COURT – AFFIRMED
NO. 92,307 – FEBRUARY 11, 2005

FACTS: District court granted motion to suppress evidence obtained from search of defendants' residence, finding a "knock and talk" fishing expedition had turned from a consensual encounter into an unreasonable seizure. Facts detailed in the opinion. State filed interlocutory appeal.

ISSUE: Search and seizure

HELD: Under facts, voluntary encounter at defendants' home was transformed into an investigatory detention result-
FACTS: Patch charged with traffic offenses in municipal court. After he waived speedy trial to a scheduled trial date, City sought another continuance. Municipal court denied the continuance and dismissed the charges without prejudice. City refilled charges, and Patch sought dismissal based on speedy trial violation. Municipal court denied Patch's motion, and found Patch guilty on stipulated facts. On appeal, district court affirmed, stating it had no authority to review the municipal court's speedy trial decision, and that record would be insufficient for such review.

ISSUES: (1) Appeal from municipal court and (2) speedy trial

HELD: District court's de novo review includes power and responsibility to revisit issues raised before the municipal court that are renewed in de novo trial. Facts before the district court were adequate for review of speedy trial issue.

Under facts, waiver of right to speedy trial was conditioned on a scheduled trial date. Patch had right to withdraw his conditional waiver, and when he did so, city was required to exercise due diligence in prosecution. Patch's right to a speedy trial was violated. Charges are to be dismissed.

STATUTES: K.S.A. 12-4501, 22-3402, -3402(2), -3609(1), -3610(a)
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