Testing the Waters of Kansas Mechanic’s Liens

Elect or Instruct: Preventing Evidence of Multiple Acts from Threatening Juror Unanimity in Criminal Trials
# Kansas Bar Association Districts

Let Your Voice be Heard!

## KBA Board of Governors Representatives

<table>
<thead>
<tr>
<th>Position</th>
<th>Name</th>
<th>District</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>President</td>
<td>Michael P. Crow</td>
<td>District 6</td>
<td>(913) 682-0166 <a href="mailto:mikecrow@cbblegal.com">mikecrow@cbblegal.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>President-elect</td>
<td>Richard F. Hayse</td>
<td>District 7</td>
<td>(785) 232-2662 <a href="mailto:rhayse@morrislaing.com">rhayse@morrislaing.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vice President</td>
<td>David J. Rebein</td>
<td>District 8</td>
<td>(620) 227-8126 <a href="mailto:drebein@rebeinbangerter.com">drebein@rebeinbangerter.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Secretary-Treasurer</td>
<td>Anne Burke Miller</td>
<td>District 9</td>
<td>(785) 539-6500 <a href="mailto:amillerJD@aol.com">amillerJD@aol.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Executive Director</td>
<td>Jeffrey Alderman</td>
<td>District 10</td>
<td>(785) 551-5434 <a href="mailto:grbraun@haysamerica.com">grbraun@haysamerica.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Immediate Past President</td>
<td>Daniel J. Severt</td>
<td>District 10</td>
<td>(316) 269-4215 <a href="mailto:dansevar@kcc.state.ks.us">dansevar@kcc.state.ks.us</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Young Lawyers Section President</td>
<td>Eric G. Kraft</td>
<td>District 6</td>
<td>(913) 498-3536 <a href="mailto:ekraft@kc-dsdlaw.com">ekraft@kc-dsdlaw.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>KDJA Representative</td>
<td>Hon. Patricia A. Macke Dick</td>
<td>District 7</td>
<td>(785) 694-2972 <a href="mailto:dick@ourownusa.net">dick@ourownusa.net</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>District 1</td>
<td>Thomas J. Bath Jr.</td>
<td>District 7</td>
<td>(913) 652-9800 <a href="mailto:tom@bathedmonds.com">tom@bathedmonds.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>District 2</td>
<td>Gerald R. Kuckelman</td>
<td>District 8</td>
<td>(913) 367-2008 <a href="mailto:acat@journey.com">acat@journey.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>District 3</td>
<td>Hon. Rawley J. &quot;Judd&quot; Dent</td>
<td>District 9</td>
<td>(620) 330-1080 <a href="mailto:chiefjudge@14thjudicialdistrict-ks.org">chiefjudge@14thjudicialdistrict-ks.org</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>District 4</td>
<td>William A. Taylor III</td>
<td>District 10</td>
<td>(620) 221-1120 <a href="mailto:bill@winfieldattorneys.com">bill@winfieldattorneys.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>District 5</td>
<td>Martha J. Coffman</td>
<td>District 11</td>
<td>(785) 271-3105 <a href="mailto:m.coffman@kcc.state.ks.us">m.coffman@kcc.state.ks.us</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>One seat vacant</td>
<td></td>
<td>District 12</td>
<td>(785) 296-6146 <a href="mailto:marquardt@kscourts.org">marquardt@kscourts.org</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ABA Delegate at Large</td>
<td>Hon. Christel E. Marquardt</td>
<td>District 12</td>
<td>(816) 292-2000 <a href="mailto:mwilliams@fathroppage.com">mwilliams@fathroppage.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ABA Delegate at Large</td>
<td>Hon. Christel E. Marquardt</td>
<td>District 9</td>
<td>(785) 296-6146 <a href="mailto:marquardt@kscourts.org">marquardt@kscourts.org</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>KANSAS DELEGATE TO ABA:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>ABA Delegate at Large:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Testing the Waters of Kansas Mechanic's Liens

By Eric G. Kraft

ITEMS OF INTEREST

5 In Memoriam
Justice Robert L. Gernon

8 Fellows of the Kansas Bar Foundation:
Lawyers Making a Difference

11 Open Letter to all KBA Members

15 Welcome Spring 2005 Admittees to
the Kansas Bar

23 Annual Meeting At-a-Glance
and Registration Form

REGULAR FEATURES

4 President's Message
9 A Nostalgic Touch of Humor
10 Young Lawyers Section News
12 Law Students' Corner
13 Members in the News
14 Dan's Cartoon
16 Liens
18 Testing the Waters of Kansas
Mechanic's Liens
28 By Scott R. Ediger

Cover photo: Kiowa State Fishing Lake, near Greensburg in Kiowa County, Kansas. Photo taken by Eric Kraft, KBA Young Lawyers Section president.
Next Stop: Vail

It is not too late to sign up for this year's KBA Annual Meeting, which is scheduled for June 9 through June 11, 2005, at the beautifully renovated Vail Cascade Resort & Spa. There will be plenty of great CLE as well as the opportunity to meet with fellow lawyers and judges at a summer getaway in Colorado for you and your family. See you there!

Terri Schiavo

The Terri Schiavo case brought out strong feelings throughout the world. The need for sound legal advice and professionally drafted living wills, durable powers of attorney, and other documents was clearly demonstrated.

The legal profession and judiciary, however, were harshly and unfairly criticized. The lawyers on both sides were attacked for doing what lawyers should be doing, articulating issues and advocating. The courts, sharply undermining the modern mantra of “a conspiracy of activist judges” uniformly applied judicial restraint.

Justice Bob Gernon

We were all deeply saddened by the death of Justice Robert L. Gernon. As many of you know, he was a very active and loyal KBA member. He loved and respected the law, the judiciary, and lawyers. His dedication to our Annual Survey of Law Committee is well known, as was his enthusiastic participation on the Continuing Legal Education Committee. I will always remember him for his sense of humor and enjoyment of life. We will miss him.

Lawyer Legislators

The KBA thanks the dedication and service of our lawyer legislators. In the Kansas Senate, lawyer/senators are Barbara Allen, Terry Bruce, Jay Emler, David Haley, Phil Journey, Derek Schmidt, and John Vratil. In the Kansas House of Representatives, lawyer/representatives are Eric Carter, Pat Colloton, Marti Crow, Paul Davis, Jeff Jack, Lance Kinzer, Ward Loyd, Dean Newton, Mike O’Neal, Tim Owens, Janice Pauls, Mike Peterson, Jim Ward, and Kevin Yoder.

Our thanks to the KBA Legislative Committee and to those KBA members who testified before House and Senate committees and contacted their legislators on issues important to the KBA.

Courthouse and Courtroom Security

The courthouse murders in Atlanta, murder of family members of a judge in Chicago, and other incidents of violence demonstrate the need for better courthouse security. Improved technology is important. We need to emphasize to our elected officials the importance of funding for courthouse security. Lawyers are in a unique position to observe the behavior of individuals who come in contact with the court system. We cannot ignore erratic and dangerous conduct. The stakes are too high.

Applause for a Job Well Done

By the time you read this column, an important member of the KBA staff, CLE Director Eric Ward, will have left his employment at the Bar to begin a new chapter in his life. Eric began his career at the KBA in 1996 as a publications assistant after graduating from college and then serving in the Navy. It did not take too long to see that he was destined for success. We will all miss his leadership and friendly demeanor, but do wish him well in his new endeavors.

Mike Crow may 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 Memoriam
Justice Robert L. Gernon

By Susan M. McKaskle, Journal managing editor

On March 30, Kansas Supreme Court Justice Robert L. Gernon lost his battle with cancer, and the legal community and all citizens of Kansas lost a dedicated jurist and advocate for equal justice for all.

"Justice Gernon's fairness and integrity made him a valued member of the Kansas Supreme Court, and his untimely death cuts short a distinguished legal career," Gov. Kathleen Sebelius said. "He has served the state, his community, and his profession with great dedication. The state of Kansas will miss his presence on the Court."

Justice Gernon's choice of the law as a career and his devotion to that choice was a natural for him. In an interview just prior to taking his seat on the Supreme Court, he said, "My family viewed the law as a profession where those who were lawyers helped people who were in trouble or needed assistance in various parts of their lives and who were often in conflict."

He added, "I believe the courts are a place where everyone ought to expect a level playing field and that should be the goal of all courts. The statue of justice has a blindfold for a reason. The courts ought to be colorblind, gender-blind, religion-blind, and blind to all other reasons for bias."

His family has a multigenerational tradition in the law. Gernon's father, John Lawrence, was an attorney and later district judge in the 22nd Judicial District. His mother was a court reporter and his brother, John, and sister, Maureen, are both attorneys. Gernon's daughter, Rebecca Gernon Wilson M.D., is married to a law student. Gernon's two siblings each have four children, and four of the eight are attorneys. His daughter, Kristin Gernon, is a clinical social worker.

He began his legal career by serving as a probation officer and presentence investigator for Shawnee County while he was a law student at the Washburn University School of Law. After receiving his J.D. in 1969, he practiced with his brother in Hiawatha and then, following his father's example, served as district judge in the 22nd Judicial District from 1979-1988. He served on the Kansas Court of Appeals from 1988 until his appointment to the Supreme Court in January 2003.

"His commitment to public service, his legal skills, and his ready sense of humor will be missed," Chief Justice Kay McFarland said.

For 15 years, Judge Jerry Elliott served with Justice Gernon on the Court of Appeals.

"Bob will be missed by all who knew him — and that's a whopping number," Elliott said. "He combined intellectual curiosity and honesty with a wonderful sense of humor. He was not overly coordinated; he remains the only person at the court to have caught his necktie in the paper shredder. But, he never met a stranger, and that openness was much appreciated and cherished."

Justice Gernon contributed a great deal to the legal profession outside of the courtroom. He became a member of the Kansas Bar Association in 1969 and remained an involved member.

"Justice Gernon respected the judiciary and lawyers," KBA President Mike Crow said. "He was a loyal and active KBA member. His sense of humor and love of people drew people to him. We will all miss Justice Gernon."

With tireless efforts, Justice Gernon spearheaded the publication of the first edition of the KBA Annual Survey of Law in 1990 and remained the chairman of the editorial board for the publication. He also served as the coordinator for the annual program associated with the publication.

He became a member of the KBA CLE Committee in 1986 and served continuously until 2005. He was also a member of the KBA Awards, Law Related Education, and Bench-Bar committees.

Justice Gernon received the KBA Outstanding Service Award in 1991 and the Professionalism Award in 2001.

"Justice Gernon embraced me from the very beginning of my tenure at the Kansas Bar Association," KBA Executive Director Jeffrey Alderman said. "It certainly did not take me very long to recognize just how dedicated he was to the profession and to the administration of justice. He was the type of person who made you feel that you could make a difference."

From the daughters of Justice Robert L. Gernon:
"Dad's greatest joy in the last year of his life was being a grandfather. It is important to us that Finn and all future grandchildren know their grandfather. Please use the addresses below to send us your favorite story, picture, or thoughts about our father so that we may create a scrapbook to share with his grandchildren."

Kristin Gernon, 255 Huguenot St. #1610, New Rochelle, NY 10801, e-mail klgwo@yahoo.com.
Rebecca Gernon Wilson, 9 Village Rock Lane #12, Natick, MA 01760, e-mail beckygwilson@yahoo.com.
Returning to Kansas because of an old, rotted-out building is not something a person would normally do. Yet, attorney Nina Miley moved to the small town of White City, population of just more than 500 in Morris County, to restore the 120-year-old Jenkins Building.

Born on the Mississippi Delta, Miley was often told by her mother “you would have made a great lady lawyer” because Miley liked to speak, study, write, and help people solve problems.

Miley did not take the conventional road to becoming an attorney. After graduating from college with her bachelor’s degree in English from the University of North Alabama in 1965, Miley taught English and art at Alcee Fortier Senior High School in New Orleans. She moved to Manhattan, Kan., in 1969, where she served as a community advocate for energy efficient design in low- and moderate-income housing.

Miley applied and was accepted to Washburn University School of Law, where she graduated with her juris doctorate in 1990. She said Washburn was the greatest place for her because the entire faculty and staff are committed to each student’s success.

She worked in the university’s law library, where she “fell in love with helping people find the law.” Her experience at the library inspired her to get her master’s degree in library and information science.

After earning her master’s from the University of Illinois at Champagne-Urbana in 1991, Miley moved to Oklahoma to work as a reference librarian at the University of Oklahoma (OU) Law Library. She was the associate director of Legal Research and Writing at OU and taught for seven years, before retiring in 2004 and returning to Kansas.

“I kept my law license active for 15 years,” she said. “I must have known, in the back of my mind, that I was going to come back to the Flint Hills.”

Today, Miley concentrates her practice in the areas of land, deeds, real estate, and taxes, but she said she does a little bit of everything.

“In this small town, there are never really huge problems,” she said. “So, I help people with the little things they need help with.”

Miley, who has renovated eight homes, was contacted by Sam Seals, the owner of the Jenkins Building, who was looking to sell the property.

Miley began doing research on the building by spending nights in the library looking for information.

“The Kansas State Historical Society made every effort to help me when I was conducting the research and writing the documentation for the Jenkins Building,” she said. “I could not have done it without the help of those intelligent, dedicated people at the historical society. They are so committed to saving the built environment of Kansas.”

William Schilling and Son built the Jenkins Building in 1885 for use as a general store. It was purchased by the Jenkins Brothers in 1888 and was a thriving general merchandise store until 1939.

When Miley took ownership of the building in 2004, she was successful in getting it listed on both the state and national registers of historic places.

Miley said her children, Thorin, of Yukon, Okla., and Katy, of Topeka, thought she was crazy for taking on this project; however, she has never regretted her decision to buy the building.

“I designed the whole building,” she said. “I had help, but I always maintained my vision for it.”

Miley did not spend all of her own money. After the building was placed on the state registry, the very first thing she received was a Heritage Trust Fund Grant from the Historical Society to clean up and restore the outside of the building, particularly the coping stones and repointing. The grant is designed to represent recognition to individuals and organizations that work to preserve Kansas' history.

“It is Kansas money,” she said. “This is money that has come back to this county.”

After completing the outside, Miley moved to the inside.

“I got the worst part done, the law office and my apartment,” she said. “Where those are located, the floors were rotted out, so you had to be careful because you could fall into the basement.”

Miley's apartment and law office take up the south half of the main floor. Her apartment is on the east, where she claims most of her legal work is done in a rocking chair in the sitting area, and her office is on the west. The office's entertaining area includes a gas fireplace, which heats the entire office and apartment.

(continued on next page)
The north half of the main floor will be a retail area, which the city can use for its own purposes. Miley said she chose to give the city the use of that area as a way to give back to citizens of the community.

Miley is now working on the second floor, where she will have two bed and breakfasts.

"My philosophy is to make something out of nothing," Miley said. "Some people couldn't see the beauty, but I believe I have a vision about buildings and spaces."

Miley is not one who hands over a project to someone else to complete; she is entirely hands-on and has a drive to get things done. She has cut, hammered, installed floor joists, dry walled, painted, and even climbed scaffolding.

"Everything is handmade," she said. "To me, you can't not do things."

Miley said she is blessed with good health and, as a result, she has a high energy level, and the time used to create is always refreshing.

"I try to do my own thing and hope that it is a catalyst for other people," she said. "I made a beautiful space out of something that was nothing. I really do believe it is miraculous that I have this 120-year-old building."

"No man is an island," said Miley, quoting 17th century renaissance poet John Donne. "Well, no woman is either," she adds. "What I have accomplished today, I did not do so alone. Dozens of men, women, and Kansas institutions have helped me every step of the way. I will always remember that and be grateful."

---

**THE KANSAS ASSOCIATION OF LEGAL ASSISTANTS (KALA)**

**ANNUAL MEETING AND SEMINAR IS SCHEDULED FOR FRIDAY, JUNE 3, 2005, 7:30 A.M. TO 4:30 P.M., AT THE AIRPORT HILTON, WICHITA, KANSAS.**

The presenters are:

- Lt. Kenneth Landwehr, Wichita Police Department
- Debra Barnett, U.S. Attorney's Office
- Kim Parker, Chief Deputy District Attorney in Wichita
- Hon. Joseph Piron, Kansas Court of Appeals
- Document and case management presentation by CaseMap
- A team presentation by Bill Townsley and Cheryl Clark CLA, of Fleeson Gooing Coulson & Kitch, L.L.C.
- The guest speaker at lunch is Barbara Yarnell Chamberlin, and her topic is Botanica: Yesterday, Today and Tomorrow.

If you would like to register for the seminar or want more information, please contact

Linda Siders, CLA, at 316-291-9735, lsiders@foulston.com or Julie Daniels, CLA, at 316-291-9520, jdaniels@foulston.com.

---

**Getting to know you one member at a time ...**

Have you enjoyed getting to know the KBA members featured in the Member Profiles section of *The Journal of the Kansas Bar Association*? Do you or another member you know have an interesting pastime, hobby, or story to tell?

The *Journal* is seeking real stories from the real lives of its members to amuse, inspire, inform, and/or entertain our readers.

To give us the scoop, contact Susan McKaskle or Beth Warrington at the KBA!

(785) 234-5696
smckaskle@ksbar.org or bwarrington@ksbar.org
Fellows of the Kansas Bar Foundation: Lawyers Making a Difference

The key to any organization’s success lies in its membership. The KBF (Foundation), in particular, continues to flourish with the support of its members, the fellows. Contributions from the fellows help fund many of the Foundation’s educational and charitable activities that provide access to the legal system for low-income Kansans, advocacy for children in need of care, educational materials and training for Kansas students and teachers, and improvements to the administration of justice.

How do I join?
Entry into the fellows program is open to any person who contributes $1,000 to the Foundation or pledges to contribute at least $1,000, customarily giving $100 per year for 10 years. Each spring the Foundation invites members of the bar to become fellows. This prestigious honor is limited to a select group of lawyers who have been nominated by current fellows.

Fellows categories
The Foundation has designated six membership categories for the fellows program:

- $1,000 Fellow of the Kansas Bar Foundation
- $1,001-$4,999 Fellow Silver of the Kansas Bar Foundation
- $5,000-$9,999 Fellow Gold of the Kansas Bar Foundation
- $10,000-$14,999 Fellow Diamond of the Kansas Bar Foundation
- $15,000-$49,999 Pillar of the Foundation
- $50,000 or more Pillar of the Profession

Fellows recognition
Those added to the published roll of fellows and those who reach a new contribution level are honored at an annual Fellows Dinner. The dinner provides a wonderful opportunity to salute the new fellows, introduce new officers, and reminisce with colleagues.

If you would like more information on joining the Kansas Bar Foundation and supporting its programs, contact Janessa Akin, manager, public services, at (785) 234-5696 or jakin@ksbar.org. Your contribution can make a difference!

Fellows Dinner Postponed

Please note that the Board of Trustees of the Kansas Bar Foundation has voted to postpone this year’s Fellows Dinner, which had originally been scheduled for Saturday, June 11, 2005, at the KBA Annual Meeting in Vail, Co.

The Board has tentatively rescheduled the dinner for Friday, September 23, 2005, in Wichita. An invitation for this event will be sent in the near future.

At the Dinner, the KBF will present its Robert K. Weary Award, which recognizes exemplary service to the Foundation, as well as make several very important announcements. Thus, all Fellows are encouraged to attend for what promises to be a very special evening.

THE JOURNAL OF THE KANSAS BAR ASSOCIATION
Learning Kansas Geography Poses Special Challenges for my Children

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

I have lived in Johnson County for 20 years. But Barton County is really home – Great Bend to be precise. And as long as my dad and two brothers live and practice law there, that won’t change. So I have a close affinity for Western Kansas. I have learned that most of the people from Kansas City – particularly Johnson County – are, like me, transplants from some other part of the world. This has made one question quite popular and sooner or later, people ask: “Where ya from?” Ninety-eight percent of the time this is one of those “filler questions” strangers ask because they already mentioned the weather and the Chiefs’ latest loss. And 99 percent of the time they really don’t care about your reply. Until you give it.

At that point, they get the chance to show how smart they really are. They stick their neck out and pretend to spout off some level of sophistication about Kansas geography. To them, it’s I-70 with a couple rest stops between here and Limon. They ask, “Which part?” I make it easy on them. “Central Kansas. Near Salina.” As soon as those words roll off my lips, they go blank. Their eyes glaze over. You hear an ocean roar near their ears. To them, Salina sounds like something they ate at the Carlos O’Kelly’s condiment bar last night. Their mind eventually returns to this planet and they declare, confidently, “Sure. Near Wichita, right?” To non-natives, Wichita is the most popular guess. “Yeah, that’s right.” And then I look for the nearest exit, fire alarm, or men’s restroom.

No sooner do I bemoan the geographical inadequacies of Eastern Kansans, I encounter the same confusion from my friends from Great Bend. They know Central and West but don’t know jack about the East. They can’t sort Shawnee from Shawnee Mission from Mission to Mission Hills, Westwood from Westwood Hills, or Prairie Village from Prairie View. To them, Johnson County is either Overland Park or Olathe.

So all of this confusion has bothered me a bit, in case you couldn’t tell. Since I’m one of those sentimental Kansas guys who tears up at the sight of the Kansas flag, I want my four children to break the mold. I want them to know both ends of this great state and be able to intelligently converse with strangers no matter where they are from. As long as it’s about Kansas, of course. No one should care about Missouri, obviously. I want them to know that Wichita County does not include Wichita, and Johnson County does not include Johnson City. Chase is not in Chase County, and Quivira Lake and Quivira refuge are separated by 270 miles. Hays and Haysville are nowhere close.

That Kansas has a fondness for five saints: St. Francis, St. George, St. John, St. Marys, and St. Paul. All fine cities with lots of holy people.

They must understand that you can travel to Columbus, Minneapolis, Nashville, Plains, Pittsburgh, Sun City, Tampa, and Syracuse in one day in one car. Where you can visit Zurich, Moscow, and Frankfurt without needing a passport. I want them to remember that my mom grew up in Kingman and my dad in Seward, and that they were married in Wichita. East Wichita, to be exact on December 19, 1943.

In the course of a couple thousand road trips to see my brothers in Great Bend, my sister in Wichita, or frequent trips to Colorado, I’ve filled the role as full-time tour director. I have yelled to them, for example, on Highway 150, that Strong City had two world champion rodeo riders in the early 1900s. Along I-70 I tell them that the Garden of Eden is really in Lucas. “Adam and Eve were from Kansas” they marveled. That Hays is where they filmed “Paper Moon,” circa 1973. That “In Cold Blood” has a scene filmed at the A&W in Great Bend. Never mind that now it’s a Chinese restaurant. I tell them that movie starred Robert Blake back when he played a murder suspect instead of actually being one. Most of the time when I play tour guide I’m lucky to get a grunt in return, if not complete silence, but that does not deter me one bit. I’m making progress.

My dad told me it’s better to light one candle than to curse the darkness. He’s right. He told me that driving along I-70, I probably grunted in response.

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.
Get Ready for Vail!

By Eric Kraft, KBA Young Lawyers Section president

Last year at the KBA Annual Meeting in Topeka, there were times when I felt as though I was the only young lawyer in attendance. Although I know there were other young lawyers there, our numbers were nothing of which the Young Lawyers Section (YLS) should be proud. In fact, YLS attendance at the Annual Meeting has never been good at the five previous annual meetings I have attended.

The benefits of attendance seem to be missed by many but this small (but proud) group of young lawyers that accompany me to our Annual Meeting. This year will be different, and you can be a part of it.

In an effort to strengthen our section, as well as provide its members tangible benefits, the YLS has, for the first time, organized its own events for the KBA Annual Meeting, June 9-11, 2005, Vail, Colo. These include the usual welcome meeting/reception, which will be hosted at a local pub in Vail. However, this year, we are also organizing our own CLE and, more importantly, a social hour with the creme de la creme of attendees at the Annual Meeting. YLS attendees will be able to meet and visit with judges, presenters, the KBA Board of Governors, and other important people at the Annual Meeting, and we are bound and determined to make that happen. The only way you will miss out is by not attending.

You will also gain the ability to achieve all of your required CLE in Vail. Our CLE Committee has organized a great track of YLS-specific CLE on topics that are important to you. These topics are outlined in the open letter on the facing page. Tear this letter out and stick it under the door of the managing partner of your firm. Better yet, walk into their office and request approval to attend. I have been a lawyer long enough to know that your managing partner will not ask you to go to a meeting and spend their firm’s money. You must ASK to go. I can guarantee that you will not go if you do not express an interest in going.

I can hear you now, “Sure, Eric, but that’s easier said than done. The managing partner at my firm is notoriously prickly, especially when you are asking to go on what they may believe is a ‘boondoggle’ to Vail on his dime.” I would suggest that there are some judges that are the same way (none that I frequent, of course), but you still must try to convince that judge to side with you from time to time. Treat that managing partner the same way. Prove to them that attending the Annual Meeting is good for the firm, good for you, and good for your future as a lawyer. If you need ammunition for that argument, let me know.

If they still refuse, tell them to call me — I will personally educate them on the benefits of attending (for both of you). You will return refreshed, renewed, happier, and in full compliance with your CLE requirements. You will also meet more people that can help your career than you will imagine. It’s a great value and a wonderful networking opportunity!

The YLS will also elect new officers at the Annual Meeting. Only two positions have already been taken: I will become your past president, and Paul Davis will take the reins as president. All other positions are still up for grabs. The YLS nominating committee continues to take nominations for the following positions:

- President-elect,
- Secretary/Treasurer,
- Kansas Bar Foundation Liaison,
- CLE Chair,
- Social Chair,
- Membership Chair,
- Public Service Chair,
- Publications Chair,
- Legislative Chair, and
- Law School Liaisons (two positions open).

Each of these positions is an integral part of the YLS. Members may nominate themselves or any other member for these positions until May 31, 2005. (We even take nominations from those of you who have aged out, though you cannot nominate yourself anymore.) The form for doing so can be found at our Web site, www.ksbar.org/yls/nomination.htm. Please consider nominating yourself or someone deserving of and interested in one of these positions.

Annual Meeting promises to be a great opportunity for all young lawyers in the state to network, learn, and socialize with other attorneys, all in a beautiful setting. You will not regret going. As for those prickly managing partners, bring them along, and we’ll see to it that even they can have fun.

I look forward to seeing you in Vail! ■

Eric Kraft may be reached by phone at (913) 498-3536 or by e-mail at ekraft@kc-dsdlaw.com.
Open Letter to all KBA Members

May 2005

Re: Kansas Bar Association Annual Meeting – June 9-11, 2005

Dear KBA Member:

Are you aware that this year's KBA Annual Meeting is rapidly approaching? The meeting will be held from June 9-11 at the beautiful Vail Cascade Resort & Spa in Colorado. Being intimately involved in planning for this event, I know that it will be a wonderful affair, and I encourage you to attend. My purpose for this letter, however, is to ask you to encourage young attorneys in your office to attend as well.

I presently serve as the president of the KBA Young Lawyers Section. During my term, my focus has been to increase the benefits we provide to young attorneys across the state. With that in mind, the YLS has arranged for a special track of programming specifically designed for newer attorneys. As such, young lawyers will be able to fulfill their CLE requirements for the entire year! Some of the planned topics include:

- Basic Estate Planning
- Handling the Basic Divorce
- Handling Workers’ Comp Cases
- Surviving Mechanic’s Liens
- Legal Ethics
- The Basics of Mediation
- Technology in the Law
- Law Office Management

By encouraging your associates to attend, they will be able to connect with attorneys and judges from across the state, and your firm will undoubtedly benefit from this increased exposure.

I truly appreciate your help in making this annual meeting one to remember for the YLS. If you have any questions, please do not hesitate to contact me. I may be reached at (913) 498-3536 or by e-mail at ekraft@kc-dsdlaw.com.

See you in Vail!

Sincerely,

KANSAS BAR ASSOCIATION

Eric G. Kraft
Young Lawyers Section president
LAW STUDENTS’ CORNER

It is Time for Legal Education to Prepare Law Students for Law Practice

By Stefanie M. Benson, Washburn University School of Law

As a second-year law student who is likely to be representing real clients in a little more than a year, I am fearful that I will not be adequately prepared for the responsibility. Law students are told that law school is supposed to teach us how to think like lawyers. But who will teach us how to act like lawyers?

I have learned a lot about the law. I can intelligently discuss why it is unconstitutional to forbid same-sex couples to marry, how taxes are structured to help the wealthy, and whether Jennifer Lopez should have returned her engagement ring to Ben Affleck. What I cannot do is interact with clients, attorneys, and the courts, or write legal documents other than memos and briefs. When I discuss my concerns with lawyers and professors, they generally respond, “Well, this is how it’s always been. Lawyers know law students don’t know what they’re doing when they graduate.”

But why should law school graduates continue to be unprepared to practice law after spending three years and a whole lot of money learning how to be lawyers? I think it is a systemic problem that involves the American Bar Association (ABA), law schools, and the culture and history of the law.

The ABA accreditation standards promote an academic rather than practical focus for legal education. For professors, research and scholarship are emphasized as much as teaching skills. For students, the ABA regulates the amount of classroom time and limits the hours students can work. By forcing students to spend more time learning to think like lawyers, the ABA effectively limits the time available for learning to act like lawyers.

Law schools are hesitant to change because they must balance a number of factors to remain competitive. First, they must follow ABA accreditation guidelines, which do not encourage innovative ways to prepare students to practice. Second, publicized rankings of law schools often rely on non-academic factors. While law schools strive to improve legal education, many factors impede significant headway.

Finally, the history and culture of the legal system must share responsibility for the problems with legal education. The American legal system originates in the common law. As we all learned on our first day of law school, stare decisis give our legal system stability. However, it also defends the status quo. “If it ain’t broke, don’t fix it. And if it is broke and you try to fix it, we’ll call you an ‘activist’ and shun you.” Law schools are subject to this culture, and it is one reason they are reluctant to veer too far from the fray.

Fortunately, improvements are underway. Many law schools now have clinics modeled after law firms, which give students the opportunity to represent real clients. Washburn has an excellent clinic program; however, it is not required for graduation and enrollment is limited. Research and writing programs are also evolving. Washburn is finally offering more writing and drafting electives, but in a very limited capacity. Washburn is also growing its advocacy program, but again those courses are not required and enrollment is generally limited.

While definitely an improvement, these small steps forward do not come close to addressing law schools’ failure to adequately prepare graduates to represent clients. Therefore, I propose a major overhaul of legal education to follow along the lines of medical education. Law school should be limited to two years of coursework, followed by one year of real-world practice experience, and then the bar exam.

The first year curriculum could continue to focus on foundation classes as it does now. The second year should be all electives, taught in intensive one-week classes. This approach would allow students to take a greater variety of courses that focus only on truly important material. Unless assessment methods can be developed to reflect how a student will perform as an attorney, all course grades should be pass/fail. A passing grade should indicate that a student actually knows enough about the course content to adequately represent a client. If classes were graded this way, law firms could focus on hiring criteria such as recommendations and writing samples, rather than traditional grades that indicate little about a student’s competence to practice law.

The two years of coursework should be followed by one year of real-life practice experience in an externship or clinic setting. This would give students experience interacting with clients, attorneys, and courts, along with experience writing legal documents. Then students should be required to take a modified bar exam covering general legal principles as well as a specialized area of certification.

This type of overhaul would resolve many issues long inherent in legal education. First, students would learn about a greater variety of practice areas after learning to think like lawyers during their first year. Second, a practical approach to legal education would instill greater public confidence that attorneys are well trained. Finally, law students would gain the real-world experience necessary to confidently and effectively practice law at the time they graduate.

About the Author

Stefanie M. Benson, Shawnee, Kan., is a second-year student and a member of the Washburn Law Journal. She received her B.S. in psychology and human and organizational development from Vanderbilt University. Before law school, Benson was employed as a business operations manager for an Internet start-up company in California and as a preschool teacher in Overland Park. She plans to practice in the area of family law.
CHANGING POSITIONS

Michael P. Alley and Peter S. Johnston have become shareholders with Clark, Mize and Linville Chtl., Salina.

David Barnard, Allison Bergman, Gail Edson Halterman, Kenton Snow, and David Zeiler, all of Kansas City, Mo., have become partners with Lathrop and Gage L.C.; Allen J. Poppin, Kansas City, Mo., has joined the firm; and Andrew Ramírez, Overland Park, has been named chairman of the firm’s Health Care Department.

Patricia Voth Blankenship, Karl Hesse, Michael Norton, and Scott Palecki, all of Wichita, have become partners with Foulston Siefkin LLP. Kyle J. Steadman, Wichita, has joined the firm as special counsel.

Heather Counts, Kansas City, Mo., is now with Heart of America United Way.

Matthew R. Crimmins, Kansas City, Mo., has joined Watters Bender Strohbehn and Vaughan P.C.

Kelli R. Curry has joined the Kansas City, Mo., office of Shook Hardy and Bacon LLP.

Denise K. Drake has been named chair of the Spencer Fane Britt and Brown labor and employment practice group in Kansas City, Mo.

Jeffery Evans, Topeka, has joined the Kansas County of Appeals Central Research Department.

Clayton T. Fielder, Kansas City, Mo., has joined Baty Holm and Numrich P.C.

Brian R. Hazel has joined South and Associates P.C. in Kansas City, Mo.

Marty T. Jackson and Gary A. Schaferman, both of Overland Park, have been elected shareholders and directors of Wallace, Saunders, Austin, Brown and Enochs Chtl.

Mark R. Johnson, Kansas City, Mo., has joined Wagoner Bankruptcy Group P.C.

Sara J. Kagay has joined Vedder, Price, Kaufman and Kammholz P.C. in Chicago.

Larry A. Kleeman, Wichita, has joined Gold Capital Management Inc.

Erik Klinkenberg has joined Lewis Rice and Fingersh L.C. as an associate attorney in Kansas City, Mo.

Kenneth R. Lang has become the managing partner of the Wichita office of Cozen O’Connor.

Nathan D. Leadstrom, Topeka, has become a partner with Goodell, Stratton, Edmonds and Palmer LLP. Theresa L. Rhodd, Circleville, and Blake E. Vande Garde, Olathe, have also joined the firm as associate attorneys.

Mark A. Litter, Joplin, Mo., has joined Warren Fisher Lee and Brown LLC.

James R. Lloyd II, Kansas City, Mo., has joined Seigfried Bingham Levy Selzer and Gee P.C.

Diana L. Maier, Wichita, has joined Hinkle Elkouri Law Firm L.L.C.

Christopher J. Masoner, Kansas City, Mo., has joined Blackwell Sanders Peper Martin LLP.

Otis W. Morrow, Arkansas City, Kan., has joined Home National Bank.

Melody L. Nashan, Kansas City, Mo., has joined Van Osdig Maugruder Erickson and Redmond P.C. as an associate.

Joshua A. Pollak, Wichita, has joined Biggs Willkerson L.C. as an associate attorney.

John E. Rapp, Wichita, has joined the Hulnick Law Offices P.C.

David Schatz, Kansas City, Mo., has joined Husch and Eppenberger LLC’s general business litigation group.

Constance L. Shidler, Overland Park, has joined Smithyman and Zakoura Chtl.

Dawn S. Wake, Augusta, Kan., has joined Learjet Inc.

CHANGING PLACES

G. Gordon Atcheson has formed The Atcheson Law Office, 4800 Rainbow Blvd., Ste. 6, Westwood, KS 66205.

Lance W. Behnke has a new business address, 925 4th Ave., Ste. 2900, Seattle, WA 98104-1158.

Bennett and Bodine P.A., formed by Kevin Bennett and Mark Bodine, is located at 11125 Johnson Dr., Shawnee, KS 66203.

Howard E. Bodney Chtl. has moved to Mark I Building, 10100 W. 87th St., Ste. 210, Overland Park, KS 66212-4628.

The Law Offices of R.E. Duncan have moved to 212 S.W. 8th Ave., Ste. 202, Topeka, KS 66603.


Hornbaker, Altenhofen, McCulley and Alt have moved to 117 W. 8th St., Junction City, KS 66441.

Christopher P. Lawson has formed Lawson Law Office LLC, 5330 Gleason Road, Shawnee, KS 66226.

Tamara L. Niles has formed The Law Firm of Tamara L. Niles, 125 W. 5th Ave, Arkansas City, KS 67005. She has also become city attorney for Arkansas City.

Ralls Law Firm LLC has moved to 4740 Grand, Ste. 200, Kansas City, MO 64112.

Harold F. Schorn II has moved to 713 N. Main, Newton, KS 67114.

Rachel E. Smith and Brett C. Coonrod have formed Smith/Coonrod LLC, 7500 College Blvd., Ste. 900, Overland Park, KS 66210.

MISCELLANEOUS

Peter J. Ramírez, Garden City, has been named a municipal court judge.

Joseph Robb, Newton, has been elected president of the Harvey County Bar Association.

Correction: In the April 2005 issue of the Journal, it was reported that Thomas E. Beall had joined a new firm. The name Mudrick was left out of the firm name, Wright, Henson, Clark, Hutton, Mudrick and Gragson LLP, Topeka.

Correction: In the April 2005 issue of the Journal, it was reported that David A. Williams had joined Covenant Legal Services in Olathe. It should have read Daniel A. Williams.

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.

Dan’s Cartoon by Dan Rosandich
William B. “Bill” Buechel

William B. “Bill” Buechel, 78, Salina, died Feb. 24. He was born July 27, 1926, in Wichita to Donald William and Bonnie S. Priddy Buechel.

He graduated from the University of Kansas with a B.S. in 1951 and a J.D. in 1954. He married Theresa Marie Girard on Nov. 3, 1955.

He was a lifetime member of the Kansas Bar Association, serving on the Executive Council, which is now the Board of Governors, from 1966 to 1968 and as chairman of the Advisory Section on Professional Ethics Committee from 1974 to 1976.

Buechel opened a law office in Concordia and later formed the partnership of Baldwin, Paulsen, Gibson and Buechel. The law office later changed to Buechel, Swenson, Uri and Brewer Chtl., where he was a senior partner. He practiced law for 38 years in Concordia, focusing on the areas of probate, estate taxation, and estate planning. He served as president of the Cloud County Bar Association and was a member of the American Bar Association. He served as municipal judge, assistant city attorney, and city attorney for Concordia.

He served on the Board of Directors of the Cloud County Bank and Trust and was a member of the Advisory Committee for the Children’s Trust. He was a member of the Administrative Trust Committee at the Citizens National Bank, a member of the Cloud County Community College Foundation, and was a member and past president of the Rotary Club.

Survivors include his wife and two daughters, Sarah, Woodinville, Wash., and Julia Marino, Dayton, Ohio. His parents preceded him in death.

Robert M. Landman

Robert M. Landman, 57, Kansas City, Mo., died Feb. 17 at his home after battling Amyotrophic Lateral Sclerosis (ALS), often referred to as “Lou Gehrig’s disease.”

Born in Hutchinson, Landman graduated from the College of Wooster, Wooster, Ohio, in 1969. As a member of Volunteers In Service To America in California, he began to realize his lifelong interest in public service and law. After graduating in 1973 from the University of Kansas School of Law, he worked with the Legal Aid Society. He focused on the financial service and real estate part of law, most recently at Spencer, Fane, Britt and Brown LLP.

Landman became a member of the Kansas Bar Association in 1974. He served as past chairman of the Kansas City Metropolitan Bar Association Real Estate Committee.

Survivors include his wife, Faye; two daughters, Molly and Kyle; and his mother, Dorothy. His father, Lee, preceded him in death.

John B. Markham

John B. Markham, 95, Parsons, died Feb. 21. He was born Sept. 10, 1909, to Dr. H.C. Markham and Rhoda M. (Bartlett) Markham. He was a lifelong Parson resident and attended local schools.

He attended the University of Kansas from 1927 to 1933, earning both his bachelor’s and law degrees. In 1933, he established his law practice in Parsons and worked at that profession continuously until recent years. Through the years, he was a solo practitioner; a partner with the firm of Columbia, Markham and Smith; a partner with his son, David; and a member of the firm of Dearth Markham and Jack Chtl.

In 2003, the Kansas Bar Association honored him with a 70-year membership pin. He served as a member of the Kansas House of Representatives from 1941 to 1945. From 1945 to 1946 he was Labette County Attorney and from 1969 to 1984 he served as a U.S. magistrate judge.

Markham had been a member of the Parsons Rotary Club since 1946 and served as its president. He was a member of the Parsons Lodge No. 117 and A.F. and A.M. He had been director of the Commercial Bank since Jan. 1, 1944, and was recently named director emeritus.

He married Lucille Kelley on Oct. 7, 1939. She preceded him in death.

Survivors include one son, David, Parsons; and one daughter, Carol Stoddard, Swampscott, Mass.

Fred Tiffany Wilkin Jr.

Fred Tiffany Wilkin Jr., 83, died Feb. 12 in Independence. Wilkin was born Nov. 14, 1921, in Independence, the son of Grace McClelland and Fred Wilkin Sr.

He attended Independence Community College for two years and entered Washburn University in 1941. In February 1942 he enlisted in the U.S. Navy and was commissioned a second lieutenant.

During World War II, Wilkin served aboard the USS Pinto and participated in many of the major battles, including D-Day, Anzio, and the landings in North Africa and Sicily. After World War II, he returned to school and graduated from Washburn University School of Law in 1947.

He moved back to Independence in 1947 and partnered with his father in The Security Abstract Co., the family business since 1907. He remained with the company until his retirement in 1986.

Wilkin became a lifetime member of the KBA in 2003. He was the senior member of the Independence Rotary Club and was an active participant for 58 years, where he served as president. He was a founding member and past president of Dry Holes Investment Club, was past president of the Independence Chamber of Commerce, and past president of the Kansas Land Title Association.

Survivors include his three children, Stephen Wilkin and Ann Crow, both of Independence, and Barbara Shepard, Coffeyville. His wife of 60 years, Barbara Mary Johnson, preceded him in death in 2004. At the time of his death, he was engaged to Virginia Hedquist, Independence.

---

**Obituaries**

**William B. “Bill” Buechel**

William B. “Bill” Buechel, 78, Salina, died Feb. 24. He was born July 27, 1926, in Wichita to Donald William and Bonnie S. Priddy Buechel.

He graduated from the University of Kansas with a B.S. in 1951 and a J.D. in 1954. He married Theresa Marie Girard on Nov. 3, 1955.

He was a lifetime member of the Kansas Bar Association, serving on the Executive Council, which is now the Board of Governors, from 1966 to 1968 and as chairman of the Advisory Section on Professional Ethics Committee from 1974 to 1976.

Buechel opened a law office in Concordia and later formed the partnership of Baldwin, Paulsen, Gibson and Buechel. The law office later changed to Buechel, Swenson, Uri and Brewer Chtl., where he was a senior partner. He practiced law for 38 years in Concordia, focusing on the areas of probate, estate taxation, and estate planning. He served as president of the Cloud County Bar Association and was a member of the American Bar Association. He served as municipal judge, assistant city attorney, and city attorney for Concordia.

He served on the Board of Directors of the Cloud County Bank and Trust and was a member of the Advisory Committee for the Children’s Trust. He was a member of the Administrative Trust Committee at the Citizens National Bank, a member of the Cloud County Community College Foundation, and was a member and past president of the Rotary Club.

Survivors include his wife and two daughters, Sarah, Woodinville, Wash., and Julia Marino, Dayton, Ohio. His parents preceded him in death.

**Robert M. Landman**

Robert M. Landman, 57, Kansas City, Mo., died Feb. 17 at his home after battling Amyotrophic Lateral Sclerosis (ALS), often referred to as “Lou Gehrig’s disease.”

Born in Hutchinson, Landman graduated from the College of Wooster, Wooster, Ohio, in 1969. As a member of Volunteers In Service To America in California, he began to realize his lifelong interest in public service and law. After graduating in 1973 from the University of Kansas School of Law, he worked with the Legal Aid Society. He focused on the financial service and real estate part of law, most recently at Spencer, Fane, Britt and Brown LLP.

Landman became a member of the Kansas Bar Association in 1974. He served as past chairman of the Kansas City Metropolitan Bar Association Real Estate Committee.

Survivors include his wife, Faye; two daughters, Molly and Kyle; and his mother, Dorothy. His father, Lee, preceded him in death.

**John B. Markham**

John B. Markham, 95, Parsons, died Feb. 21. He was born Sept. 10, 1909, to Dr. H.C. Markham and Rhoda M. (Bartlett) Markham. He was a lifelong Parson resident and attended local schools.

He attended the University of Kansas from 1927 to 1933, earning both his bachelor’s and law degrees. In 1933, he established his law practice in Parsons and worked at that profession continuously until recent years. Through the years, he was a solo practitioner; a partner with the firm of Columbia, Markham and Smith; a partner with his son, David; and a member of the firm of Dearth Markham and Jack Chtl.

In 2003, the Kansas Bar Association honored him with a 70-year membership pin. He served as a member of the Kansas House of Representatives from 1941 to 1945. From 1945 to 1946 he was Labette County Attorney and from 1969 to 1984 he served as a U.S. magistrate judge.

Markham had been a member of the Parsons Rotary Club since 1946 and served as its president. He was a member of the Parsons Lodge No. 117 and A.F. and A.M. He had been director of the Commercial Bank since Jan. 1, 1944, and was recently named director emeritus.

He married Lucille Kelley on Oct. 7, 1939. She preceded him in death.

Survivors include one son, David, Parsons; and one daughter, Carol Stoddard, Swampscott, Mass.

**Fred Tiffany Wilkin Jr.**

Fred Tiffany Wilkin Jr., 83, died Feb. 12 in Independence. Wilkin was born Nov. 14, 1921, in Independence, the son of Grace McClelland and Fred Wilkin Sr.

He attended Independence Community College for two years and entered Washburn University in 1941. In February 1942 he enlisted in the U.S. Navy and was commissioned a second lieutenant.

During World War II, Wilkin served aboard the USS Pinto and participated in many of the major battles, including D-Day, Anzio, and the landings in North Africa and Sicily. After World War II, he returned to school and graduated from Washburn University School of Law in 1947.

He moved back to Independence in 1947 and partnered with his father in The Security Abstract Co., the family business since 1907. He remained with the company until his retirement in 1986.

Wilkin became a lifetime member of the KBA in 2003. He was the senior member of the Independence Rotary Club and was an active participant for 58 years, where he served as president. He was a founding member and past president of Dry Holes Investment Club, was past president of the Independence Chamber of Commerce, and past president of the Kansas Land Title Association.

Survivors include his three children, Stephen Wilkin and Ann Crow, both of Independence, and Barbara Shepard, Coffeyville. His wife of 60 years, Barbara Mary Johnson, preceded him in death in 2004. At the time of his death, he was engaged to Virginia Hedquist, Independence.
Welcome Spring 2005 Admittees to the Kansas Bar

Lindsay Dolce Aaron
Jeremy Craig Adest
Zachary Jon Christopher Anshutz
Pamela DeRousse Asjes
Susan Buche Ayers
Marcos Antonio Barbosa
Robert Matthew Berland
Adam Keith Berman
Milan Christopher Berry
Wade Hampton Bowie II
Shenna Marie Bradshaw
John Lawrence Branum
Amy Bree Broockerd
Franklyn Ross Carella
Brian Robinson Carman
Elizabeth Amanda Caskey
Lynda Allene Cleveland
Moria Ann Coker
Colleen Ivy Collette
Kimberly Wiggans Corum
Robert Anthony Costello
Jana Diane Croft
Steven Joseph Crossland
Judd Matthew Davis
Erin Marie Dedrickson
Bryan J. Didier
Anjali Bajaj Dooley
Kristina Susan Drake
Lynda Allene Cleveland
Colleen Ivy Collette
Kimberly Wiggans Corum
Robert Anthony Costello
Jana Diane Croft
Steven Joseph Crossland
Judd Matthew Davis
Erin Marie Dedrickson
Bryan J. Didier
Anjali Bajaj Dooley
Kristina Susan Drake
Lynda Allene Cleveland
Nathan J. Owings
Jerome Michael Patience
Joshua Paul Perkins
John Gage Peryam
Scott David Peterson
Laurie Lynn Pickle
Nicholas Joseph Porto
John F. Preis
Jason Barrett Prier
Joe Lowell Ramboldt
Megan Joanna Redmond
Charles Arthur Rikli
Kevin Wayne Robinett
Bridget Birkby Romero
Landon Reed Roth
Sharon Kay Russo
Aram Sadeghi
Kip Conrad Sagehorn
Don Paul Saxton
Elizabeth Christine Schleicher
Travis Paul Schmeling
Emily Reyne Schutte
Jennifer Elizabeth Shafer
Kris Kimberly Shaffer
John Richard Shotts
Meaghan Elizabeth Shultz
Keith M. Singleton
Linda Lee Small
J Thomas Smith
Seamus Patrick Smith
Clayton Eli Soule
Phonesyvanh Sounakhen
Rebecca Marie Sourk
Jordon Tait Stanley
Jacob William Stauffer
Randy Edward Stookey
Christopher Spence Stover
Robert Michael Supper
Jason Patrick Talley
Billie Jo Taylor
Charles William Thomas
Sarah Anne Thompson
Sheila Diane Verduzco
Nicholas James Walker
Charlene Ballaro Wright
Matthew Dean Wright
Emily Margaret Yeretsky
Judy Yi
Jonathan Neal Zerger
Brian Jeffrey Zickefoose
Allen Todd Zugelter
Testing the Waters of Kansas Mechanic’s Liens
By Eric G. Kraft

Kansas appellate courts recently issued several substantive rulings that examined novel issues pertaining to Kansas mechanic’s liens. Largely an area of law that remains under-examined by our appellate courts, and misunderstood by many more, mechanic’s liens can be a powerful tool to collect debt. However, mechanics’ liens are notoriously tricky; one small drafting mistake can conceivably invalidate the entire lien by preventing its attachment to the property. Consequently, practitioners find the process of drafting liens frustrating because court cases seem to provide little concrete guidance in an area requiring perfection — in more ways than one.

In the past few years, Kansas appellate courts have examined several specific areas of Kansas mechanics lien laws and, in the process, have provided some guidance to practitioners. At the same time, the courts’ decisions have also muddied waters once thought to be clear, creating some doubts about the validity and priority of liens. The purpose of this article is to examine the lessons of the courts’ recent decisions and also to explore those questions.

I. Reversal of Fortune: Is Visibility of Work no Longer a Consideration?

The Kansas mechanic’s lien statute, K.S.A. 60-1101, provides any contractors who furnish:

“labor, equipment, material, or supplies used or consumed for the improvement of real property, under contract with the owner or with the trustee, agent, or spouse of the owner, shall have a lien upon the property for the labor, equipment, material, or supplies furnished, and for the cost of transporting the same.”

Subcontractors who provide similar services or materials may also file liens upon property but may do so only if they contracted directly with the contractor, rather than the owner of the property.

Pursuant to K.S.A. 60-1101, any “labor, equipment, material, or supplies used or consumed for the improvement of real property” may be lienable. However, this definition does not define or qualify improvements to property required for the lien statute to take effect. In dealing with the question of the quality of the improvement necessary to constitute lienable work, the Kansas Supreme Court, in the 1996 opinion of Haz-Mat Response, Inc. v. Certified Waste Services, Ltd., stated the phrase “improvement of real property” was defined as:

FOOTNOTES
A valuable addition made to real property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty, or utility or to adapt it for new or further purposes.6

The court also devised a seven-part test to determine whether an activity improves real property: (1) considerations must be made on a case-by-case basis; (2) it does not require the actual construction of a physical improvement; (3) it need not be visible, though most often it is; (4) it must enhance the value of the property, though it need not enhance its selling value; (5) the products or labor must become part of the real property; (6) the purpose of the activity outweights the nature of the activity; and (7) whether the activity is part of an overall plan to improve the value of the property.7

The case-by-case criteria in Haz-Mat does not resolve the definitional issues of an “improvement” as the term is used in K.S.A. 60-1101, but, instead, leaves it open to interpretation. In 1990, previous to Haz-Mat, the Court of Appeals, in Mark Twain Kansas City Bank v. Kroh Bros. Development Co.,8 specified that nonvisible work performed on real estate was not lienable and, in order to become lienable, the present lien statute would have to be amended.9 The Haz-Mat criteria retreated from this unequivocal statement, simply providing that an improvement need not be visible to be lienable, though in most cases it would be.10 In Mutual Sav. Assoc. v. Res/Com Properties, L.L.C.,11 the Kansas Court of Appeals in 2003 seems to abandon this preference for visible improvements altogether.

In Mutual Savings, the parties argued whether an engineering firm perfected its mechanic’s lien prior to the recording of a mortgage on the real estate. In this dispute, the Court of Appeals first considered whether an engineering company’s preliminary staking and surveying of real estate was a lienable improvement under the definition of K.S.A. 60-1101. Using Haz-Mat’s criteria as a guideline, the court rightly found that the engineer’s activities were indeed lienable, but also stated:

“This record is silent as to whether stakes installed by Peridian were still on the property at the time Mutual’s mortgages were filed, but this is irrelevant under the Haz-Mat test.”12

With this statement, the court seems to completely disregard the third Haz-Mat element and instead states that the visibility of an improvement is irrelevant. As a result, Kansas appellate courts complete their reversal from the 1990 mandate in Mark Twain that calls for an amendment to the mechanic’s lien statute to create liens when the work is not visible.

II. Unpreferred Banking: When Unknown Improvements Become a Big Headache.

A. Everything new is old again.

Kansas mechanic’s liens are preferred similarly; that is, the statute provides that each lien claimant’s date of preference relates back to the date of the “earliest unsatisfied lien” of any lien claimant.13 Though a simple concept in principal, the courts have increasingly scrutinized the preference of a lien claimant to other encumbrances on real estate. Surprisingly, although the Legislature added the word “unsatisfied” to K.S.A. 60-1101 in 1977,14 the appellate courts never specifically discussed its application to lien preferences until 2003.

The Court of Appeals finally discussed the 1977 amendment in Davis Electric, Inc. v. Showalter.15 There, a bank sought the preference of its mortgage over that of a mechanic’s lienholder, an electrical contractor. The contractor began working on the project on June 21, 2000. The bank filed a mortgage on the property the following day, June 22, 2000. On Sept. 18, 2000, during the course of performance on its single, continuing contract with the owner of the property, the owner paid the contractor in full for all work and material furnished through Aug. 29, 2000.

The bank argued that the full payment of the contractor on Sept. 18, 2000, caused the contractor’s preference period to begin anew and thus caused the bank’s lien to be preferred over that of the contractor. This argument focused on the Legislature’s inclusion of the word “unsatisfied” in the lien statute. If the contractor had been fully satisfied, then he could no longer claim preference over the bank.16

6. 259 Kan. at 175-76 (quoting BLACKS LAW DICTIONARY. 757 (6th Ed. 1990)).
7. Id. at 175.
12. Id., 32 Kan. App. 2d at 56 (emphasis added).
The court found no guidance in the legislative history to the 1977 amendment. Speculation by the court concluded that the amendment was intended to preclude unpaid lienholders from claiming a priority date based upon the prior date of a fully paid lienholder. Regardless, the court stated the lien statute did not modify the priority date for a contractor "working under a single contract that has not been paid in full." Because the contractor had not completed the contract, was contractually obligated to do so, and had not been paid the remaining amount for its performance, the lien's preference period extended back to June 21, 2000, the first date of performance. Therefore, the bank was relegated to a secondary encumbrance on the property.

B. When is a satisfied lien unsatisfied?

Though the court speculated about the meaning of the Legislature's inclusion of "unsatisfied" to the preference requirements in Davis Electric, it apparently decided to completely disregard its hypothesis only nine months later. In Mutual Savings, the Court of Appeals again examined the priority of an unsatisfied mechanic's lienholder to that of a mortgage. There, an engineering firm, The Peridian Group (Peridian), began staking and surveying the subject property on May 22, 2000, prior to the filing of a mortgage by Mutual Savings Association (Mutual) on May 24, 2000. Subsequently, two subcontractors, LRM Industries Inc. (LRM) and Modern Engineering Utilities Co. Inc. (Modern), began making improvements on the real estate.

The engineering firm tasked with the initial surveying and staking of the project filed a mechanic's lien for that work on Oct. 26, 2000. LRM and Modern filed liens on Dec. 18, 2000, and Dec. 19, 2000, respectively. On March 15, 2001, Mutual paid Peridian in full and took an assignment of Peridian's lien. Res/Com then defaulted on the note and mortgage, and Mutual foreclosed on the property. The district court granted summary judgment on the foreclosure and determined that the liens held by LRM and Modern did not relate back to the date Peridian started its work on the property. Therefore, the bank's mortgage was preferred to these liens. LRM and Modern appealed this ruling.

LRM and Modern argued that K.S.A. 60-1103 required that all subcontractors' and general contractors' liens attach to the property at the same time. Therefore, all mechanic's liens related back to the date of Peridian's lien, even though it had since been fully satisfied. Mutual disagreed, stating that its satisfaction of Peridian's lien removed the capability of LRM and Modern to relate back to the start-date of Peridian's work. The court, in a complete reversal from the hypothesis it expressed in Davis Electric, disagreed with both parties: "The only way to harmonize [K.S.A. 60-1101 and 60-1103] is to hold that the date used to determine who was an unsatisfied lien holder for priority purposes, is the date when Mutual filed its mortgage from Res/Com. On the date Mutual filed its first mortgage securing the note from Res/Com, Peridian was an unsatisfied lien holder. As such, all contractors' and subcontractors' liens were perfected as of the date Peridian started work."

Because the court determined that the pivotal date to consider when determining the priority of a lien is the status of that lien on the date of a subsequent encumbrance, the language in K.S.A. 60-1101 requiring similar preferences to the date of the earliest unsatisfied lien holder loses much, if not all, of its meaning.

Banks and other mortgage holders should rightfully be worried about this decision. The court's ruling specifies that perfected lien holders whose liens have attached and are not satisfied will pre-empt a mortgage recorded after the commencement of work by a lien holder who was not satisfied on the recording date. More alarming than that revelation, however, is the court's determination that a lien holder has perfected its lien once it commences work on the property. Under this theory, a mortgage, deed of trust, or other encumbrance filed after the commencement of any work on the real estate cannot be prior to any mechanic's lien on the property if any of the potential lien-holders are unpaid at the time it records its encumbrance. This is true even if the prior work is not visible or is the subject of a continuing contract that has not yet been fully completed.

What the court in Mutual Savings does not address is whether the contractor or subcontractor needs to actually file a lien in order to become the

17. Id. at 320.
18. Id.
19. Id.
20. Id. at 321.
22. Id. at 64.
23. Id. at 63.
24. Id. at 65 (emphasis added).
25. Id. at 66.
26. Id.
27. Id.
28. Id. at 63.
starting date for all subsequent lien holders. Peridian, the lien holder in Mutual Savings, had filed a lien after Mutual recorded its mortgage. The court does not address whether this lien needed to have been filed, but does state that the lien “attached” to the property at the time of the subsequent encumbrance. It also states that the pivotal date upon which to establish priority is the date that a subsequent mortgage is filed. Therefore, the direct implication is that a perfected lien has attached to the property upon commencement of the work, but a lien may not have to be filed in order for subsequent lien holders to take advantage of the earlier commencement date for priority purposes.

C. Are waivers the answer?

In both Davis Electric and Mutual Savings, the court suggests that bankers wishing to protect their interests should obtain waivers from all potential lien claimants. However, since banks and lending institutions can no longer count on the visibility of the work to determine whether a potential lien claimant exists, they are left in the untenable situation of relying on their clients or underlying property owners to provide the names of any person who has performed work on the property.

Consider the possible scenario of an engineer, who preliminarily stakes out the footprint of a building and, due to oversight, is not timely paid. Due to further oversight, the mortgagee fails to tell the engineer about the survey company and the bank lends $1 million on the project. The engineer later files a lien and gets paid, but, on the date the bank recorded its mortgage, the engineer had not been paid. Subsequently, the project falls apart, the mortgagee files for bankruptcy protection and mechanics’ liens totaling $500,000 are filed against the property, which is still incomplete.

Under Davis Electric and Mutual Savings, the bank is left as a secondary creditor to every other mechanic’s lien claimant. The bank could proceed against the mortgagee who omitted the name of the engineer, but bankruptcy and the lack of an overtly wrongful act may preclude any recovery. The bank’s usual “gold standard” of security—a mortgage—fails and the bank loses a substantial part, if not all, of its investment in the project. This blind reliance on a client’s “good word” would be enough to unsettle the stomach of any good banker, and his or her attorney as well.

One practitioner suggests that the bank in this scenario obtain a subrogation agreement as well as a waiver. However, this also depends on the word of the bank’s client. Moreover, even if the subcontractor properly subrogates any interest it has in the property to the bank, that subrogation agreement may not affect subsequent subcontractors, who may be able to utilize the work of the earlier, now-subrogated, subcontractor to prioritize its lien ahead of a mortgage-holder with whom it has no such agreement.

III. Date of Last (Authorized) Performance?

Without a doubt, courts in Kansas have consistently held that, unless the procedure for filing a mechanic’s lien is strictly followed, no foreclosable lien actually attaches to the property. That procedure involves many, seemingly self-explanatory acts, each of which is supposedly designed to allow the property owner to ascertain that the materials or services were actually furnished and the charges fair. One of these crucial facts, without which there is no lien, is the date on which the lienor last performed on the property.

The date of last performance has long been the benchmark to determine the timeliness of a mechanic’s lien. However, the date of last performance may not actually be the last date that any services are performed by the prospective lienor. For example, the date of last performance cannot be extended by gratuitous services that are beyond the scope of the original contract. In Crème de la Crème Inc. v. R & R Int’l Inc., the Kansas Court of Appeals recently expanded the concept of “gratuitous work.”

The court in Crème de la Crème considered two questions related to gratuitous work and the extension of the last date of performance. The first question involved a subcontractor performing services that were not contained in its contract or in a written change order, but was alleged to have been incidental to the performance of its written contract. The owner of the property and an employee of the subcontractor each testified that the work was not part of the original contract and no change order was completed. The subcontractor’s president, however, testified that the work was included in the original contract and was necessary to the completion of the work, which it was hired to do. The court, in the face of this conflicting testimony, correctly concluded that the work was gratuitous in stating:

31. Repeated oversight is not as unlikely a scenario as one might think in this situation.
32. The failure to disclose the existence of the engineer was “inadvertent” in this hypothetical.
36. 32 Kan. App. 2d at 490.
37. Those claiming a mechanic’s lien have the burden of bringing themselves clearly within the provisions of the statute. Id. at 493.
"In the absence of a contractual mandate or work order to complete the subcontractor's work, we agree with the trial court that the tying in work was gratuitous and did not extend Alpine's time for filing a mechanic's lien."

This unequivocal statement seems to beg the question of whether work performed as a result of an oral contract can ever be the subject of a valid mechanic's lien.

The judicial exclusion of oral contracts from mechanic's liens seems to be affirmed by the court's consideration of the second question in Crème de la Crème. In this instance, the owner of the property, the contractor, and the subcontractor all agreed that the owner orally requested the subcontractor to perform additional work. However, when the subcontractor attempted to enforce its lien for this work, the court denied the work's applicability under K.S.A. 60-1101:

"Under K.S.A. 60-1101, the work that is performed under the terms of a contract may be subject to a mechanic's lien. The work performed in the instant case was not part of the original contract, nor was it reflected on a change order. Thus it cannot be the subject of a mechanic's lien."

As a result, the complete exclusion of oral agreements between parties from the protection of the mechanic's lien laws seems to be confirmed.

This undeniable exclusion should cause any seasoned construction attorney to pause. Oftentimes, the normal course of business for contractors is to do the work first and get the change order later so that the project is not delayed. Owners would be wise never to sign a change order, lest the order give rise to future liens. Likewise, contractors and subcontractors should obtain a signed change order for any change, no matter the size, prior to commencing the work. This policy ignores the manner in which construction projects are typically conducted and would cause many contractors' work to be outside of the protection of the statute.

The final lesson of Crème de la Crème involves the date of substantial completion. Without citation, the Court of Appeals concludes that "[w]hen a building is substantially complete and is accepted by the owner, the contractor cannot thereafter perform some omitted part of the contract and thereby extend the period of filing the lien." However, remedial work may extend the deadline for filing a lien, if it is performed pursuant to the original contract. Therefore, it seems that a contractor, when certifying that the work is substantially complete, had better ensure that all requested work is complete, not that it actually functions properly.

IV. Other Technicalities.

A. Watch your prepositions.

All mechanic's liens must be signed by a person with knowledge of the contents therein. If the lienor is a corporation, the signature and execution of the lien may be performed by some individual acting for and on behalf of the corporation. The apparent representative capacity necessary to validate a lien, however, was the subject of a recent Court of Appeals decision, Jankord v. Lin.

In Jankord, the mechanic's lien claimant, a corporation, had indicated its agent's representative capacity by inserting a slash between the name of the person signing the lien and the business for which the lien was asserted. As a result, the first line of the mechanic's lien read:

"Know all Men by this Statement: That Nicholas Thilges/Mead Building Centers of Manhattan, the undersigned, claims a lien ..."

At the signature line, the lien simply read "Nicholas J. Thilges." The owner of the property argued that the descriptive slash did not properly identify the representative capacity of the signatory to the lien, which is required when the lienor is a corporation or similarly-organized business entity. The lienor, however, argued that:

"[T]he law favors flexibility when determining the validity of a mechanic's lien and a reasonable person would conclude that Thilges signed the lien for Mead in his representative capacity."

The Court of Appeals concluded that the lienor had it backwards: the enforceability of a lien allows for some flexibility, the technical requirements of a lien must be strictly met.
Interestingly enough, the court also suggests that a mere two-word preposition may have saved this lien:

“In the instant case, no preposition, such as “for” or “by,” was used. Only Thilges’ name and the name of the corporation appear. Where there is nothing other than the name of the corporation appearing with an individual’s signature, there is insufficient evidence to show representative capacity. Also, a slash mark between an individual’s name and the name of the corporation is insufficient to show the individual’s representative capacity.”

As a result, the court affirmed the trial court’s granting of summary judgment in favor of the owner.

B. Itemization.

The Court of Appeals recently revisited the need to itemize a lien statement, but only to order the publication of its previously unpublished 1986 decision Huber v. DeSouza. In Huber, the Court of Appeals discusses the need to itemize a lien in order for the landowner to “ascertain whether the material was furnished and the charges fair” from the four corners of the lien itself. Under the old lien statute, the court had determined that the failure to separate labor cost from that of materials constituted “unreasonable itemization” enough to invalidate the lien. Later, the court determined that poor copy quality of the labor and material charges attached to the lien statement would not invalidate the lien, so long as “it was possible to determine that most of the materials were a type that would have been used in the work and the total charge on each invoice could be read.”

In Huber, the court provided three instructive statements. First, the mere attachment of the contract between the owner and the contractor to the lien would not serve as a substitute to the requirement that the amount of the lien be itemized. Second, the subsequent dealings of the owner and the contractor, which indicate a lack of misunderstanding or ambiguity to those parties, will not remedy a deficient itemization by supplementation. Third, the court clearly states, albeit in dicta, that the use of a written instrument as a substitute to the reasonably itemized statement will only work if the amount of the contract is precisely the amount sought by the lienor.

C. Intending to provide intent. In 2000, the Supreme Court interpreted the requirements of K.S.A. 60-1103b for the first time in Owen Lumber Co. v. Chartrand (Owen Lumber I). Under 1103b, the subcontractor wishing to file a mechanic’s lien on new residential construction may file a Notice of Intent (Notice). This Notice is intended to warn prospective purchasers of the property that it may be encumbered by a lien. This Notice is especially important when the property is likely to change ownership from the developer of the property to the ultimate buyer.

The question pending in Owen Lumber I is whether that Notice was required if the subcontractor filed its mechanic’s lien before the property transferred to the ultimate owner. The court determined that subcontractors are required to file a Notice of Intent only if required by 60-1103b. A careful reading of 60-1103b(b) showed that the Notice was only required if the subcontractor wished to attach the lien to the property “after the passage of title.” Thus, if the lien is filed before title is passed on new residential construction, a Notice is not required and its absence will not serve to defeat the lien.

D. Actual notice does not equal service.

After the court determined the notice requirements in Owen Lumber I, the Legislature amended K.S.A. 60-1103(c) on Dec. 8, 2000, to require that subcontractors serve notice to any persons holding a recorded equitable interest in residential real property. This amendment created another question in Owen Lumber Co. v. Chartrand (Owen Lumber II), where the court interpreted the specific amendment, which instructed:

“No action to foreclose any lien may proceed or be entered against residential real property in this state unless the holder of a recorded equitable interest was served with notice in accordance with the provisions of this subsection.”

(continued on next page)
Although the equitable owner of the property in *Owen Lumber II* had received actual notice of the lien and had knowledge of its contents, the Kansas Supreme Court ruled that the contractor had not complied with the strict requirements of mechanic’s liens.\(^67\) In order to comply, the owner of the recorded equitable interest must be served a copy of the lien, either by personal service or by restricted mail.\(^68\) Without that service, the lien could not be enforced against the holder of the equitable mortgage who, in this case, had ripened into the owner of the property itself.\(^69\) Thus, failure of service would effectively defeat the lien.

Contractors may justifiably believe that the strict interpretation of Kansas mechanic’s lien statutes unnecessarily works to defeat their potential lien before they even commence operations at the site. At the same time, banks and lending institutions fear that, once the liens attach, courts provide contractors too much protection and jeopardize their collateral. In either case, disputes relating to the perfection, attachment and priority of mechanic’s liens will likely continue.\(^70\) Despite these uncertainties, mechanic’s liens still provide contractors and suppliers a powerful and underutilized, tool to collect debt.

---

\(^67\) 276 Kan. at 230.

\(^68\) Id.

\(^69\) Due to the fact that the statute had changed after the foreclosure had been filed in *Owen Lumber I*, the Kansas Supreme Court allowed the subcontractor 60 days to serve its lien upon the holder of this equitable interest, who was now the owner of the property. *Id.* at 228.

\(^70\) The fallout from the *Mutual Savings* decision is evident in *Suitt Const. Co., Inc. v. Hill*, Findings of Fact, Conclusions of Law, and Journal Entry of Judgment (D. Ct. Cowley County, Kan., Case No. 02 C 185W, Dec. 30, 2004). In *Suitt*, Judge Lively held that *Mutual Savings* “upholds the rules established by the Kansas Legislature in 1972 that (1) commencement of work must occur at the site in order for a mechanic’s lien to attach and (2) mechanic’s lien priority can be no earlier than that date, regardless of the scope and nature of work previously performed.” *Id.* at p. 110. As a result, the court dashed Suitt’s determined effort to include off-site and nonvisible work and mental processes performed at the site to elevate the lien to a prior position than that of the mortgage on the property. *Id.* at 114-15. In doing so, Lively cleverly brought the holding in *Mutual Savings* in line with Kansas precedent. However, Suitt’s attorneys have filed a notice of appeal of this voluminous decision and the Court of Appeals will next grapple with the questions presented by their earlier decision in *Mutual Savings*.
eta: june 9-11, 2005
next stop: vail cascade resort & spa

annual meeting at-a-glance

thursday, june 9

<table>
<thead>
<tr>
<th>time</th>
<th>event</th>
</tr>
</thead>
<tbody>
<tr>
<td>10:30 a.m.</td>
<td>golf tournament @ eagle vail golf club</td>
</tr>
<tr>
<td>11 a.m.</td>
<td>sporting clays shoot</td>
</tr>
<tr>
<td>11 a.m.</td>
<td>tennis tournament</td>
</tr>
<tr>
<td>5 – 7 p.m.</td>
<td>welcome reception</td>
</tr>
<tr>
<td>5 – 7 p.m.</td>
<td>children's welcome reception</td>
</tr>
</tbody>
</table>

friday, june 10

<table>
<thead>
<tr>
<th>time</th>
<th>event</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 a.m.</td>
<td>sunrise cle</td>
</tr>
<tr>
<td>8:45 a.m.</td>
<td>president's welcome</td>
</tr>
<tr>
<td>9 a.m.</td>
<td>keynote address – jeffrey benz, general counsel, us olympic committee</td>
</tr>
<tr>
<td>10:15 a.m. – 5:10 p.m.</td>
<td>cle presentations</td>
</tr>
<tr>
<td>12:15 p.m.</td>
<td>awards luncheon</td>
</tr>
<tr>
<td>6 p.m.</td>
<td>president's reception: cocktails and hors d'oeuvres</td>
</tr>
<tr>
<td>7 p.m.</td>
<td>“changing of the guard” dinner banquet and ceremony</td>
</tr>
<tr>
<td>8:30 p.m. – midnight</td>
<td>“mixer and music” – meet the new board of governors and officers</td>
</tr>
</tbody>
</table>

saturday, june 11

<table>
<thead>
<tr>
<th>time</th>
<th>event</th>
</tr>
</thead>
<tbody>
<tr>
<td>6:45 a.m.</td>
<td>5k legal runaround @ vail cascade trail</td>
</tr>
<tr>
<td>7 a.m.</td>
<td>eggs &amp; issues membership forum breakfast</td>
</tr>
<tr>
<td>8 a.m.</td>
<td>board of trustees meeting</td>
</tr>
<tr>
<td>8:30 a.m. – 12:05 p.m.</td>
<td>cle presentations</td>
</tr>
<tr>
<td>9 a.m.</td>
<td>board of governors meeting</td>
</tr>
<tr>
<td>12:30 p.m.</td>
<td>law school luncheons</td>
</tr>
</tbody>
</table>

price of rooms (if reserved before may 17, 2005): $169 single/double occupancy
room reservations: call (800) 420-2424 or e-mail groupres@vailcascade.com
Take the Highway to Vail!

Are you longing for a summer vacation but know you must acquire your CLE credits by June 30th? Then join us for this year’s KBA Annual Meeting June 9 – 11 at the Vail Cascade Resort & Spa in Vail, Colo., and you can enjoy a family vacation while you fulfill your credit requirements! And if you already have your CLE credits for the year, you can carry over up to 10 credit hours to the next reporting year!

For a little more than the price of a regular CLE program, you will have the opportunity to obtain 12 credit hours, including 2 hours of professional responsibility credit, as well as enjoy all the social events, including:

• **Welcome Reception** – This casual event will be held “under the big top” outside the resort. Enjoy cocktails, bountiful hors d’oeuvres, and the beauty of the mountains while networking with old and new friends. While mom and dad socialize with the grownups, there will be a special children’s welcome reception with kid-friendly games and food!*  

• **President’s Reception** – All meeting attendees are invited to attend this black tie optional reception in honor of KBA President Mike Crow as he concludes his term in office.

• **“Changing of the Guard” Dinner Banquet & Ceremony** – This black tie optional event is open to all attendees and will be the showcase event of the year as President Crow passes his gavel on to incoming president Rich Hayse.

• **“Mixer & Music”** – After dinner, meet your new Board of Governors and Officers while enjoying the music of renowned jazz musician Kevin Mahogany.

• **Movie & Pizza Night For Kids** – While mom and dad are enjoying the President’s Reception, dinner, and music, the kids will be enjoying their own festivities, including games, movies, and food under the supervision of licensed childcare providers.*  

• **Eggs & Issues Membership Forum Breakfast** – Don’t let the fact that this event starts at 7 a.m. keep you from rising early! This casual breakfast buffet is a good opportunity to become acquainted with your new Board of Governors and other members over a full breakfast buffet and coffee.

**About Vail Cascade Resort & Spa**

Nestled at the base of Vail Mountain in the heart of the Rockies, Vail Cascade Resort & Spa is Vail’s premier 4-Diamond renaissance resort. The resort recently underwent a four-year, $20 million renovation, and each of their remodeled guestrooms offers a picturesque view of the mountains, alpine creek, or valley that surround the resort. After a day of CLEs, unwind at the newly renovated and luxurious Aria Spa & Club, where you can get a massage, pedicure, or facial. On-site you will also find swimming pools, hot tubs, tennis and basketball courts, weight rooms, a movie theatre, general store, and childcare center!

**Room reservations must be made by May 17** in order to ensure you receive the special rate of $169 single/double occupancy. Call (800) 420-2424 or e-mail groupres@vailcascade.com; don’t forget to mention that you are with the Kansas Bar Association.

**Things to do in Vail**

A free shuttle will take resort guests to the villages of Vail and LionsHead, where shopping, restaurants, and entertainment abound. The area also offers excellent fishing, whitewater rafting, golfing, horseback riding, hiking, biking, camping, and more! For more information on things to see and do in Vail, visit www.visitvailvalley.com or call the Vail Valley Chamber and Tourism Bureau at (800) 525-3875.

*For ages 4 and older only. For children under the age of 4, the resort offers on-site licensed childcare from 9 a.m. to 9 p.m. Call (970) 479-5947 at least 48-hours in advance to make arrangements.
2005 Annual Meeting Registration Form • Page 1

Thursday, June 9

☐ Golf Tournament* ........................................... $100/person $____
10:30 a.m. shotgun start • Eagle Vail Golf Club • Includes a box lunch, beverages, cart, & green fees. • Prizes awarded!
Participant Name ____________________________
☐ Please assign me to a foursome.
☐ Please assign me to the following foursome: __________________________

Handicap or average score/18 ______________________

☐ Sporting Clays Shoot*........................................ $50/person $____
11 a.m. check-in and shooting begins • 100 targets.
• Includes box lunch and beverages • Prizes awarded!

☐ Doubles Tennis Tournament* ........................... $25/person $____
11 a.m. Round Robin Mixer begins • Includes box lunch, beverages, high altitude tennis balls, & one T-shirt • Size □ L  □ XL  □ XXL

☐ Welcome Reception (casual attire)
5 – 7 p.m. • Two tickets/registrant are included with conference registration. • Additional tickets are $25 each $____

☐ Children’s Welcome Reception
5 – 7 p.m. • Children’s snacks and activities • Please indicate names and ages attending (ages 4 and older) ______________________

SUBTOTAL A. FROM THURSDAY ....................... $____

Friday, June 10

(Please check those you plan to attend)

☐ Sunrise CLE: Juror Anger Management
7 – 8:40 a.m. (2 CLE)

☐ Fiction Writing for Attorneys: Michael Levin, former attorney, author, and screenwriter
7 – 8:40 a.m. (Not for CLE credit)

☐ Keynote Address: Jeffrey Benz, general counsel, U.S. Olympic Committee
9 a.m. (Not for CLE credit)

☐ General Session: Representing the Author or Screenwriter
10:15 – 11:55 a.m. (2 CLE)

☐ Awards Luncheon .......................... $35/person $____
12:15 – 1:30 p.m.
☐ Dietary restrictions? Please specify: ______________________

☐ Appellate Arguments
1:30 – 2:20 p.m. (1 CLE)

☐ YLS: Mechanic’s Liens
1:30 – 2:20 p.m. (1 CLE)

☐ Legislative Update with Lawyer-Legislators
1:30 – 3:10 p.m. (2 CLE)

☐ Simulated Accident Reconstruction
1:30 – 3:10 p.m. (2 CLE)

SUBTOTAL B. FROM FRIDAY ....................... $____

Saturday, June 11

☐ 5K Legal Runaround* .............................. $15/person $____
6:45 a.m. start • Includes refreshments & one T-shirt
• Size □ L  □ XL  □ XXL

☐ Eggs & Issues Membership Forum Breakfast
7 a.m. • One ticket/registrant is included with conference registration.

*Information on special events will be mailed to you prior to the conference.

Registration Continued on Next Page
2005 Annual Meeting Registration Form • Page 2

Saturday, June 11 (cont.)

(Please check those you plan to attend)

☐ YLS: Alternate Occupations in the Law
8:30 – 9:20 a.m. (Not for CLE credit)

☐ Family Law
8:30 – 9:20 a.m. (1 CLE)

☐ ADR: Mediation Advocacy
8:30 – 10:10 a.m. (2 CLE)

☐ Intellectual Property for the General Practitioner
8:30 – 10:10 a.m. (2 CLE)

☐ YLS: Technology in the Courtroom
9:20 – 10:10 a.m. (1 CLE)

☐ Employment Law
9:20 – 10:10 a.m. (1 CLE)

☐ YLS: Workers’ Comp
10:25 – 11:15 a.m. (1 CLE)

☐ ALPS Ethics CLE
10:25 a.m. – 12:05 p.m. (2 CLE, including 2 PRC)

☐ Federal Tax Law Update & IRS Circular 230
10:25 a.m. – 12:05 p.m. (2 CLE, including 1 PRC)

☐ Time Matters: Research Using LexisNexis
10:25 a.m. – 12:05 p.m. (Not for CLE credit)

☐ YLS: Estate Planning
11:15 – 12:05 p.m. (1 CLE)

☐ Law School Luncheons
$35/person $______
12:30 – 1:30 p.m. ☐ KU ☐ WU ☐ Out-of-State
☐ Dietary restrictions? Please specify: ____________________________

SUBTOTAL C. FROM SATURDAY ........................................ $______

Conference Registration

(Full registration includes two days of CLEs and all program materials and hospitality; optional and sporting event fees are not included.)

Name ____________________________

Company/Firm Name ____________________________

Address ____________________________

City ___________ State _______ Zip ________

Phone ____________________________ Fax ____________________________

KBA Member # ___________ E-mail ____________________________

Spouse's/Guest's Full Name (if attending):

Your name as you'd like it to appear on your name badge:

Guest's name for badge:

KBA Member Early Bird Discount ........................................ $325 $______
(Payment must be received no later than May 20)

KBA Member (After May 20) ........................................ $375 $______

Nonmember ................................................................. $450 $______

Young Lawyers Registration ........................................ $250 $______

Associate Member/Student ........................................... $200 $______

SUBTOTAL A. FROM THURSDAY ......................................... $______

SUBTOTAL B. FROM FRIDAY ........................................... $______

SUBTOTAL C. FROM SATURDAY ........................................ $______

TOTAL ENCLOSSED ........................................................ $______

Payment Information

☐ Check Enclosed (Payable to Kansas Bar Association)

☐ Bill to:
    ☐ MasterCard ☐ Visa ☐ American Express

Account Number ____________________________

Expiration Date ____________________________

Signature ____________________________

THREE WAYS TO REGISTER!

1. Mail registration with payment or credit card information to
KBA Annual Meeting Registration
P.O. Box 1037, Topeka, KS 66601-1037

2. Fax registration with credit card information to KBA at
(785) 234-3813

3. Register Online at www.ksbar.org

Questions? Call (785) 234-5696. All CLE seminar materials, name badges, event tickets, final program schedules, and CLE credit affidavits will be available on-site at the KBA registration desk.

*Information on special events will be mailed to you prior to the conference.

CHECK ALL THAT APPLY

☐ Author
☐ Award Recipient
☐ Board of Governors
☐ Board of Trustees
☐ Committee Chair
☐ Faculty
☐ KBF Fellow
☐ Guest
☐ Host Committeee
☐ Judge
☐ Moderator
☐ Past President
☐ Section President
☐ Young Lawyers
Celebrating 70 years of service to the legal community...

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

Legal Directories Publishing Company.
We’re the blue book.
I. Introduction

The Sixth Amendment of the U.S. Constitution1 and Section Five of the Kansas Bill of Rights2 provide the constitutional basis for the right to a jury trial. While everyone generally agrees that criminal defendants have the right to a jury trial, the details of the type of jury trial that is constitutionally and statutorily required are not always clear. This article considers what is known in criminal cases as the multiple acts problem. A multiple act problem arises when the jury hears evidence of more than one criminal act, yet the state has charged the defendant with only one count. If the state fails to elect a particular act upon which it is basing the charge, and the trial court fails to instruct the jury that each juror must agree upon a particular act before reaching a unanimous verdict, the concern arises that the defendant’s right to a jury trial with an unanimous verdict has been violated.

The purpose of this article is twofold. First, it is intended to increase awareness of the problem posed by the multiple acts issue. As this article suggests, it is relatively easy for prosecutors to foreclose the multiple acts argument from being raised on appeal by electing in closing arguments for the jury to focus on one factual incident.3 As an alternative to the state’s election, it is, likewise, relatively easy for the trial court to prevent the multiple acts error by giving the pattern jury instruction addressing juror unanimity in the multiple acts case.4 Second, this article attempts to address the much more difficult problem of summarizing and critiquing the framework adopted in Kansas for analyzing the multiple acts issue on appeal, with the goal in mind of providing guidance for prosecutors, defense attorneys, and trial judges for determining when it is necessary for the state to elect or the trial judge to instruct.

FOOTNOTES

1. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the [s]tate and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”
2. “The right of trial by jury shall be inviolable.”
4. The pattern jury instructions include the following instruction to address the multiple acts issue: “The [s]tate claims distinct multiple acts which each could separately constitute the crime of____. In order for the defendant to be found guilty of____, you must unanimously agree upon the same underlying act.” Pattern Instructions for Kansas (PIK) Crim. 68.09-B. The PIK cites K.S.A. 22-3421 as the statutory authority for instruction. The generic unanimity instruction, which the commentary to the pattern jury instructions suggests should be given in each jury trial absent special circumstances, contains the following language: “Your agreement upon a verdict must be unanimous.” PIK Crim. 68.01.
II. Constitutional and Statutory Requirements of a Unanimous Jury Verdict.

Under the U.S. Constitution’s Sixth Amendment, which applies to the states through the 14th Amendment, each defendant in a criminal prosecution has the right to a jury trial. The question of jury size and juror unanimity in Kansas is governed by statute. K.S.A. 22-3403(2) and K.S.A. 22-3411 authorize a 12-member jury in cases of felony trials. The defendant must personally waive the right to a jury of less than 12 members. Juror unanimity is guaranteed through K.S.A. 22-3421 and K.S.A. 22-3423(1)(d).

III. Spotting the Substantive Issue: What is and What is not a Multiple act?

A. Kansas appellate courts’ definition of multiple acts.

It is helpful to consider what is and what is not a multiple act. The Kansas Supreme Court defined the multiple acts problem as a case:

“where several acts are alleged and any one of them could constitute the crime charged, the jury must be unanimous as to which act or acts constitutes the crime. To ensure jury unanimity in multiple acts cases, we require that either the state elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of the jurors must agree that the same underlying criminal act has been proved without a reasonable doubt. State v. Carr, 265 Kan. 608, 618, 963 P.2d 421 (1998) (quoting State v. Timley, 255 Kan. 286, 289-90, 875 P.2d 242 [1994]).”

Thus, there are two elements to the multiple acts problem: (1) the presentation of evidence to the jury of separate acts, any one of which could constitute the crime charged; and (2) the failure of the state to elect an act upon which it is relying, or the failure of the court to instruct all jurors that they must agree that the same underlying criminal act has been proved beyond a reasonable doubt. Clearly, the detection of the first of these elements presents the greatest challenge to attorneys and judges.

Another related, but distinguishable situation is the concept of alternative means. In an alternative means case, the criminal act may be committed in more than one way, i.e., rape may be committed by physical force or by placing the victim in a state of fear. In an alternative means case, the jury must be unanimous as to guilt on the crime charged; however, unanimity as to the means by which the crime was committed is not required as long as substantial evidence supports each alternative means.

B. The concept of multiplicity as an aid in detecting separate acts.

The flip side of a multiple acts case is a case involving multiplicity, which the Kansas Supreme Court has defined as the “charging of two or more counts in a complaint where only a single wrongful act is involved.” Multiplicity “creates the potential for multiple punishments for a single offense.”

“In examining a multiplicity issue, we are mindful that a single offense may not be divided into separate parts and a single wrongful act may not generally furnish the basis for more than one criminal prosecution; offenses do not merge where each offense requires proof of a fact not required in proving the other; and offenses do not rise out of a single wrongful act where they are committed separately and severally at different times and places.”

Put simply, multiplicity and multiple acts both represent a mismatch between the criminal act and the charge: in the
case of multiple acts, there is evidence of too many criminal acts for each charge, whereas in the case of multiplicity, a single criminal act is being spread among too many charges.

The multiplicity issue is relevant because the analysis of both the multiplicity and multiple acts issues requires a determination of whether there are separate acts. Unfortunately, it has not always been clear in Kansas under what circumstances a multiple acts unanimity instruction is needed in the first place. As suggested below, the Kansas appellate courts have adopted a harmless error test that appears to incorporate in part what some jurisdictions have treated as the initial substantive error analysis. The Kansas courts may have been too quick to jump to a harmless error analysis without considering, first, the question of whether a substantive error exists in the first place. This approach has made it difficult to spot and avoid multiple acts issues before they arise on appeal.

State v. Staggs, is a helpful starting point for the analysis of the multiple acts issue. Staggs is a good case because it explicitly analyzes whether evidence of separate acts was presented to the jury. A jury convicted Scott Staggs of aggravated battery. The evidence tended to show that Staggs kicked the victim, while his own testimony suggested that he only punched the victim. Thus, the case was arguably a multiple acts case, with the multiple acts being some kicks and a punch. The court, however, disagreed with Staggs' argument. The issue, according to the court, was whether Staggs' "conduct is part of one 'act' or represents distinct and separate 'acts' in and of themselves." In determining whether there were separate acts, the court in Staggs turned to the multiplicity analysis in State v. Perry. The court in Perry offered the following guidance for determining whether there were separate criminal acts:

"(1) A single offense may not be divided into separate acts and, generally, a single wrongful act may not furnish the basis for more than one criminal prosecution; (2) if each offense charged requires proof of a fact not required in proving the other, the offenses do not merge; and (3) where offenses are committed separately and severally, at different times and at different places, they cannot be said to arise out of a single wrongful act. [Citation omitted.]"

The court concluded that, based on these principles, the state could not have charged Staggs with two counts of aggravated battery, because to do so, the charges would have been multiplicitous. Having established the principles from the multiplicity analysis for determining whether there were separate acts, the court in Staggs concluded that in Staggs' case, the various acts were one short, continuous, single incident:

"[T]he evidence here supports only a brief time frame in which the aggravated battery occurred. Once defendant initiated the altercation, no break in the action of any length occurred, and the confrontation continued until defendant broke the victim's cheekbone. Simply put, the evidence established a continuous incident that simply cannot be factually separated. No 'multiple acts' instruction was necessary."

Clearly, there are some cases that may appear to involve multiple acts but in reality are not multiple acts cases based upon a limited time period in question. Further, the continual nature of the criminal actions may indicate that the allegedly separate actions were not motivated by a fresh impulse, thereby suggesting only one act for purposes of forming the basis for a criminal prosecution. Viewed this way, a legitimate multiple acts error only arises when the state fails to elect or the trial court fails to instruct when there are truly multiple acts at issue.

IV. Split of Authority in Court of Appeals and its Apparent Resolution in the Supreme Court.

A. Appellate standards of review of jury instruction errors.

Once it is established that the appellate court faces a legitimate multiple acts issue, the question becomes how to evaluate the argument. Fundamentally, the error is an assertion that the trial court improperly instructed the jury. This argument can come before an appellate court in one of two ways. In the first scenario, the defendant requests the specific multiple acts unanimity instruction, but the trial court refuses to give it. In the second scenario, there is a multiple acts problem before the trial court, but the defendant's trial counsel does not request the instruction. In the second scenario, the defendant's appellate counsel raises the argument for the first time on appeal. Before proceeding further, it is helpful to consider some fundamental princi-

18. 27 Kan. App. 2d at 865-66.
19. 27 Kan. App. 2d at 867.
21. 266 Kan. at 229.
22. 27 Kan. App. 2d at 867.
23. 27 Kan. App. 2d at 868.
ples governing the appellate standard of review of these errors.

Statutory law controls the appellate review of issues of jury instruction errors raised for the first time on appeal:

“No party may assign as error the giving or failure to give an instruction, including a lesser included crime instruction, unless the party objects thereto before the jury retires to consider its verdict stating distinctly the matter to which the party objects and the grounds of the objection unless the instruction or the failure to give an instruction is clearly erroneous. Opportunity shall be given to make the objections out of the hearing of the jury.”

The Kansas Supreme Court defines clearly erroneous instructions as those instructions causing the court to be "firmly convinced that there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred." The Kansas Supreme Court has articulated the following constitutional harmless error analysis, which is similar to the clearly erroneous analysis:

"Errors that do not affirmatively cause prejudice to the substantial rights of a complaining party do not require reversal when substantial justice has been done. [Citations omitted.] An error of constitutional magnitude cannot be held to be harmless unless the appellate court can declare beyond a reasonable doubt that the error had little, if any, likelihood of changing the results of the trial.""25

This rule as articulated by the Kansas Supreme Court is similar to the harmless error rule applied by the federal courts. The U.S. Supreme Court said the harmless error test is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."28 However, the U.S. Supreme Court has observed that there are some errors of a "limited class of fundamental constitutional errors that defy analysis by harmless error standards."29 At one time, it was unsettled in Kansas whether the multiple acts error was one of these limited class members.30

B. Structural error.
The Kansas Court of Appeals in State v. Barber31 applied a structural error analysis for dealing with a multiple acts error. Robert Barber was charged with criminal possession of a firearm after he possessed a gun during a disturbance and then returned to the location of the disturbance with another gun. However, the state only charged Barber with one count of criminal possession of a firearm. Following his conviction, Barber argued on appeal that the "trial court erred in failing to instruct the jury that to convict, all of the jurors had to agree that the same underlying criminal act had been proven beyond a reasonable doubt."33 On appeal, the state conceded that, under the facts, the trial court should have given the unanimity instruction, but argued Barber could not raise the issue on appeal because of his failure to request the specific multiple acts unanimity instruction, citing K.S.A. 22-3414(3).34 The court rejected the state's argument that the clearly erroneous analysis could be applied: "We do not agree that the failure to give a multiple acts instruction, when the giving of such instruction is required by the evidence, permits review under a clearly erroneous standard. The trial court's failure to so instruct the jury prevents an objective analysis as to whether the jury unanimously agreed Barber was guilty of committing a specific criminal act. And to quantify the evidence does not solve this Sixth Amendment problem -- no amount of analysis would ever permit us to say the jury unanimously agreed to the underlying act supporting the conviction. Under such circumstances, the trial court's failure to give a multiple acts instruction constitutes structural error, requiring that Barber's conviction be set aside. See Sullivan v. Louisiana, 508 U.S. 275, 281-82, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993)."35

Based upon this analysis, the court reversed Barber's conviction and remanded the case for a new trial.36

26. State v. Henry, 263 Kan. 118, 131, 947 P.2d 1020 (1997). Rule 52(b) of the Federal Rules of Criminal Procedure defines plain error as "error that affects substantial rights ... even though it was not brought to the court's attention."
28. Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). Rule 52(a) of the Federal Rules of Criminal Procedure defines harmless error as "[a]ny error, defect, irregularity or variance that does not affect substantial rights." Under these circumstances, the appellate court on direct appeal must disregard the claimed error.
33. 26 Kan. App. 2d at 330.
34. 26 Kan. App. 2d at 331.
35. 26 Kan. App. 2d at 331.
36. 26 Kan. App. 2d at 332.
“In short, in a multiple acts case such as this, the jury must unanimously agree upon the underlying criminal act supporting the conviction. Further, the failure of the trial court to give the unanimous/multiple acts instruction constitutes structural error, precluding a harmless error review or a clearly erroneous review.…”

Following the lead established in Barber, the Court of Appeals reversed another conviction in State v. Wellborn. A jury convicted Robert Wellborn of rape and four counts of aggravated indecent liberties with a child. In the factual summary, the court noted that the state introduced evidence of multiple acts to support each of the counts. Unlike the defendant in Barber, Wellborn requested a unanimity instruction that would have required all jurors to conclude that he committed the same act to support the charge; however, the district court refused to give the instruction requested. Also, the prosecutor did not elect an act upon which she was relying as the factual basis for the charge.

Because Wellborn requested the specific multiple acts unanimity instruction, the clearly erroneous analysis in K.S.A. 2003 Supp. 22-3414(3) was inapplicable. The court concluded that the failure to instruct under these circumstances prevented a harmless error analysis, adopting the rationale from Barber:

“In short, in a multiple acts case such as this, the jury must unanimously agree upon the underlying criminal act supporting the conviction. Further, the failure of the trial court to give the unanimous/multiple acts instruction constitutes structural error, precluding a harmless error review or a clearly erroneous review. See Barber, 26 Kan. App. 2d 330, Syll. ¶¶ 1, 2.”

C. State v. Hill and the introduction of harmless error.

A different approach was employed by the Court of Appeals less than six months after the Wellborn decision in State v. Hill, which distinguished the Sullivan case cited in Barber. Jimmy Dean Hill appealed his convictions of rape, aggravated indecent liberties with a child, and aggravated indecent solicitation of a child. At trial, the evidence suggested that Hill penetrated the victim’s vagina twice in the victim’s bathroom and once in the victim's kitchen. The court considered Hill’s argument that the trial court erred by failing to instruct the jury that its verdict must be unanimous as to the act that constituted the crime.

The Hill I court recognized, without citing to Barber, that some jurisdictions find that the failure to give the unanimity instruction results in structural error. The court relied on a U.S. Supreme Court case for the following definition of structural error. “Structural errors are so intrinsically harmful as to require automatic reversal, i.e., affect substantial rights,” without regard to their effect on the outcome. In the other camp, explained the Court of Appeals, jurisdictions follow the harmless error approach:

“Other jurisdictions apply a version of harmless error analysis whereby reversal is not automatic. In those jurisdictions, there is a common theme concerning potential juror confusion and resolving the issue of whether the acts were legally and factually separate incidents.”

The Hill I court did not directly cite any authority for this proposition. After surveying a number of foreign jurisdictions, the court adopted the following test:

“We find the authority applying harmless error to be persuasive and adopt the following test that effectively balances the tension between the defendant’s right to a unanimous jury verdict and judicial economy.

After the court establishes the jury was presented with evidence of multiple acts, the first step is to determine whether there is a possibility of jury confusion from the record or if evidence showed either legally or factually separate incidents. Incidents are legally separate when the appellant presents different defenses to separate sets of facts or when the court’s
"In applying a harmless error analysis, the first step is to determine whether there is a possibility of jury confusion from the record or if the evidence showed either legally or factually separate incidents. Incidents are legally separate when the defendant presents different defenses to separate sets of facts or when the court's instructions are ambiguous ...

Instructions are ambiguous but tend to shift the legal theory from a single incident to separate incidents. Incidents are factually separate when independent criminal acts have occurred at different times or when a subsequent criminal act is motivated by 'a fresh impulse.' Simms v. U.S. [634 A.2d 442, 445-46 (D.C. 1993)]."" 47

Following the Court of Appeals' decision in Hill I, the defendant petitioned to the Kansas Supreme Court for review. On review, the Court acknowledged that Hill I relied upon the Simms case from the D.C. Court of Appeals in its harmless error analysis to arrive at definitions of legally separate and factually separate incidents. And the Court cited authority from three jurisdictions, the District of Columbia, New Hampshire, and New Mexico, for the proposition that the special multiple acts unanimity instruction is necessary when "the court cannot deduce from the record whether the jury must have agreed upon one particular set of facts." The Court then cited authority from Michigan for the proposition that

"when evidence of multiple acts is presented, the district court is to instruct the jury that it must unanimously agree on the same specific act, if the acts are materially distinct or if there is a reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt." 51

The Court went on to discuss the split of authority in the Court of Appeals over the structural error and harmless error approach, ultimately rejecting the structural error approach and adopting the following harmless error test:

"In applying a harmless error analysis, the first step is to determine whether there is a possibility of jury confusion from the record or if the evidence showed either legally or factually separate incidents. Incidents are legally separate when the defendant presents different defenses to separate sets of facts or when the court's instructions are ambiguous but tend to shift the legal theory from a single incident to two separate incidents. Incidents are factually separate when independent criminal acts have occurred at different times or when a later criminal act is motivated by 'a fresh impulse.' When jury confusion is not shown under the first step, the second step is to determine if the error in failing to give a unanimity instruction was harmless beyond a reasonable doubt." 55

Thus, the language adopted in Hill II regarding the second step, i.e., whether there is a possibility of juror confusion or if the evidence showed either legally or factually separate incidents, suggests that the second step is applied only if the answer to the first step is in the negative. As discussed below, it is not clear how the analysis should proceed in the event the first question is answered in the affirmative. Following the adoption of the above test, the Court's analysis continued, seemingly concluding that "[i]n Kansas, under these facts, the two acts of penetration were separate incidents of rape." 54 Despite the finding that there was evidence of factually separate incidents, the Court concluded there was no jury confusion because Hill did not present a different defense as to the separate acts, but rather generally denied any contact. The Court gave the following guidance regarding when the multiple acts unanimity instruction is necessary:

"In many multiple acts cases, the acts will be materially distinct and will be associated with different defenses, so a specific unanimity instruction will be required. Here, however, any error in omitting such an instruction was harmless beyond a reasonable doubt." 56

(continued on next page)
The problem with the Court’s statements is that some of the same questions – whether there are materially distinct acts associated with different defenses, and whether there were legally and factually separate incidents – are involved in the initial, substantive error analysis and the harmless error analysis. However, the Court in *Hill II* did not provide any guidance for drawing the line between (1) a short, continuous action not really involving multiple acts; (2) multiple acts in light of the evidence amounts to harmless error; and (3) multiple acts that are so distinct that the error in failing to elect or instruct was not harmless.

Importantly, the Court in *Hill II* reminded prosecutors that “[i]n many cases involving several acts, the requirement that an appellate court conclude beyond a reasonable doubt as to all acts will not be found harmless.” 57 Thus, the Court clearly intended to warn prosecutors to take the multiple acts problem seriously.

V. Practical: How to Deal with Multiple Acts.

Given the Kansas Supreme Court’s warning in *Hill II* that it will diligently protect defendants’ rights to a unanimous jury verdict, it is worth noting that there are two safe harbors for avoiding the multiple acts quagmire. The first is for the prosecutor to elect an act upon which he or she is relying for the conviction. The second is for the trial court to instruct the jury that it must be unanimous as to the underlying factual event.

A. Election.

An example of the state electing an act upon which it is relying is *State v. Dickson.* 58 In that case, the prosecutor “informed the jury, which single incident the state was relying on to convict Dickson on each of the rape counts and on the criminal sodomy count.” 59 The court agreed that such an election in both the opening statement and closing argument constitutes a “functional equivalent” of an election. 60

Another case where the state’s election proved to be effective was *State v. Stevens.* 61 A jury convicted Jamie Stevens of attempted manufacture of methamphetamine, possession of ephedrine or pseudoephedrine with the intent to use it to manufacture methamphetamine, and possession of drug paraphernalia with the intent to use it to manufacture methamphetamine. 62 Stevens raised a number of issues on appeal, one of which included the argument that he was denied the right to a unanimous jury verdict on his conviction for possession of drug paraphernalia based on the failure to give a specific multiple acts unanimity instruction. 63 At trial, the state produced evidence that could have supported two different types of paraphernalia statutes: (1) possession of drug paraphernalia with intent to use it to manufacture a controlled substance, which is a severity level 4 felony; and (2) possession of drug paraphernalia for introducing a controlled substance into the human body, which is a misdemeanor. 64

59. 275 Kan. at 696.
60. 275 Kan. at 697.
62. 278 Kan. at 442.
63. 278 Kan. at 451.
64. 278 Kan. at 452.

We’re covering Kansas...

Are you, a family member, or a friend an amateur shutterbug? We are looking for color photos of Kansas landmarks, landscapes, and scenes in all seasons to feature on covers of your *Journal of the Kansas Bar Association.*

We are working to bring you a more informative and visually appealing *Journal*. With your help, we can make it even better! If you or someone you know has a photo that fits the bill, why not submit it for consideration as a future cover. The shutterbugs submitting photos chosen will earn photo credit and bragging rights to all their friends and colleagues and their photos will be seen by more than 6,800 *Journal* readers across the state, nation, and overseas.

For more information, or to submit a photo, please contact:

David Gilham
Desktop Publishing Coordinator
Kansas Bar Association
1200 S.W. Harrison St.
P.O. Box 1037
Topeka, KS 66601-1037
(785) 234-5696 or dgilham@ksbar.org

THE JOURNAL of the Kansas Bar Association
1200 S.W. Harrison St. • Topeka, Kansas 66612

34 - MAY 2005

THE JOURNAL OF THE KANSAS BAR ASSOCIATION
Letourneau with possession of methamphetamine in addition to a number of other drug offenses. The court in State v. Letourneau found the possibility of jury confusion in a recent case, thus making the state's closing remarks that were recovered, the prosecuting attorney singled out only a few of them during closing argument when he told the jury about the evidence that would support the possession of drug paraphernalia count. In telling the jury what evidence supported the charge of possession of drug paraphernalia with intent to use it to manufacture methamphetamine, the prosecutor said: 'The coffee filter, the gloves, the lithium batteries, the tubing, the gas generator, all those things are paraphernalia to be used to manufacture methamphetamine.' The state effectively elected the particular criminal act upon which it relied for conviction.

Clearly, the Kansas Supreme Court has shown prosecutors the way to the safe harbor for avoiding reversal on appeal through an election as to the underlying factual basis for the crimes charged. While the state's failure to elect the act upon which it is relying to form the basis of the crime charged can cause reversible error, the state's remarks in closing can at times exacerbate the harm to the defendant and make the state's case on appeal more difficult to win. The Court of Appeals found the possibility of jury confusion in a recent case, State v. Letourneau. The state charged Letourneau with possession of methamphetamine in addition to a number of other drug offenses. The court in Letourneau cited Hill II for the substantive law. The Court of Appeals noted that the state relied upon two separate theories to support the possession: "(i) evidence of completed methamphetamine was found among the contents of the duffel and bucket, and (ii) evidence Letourneau allegedly admitted to ingesting methamphetamine earlier on the night of the incident." On appeal, Letourneau argued that the harm was exacerbated by the state's closing:

"And I appreciate that being brought up because I had forgotten we also have the possession of meth, the fact that he took meth out at the sand pit. I didn't even think about that. We had meth in that lab, that's possession of meth. But we got something else to consider now. We've got him saying he took some meth out there."

In concluding the possibility of juror confusion existed, the court noted that it was not necessarily the evidence but rather the prosecutor's closing remarks that was the cause of the problem. In concluding its analysis, the court advised that the state should avoid admitting evidence that Letourneau ingested methamphetamine, or the district court should instruct the jury to be unanimous as to the factual basis for its verdict.

B. The unanimity instruction.

The pattern jury instructions contain a specific unanimity instruction for use in cases of multiple acts. If the instruction is given, there is no multiple acts error.

VI. Criticism of the Hill I and Hill II Analysis: The Failure to Distinguish Between Substantive Error Analysis and Harmless Error Analysis.

Cracks in the Hill II analysis began to appear in a concurring opinion by Judge Beier in State v. Arculeo. A jury convicted Scott Arculeo of one count of rape, two counts of aggravated criminal sodomy, and two counts of aggravated indecent liberties with a child. In another case consolidated on appeal, the district court convicted Arculeo based on stipulated facts of three counts of aggravated criminal sodomy, four counts of sexual exploitation of a child, and one count of criminal possession of a firearm. After considering and rejecting Arculeo's arguments that a search warrant used in the case was defective and that his statutory speedy trial rights were violated, the court considered Arculeo's...
argument that the jury convictions were flawed because the court failed to give a unanimity instruction.73 The court did not specify whether Arculeo had requested a unanimity instruction before the district court submitted the case to the jury for its factual findings.74 In its analysis, the court began by suggesting that the approach to the multiple acts problem had caused a split in authority, which the Hill II decision finally resolved.75

The Arculeo court's analysis began by noting the principles adopted in Hill II.76 Namely, the court recognized that the first step to the harmless error analysis requires a determination of whether there was a possibility of jury confusion from the record or if the evidence showed either legally or factually separate incidents.77 In its analysis, the court was clear that the facts in two of the counts charged "factually separate incidents," therefore, the court was "dealing with a multiple acts case."78 Thus, the first step of the Hill II analysis appeared to be answered by the Arculeo court in the affirmative, raising the question of where to proceed given the premise of the second step in Hill II, i.e., "[w]hen jury confusion is not shown under the first step."79 The court in Arculeo, through an opinion written by Judge Pierron, concluded that there was no juror confusion, despite the finding of factually separate incidents. Pierron reached this conclusion by noting that the sole issue before the jury was the credibility of the defendant, i.e., the jury either believed Arculeo's denial as to all acts or did not believe him as to all acts. Under these circumstances, Pierron found that application of the harmless error rule particularly applicable because the failure to instruct could not have caused "prejudice to the substantial rights of the complaining party."80

Thus, Pierron reached a mixed answer to the first step of the Hill II analysis: Yes there were "factually separate incidents,"81 but because Arculeo's overall defense relied on his general denial as to all possible acts, "[a]ny juror believing that one incident took place would have believed that all the incidents took place."82

Beier took issue with the majority's analysis in her concurring opinion, finding that it "falls short in its analysis, critique, and application of [Hill II] on the multiple acts issue."83

"Our Supreme Court, however, evidently still regards the dual absences of an election and instruction as error when there is no finding of jury confusion, because it requires the process to continue through Hill's second harmlessness step. In the words it adopted from the Court of Appeals opinion in Hill: 'When jury confusion is not shown under the first step, the second step is to determine if the error in failing to give a unanimity instruction was harmless beyond a reasonable doubt with respect to all acts.' (Emphasis added.) 271 Kan. at 939. This is puzzling because the first step has already ruled out the existence of jury confusion and the lack of unanimity it can breed. These were the evils the elect-or-instruct rule was designed to eradicate.

Within this analytical context, it is therefore little wonder that the Supreme Court proceeded to decide that whatever error occurred in Hill was harmless. Indeed, it is difficult to imagine how any failure to elect or instruct could ever be deemed harmful once the result of Hill's first step was a finding of no possibility of jury confusion.

It is also worth noting that Hill gave rise to several unanswered questions. If we are to engage in a harmlessness analysis when there is no finding of possible jury confusion, how, if at all, should the second step be altered when we find a possibility of such confusion? Structural error analysis is no longer available. Should harmful error be presumed absent a contrary showing from the state? If the burden on appeal does not shift to the state, then is a situation where jury confusion has been demonstrated to be reviewed for harmlessness no different from one where no jury confusion has been found? If so, then what difference does the presence or absence of the possibility of jury confusion actually make? Does the first step have any validity? And finally, if the two steps ultimately make jury confusion irrelevant, then do we not lose sight of the reason we focused on this issue in the first place?84

The Court of Appeals in State v. Johnson85 reversed a conviction based in part on the multiple acts issue. A jury convicted Howard Johnson of (1) possession of cocaine with intent to sell, (2) no drug tax stamp, (3) possession of drug paraphernalia, and (4) obstructing official duty. On appeal, Johnson argued that his conviction of possession of cocaine with intent to sell should be reversed because the state presented the jury with evidence that Johnson pos-

---

73. 29 Kan. App. 2d at 972-76.
74. 29 Kan. App. 2d at 972-76.
75. 29 Kan. App. 2d at 973-74.
76. 29 Kan. App. 2d at 973-74.
77. 29 Kan. App. 2d at 973.
78. 29 Kan. App. 2d at 974.
80. Arculeo, 29 Kan. App. 2d at 975-76.
81. 29 Kan. App. 2d at 974.
82. 29 Kan. App. 2d at 975.
83. 29 Kan. App. 2d at 983 (Beier, concurring).
84. 29 Kan. App. 2d at 986.
sessed the cocaine in the following two ways: (a) his possession of a baggie of cocaine, and (b) his possession of scales containing cocaine residue. The court began with the standard quotation from Hill II; however, interestingly, the court labeled the two-step approach as the “two-step analysis for determining whether a unanimity instruction is required,” rather than a harmless error analysis. The court continued to specifically reject Johnson’s argument that a structural error analysis should be applied. The court noted also that the prosecutor not only failed to elect which act upon which he or she based the charge, but also “apparently sought to tie the evidence together in urging the jury to find Johnson guilty of the crime.” The court concluded that there were factually separate incidents. One incident was based on Johnson’s actual possession of the scales. The other incident was based on Johnson’s alleged constructive possession of the baggie of cocaine. The incidents, also, were legally separate: Johnson denied possessing the baggie of cocaine but admitted possessing the scales; and although Johnson denied knowing that the scales contained cocaine residue, he admitted possessing the scales.”

The Johnson court also concluded that it was a case of jury confusion, another component of the first step of the Hill II analysis:

“This case involved factually separate incidents. One incident was based on Johnson’s actual possession of the scales. The other incident was based on Johnson’s alleged constructive possession of the baggie of cocaine. The incidents, also, were legally separate: Johnson denied possessing the baggie of cocaine but admitted possessing the scales; and although Johnson denied knowing that the scales contained cocaine residue, he admitted possessing the scales.”

The court specifically said that because of these conclusions, there was no need for the court to consider the second step:

“Based on the evidence presented, there was a possibility of jury confusion. Johnson maintains that in finding him guilty of possession of cocaine with intent to sell, the jury could have relied either on his possession of the scales on which cocaine residue was found or conversely on his possession of the baggie of cocaine. This is correct. As a result, we cannot say that the error in failing to provide a unanimity instruction was harmless.”

The curious aspect of the court’s approach is that while it purported to reject Johnson’s structural error analysis, it appears to have applied one in fact. If the court accurately described the Hill II test as one to determine “whether a unanimity instruction is required,” and that first step required the analysis of whether there were factually or legally separate incidents or jury confusion involved, then one must wonder what was left for the harmless error analysis and what standard the court applied to conclude the error was not harmless.

The Court of Appeals’ analysis in another case, State v. Clubb, also makes the application of the Hill II rule look like structural error. In that case, a jury convicted Kristopher Clubb of aggravated indecent liberties with a child and aggravated indecent liberties with a child as a lesser included offense of rape. On appeal, Clubb argued the trial court erred by failing to give a unanimity instruction. The court did not indicate whether Clubb had requested the instruction before the trial court. The court concluded that there were factually and legally separate incidents. Moreover, the court concluded that there was a strong possibility of jury confusion, and “solid ground to believe that the evidence created a setting where the jurors could have convicted Clubb yet disagreed regarding which incident was the basis for the conviction.” The court overruled the error of evidence of multiple acts in this situation. As discussed above in connection with Staggs, whether there are truly multiple acts at play requires its own careful analysis. The substantive question is whether there was evidence of multiple acts presented such that there

87. 31 Kan. App. 2d at 278-79.
88. 31 Kan. App. 2d at 280-81.
89. 31 Kan. App. 2d at 281.
90. 31 Kan. App. 2d at 281.
92. 28 Kan. App. 2d at 35.
was a possibility of juror confusion or there was evidence of factually or legally separate incidents presented. This approach may give meaning to Hill I's first inquiry that Beier suggested was meaningless in her concurrence in Areujo. After all, as Beier pointed out, if there is no juror confusion as to which act the [s]tate claimed formed the basis for the charge or if evidence of seemingly separate "acts" did not rise to the level of factually or legally separate acts as that term is defined, then it begs the following questions: What is the error, and how could the defendant possibly have been harmed? Moreover, the adoption of the legally and factually separate incidents standard as a substantive error analysis can help provide guidance to the trial judge in making the determination as to when a unanimity instruction is necessary and also to prosecutors as to when an election as to which act forms the basis for the charge is necessary.

Support for this position may be found in the underlying authority for the Hill decisions from the D.C. Court of Appeals. Consideration of the D.C. Court of Appeals approach is particularly helpful because Kansas courts have adopted its definition of factually separate and legally separate incidents. In Simms, after defining factually and legally separate incidents, the D.C. Court of Appeals concluded that there were no legally nor factually separate incidents in that case. Moreover, because there was no jury confusion, "no unanimity instruction was required." Given this fact, it is curious that the Kansas courts in the Hill decisions would have suggested that the reviewing court continue to a consideration of a harmless error analysis after the analysis of legally or factually separateness and jury confusion. The question arises whether the Court of Appeals in Hill I should have prefaced its second step with the following: When jury confusion is shown under the first step of above analysis, the second step is to apply a harmless error analysis to determine if the error, i.e., evidence of legally or factually separate incidents or jury confusion, was harmless beyond a reasonable doubt with respect to all acts. The question would remain, however, what that harmless error analysis would entail.

An earlier District of Columbia case illustrates how the analysis should proceed once the first step to the analysis reveals legally or factually separate incidents. In Horton v. U.S., the court concluded that there were separate factual acts in addition to the possibility of jury confusion. Because the defendant did not object to the court's instructions, the reviewing court went on to consider plain error, or "error so clearly prejudicial to substantial rights of the defendant as to jeopardize the very fairness and integrity of the trial."

"The error complained of here was of constitutional magnitude, violating appellant's [S]ixth [A]mendment right to an unanimous jury verdict. Although not every error of constitutional magnitude may rise to the level of plain error, [citations omitted], we conclude that the [S]ixth [A]mendment right to a unanimous jury - a substantial right - was so clearly prejudiced by the
confusion inherent in the separate defenses to the alleged gunshots, unaided by a special unanimity instruction, that plain error occurred. [Citations omitted.]

Accordingly, appellants conviction of assault with a pistol on Rickie Marsh and Carlton Stewart must be reversed and remanded. [Footnote omitted.]

Thus, as the analysis of Horton suggests, the difference between the analysis of the substantive error and harmless error may be one of degree. Once the determination is made that the instruction should have been given, i.e., there were legally or factually separate acts or the possibility of jury confusion, then the second step is reached and the court should apply the standard harmless error test of determining whether the error caused prejudice to the substantial rights of a complaining party or if the court can declare beyond a reasonable doubt that the error had little, if any, likelihood of changing the results of the trial. 99

The test as articulated by Hill II should be modified. In crafting a harmless error rule, it swallowed too much of the substantive analysis. Hill II's own analysis suggests this conclusion. Despite the fact that it concluded there were factually separate incidents, it went on to consider jury confusion as a measure of whether it could "equivocally say there was no rational basis by which the jury could have found that Hill committed one rape but did not commit the other." 100

The confusion associated with analyzing multiple acts cases in the criminal context is likely caused by the fact that the analysis of the substantive issue, i.e., whether an election should have been made or an instruction given, is not much different from the harmless error analysis of trying to determine whether the error affected the jury's decision. This is so because, in the case of the factually separate analysis, the greater the temporal and spatial difference, the more likely there is to be a multiple act. At some point, the temporal and spatial differences become so great that the reviewing court is unlikely to find that it "can declare beyond a reasonable doubt that the error had little, if any, likelihood of changing the results of the trial." 101

VII. Conclusion.

Like so many areas of the law, finding simple solutions to difficult issues is elusive. But there is some solace in that while the determination of the harmlessness of the multiple acts error on appeal may continue to be a difficult issue, prevention of such errors can be easily achieved through an election by the state as to a particular act or an instruction from the trial court that the jury should unanimously agree on a particular act. Prosecutors and trial judges should take seriously the warning in Hill II that such errors are not likely to be found harmless, and err on the safe side by preventing them at the trial level.

About the Author

Scott R. Ediger earned his J.D. from the University of Kansas School of Law in 2000. He served as a research attorney for the Kansas Court of Appeals Central Staff for the Hon. Robert E. Davis of the Kansas Supreme Court and for the Hon. Richard D. Greene of the Kansas Court of Appeals. He joined the Kansas Corporation Commission in 2004 as advisory counsel.

98. 541 A.2d at 611-12.
99. See Pelletier, 249 Kan. at 426.
100. Hill II, 271 Kan. at 940.
101. Pelletier, 249 Kan. at 426.
102. See Shivers v. U.S., 533 A.2d 258, 261-62 (D.C. 1987) ("In those cases where we have found factually separate events so that the failure to give a special unanimity instruction has been deemed 'plain error,' there has usually existed significant spatial or temporal separation.").
All opinion digests are available on the KBA members-only Web site at www ksbar.org, and we send out a weekly eJournal informing KBA members of the latest decisions. If you do not have access to the KBA members-only site, please contact Deana Mead, manager, member services, at dmead@ksbar.org or at (785) 234-5696. You may go to the court’s Web site at www ks courts.org for the full opinions.

Supreme Court

Attorney Discipline

IN RE HARRY L. FELKER
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 07,633 – MARCH 11, 2005

FACTS: Respondent, who formerly was mayor of Topeka, voluntarily surrendered his license to practice law pursuant to Supreme Court Rule 217 in a letter dated March 9, 2005, to the clerk of the appellate courts. At that time, a disciplinary hearing had been scheduled on a formal complaint that alleged violations of Kansas election statutes regarding campaign contributions.

HELD: The Supreme Court reviewed the disciplinary administrator’s files and found that the surrender of the license should be accepted and respondent disbarred.

Criminal

CITY OF SALINA V. AMADOR
SALINE DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 90,166 – MARCH 4, 2005

FACTS: Amador convicted in municipal court of battery and criminal damage to property. His appeal to district court was dismissed without prejudice when district court denied city’s motion for continuance. City did not appeal to Court of Appeals and instead refiled charges in municipal court. Amador again convicted. On appeal, district court dismissed the charges on double jeopardy grounds. Court of Appeals reversed, 32 Kan. App. 2d 548 (2004). Amador’s petition for review granted.

ISSUES: (1) Effect of appeal to district court and attachment of jeopardy and (2) failure to appeal to Court of Appeals

HELD: Under facts, Amador’s municipal court conviction was stayed by his appeal to district court, and district court’s dismissal of the appeal without prejudice vacated all proceedings in municipal court. Jeopardy did not attach at the district court level, with the result that Amador’s prosecution on the same charges in municipal court did not violate double jeopardy rights under U.S. or Kansas constitutions.

Opportunity to appeal the dismissal of a complaint under K.S.A. 2003 Supp. 22-3602(b), or to refile the complaint in municipal court, are not mutually exclusive. State may appeal but also may, as in this case, refile the charges in municipal court.

STATUTES: K.S.A. 2003 Supp. 22-3602(b) and (b)(1), -3609, -3609(1), -3609a; K.S.A. 2000 Supp. 22-3602; K.S.A. 12-4601, -21-3108, 22-3603, -3610(a)
Court of Appeals

Civil

CHILD SUPPORT
IN RE MARRIAGE OF FUNK
SHERMAN DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
NO. 92,332 – MARCH 2, 2005

FACTS: Byron and Wanda Funk divorced in 1997 and were the parents of two minor children. The divorce decree stated that child support payments would continue until each child attains the age of 18 or “if said child reaches 18 years of age before completing the child’s high school education, then to continue to June 30 of the school year during which the child becomes 18 years of age, if the child is still attending high school.” The younger son, Landon, resided with Wanda and turned 18 in May 2002 while still a junior in high school. Byron stopped child support payments for Landon pursuant to the divorce decree on June 30, 2002. Landon attended high school for his senior year and graduated in May 2003. In December 2003, Wanda filed a motion for indirect contempt of court and requested child support payments, insurance premiums, and medical expenses through June 2003. The district court entered judgment for Wanda and found Byron responsible for the requested support obligations through June 2003.

ISSUES: Did the district court err in awarding child support obligations pursuant to Kansas statutes and the divorce decree?

HELD: Court held the district court erred in awarding child support to Wanda. Court reversed the judgment. Court stated there was no written agreement between the parties to extend child support beyond Landon’s 18th birthday. Court held that a motion filed pursuant to K.S.A. 2004 Supp. 60-1610(a)(1)(C) seeking an extension of child support through the school year during which the child becomes 18 years of age must be filed while the child is still a high school student. Court held the district court did not have jurisdiction to entertain a motion to extend child support.

STATUTES: K.S.A. 2004 Supp. 60-1610

DRIVING UNDER THE INFLUENCE (DUI)
EBERLE V. KANSAS DEPARTMENT OF REVENUE
THOMAS DISTRICT COURT – AFFIRMED
NO. 91,825 – MARCH 25, 2005

FACTS: Eberle was involved in an automobile accident and was transported to law enforcement headquarters, where he was given the implied consent advisories and refused the breath test. Approximately 27 minutes later, he was released to his wife and they walked outside the sheriff’s department to their car. When Eberle’s wife told him that since he refused the test his license would be suspended, they returned inside the sheriff’s department and requested a breath test. They talked with the same officers who were still available to administer the test, but the officers refused the request. Eberle claimed it was not until his wife talked to him that he realized his license would be suspended. Eberle’s license was suspended. His suspension was affirmed at an administrative hearing and by the district court.

ISSUES: Should Eberle have been allowed to rescind his refusal to take the breath test? Was the officer’s refusal to administer the test unreasonable?

HELD: Court affirmed Eberle’s suspension. Court stated that although the record on appeal was sparse and contained very few details about the evening in question, it is undisputed that Eberle left the police station with his wife. Although Eberle claimed that he did not consume any additional alcohol, court stated that the requirement that the suspect not leave the custody of the arresting officers encompasses more than a simple question about alcohol consumption. Once an individual is arrested for DUI and leaves the building, he or she is out of the custody of law enforcement officers; thus, the individual has lost the right to rescind a prior refusal to take the breath test. According, we agree with the trial court’s decision to uphold the administrative suspension of Eberle’s driving privileges.

STATUTES: No statutes cited.

HABEAS CORPUS
SNYDER V. STATE
SALINE DISTRICT COURT – AFFIRMED
NO. 92,393 – MARCH 4, 2005

FACTS: Snyder entered no contest plea in 2001 to manufacture of methamphetamine and was sentenced pursuant to the plea agreement. No appeal taken from that sentence. He filed a 1507 in 2004, arguing he should have been sentenced as severity level 3 drug felony, pursuant to State v. McAdam, 277 Kan. 136 (2004). District court denied the motion, finding Snyder was barred from collaterally attacking his sentence.

ISSUE: Retroactive application of McAdam

HELD: State v. VanCleave, 239 Kan. 117 (1986) is construed and applied. Holding in McAdam will not be given retroactive effect to cases whose direct criminal proceedings were final prior to Jan. 30, 2004.

STATUTES: K.S.A. 2004 Supp. 60-1507, -1507(b); K.S.A. 2003 Supp. 60-1507; K.S.A. 2001 Supp. 65-4152(a)(3) and (4), -7006(a); K.S.A. 8-142, -1567(a), -1567(a)(4), -2503, 21-3808(a), 22-3504(1), -3608(c), 40 -3104, 65-4125, -4159(a), -4160(a), -4161(a)

MENTAL HEALTH
IN RE CARE AND TREATMENT OF FOSTER
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 91,324 – MARCH 18, 2005

FACTS: Foster committed under Kansas Sexually Violent Predators Act. On appeal he claimed trial court erred in giving jury instruction that included issues related to commitment, treatment, and possible release, and in admitting Larued evaluation report that included inadmissible statements regarding polygraph results. Foster also claimed prosecutorial misconduct in opening statement that predisposed jury and prevented a fair trial.

THE JOURNAL OF THE KANSAS BAR ASSOCIATION

MAY 2005 – 41
ISSUES: (1) Jury instruction, (2) admission of evidence, and (3) Prosecutorial Misconduct

HELD: Challenged instruction only informed jury how long Foster’s treatment would last if commitment was necessary. No reversible error.

Issue not properly preserved for appeal. No exceptional circumstances for disregarding contemporaneous objection rule.

No Kansas authority for applying rules of prosecutorial misconduct to a civil commitment proceeding under Kansas Sexually Violent Predators Act. Nonetheless, state’s opening statement simply outlined history of case and evidence ultimately presented to jury. Even if credibility of state’s case was bolstered, no plain error resulted.

DISSENT (Green, J.) – Details the similarity of criminal proceedings to statutory scheme under Kansas Sexually Violent Predators Act. Prosecutor invaded province of jury by repetitious reminders of numerous prior review determinations that Foster met statutory commitment standards. Would also hold there was reversible error in admission of evaluation report containing polygraph results. State v. Moncla, 262 Kan. 58 (1997), is distinguished. Challenged jury instruction that presupposed or implied Foster has a mental abnormality or personality disorder was plain error. Relative infancy of Kansas Sexually Violent Predators Act tips balance for ascribing exceptional circumstances for appellate review in this case.

STATUTES: K.S.A. 2004 Supp. 59-29a03(a), -29a05, -29a06, -29a07, -29a09; K.S.A. 59-29a01 et seq., 60-404

SCHOOLS
NORLIN V. BOARD OF TRUSTEES OF CLOUD COUNTY COM. COLLEGE
CLOUD DISTRICT COURT – AFFIRMED
NO. 91,309 – SEPTEMBER 17, 2004
PUBLISHED VERSION FILED MARCH 11, 2005

FACTS: Tenured college instructor claimed he was denied due process when contract was changed to exclude duties and pay beyond his basic and regular teaching assignments. He appealed district court’s grant of summary judgment to college.

ISSUE: Due process and supplemental teaching duties

HELD: K.S.A. 72-5410 et seq. is construed and applied. Statutes protect teacher from being dropped from full-time to part-time employment without following proper procedures; they do not guarantee a certain salary or position. Assignment beyond normal teaching duties are considered supplemental duties and cannot be turned into part of primary contract protected by Teacher Due Process Act. Even when one instrument memorializes base teaching contract and supplemental duties, this does not make supplemental duties part of the primary contract. Under circumstances of case, supplemental duties could be unilaterally terminated by either party without notice.

STATUTES: 72-5410 et seq., -5412a, -5436 et seq., -5437(a)

SCHOOLS
U.S.D. NO. 215 V. MCGLYNN
KEARNEY DISTRICT COURT – AFFIRMED
NO. 91,310 – OCTOBER 1, 2004
PUBLISHED VERSION FILED MARCH 16, 2005

FACTS: Three tenured teachers appealed trial court’s decision that held the extended days in each teacher’s individual contract was supplemental and not subject to due process procedures under Due Process Procedure Act.

ISSUE: Due process and extended day contract

HELD: Due Process Procedure Act for teachers’ contracts is construed and applied. Act covers only full-time tenured positions. Same due process considerations are not required for extended day supplemental contracts, even if supplemental duties are listed in the same instrument. District court properly found a hearing under Due Process Procedure Act was not required to terminate each teacher’s extended day supplemental contract.

STATUTES: K.S.A. 72-5410 et seq., -5412a, -5436 et seq.

SPECIAL MASTER
SCHAUF V. SCHAAF
BUTLER DISTRICT COURT – AFFIRMED
NO. 91,783 – MARCH 4, 2005

FACTS: Roman and Leona Schaaf ran a family dairy operation. Their son, Mike, lived and worked at the dairy operation while he was growing up and returned home after college and assisted in the dairy operation. He continued his active participation until 1992, but his devotion of time had gradually diminished. During the previous 21-year period, there was no discussion of any written partnership agreement, but a substantial dispute existed as to Mike’s interest in the business. Roman and Leona deny any interest ever given to Mike. Leona paid the income from the dairy to the family members. In 1985, Leona decided to divide the “second” milk check between herself, Mike, and younger brother, Jaye, and a similar share of the proceeds from the sale of any male calves. Mike never demanded any accounting for a partnership, nor were there ever any partnership interests established. The parties also had substantial separate business and real estate transactions. Roman and Leona initiated the litigation in 1992 by filing an eviction. Mike and his wife, JoAnn, counterclaimed alleging equitable ownership of real and personal property and accounting of all profits. Mike and JoAnn were granted a bifurcation of the issue of the existence of a partnership and the damages. A special verdict of the jury found simply that “the parties were in a partnership relation.” Discovery ensued for nearly six years on a host of remaining issues. The judge appointed Senior Judge James P. Buchele as a mediator and master. No objections were made by either party to the appointment until after the master’s report was filed. After failed mediation, the master entered an extensive order finding the partnership was limited to distribution of incomes from the dairy and cow sales. The master awarded Mike $5,053 for 10 head of cows as a wedding gift and $7,369.76 from the sale of cows. The master stated that Mike never acquired any interest in real estate or cattle or other assets in the name of Roman and Leona. After hearing arguments, the district court adopted the master’s report.

ISSUES: (1) Did the report of the master disregard the jury verdict and address issues already determined by the
jury? (2) Were Mike and JoAnn entitled to the jury trial on some of the issues determined by the master and adopted by the district court? (3) Did the district court err in appointing a master and ordering that person to also serve as a mediator?

HELD: Court affirmed the district court's adoption of the master's report. (1) Court concluded that the scope of the master's report was fully consistent with the special verdict of the jury. Court stated the special verdict was simply to decide whether the parties had a partnership relation. Mike's issues in the pretrial order recognized the questions remaining about the nature of the partnership. Mike's arguments on what was partnership property and in what proportion demonstrate the uncertainty. (2) Court held that Mike's demand for a jury trial rather than the master proceeding on some of the remaining issues was waived as a matter of law upon submission of the special verdict form to the jury. Court stated the remaining issues were properly referred to the master, and Mike failed to object to the scope of the referral. (3) Court agreed that there are perils to having a master also serve as mediator, namely the revealing of confidential information. Court stated the better practice is to avoid such a dual appointment and to preclude any person who serves as a mediator from being assigned to any subsequent role as a factfinder or master in the same case. However, the court held Mike and JoAnn failed to object to the dual appointment at the time and they cannot complain of the dual appointment on appeal.


WORKERS' COMPENSATION
POFF V. IBP INC.
WORKERS' COMPENSATION BOARD – AFFIRMED
NO. 92,020 – MARCH 11, 2005

FACTS: Poff worked at IBP for 31 years starting in 1970. He suffered from carpal tunnel syndrome, had carpal tunnel release surgery, and was given an accommodated light duty job. Poff also suffered from varicose veins and sought medical attention in 1999 for the condition. Poff had surgery on his legs. Poff was given a light duty, sit down job of “washing tails” and he performed the job until he quit IBP in 2000. Poff also had lower back pain when he lifted baskets of intestines when he had his first light duty job, and the pain did not subside when he moved to washing tails. Poff testified he quit because the pain in his legs, arms, shoulders, and hands was too much. The day before he quit, he requested a hearing examination performed by the medical staff at IBP so he would have a record of his hearing. Poff filed four separate workers' compensation claims. The administrative law judge (ALJ) awarded compensation on three of the claims, but denied compensation for hearing loss because he failed to give timely notice of the accident. The appeals board affirmed the ALJ's awards, but increased the impairment for the varicose vein condition and the carpal tunnel syndrome.

ISSUES: Did the Board err in not considering all of Poff's injuries together? Was Poff's claim for hearing loss timely filed? IBP cross-appeals the board's decision for compensation for varicose veins.

HELD: Court affirmed the board's award of compensation. Court stated that Poff did not object to the ALJ's procedure of considering each claim individually. Court stated the ALJ had full discretion whether to consolidate Poff's cases and held there was no abuse of discretion in the ALJ's decision to issue four separate awards. Court held there was substantial competent evidence that Poff was not permanently disabled. Court acknowledged that if the board had ruled in favor of Poff, it would have probably sustained that decision considering the evidence and the scope of review. Court held the ALJ/Board did not err in finding Poff's claim for hearing loss was time barred. Court stated Poff failed to convey the required specific information that he was alleging a workplace injury when he had the hearing examination and he also failed to make a timely written claim. Court found IBP was not required to file an accident report because Poff never missed any work because of the hearing loss. Court rejected IBP's cross-appeal. Court stated there was substantial competent evidence in the record to support the board's finding that Poff's varicose vein condition was a new and distinct injury that arose out of and was directly caused by his employment at IBP.


Criminal

STATE V. DUMARS
SALINE DISTRICT COURT – REVERSED AND REMANDED
NO. 91,107 – MARCH 25, 2005

FACTS: DuMars convicted of attempted manufacture of methamphetamine, possession of drug paraphernalia for manufacturing purposes, and child endangerment. On appeal she claimed error in district court’s admission of inculpatory hearsay evidence and exclusion of exculpatory hearsay evidence. Specific instances included admission of inculpatory hearsay to which there was no objection or a late objection, striking inculpatory hearsay after a late admission, and exclusion of exculpatory hearsay. She also claimed prosecutorial misconduct, instructional error, nondisclosure of officer's field notes until officer's testimony, cumulative trial error, and insufficient evidence to support the convictions.

ISSUES: (1) Uneven application of hearsay rule, (2) prosecutorial misconduct, (3) jury instruction, (4) belated disclosure of field notes, (5) cumulative error, and (6) sufficiency of evidence.

HELD: State v. Brickhouse, 20 Kan. App. 2d 495 (1995), distinguished. All instances examined, finding violations of Brickhouse and of foundational rule in State v. Thompson, 221 Kan. 176 (1976), and finding abuse of discretion in failing to strike and instruct jury on elicited prejudicial hearsay. Claims of prosecutorial misconduct are upheld. (1) State's elicitation of inadmissible hearsay evidence constitutes gross and flagrant misconduct. Deliberate framing of question to include a suggested inadmissible and prejudicial hearsay response is neither the result of prosecutorial innocence nor inexperience. (2) Clear violation of Doyle v. Ohio, 426 U.S. 610 (1976), in provoking response that the defendant had exercised Miranda rights. (3) Prosecutor's comment in closing argument regarding the unanimity requirement rendered suspect all verdicts on charges relying on multiple acts. (4) Prosecutor misstated evidence and testimony. Defense failure to offer or request custom instruction to
address nonexclusive possession of drug paraphernalia precludes a finding of clear error.

Officer's field notes are not discoverable under K.S.A. 2004 Supp. 22-3212(b), thus are not subject to continuing duty rule in K.S.A. 2004 Supp. 22-3212(g). No abuse of discretion in denying motion for new trial based on these grounds.

Quantity of errors and totality of circumstances denied DuMars a fair trial. Convictions appealed are reversed.

Sufficient evidence supports drug manufacturing-related convictions, where DuMars was convicted on aiding and abetting theory. Conviction for child endangerment is reversed. Evidence demonstrates no authority or control over the child to find DuMars intentionally caused or permitted child to be in kitchen near the methamphetamine.

DISSENT (Malone, J.): Concurs that child endangerment conviction is not supported by sufficient evidence. Disagrees that a new trial is required on remaining charges based on cumulative error. Uneven application of hearsay rule not as glaring as in Brickhouse. Disagrees with finding of gross and flagrant misconduct, and of Doyle violation. Prosecutor's misstatements were trivial.

STATUTES: K.S.A. 2004 Supp. 22-3212(b) and (g); K.S.A. 21-3201(b), -3205, -3608(a), 22-3213(1), 60-261, -404, -455

STATE V. MCCONNELL
SUMNER DISTRICT COURT - AFFIRMED NO. 92,042 - MARCH 11, 2005

FACTS: McConnell convicted of possession of methamphetamine and illegal vehicle registration. On appeal, he claimed instruction on presumption of innocence should have stated "unless you are convinced" instead of "until you are convinced." He also claims insufficient evidence supports methamphetamine conviction.

ISSUES: (1) Instruction on presumption of innocence and (2) sufficiency of evidence

HELD: Instruction informing jury to presume defendant is not guilty until jury is convinced the defendant is guilty was not reversible error. Pattern Instructions for Kansas mirrored statutory language and has been upheld by Kansas Supreme Court. Distinction between "until" and "unless" is subtle, given natural usage of these words in common language. Instructions read as a whole and in context, jury could not reasonably have been misled about presumption of innocence.

Under facts, rational jury could have found McConnell guilty beyond a reasonable doubt of possession of methamphetamine.

STATUTES: K.S.A. 21-3109

STATE V. SHELINBARGER
SHAWNEE DISTRICT COURT – AFFIRMED NO. 91,821 – MARCH 4, 2005

FACTS: Shelinbarger entered into 1991 diversion agreement on Driving Under the Influence (DUI) charge. Agreement included a five-year decay of the conviction for the purpose of charging and sentencing. He was convicted a second time in 2000. Legislature removed the decay provision in 2001. In 2002, Shelinbarger was charged and convicted as third time DUI offender. On appeal, sole issue is whether use of the 1991 diversion as a prior conviction violated the Contract Clause.

ISSUE: Contract Clause

HELD: Under facts, language in diversion agreement stating DUI conviction could be used for five years for sentencing was in accord with DUI statute in effect at time of the agreement and did not expressly and unequivocally grant immunity from future changes in state law. Because agreement did not contain any promise by the city of such immunity, no obligation existed and there could be no impairment of contract under Contract Clause.

STATUTES: K.S.A. 2004 Supp. 8-1567(f), -1567(m)(3); K.S.A. 8-1567(k)(3) (Furse 1991)

STATE V. SIMS
GRANT DISTRICT COURT – AFFIRMED NO. 92,042 – MARCH 25, 2005

FACTS: Sims was originally charged with feloniously and intentionally committing the act of sexual intercourse with his daughter who was under 14 years of age at the time. Sims pled to attempted rape. On Aug. 7, 1997, the district court found Sims guilty of attempted rape and sentenced him in accordance with the parties’ plea agreement. On March 10, 2003, Sims filed a motion to correct sentence, but the district court summarily denied the motion.

ISSUES: Should Sims have been charged with attempted aggravated incest rather than rape? Does public policy dictate that the aggravated incest statute should apply to minor children without any age restriction? Was Sims denied effective assistance of counsel?

HELD: Court affirmed. Court held under the facts of the case, Sims could have been charged with attempted rape but not attempted aggravated incest under K.S.A. 21-3603. Court stated there was no conflict between the rape statute and the aggravated incest statute. Court held the age restrictions in the aggravated incest statute are plain and unambiguous, and they cannot be read out of the statute. Court stated the court must give effect to the Legislature’s intent as expressed. Court rejected Sims’ ineffective assistance of counsel argument as well. Court held that since the charge of attempted aggravated incest was inapplicable to the fact of his case, Sims’ trial counsel did not err by acquiescing to the state’s complaint.

STATUTES: K.S.A. 21-3501, -3502, -3603

STATE V. SLIMMER
SHAWNEE DISTRICT COURT – AFFIRMED NO. 92,232 – MARCH 4 2005

FACTS: Slimmer convicted of DUI and sentenced as second offender, based on 1988 DUI to which Slimmer entered into diversion agreement. On appeal he argues for first time that application of the 2001 amendment to K.S.A. 8-1567(m)(3), which eliminated the five-year decay provision in effect in 1988, violated his rights under the Contract Clause.

ISSUE: Contract Clause

HELD: K.S.A. 8-1567(m)(3) as applied in this case does not violate Contract Clause. Slimmer’s diversion agreement did not contain any promise by city to immunize Slimmer from future changes in state law. Without such an obligation, there is no impairment. Slimmer received primary benefit of his diversion agreement, and agreement was subject to changes in existing law.

STATUTES: K.S.A. 2004 Supp. 8-1567(m)(2) and (3); K.S.A. 1990 Supp. 8-1567(m)(3)
Appellate Practice Reminders . . .
From the Appellate Court Clerk’s Office

Additions to the Record on Appeal

Requests for additions to the record are made to the court that has the record on appeal. See Rule 3.02. The district court creates the record on appeal and does not transmit it to the appellate court until the appeal is “date ready.” A case becomes “date ready” when the appellee brief is filed.

If the district court denies the request, a request for additions to the record can be made to the appropriate appellate court before the record is transmitted. If the appellate court denies the request as well, the additions cannot be made to the record.

Motion to Withdraw

Initial entries of appearance in appeals are made in two ways. By filing the docketing statement, the appellant has entered an appearance. All parties named in the certificate of service for the docketing statement are treated as entering an appearance as an appellee. See Rule 2.04. Entries of appearance can also be made by motion to the appropriate appellate court. See Rule 1.09(a).

Once an appeal is docketed and a litigant is listed as a party, a motion to withdraw must be filed with the appropriate appellate court with service on the client and on opposing counsel. See Rule 1.09(b). Motions to withdraw should not be filed in the district court once an appeal is docketed. This is true even if the district court initially issued an order of appointment. Once an appeal is docketed or a motion to docket appeal out-of-time has been filed with the appellate courts, the district court loses jurisdiction. See Rule 2.04, annotation 4.

If you have any questions about these or other appellate court rules and practices, call the Clerk’s Office and ask to speak with Jason Oldham, the chief deputy appellate clerk. 785-368-7170.
ATTORNEY: Kansas Legal Services, a statewide nonprofit law firm, seeks a customer-focused Kansas licensed attorney or recent graduate, who is committed to exceeding client/customer expectations. Lawyer will perform general civil casework, including misdemeanor and juvenile defense in our Emporia office. Spanish bilingual a plus. Paid employee benefits include health, dental, life, and disability. Malpractice insurance and CLE paid. Two-year contract for employment required. Salary depends on experience. Send resume to: Ty Wheeler, managing attorney, Kansas Legal Services, 527 Commercial, Ste, 521, Emporia, KS 67802 or e-mail to wheeler@klslinc.org. EOE and Affirmative Action Employer. www.kansaslegalservices.org

PARALEGAL: Public interest law firm seeks full-time paralegal. College degree or formal paralegal or social work training preferred. Spanish bilingual a plus. Some local travel required. Must be self motivated and enjoy working in a fast-paced office. Paid employee benefits include health, dental, life, disability insurance, and parking. Salary depends on experience. Send resume to Shannon Crane, Kansas Legal Services, 206 W. 1st St., Hutchinson, KS 67501 or e-mail cranes@klslinc.org

MANAGING ATTORNEY: Kansas Legal Services Inc. is seeking a managing attorney with experience in general civil practice with good administrative skills to manage our Kansas City office. Kansas license with seven years’ minimum practice required. Benefits include health, dental, life, disability, bar dues, CLE, and parking. Salary depends on experience. Send resume and writing sample to Roger McCollister, Kansas Legal Services, 713 S. Kansas Ave., Ste. 200, Topeka, KS 66603 or e-mail to rotherra@klslinc.org. EOE and Affirmative Action Employer. www.kansaslegalservices.org

ATTORNEY SERVICES

EXPERIENCED ATTORNEY with excellent legal research and writing skills is available to assist overworked solo practitioners and small firms. I provide prompt, professional service at reasonable rates. References are available upon request. Call or e-mail Shelley Patterson at (816) 204-7949 or Shelley.Patterson@spatterson-law.com

ELECTRONIC CASE FILING ASSISTANCE. Electronic filing is now mandatory in bankruptcy court. We can help you keep your clients regardless of your electronic filing capability. ECF provides electronic case filing services, software, hardware, and training solutions. Call ECF (316) 262-5908. Ask for Liz or Eric.

OVERWHELLED WITH RESEARCH/Writing WORK? Let me help! Experienced attorney is available for research/writing assignments. Visit www.anglinlawoffice.com and contact Stephanie Anglin at (913) 484-3174 or sanglin@earthlink.net

FORMER EIGHTH CIRCUIT COURT OF APPEALS law clerk with 16 years of appellate litigation experience is available for appellate referrals or consultation. Contact Thomas Sheehan at (913) 461-3648 or e-mail Sheehanlaw@kcrr.com

LEGAL RESEARCH AND WRITING. Research attorney available for memos, briefs, or informal research. Pay by the hour or on a project basis. Carolyn R. Simpson, Attorney at Law LLC (785) 979-4353 or e-mail simpsonlaw@sbcglobal.net

PATENTS, TRADEMARKS, AND COPYRIGHTS. At Erickson and Kleyapas LLC, our practice focuses exclusively on intellectual property matters, including the acquisition, maintenance, licensing, and enforcement of patents, trademarks, and copyrights. Please contact us if you have a client needing assistance with an intellectual property issue. Call or e-mail Sean Bradley at (816) 753-6777 or sbradley@kcpatentlaw.com

30 PERCENT REFERRAL FEE!! Attorney with eight years’ experience has recently become of counsel at Powell, Brewer and Reddick LLP and is trying to add to her client base. If you have clients who need representation in medical malpractice, personal injury, product liability, or workers’ compensation litigation, please give Shari Willis a call at (316) 265-7272.

FOR SALE

THE LAWBOOK EXCHANGE, LTD. buys, sells, and appraises all major lawbook sets. Also, antiquarian, scholarly. Reprints of legal classics. Catalogues issued in print and online. Mastercard, VISA, and AmEx. (800) 422-6686; fax: (732) 382-1887; www.lawbookexchange.com

What Is A Business Worth?

If you need an Expert Witness or Certified Appraiser of a business or its assets, or... If you need an Experienced Broker to help sell a business... Call the one with Knowledge & Experience

John R. Harris, CBC, ASA
Marketing & Consultant Services, Inc
Riverbend Office Park
2014 W. 13th Street
Wichita, KS 67203
(316) 681-1527
www.marketingconsult.com

ATTORNEY SERVICES

GET OFF THE MERRY-GO-ROUND OF CHEMICAL DEPENDENCY! Help is available; you don’t have to do it alone. Call the completely confidential and anonymous Kansas Lawyers Assistance Program (KALAP) — Donald L. Zemites, executive director, (888) 342-9080, (24 hours/7 days).
The KBA Road Show

Soon to be traveling in your direction, the KBA Road Show is now available to take part in local bar happenings, provide speakers for seminars and luncheons, or perhaps even co-host events throughout the year.

Simply call Bar headquarters to notify us of any upcoming activity and we’ll be happy to head your way, bringing free CLE as well as information on our latest programs and member benefits.

Contact: Bar Headquarters
Phone: (785) 234-5696
E-mail: info@ksbar.org
### CLE Docket 2005

#### MAY

<table>
<thead>
<tr>
<th>Date</th>
<th>Seminar</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>Federal Criminal Practice</td>
</tr>
<tr>
<td></td>
<td>Embassy Suites on the Plaza, Kansas City, Mo.</td>
</tr>
<tr>
<td></td>
<td>3 CLE credit hours</td>
</tr>
<tr>
<td>6</td>
<td>Ethical Challenges in Managing a Law Office</td>
</tr>
<tr>
<td></td>
<td>Embassy Suites on the Plaza, Kansas City, Mo.</td>
</tr>
<tr>
<td></td>
<td>3 CLE credit hours, including 3 hours PRC</td>
</tr>
<tr>
<td>13</td>
<td>Intellectual Property Institute</td>
</tr>
<tr>
<td></td>
<td>Ritz Charles, Overland Park</td>
</tr>
<tr>
<td></td>
<td>6 CLE credit hours, including 1 hour PRC</td>
</tr>
<tr>
<td>19</td>
<td>Stock Options and Valuations</td>
</tr>
<tr>
<td></td>
<td>Telephone CLE</td>
</tr>
<tr>
<td></td>
<td>1 CLE credit hour</td>
</tr>
<tr>
<td>20</td>
<td>Practical Skills</td>
</tr>
<tr>
<td></td>
<td>Holiday Inn West, Topeka</td>
</tr>
<tr>
<td></td>
<td>8 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>27</td>
<td>Legal Issues Involving Gay, Lesbian, Bisexual, and Transgender Individuals</td>
</tr>
<tr>
<td></td>
<td>Country Club Plaza Marriott, Kansas City, Mo.</td>
</tr>
<tr>
<td></td>
<td>4 CLE credit hours</td>
</tr>
<tr>
<td>30</td>
<td>Legislative and Case Law Institute</td>
</tr>
<tr>
<td></td>
<td>3 sites: Wichita, Overland Park, and Topeka</td>
</tr>
<tr>
<td></td>
<td>8 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>30</td>
<td>Bankruptcy Update: The Good, the Bad, and the Unknown</td>
</tr>
<tr>
<td></td>
<td>Holiday Inn, Overland Park</td>
</tr>
<tr>
<td></td>
<td>6 CLE credit hours, including 1 hour PRC</td>
</tr>
<tr>
<td>30</td>
<td>3 hour Video Replay, including 2 hours of ethics!</td>
</tr>
<tr>
<td></td>
<td>KBA Headquarters, Topeka</td>
</tr>
<tr>
<td></td>
<td>3 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>25</td>
<td>Legislative and Case Law Institute</td>
</tr>
<tr>
<td></td>
<td>26 sites statewide</td>
</tr>
<tr>
<td></td>
<td>8 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>27</td>
<td>Brown Bag Ethics video-replay (morning and afternoon)</td>
</tr>
<tr>
<td></td>
<td>KBA Headquarters, Topeka</td>
</tr>
<tr>
<td></td>
<td>2 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>28</td>
<td>3 hour Video Replay* and Brown Bag Ethics**</td>
</tr>
<tr>
<td></td>
<td>3 sites: Wichita, Overland Park, and Topeka</td>
</tr>
<tr>
<td></td>
<td>*3 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td></td>
<td>**2 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>29</td>
<td>3 hour Video Replay* and Brown Bag Ethics**</td>
</tr>
<tr>
<td></td>
<td>3 sites: Wichita, Overland Park, and Topeka</td>
</tr>
<tr>
<td></td>
<td>*3 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td></td>
<td>**2 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>30</td>
<td>LCLI Video Replay</td>
</tr>
<tr>
<td></td>
<td>KBA Headquarters, Topeka</td>
</tr>
<tr>
<td></td>
<td>8 CLE credit hours, including 2 hours PRC</td>
</tr>
</tbody>
</table>

#### JUNE

<table>
<thead>
<tr>
<th>Date</th>
<th>Seminar</th>
</tr>
</thead>
<tbody>
<tr>
<td>9-11</td>
<td>123rd KBA Annual Meeting – Highway to Vail</td>
</tr>
<tr>
<td></td>
<td>Vail Cascade Resort &amp; Spa, Vail, Colo.</td>
</tr>
<tr>
<td></td>
<td>12 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>17</td>
<td>Legislative and Case Law Institute</td>
</tr>
<tr>
<td></td>
<td>3 sites: Wichita, Overland Park, and Topeka</td>
</tr>
<tr>
<td></td>
<td>8 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>24</td>
<td>Bankruptcy Update: The Good, the Bad, and the Unknown</td>
</tr>
<tr>
<td></td>
<td>Holiday Inn, Overland Park</td>
</tr>
<tr>
<td></td>
<td>6 CLE credit hours, including 1 hour PRC</td>
</tr>
<tr>
<td>24</td>
<td>3 hour Video Replay, including 2 hours of ethics!</td>
</tr>
<tr>
<td></td>
<td>KBA Headquarters, Topeka</td>
</tr>
<tr>
<td></td>
<td>3 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>25</td>
<td>Legislative and Case Law Institute</td>
</tr>
<tr>
<td></td>
<td>26 sites statewide</td>
</tr>
<tr>
<td></td>
<td>8 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>27</td>
<td>Brown Bag Ethics video-replay (morning and afternoon)</td>
</tr>
<tr>
<td></td>
<td>KBA Headquarters, Topeka</td>
</tr>
<tr>
<td></td>
<td>2 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>28</td>
<td>3 hour Video Replay* and Brown Bag Ethics**</td>
</tr>
<tr>
<td></td>
<td>3 sites: Wichita, Overland Park, and Topeka</td>
</tr>
<tr>
<td></td>
<td>*3 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td></td>
<td>**2 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>29</td>
<td>3 hour Video Replay* and Brown Bag Ethics**</td>
</tr>
<tr>
<td></td>
<td>3 sites: Wichita, Overland Park, and Topeka</td>
</tr>
<tr>
<td></td>
<td>*3 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td></td>
<td>**2 CLE credit hours, including 2 hours PRC</td>
</tr>
<tr>
<td>30</td>
<td>LCLI Video Replay</td>
</tr>
<tr>
<td></td>
<td>KBA Headquarters, Topeka</td>
</tr>
<tr>
<td></td>
<td>8 CLE credit hours, including 2 hours PRC</td>
</tr>
</tbody>
</table>