From Solo to Megafirm: You Need a ‘General Counsel’

Protecting Medicare’s Interests in Kansas Workers’ Compensation Settlements — Simplifying the Maze
Law Museum Planned for Bar Center Renovation

Members can be a part of Kansas Law History

As part of its renovation and expansion of the Kansas Law Center through the Raising the Bar Campaign, the Kansas Bar Association and Kansas Bar Foundation are creating a Kansas Law Museum. The museum will house numerous legal treasures and historical law pieces, including a timeline of the practice of law in Kansas. The museum will be open to members as well as the public.

The Bar plans to have a rededication ceremony for the building in the fall of 2007 in conjunction with the 125th anniversary of the KBA.

To help raise funds for the renovation project, we are pleased to provide our members and other interested persons with a unique opportunity to support this effort through a special brick campaign. This is your chance to leave your mark on the legal profession forever.

Purchase a brick for yourself or in honor or memory of friends and loved ones. You can have a name, law firm, or message engraved on a brick that will be permanently displayed at the new entrance and garden of the Law Center.

Brick by brick, your generous donations will allow us to provide the funds necessary to expand and improve facilities so that we can enhance member services and promote legal professionalism as well as strengthen our Foundation endowment to be used to make justice accessible to all Kansans and promote a better understanding of the law.

The first KBF president and contributor was L.J. Bond of El Dorado, who served as president from 1957-1962. His words still give inspiration to this day:

“It is conceivable that this Foundation, 50 years from now, may have a very substantial amount of money and that it can carry out the ends for which it is organized in a manner that would make every lawyer of the state proud to be a lawyer and proud of this foundation.”

The first brick will be laid in the spring of 2007 and will continue through the years.

“Cornerstone Contributor” Brick

- Pledged gift of $1,000
- Purchase a brick for yourself or in honor or memory of friends and loved ones
- Payable in annual installments over three years

To make your pledge and purchase your own brick, please contact Janessa Akin at Bar headquarters at (785) 234-5696 or e-mail at jakin@ksbar.org.
Our Mission:
The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.

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Cover photo by Susan M. McKaskle

Don’t forget! Renew your KBA membership today!

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Terri Bezek, Board of Editors chairperson, bezekt@kcourts.org
Susan McKaskle, managing editor, smckaskle@ksbar.org
There is increasing evidence that the legal representation requirements of a large percentage of our population are simply not being fulfilled, both in Kansas and across the country. While busy lawyers may not want to hear a call to take on more work, it appears that may be at least a part of the solution. Beyond an optimistic increase in public funding for legal services to the poor, the rest of the solution is yet to be found.

The Legal Services Corporation issued a report in September 2005 which concluded that 80 percent of the civil legal needs of low-income Americans was not being met. Merely reorienting those legal needs to be served by affiliates of the LSC isn’t working. The report estimated that for every client who receives legal service from an LSC-funded agency, another one was turned away for lack of available program resources.

Adding up all the legal aid attorneys serving the poor in comparison to the population eligible to be served, the report arrived at one attorney for every 6,681 low-income persons. By contrast, there is said to be one attorney providing civil legal services for every 525 members of the general population. In other words, every legal aid attorney must cover a population base 13 times greater than a general civil attorney. (Benchmark: In Shawnee County the ratio between the total population and active lawyers registered with the Supreme Court is about 138 to 1.) And it’s probably a fair assumption that low-income Americans have more legal problems per capita than more affluent citizens.

The head of Kansas Legal Services says the pattern is the same in Kansas. According to Roger McCollister, KLS employs 55 attorneys across the state to handle 27,000 clients yearly — about one lawyer for every 490 cases. The cases handled by KLS have been winnowed from some 100,000 requests for service each year. McCollister says some 40-50,000 of those requests are valid claims within the organization’s income/asset guidelines, but there is simply not enough staff to provide representation.

Mike Greco, President of the American Bar Association, has offered a challenge that would even further increase the legal workload on behalf of low-income citizens. Greco has proposed that there should be a right to counsel in certain civil cases, expanding the current reach of constitutional guarantees beyond criminal cases. For instance, he suggests that a person should be provided counsel if their family status is being challenged by the state, such as in an unfit parent proceeding. Second, he asks whether counsel should be provided when a person’s housing is being threatened, such as eviction cases. And finally, Greco posits a need for counsel when government medical assistance is at risk, as in Medicare denial.

The future of such proposals is unclear at present, but they are certainly thought-provoking. Even more provocative is the question of how those legal services would be provided in an environment in which we can’t even approach current needs. One answer sure to be heard is for attorneys to provide more representation on a pro bono basis, and there are already moves in that direction.

The New York Law Journal reported in December 2005 that 30 large Manhattan law firms have agreed to abide by a statement of principles which calls for 50 pro bono hours per year from every lawyer. The principles, adopted by the New York City Bar Association, track with the ABA’s Model Code of Professional Responsibility. In addition to pro bono service, a policy of the New York State Bar Association also calls for direct monetary contributions to legal service organizations from members of the bar and their firms.

Every year the KBA recognizes Kansas lawyers who have given outstanding service on a pro bono basis. Beyond formal pro bono work, virtually every practicing lawyer donates an appreciable amount of time which is never compensated, including unbilled services to nonprofit organizations and to clients who simply have no resources to pay what our services are worth. Can we do more? Should we even be asked to do more?

A couple of things are abundantly clear. First, in an increasingly-regulated and legislated society, more and more people’s lives will be affected by the way in which government rules are applied to them. At the same time, the demands on government funding sources are increasing from every other quarter (read school finance and Medicaid). Where will we find adequate public or private funding when the legal community hits its limits for pro bono services?

As always, the organized bar and its members will be called upon to find solutions to these persistent problems. Suggestions are welcomed.
“When firms are looking at the bottom line and are wondering if they can justify sending an associate or partner to the KBA Annual Meeting, I would point out all the things it provides, including the opportunity to get as many CLEs as you need, to expand professional and social relationships, and to network with other lawyers.

“When you attend the KBA Annual Meeting, you become friends with people who are outside of your community, and when they’re thinking of referrals they generally think of people they actually know as opposed to just names they’ve seen on pleadings. To my knowledge I don’t think I’ve ever gotten a referral from somebody that I didn’t know to some level.

“I truly believe the Kansas Bar Association Annual Meeting is one event no legal professional should miss.”

Larry Bork,
Goodell Stratton et al., Topeka
KBA member since 1983
Annual Meeting Task Force Chair 2000, 2004

124th ANNUAL MEETING of the KANSAS BAR ASSOCIATION
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Visit www.ksbar.org for more information
John C. Tillotson, 65, died Nov. 4 at his home after a three-year battle with cancer. He was born in Norton, Kan., on Aug. 13, 1940, to Charles and Maxine Tillotson.

After earning his bachelor’s degree in political science and international relations from the University of Kansas in 1962, he began his law career. While attending law school at Washburn University, he was a law clerk for the Kansas Supreme Court. Becoming a member of the bar in 1965, he entered into private practice before serving as Leavenworth County Attorney from 1969-1971. In 1971 he became a member of Murray Tillotson & Wiley Chtd., where he practiced until his death.

“John’s long-standing dedication to the law and improving the administration of justice set the highest standard for all of us,” said KBA President Rich Hayse. “He showed us by example how to do things better than before. The challenge for the next generation is to build on his leadership and innovation.”

As a member of the KBA he served on the Board of Governors and as president from 1997-1998. He was also a member of the KBA Fee Dispute Resolution Panel and the Past Presidents, Nominating, and Legislative committees. He was a past member of the Annual Meeting Planning Task Force and was a member of the former KBA Judicial Resources, Admission on Motion, and Access to Justice task forces. He served on the former Client Security Fund (chair) and Bad Checks Law committees. He also served on the Kansas Bar Foundation’s Board of Trustees.

“John was instrumental in getting me actively involved in Kansas Bar Association activities,” said Mike Crow, KBA president 2004-2005. “He was my mentor, and he will be greatly missed by the legal profession.”

Tillotson mentored some and inspired others.

“John had a vision for the way he thought things should be,” said KBA Executive Director Jeffrey Alderman. “He was a great leader, and we are forever indebted to him for his tireless service to the organization and to the legal profession.”

He was preceded in death by his father.

Tillotson was a past member and legislative representative for the Kansas County Attorneys Association, past chair of the Kansas Lawyers Fund for Client Protection, and a past member Washburn Law Association Board of Governors. He served as chair of the Standing committee on Criminal Law and Procedure for the Kansas Judicial Council, as well as a member of its committee on ABA Criminal Standards. He was a past member of the ABA Client Security Advisory committee and served on the Committee for Merit Selection of Judges for Leavenworth County.

Tillotson was a member of the American, Missouri, and Leavenworth county bar associations. He was an approved mediator by the Kansas Supreme Court and a certified arbitrator and commercial mediator by the American Arbitration Association. He was admitted to practice before the U.S., Kansas, and Missouri Supreme Courts; the Federal District Court; and the Tenth U.S. Circuit Court of Appeals.

His choice to make the law his career was a natural for him. His father; grandfather, Hubert Tillotson; and his great-aunt, Ida Tillotson, who was one of the first women to be admitted to the bar in Kansas, were all lawyers.

Tillotson was survived by his wife, Carolyn; daughter, Cathy, Leavenworth; son and daughter-in-law, Charles and Melissa Tillotson, Leavenworth; mother, Maxine, Topeka; sister and brother-in-law, Carolyn and Norman Smith, Middleburg, Va.; and two grandchildren, Cole Allen and Clayton Andrew Tillotson, Leavenworth.

Memorials contributions may be made to the Cushing Hospital Foundation, 711 Marshall St., Leavenworth, KS 66048; First United Methodist Church, 5th and Chestnut St., Leavenworth, KS 66048; or Hospice of Leavenworth, 920 6th Ave., Leavenworth, KS 66048.
Daniel “Dan” J. Sevart, 61, Wichita, died Dec. 16 after a courageous battle against cancer. He was born June 25, 1944, to Vernon and Alma Sevart and grew up on a farm in Oswego.

After graduating from Oswego High School in 1962, Sevart received his associate of arts degree from Labette County Community College in 1964. He attended Wichita State University from 1964-1965 and served in the U.S. Air Force from 1965-1972, where he was promoted to staff sergeant and received the Vietnam Service Medal.

It was in Tokyo in the late 1960s where he met Shoko, who was attending law school at the time; they married in 1968 and later transferred to Topeka. As Shoko finished law school at Washburn University School of Law (WU), she convinced her new husband, who was considering a career in journalism, to also become a lawyer. He earned his B.A. in English with departmental honors in 1973 and his J.D. (dean’s honor roll) in 1975 from WU.

From 1972-1975, Sevart worked as a property officer at Shawnee County Community Assistance and Action Inc. After graduating from law school, he was an associate (1976-1978) and then partner (1978-1982) at Render and Kamas in Wichita. From 1982-1983 he was a partner in the firm of Schartz and Sevart, Wichita, and in 1983 he and Shoko opened the law firm of Sevart and Sevart in Wichita, which focused on mediation, personal injury, and employment litigation.

“Dan was waiting for me when I started last year, and I always knew that I could count on him when I needed assistance,” said KBA Executive Director Jeffrey Alderman. “He spent so many hours working on Bar-related projects that I often wondered how he made a living.”

Sevart was a member of the American, Kansas, and Wichita bar associations and served as president of the KBA from 2003-2004 and president of the WBA from 1993-1994.

He was a Fellow of the Kansas Bar Foundation, Wichita Neighborhood Justice Center, the Kansas Lawyer Service Corporation, and Washburn University Alumni Association. Sevart also served on the Wichita Municipal Court Nominating Commission, the Judicial Selection Panel for the Eighteenth Judicial District, and the Kansas Governmental Ethics Commission (1996-2005). He was also a member of the National Conference of Bar Presidents and the Association of Trial Lawyers of America.

“Dan was the perfect example of a professional, not only in the way he practiced law, but also in his service to the community and the state and local bar associations he belonged to,” said U.S. Magistrate Judge David J. Waxse.

Sevart supported numerous charitable and nonprofit organizations, including serving on the board of directors of the Wichita Symphony Society, Opera Kansas Inc., WSU Dance Partners, and the Friends of the Chinese National Symphony Orchestra. He was a member of the National Endowment for the Arts and had served as the general counsel for the Greater Wichita Convention and Visitors Bureau since 1984.

“Dan’s life is a model of what it means to be a public servant,” said KBA President Rich Hayse. “His service to his community, his state and his profession was outstanding by any standards. His passing leaves an enormous vacuum that will be difficult, if not impossible, to fill.”

Survivors include his wife, Shoko, of the home; son and daughter-in-law, Eric and Karen Sevart of Midlothian, Texas; grandchildren, Anna, Rachel, Alex, and Mary; brothers and sisters-in-law, John and Gwen Sevart and Frank and Joleen Sevart, all of Wichita; and sister and brother-in-law, Lily and Joe Corso of Riverton, NJ. Sevart was preceded in death by his parents; brother, Alan Sevart; and sister, Kathleen Metzer.

Memorials have been established with the Kansas Bar Foundation, 1200 S.W. Harrison St., P.O. Box 1037, Topeka, KS 66601; Wichita Symphony Society, 225 West Douglas, Suite 207, Wichita, KS 67202; and Wichita State University College of Fine Arts, 1845 Fairmount, Wichita, KS 67208.
History is full of examples where someone comes up with an idea that seems brilliant. For about a week. Just long enough to promote it to the public, who eat it up. And then the public begins to understand that it’s not a step forward at all.

Take car security alarms, for example. In the early days car alarms were considered the essential accessory for pricey cars. Then owners learned they could be activated by things other than a thief. Like a strong gust of wind or brushing up against the trunk. False alarms then started to cause noise pollution everywhere. Especially in places that value peace and quiet, like outside churches, day care centers, monasteries, and funeral homes.

Home security alarms went through a similar period. At one time they were “must haves” for home owners. Then folks learned that they seemed to be activated during the week the owners were in the Bahamas. They blared for miles, resulting in fines and court dates. Other examples abound. Some momentary genius came up with the forced-air hand dryer for bathrooms. Those are the machines where the instructions say: 1. Punch button. 2. Twist hands. 3. Wipe hands on pants. Attorneys found laser pens a key essential for presentations. And then kids starting pointing them at movie screens and worse, like airplanes on landing patterns. Arrests and horrible publicity followed.

The legal profession is not impervious to all this. Cell phones were a lawyer’s best friend and then they became a public nuisance. And then lawyers became consumed with e-mail. Which then made the Blackberry the latest essential accessory. And while some attorneys are addicted to it, I have a different view of all this.

Now let me say at the outset that attacking the Blackberry in an audience of attorneys is more than just stupid. It’s dangerous. It would be like an American Medical Association convention inviting John Edwards to argue against medical malpractice caps. But hear me out on this.

I have a Blackberry. No, it does not rest on my belt buckle for the world to see. I tend to leave it in my coat pocket and take it when I leave town. So I can speak with some degree of familiarity with it.

Maybe it’s me, but in my view, Blackberry users need a serious lesson in moderation. I’ve seen “crackberry” addicts cradle their units in the palm of their hands for hours at a time. I suppose there are some people who need to read e-mail on Saturday afternoons. Like during sandlot baseball games, for example. Or during church. Or during movies. I suspect these are the same guys who don’t know the difference between “reply” and “reply all.” Which then prompts other users halfway around the country to read and reply to e-mails that have the substantive content of this: “Yeah, I agree.”

There are ways to deal with these types, I’ve learned. I can move to another part of the baseball bleachers. I can start a wave while they are typing. But it’s those addicts who type while driving that I’ve got real issues with. Newer Blackberry models have a telephone feature so that addicts can read e-mails and talk about it at the same time, leaving the steering wheel to little Johnny seated in his car seat. One article I found on the “Blackberry addiction” reported one professional saying the following: “There’s a thrill in getting a ‘hit’ — an e-mail.” He went on to say, “The device is attached to my hip. I have it on me every hour of the day, every day of the week. I literally sleep with it!” The good news, folks, is that this guy is not an attorney.

So just when I think this is starting to trend down, it happened. The Blackberry maker is promoting a model for children. It’s called a Blueberry and starts training our youth to pick up all these annoying habits at young age. So if we did not have enough children spending too many hours indoors wasting time, now we have added one more thing to occupy their time — reading e-mails!

My dad has made a good living as a lawyer and prides himself in the level of care he brings to his clients. In writing this column I asked him, “Do you know what a Blackberry is?”

“Sure, we grew them at the farm. They were good so long as you didn’t eat too many of them.” Perfect.

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. For the last 20 years, Keenan has practiced with Shook, Hardy & Bacon.
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Indian Law: Setting the Stage for ‘Lara II’

By Carrie Barney, Washburn University School of Law

Depending on where you plan to take the bar, you may be surprised to learn that your exam subjects may include Indian law. As tribal economic power increases, so also does the need for attorneys who are familiar with Indian law. Currently two states, Washington and New Mexico, include Indian law as a bar exam subject, with four more states considering its addition. Named by Student Lawyer as a “hot practice” area, there’s little doubt why large firms are scrambling to build practice groups specializing in Indian law. Its increasing overlap with all areas of law has created a greater need for general awareness among legal professionals everywhere.

One of the most interesting issues in the area of Indian law addresses how an individual who is an Indian can be treated by the law as a non-Indian. “Indian,” as most learn in grade school, is the name Columbus gave the people he encountered when he landed in the New World. However, as a legal construct, the term “Indian” has a meaning that is directly dependent upon federal law. In other words, federal statutes and cases dictate who can be considered an “Indian.” Typically, by federal definition, Indians who were not members of a particular tribe were considered non-Indians to that tribe, and because of that status the tribe did not have jurisdiction to prosecute or punish them for their offenses against the tribe.

In a recent 7-2 decision, the U.S. Supreme Court held that Congress has the authority to recognize an Indian tribe’s inherent power to prosecute nonmember Indians who commit certain crimes on reservations other than their own. At issue in United States v. Lara was whether a tribe’s jurisdiction over nonmember Indians springs from the Constitution or from the federal common law that recognizes such power as an aspect of inherent tribal sovereignty. Billy Jo Lara, a member of the Turtle Mountain Band of Chippewa, married a Spirit Lake Sioux woman from a nearby reservation. It was on the Spirit Lake reservation that he was prosecuted by the tribe for assaulting a police officer. Following his conviction, federal authorities stepped in and prosecuted Lara again on charges arising out of the same incident. Lara appealed his federal conviction, alleging a violation of the Double Jeopardy Clause.

In light of the Court’s recent rulings involving American Indian issues, the decision to recognize tribes as separate sovereigns came as a pleasant surprise to many American Indian legal scholars. Prior to Lara, the decisions of the Court had been consistently limiting in nature. Specifically, the Court held that tribal sovereignty lacked jurisdiction to prosecute non-Indians. In addition, the Court held in Duro v. Reina that based upon the statutory language at the time, an Indian tribe does not have authority to prosecute nonmember Indians by way of its inherent sovereignty, but instead through a special allocation from Congress. In response to this decision, Congress specifically amended the Indian Civil Rights Act to include “the inherent power of Indian tribes, hereby recognized and reaffirmed, to exercise criminal jurisdiction over all Indians,” regardless of whether they were members of that tribe. This legislation has come to be known as the “Duro fix.”

In its affirmation of Lara’s federal conviction, the Court held that Congress could properly restore tribal powers that had been removed at an earlier date. Furthermore, in its reaffirmation of the plenary authority of Congress over Indian affairs, the Court described these powers as emanating from the Constitution. Thus, tribes again had the power to prosecute Indians under certain circumstances, even though the particular offender was not a member of that specific tribe. While Lara appears to recognize a measure of sovereignty in the tribe, the case is far more important as a reaffirmation of congressional plenary authority over Indians.

In the end, however hopeful American Indian scholars may have felt initially in response to Lara, trepidation over this decision should not be ignored. The question looming on the horizon as a potential Lara II is whether a tribe’s inherent authority to prosecute nonmember Indians, but not non-Indians, amounts to a violation of equal protection under the law. Thus, while Indian tribes enjoy the protection of the amended Indian Civil Rights Act and the Court’s current willingness to accept congressional authority to enact legislation directly invalidating Lara around the corner a case lurks waiting to unfix the “Duro fix.” In that case, the defendant, a nonmember Indian, will likely question why the Constitution fails to provide him with equal protection and due process guarantees against prosecution by a tribe that is not his own. Under that scenario, it is entirely possible that the Court’s next move will be to unfix the “Duro fix” based on equal protection grounds — putting us easily back to square one.

About the Author

Carrie Barney, Aberdeen, S.D., is a third-year student at Washburn University School of Law. She earned her B.A. in political science from the University of South Dakota. Barney is currently engaged in a research project for the Sac and Fox Nation under the U.S. Department of Justice Tribal Court Assistance Program. She has also clerked for Parker & Hay LLP, Topeka.

FOOTNOTES
7. See, e.g., United States v. Archambault, 97 FED. App. 59 (8th Cir. 2004).
Advance Notice: Elections for 2006 KBA Officers and Board of Governors

It's not too early to start thinking about KBA leadership positions for the 2006-2007 leadership year.

- **KBA President-elect** (Current – David J. Rebein, Dodge City)
- **KBA Vice President** (Current – Linda S. Parks, Wichita)
- **KBA Secretary-Treasurer** (Current – Ernest C. Ballweg, Overland Park)

The KBA Nominating Committee, chaired by Michael P. Crow, Leavenworth, is seeking information about individuals who are interested in serving in the positions of president-elect, vice president, and secretary-treasurer of the Kansas Bar Association. If you are interested, or know someone who should be considered, please send detailed information to Jeffrey Alderman, KBA Executive Director, P.O. Box 1037, Topeka, KS 66601-1037, by Jan. 13, 2006. This information will be distributed to the Nominating Committee prior to its meeting on Jan. 27, 2006.

**Board of Governors**

There will be seven positions on the KBA Board of Governors up for election in 2006. Candidates seeking a position on the Board of Governors must file a nominating petition — signed by at least 25 KBA members from that district — with Jeffrey Alderman by March 10, 2006. If no one files a petition by March 10, the Nominating Committee will reconvene and nominate one or more candidates for open positions on the Board of Governors. KBA districts with seats on the Board of Governors up for election in 2006 are:

- **District 1**: Incumbent Timothy M. O'Brien is not eligible for re-election. Johnson County
- **District 2**: Incumbent Gerald R. Kuckelman Jr. is eligible for re-election. Atchison, Brown, Doniphan, Douglas, Franklin, Jackson, Jefferson, Leavenworth, Miami, Nemaha, Osage, Pottawatomie, and Wabaunsee counties
- **District 4**: Incumbent William A. Taylor is not eligible for re-election. Butler, Chase, Chautauqua, Coffey, Cowley, Elk, Greenwood, Lyon, and Sumner counties
- **District 5**: Incumbent Martha J. Coffman is eligible for re-election. Shawnee County
- **District 6**: Incumbent Gabrielle M. Thompson is eligible for re-election. Clay, Cloud, Dickinson, Ellsworth, Geary, Lincoln, Marion, Marshall, McPherson, Morris, Ottawa, Republic, Riley, Saline, and Washington counties
- **District 7**: Incumbent Rachael K. Pirner is eligible for re-election. Sedgwick County
- **District 10**: Incumbent Glenn R. Braun is eligible for re-election. Cheyenne, Decatur, Ellis, Gove, Graham, Jewell, Logan, Mitchell, Norton, Osborne, Phillips, Rawlins, Rooks, Russell, Sheridan, Sherman, Smith, Thomas, Trego, and Wallace counties

For more information:

Petitions for the Board of Governors can be obtained by contacting Becky Hendricks at the KBA office at (785) 234-5696 or via e-mail at bhendricks@ksbar.org.

If you have any questions about the KBA nominating or election process or serving as an officer or member of the Board of Governors, please contact Mike Crow at (913) 682-0166 or via e-mail at mikecrow@ccblegal.com, or Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
The KBA Awards Committee is seeking nominations for award recipients for the 2006 KBA Awards. These awards will be presented at the KBA Annual Meeting in Overland Park, June 8-10, 2006. Below is an explanation of each award, and a nomination form can be found on Page 13. The Awards Committee, chaired by Anne Burke Miller, Manhattan, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee's attention!

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

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

Professionalism Award: This award recognizes an individual who has practiced law for 10 or more years who, by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession as identified by the KBA Hallmarks of the Profession. (See Page 13.)

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

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

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

Pro Bono Award: This award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor. In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:
- Lawyers who are not employed full time by an organization that has as its primary purpose the provision of free legal services to the poor;
- Lawyers who, with no expectation of receiving a fee, have provided direct delivery of legal services in civil or criminal matters to a client or client group that does not have the resources to employ compensated counsel;
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low- and moderate-income persons.

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

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

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

KBA Awards Nomination Form

Nominee’s name: ____________________________

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

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. You may attach additional information as needed.

____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________

Nominator’s name: ____________________________

Address: _______________________________________

Phone: ____________________________ E-mail: _______________________________________

Return Nomination Form by March 1, 2006, to:
KBA Awards Committee
P.O. Box 1037
Topeka, KS 66601-1037
CHANGING POSITIONS

Collin B. Altieri has joined Shughart Thomson & Kilroy P.C., Kansas City, Mo.

Athena E. Andaya has joined the Kansas Legislative Research Department, Topeka.

Phillip Ashley has joined Wagstaff & Cartmell LLP, Kansas City, Mo., as of counsel.

Shannon Bell, Bradley Mirakian, and Jeremy Moseley have joined Foulston Siefkin LLP, Wichita.

Michelene L. Brassel has joined the Shawnee County District Attorney’s Office.

Jennifer B. Butler has joined Yellow Roadway, Overland Park.

Glenda R. Cantrell has joined ONEOK, Tulsa, Okla.

Caleb D. Crook has joined Kramer, Nordling & Nordling LLC, Hugoton.

Shaye L. Downing has become an associate with Sloan, Eisenbarth, Glassman, McEntire & Jarboe LLC, Topeka.

Lois A. Gladstone has joined Brooke Corp., Overland Park.

Nancy N. Goodall has joined Commerce Bank & Trust, Topeka.

Nicholas R. Grillot has joined Redmond & Nazar LLP, Wichita.

Sam F. Halabi has joined Latham & Watkins LLP, Washington, D.C.

Christopher J. Hanson has joined Northland Legal Services, Kansas City, Mo.

Lindsay A. Hare has joined Erker, Norton, Hare & Angles LLC, Olathe.

R. Ann Henderson has joined the Wyandotte County District Attorney’s Office.

Jack J. Hobbs has joined Fairchild & Buc P.A., Lawrence.

Cynthia Hughes-Coons has joined Bayer HealthCare LLC, Shawnee.

Patrick F. Hulla has become a shareholder with Ogletree, Deakins, Nash, Smoak & Stewart P.C., Kansas City, Mo.

Salvatore D. Intagliata has joined the Sedgwick County District Attorney’s Office.

Jeffrey L. Jack, Parsons, has been appointed by Gov. Kathleen Sebelius to serve as district judge for the 11th Judicial District.

Jared B. Johnson has joined Clark, Mize & Linville Chtd., Salina, as an associate.

M. Courtney Koger and Jason D. Stitt have joined Kutak Rock, Kansas City, Mo.

Jennifer L. Kosa has joined Schmitt Manz Swanson & Mulhern P.C., Kansas City, Mo.

John C. Kennyhertz has joined Wallace, Saunders, Austin, Brown & Enochs Chtd., Overland Park.

Amy M. Kuhn has joined the Ford County Attorney’s Office.

Stacey J. Lett has become an associate with Harris McCausland P.C., Kansas City, Mo.

Richard W. Lungstrum has joined Smith Law Offices, Bangor, Maine.

Nathan J. Meisgeier has joined Werner Enterprises Inc., Omaha, Neb.

Casey Meyer has joined the Labette County Attorney’s Office.

Klaus D. Mueller has joined the Sedgwick County Public Defender’s Office.

Mary M. Mulloy has joined the American Life Insurance Co., Washington, D.C.

Patrick D. Murphy has joined Kramer & Frank P.C., Kansas City, Mo.

Derek L. Park has become of counsel and Edward L. Robinson has become an associate with Morris Laing Evans Brock & Kennedy Chtd., Wichita.

Brian C. Perkins has become an associate with Hinkle Elkouri Law Firm LLC, Wichita.

Cary S. Smalley has joined Franke, Schultz & Mullen P.C., Kansas City, Mo.

Ronald D. Smith has joined Smith Burnett & Larson LLC, Larned.

Sean M. Sturdivan and Gregg C. Yowell have joined Sanders Conkright & Warren LLP, Overland Park.

Julie Wescott has become an associate with Bryan Cave LLP, Kansas City, Mo.

Shari R. L. Willis has joined Bachus & Schanker LLC, Denver.

Scott A. Wessel has been elected a member of Lewis, Rice & Fingersh L.C., Kansas City, Mo. Shannon M. Kerr has joined the firm.

Jami L. Wyatt has joined the AARP Office of General Council, Washington, D.C.

CHANGING PLACES

LeAnn M. Berry has a new business address, 1243 S.W. Topeka Blvd., Suite B, Topeka, KS 66612.

Biggs Wilkerson P.C. has moved its offices to 3500 N. Rock Road, Building 1100, Wichita, KS 67226.

Eldon L. Boisseau has started the Law Offices of Eldon L. Boisseau, 727 N. Waco, Suite 265, River Park Place, Wichita, KS 67203.

(continued on next page)

Dan’s Cartoon by Dan Rosandich

“MY OTHER LAWYER SAYS I DON’T HAVE TO PAY YOU.”
Keith Farnam Quail

Keith Farnam Quail, 92, Prescott, Ariz., died Oct. 6. Quail was born Oct. 6, 1913, in Douglas, Ariz.

Quail attended Washburn University, where he received his law degree in 1937. After graduating law school, Quail moved to Albuquerque, N.M. He became a trial tax attorney for the New Mexico Bureau of Revenue and then entered into private practice.

In 1942 he enlisted in the U.S. Army, where he served during World War II. Quail retired from the Army in 1947 and established the law firm of Favour and Quail in Prescott, Ariz., where he practiced until 1999.

Quail joined the Kansas Bar Association in 1937, becoming a lifetime member in 1987. He was also a member of the Arizona Bar Association, serving as a member of its board of directors and its president in 1956. He was president of the Yavapai County (Arizona) Bar Association, Arizona state chair of American Trial Lawyers Association, and a member of the International Academy of Trial Lawyers and the International Society of Barristers.

He is survived by his wife, Geri (Schott); daughters Sandra Nitsche, Evergreen, Colo., and Barbara Malone, Lubbock, Texas; stepsons Brian Schott, Lufkin, Texas, and Stephen Schott, Prescott, Ariz. His first wife, Mary Ellen Scott, preceded him in death in 1987.

Members in the News

(continued from Page 14)

Estate Recovery Unit has moved to the new Division of Health Policy and Finance, P.O. Box 2428, Topeka, KS 66601.

Floodman Wagle & West has moved to 323 N. Market, Wichita, KS 67202.

Jamie M. Harwood has started the Law Office of Jamie Harwood, 719 Massachusetts, Suite 126, Lawrence, KS 66044.

Kansas Medicaid Subrogation Unit has moved to the Division of Health Policy and Finance, Landon State Office Building, 900 S.W. Jackson, Suite 900, Topeka, KS 66612.

Kutak Rock LLP has moved its offices to 1010 Grand Blvd., Suite 500, Kansas City, MO 64106.

Cynthia Munita, with Richard W. Johnson, has started Johnson & Munita LLC, 405 E. 13th St., Suite 300, Kansas City, MO 64106.

Nathan C. Harbur Chtd. has moved to 11150 Overbrook Road, Suite 350, Leawood, KS 66211.

Steven W. Graber P.A. has moved to 714 Poyntz Ave., Suite C, Manhattan, KS 66502.

Woody D. Smith has a new business address, 14904 W. 87th St. Parkway, Suite 338, Lenexa, KS 66215-4159.

MISCELLANEOUS

Richard L. Bond, Overland Park, was inducted into the Mid-America Education Hall of Fame at Kansas City Kansas Community College.

Paul Davis, Meyer & Davis LLC, Lawrence, has been named Health Care Access Clinic’s member-at-large for its board of directors.

Randall Grisell, Emporia, has become a member of the board of directors for the City Attorneys’ Association of Kansas.

Vic Jacobson, Jacobson & Jacobson Chtd., Manhattan, was elected president of the Kansas School Attorneys Association.

Monsees, Miller, Mayer, Presley & Amick P.C., Kansas City, Mo., has been awarded the Primerus Community Service Award at the National Conference of the International Society of Primerus Law Firms.

Craig Shultz, Wichita, has become a fellow of the American College of Trial Lawyers.

Anita Tébbe, Johnson County Community College, Overland Park, has been named chair of the American Bar Association Approval Commission.

William R. Thornton, MGP Ingredients Inc., Atchison, was elected chairman of the board for the Kansas Chamber of Commerce.

Howard N. Ward, Stormont-Vail HealthCare, Topeka, received the 2005 Balfour Jeffrey Award from the Stormont-Vail Foundation.

Deryl W. Wynn, McAnany, Van Cleave & Phillips P.A., Kansas City, Kan., received the Distinguished Alumni Award from Emporia State University.

Editor’s 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.
Medicaid Eligibility and Enhancements to Estate Recovery
By Molly M. Wood, Stevens & Brand LLP

On May 17, 2004, Gov. Kathleen Sebelius signed House Substitute for SB 272 into law. It became effective on July 1, 2004, and it has already had a significant impact on some Kansans contemplating or receiving Medicaid assistance with the cost of their long-term care.

Codified at K.S.A. 39-709, the law implements five important changes:

1. Social and Rehabilitation Services (SRS) is authorized to file and enforce a lien on the real property of a medical assistance recipient during the recipient's lifetime. The lien can be enforced when the recipient has received six months of Medicaid-financed long-term care. Recipients of Medicaid have a right to a hearing on the propriety of the lien under certain circumstances. The law preserves the exemptions set out in federal Medicaid law (i.e., no enforcement of lien during the lifetime of the recipient's spouse or while property is occupied by the recipient's minor or disabled children), but in the absence of an exemption, when the amount of benefits paid exceeds the value of the lien property, SRS can force the sale of the property to satisfy the lien. (K.S.A. 39-709(g)(4))

2. The new law does not honor unequal joint ownership for purposes of estate recovery, but rather attributes the full value of any jointly owned property in which the medical assistance applicant's interest is “a specific and discrete property interest less than 100 percent” to the applicant for eligibility purposes. (K.S.A. 39-709(e)(2))

3. A special or supplemental needs trust must contain, in addition to being a discretionary trust, “specific contemporaneous language that states an intent that the trust be supplemental to public assistance and the trust makes specific reference to Medicaid, medical assistance, or Title XIX of the Social Security Act.” (K.S.A. 39-709(e)(3))

4. A “personal services contract” between a Medicaid applicant and a care provider — for example, a lump sum payment in advance for services by a caretaker child — is now a practical impossibility. (K.S.A. 39-709(e)(4))

5. The new law creates the concept of the “medical assistance estate” from which an estate recovery claim can be satisfied and is defined as including:

"all real and personal property and other assets in which the deceased individual had any legal title or interest immediately before or at the time of death, including assets conveyed to a survivor, heir or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, transfer-on-death deed, payable-on-death contract, life estate, trust, annuities, or similar arrangement. (K.S.A. 39-709(g)(3)(B))"

A couple of editorial comments:
With respect to No. 1, SRS has asserted in its Sept. 1, 2004, correspondence with current Medicaid recipients that it “will not put a lien on your home if your spouse, minor, or disabled child is still residing there.” This is good news as long as it lasts, but the new law clearly authorizes filing of a lien under these circumstances, and we have no way of knowing how long SRS will forebear. With respect to No. 3, the requirement that the “magic words” protecting a supplemental needs trust be “contemporaneous” presumably with the establishment of the trust raises ex post facto issues, at least. With respect to No. 5, SRS stated policy claims that life insurance proceeds are part of the “medical assistance estate,” but a payment to a third-party beneficiary under a life insurance contract appears to be outside the definition contained in the new law.

Traps for the Unwary

- Check all the trusts you’ve created that may benefit a disabled person to see if they both contain the “magic words” — Medicaid, medical assistance, or Title XIX of the Social Security Act — and are clearly supplemental discretionary trusts rather than support trusts.
- To the extent you are able to amend a “defective” trust, exercise that authority sooner rather than later.
- In the past, gifts of an undivided present interest in real property, while triggering a transfer penalty, could be used to transfer a partial interest, which would ripen into sole ownership; joint tenancy with right of survivorship or life estates would have accomplished this goal. Now, however, the breathtakingly broad definition of “medical assistance estate” purports to include at least the Medicaid recipient’s interest “immediately before or at the time of death.” Although we have no way of knowing right now whether the new law’s reach exceeds its grasp, expect transfers of this type to cause the Medicaid recipient’s heirs problems.
- Though not under all circumstances, it will generally be advisable to transfer the home to the sole ownership of record to the community spouse, if possible, so as to protect against the Medicaid lien and to preserve the equity value for the community spouse should the property need to be sold. (This can be tricky if the institutionalized spouse is incompetent and has not appropriately delegated his or her authority to convey the homestead to another, so maybe your power of attorney should contain homestead transfer authority.) Transfers between spouses will not incur a transfer penalty, so there is no impact on eligibility, but it’s not a perfect solution because the transfer does not cut off the institutional spouse’s inchoate claim on the homestead.
Watch out for Congress

If all Kansas’ changes were not enough, the House of Representatives’ budget plan (passed Nov. 18) includes draconian cuts to Medicaid grants to states, including, among other things, a five-year lookback for transfers and calculation of transfer penalties running at the time of application for Medicaid rather than at the time of the transfer. The Senate version, although tightening some loopholes, does not include these dramatic changes.

About the Author

Molly M. Wood, Lawrence, is a partner with Stevens & Brand LLP and Visiting Professor of Law teaching the Elder Law Clinic at her alma mater, the University of Kansas School of Law.

She is the author of a law school text, “Elder Law: Readings, Cases, and Materials,” and a treatise on elder law, Advising the Elderly Client, and is the editor of the Kansas Bar Association’s “Long-Term Care Handbook.” She is a member of the National Academy of Elder Law Attorneys.

She concentrates her practice in Medicaid eligibility for long-term care and division of assets, special needs and disability planning, guardianship, and general estate planning.

Editor’s note: “Medicaid Eligibility and Enhancements to Estate Recovery” was first published in the Winter 2005 edition of the Golden Years Review, which is published by the KBA Elder Law Section.

The Elder Law Section plans and promotes education programs; supports and recommends legislation; distributes information through newsletters, bulletin boards, or other means of communication; and provides networking opportunities for practitioners with attorneys or law firms that specialize in elder law.

If you are interested in joining this or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
I. Introduction

Medicare has issued new guidelines in an effort to crack down on parties to workers’ compensation claims who do not adequately consider Medicare’s interests. In Kansas the new guidelines affect workers’ compensation settlements, which close a claimant’s right to future medical treatment. The concern is that the injured worker will exhaust the settlement proceeds and then submit future medical bills to Medicare for services that should be paid by the workers’ compensation carrier.

This article will address the general relationship between Medicare and workers’ compensation, the procedure set forth in Medicare’s new guidelines, how to follow the guidelines, and the ramifications for failing to follow the guidelines.

II. The Medicare Secondary Payer Act and Regulations

Medicare was enacted in 1965. Today the Centers for Medicare and Medicaid Services (CMS) is responsible for administering Medicare. Since 1965 a claimant’s entitlement to Medicare benefits has always been secondary to workers’ compensation benefits. In 1980 the Medicare Secondary Payer Act was enacted to help ensure Medicare was not making payments where other insurance, such as workers’ compensation coverage, was available, as well as to recover conditional payments of medical bills paid by Medicare.¹

Today CMS actively seeks recovery for medical bills paid on behalf of Medicare beneficiaries. More importantly CMS has created standards through newly published guidelines for considering Medicare’s interest in workers’ compensation settlements that, if followed, will extinguish exposure to future litigation with Medicare.

FOOTNOTES
III. Medicare Guidelines

A. When to seek medicare approval

CMS has authority to examine every workers’ compensation case, but CMS acknowledges that doing so is impractical.2 The new guidelines address when it is in Medicare’s best interests to review a workers’ compensation case.3 If it is not in Medicare’s best interests to review the case pursuant to the guidelines, CMS will not review the case and will not issue an approval.4 Therefore seeking CMS approval in such cases is pointless.

If it is in Medicare’s best interests to review the settlement proposal, and counsel seeks and receives Medicare’s approval, a CMS official will give “a written opinion, on which the potential beneficiary and the attorney can rely, regarding whether the workers’ compensation settlement has adequately considered Medicare’s interests per 42 CFR 411.46.”5

What cases are in Medicare’s best interests to review? Counsel representing any party to a workers’ compensation settlement should be intimately aware of the answer to this question. This question must be asked during the initial assessment of the case and must again be asked before entering into any settlement because the facts of the case may have changed in the interim.

The simplest way to avoid Medicare’s wrath is to settle the workers’ compensation case by leaving the claimant’s right to future medical treatment for the injury untouched. However this simple solution is not always available. Insurance companies are often reluctant to settle cases without closing the claimant’s right to medical treatment for a variety of reasons. Many times an insurance company would rather endure the additional expense of seeking Medicare’s approval rather than settling the case by leaving the claimant’s right to future medical treatment open.

If closing a claimant’s right to future medical treatment is unavoidable, counsel must address two questions to determine if it is in Medicare’s best interests to review the case. First, is the claimant currently a Medicare beneficiary? If so, Medicare’s approval is necessary.6 Second, is there a reasonable expectation of Medicare enrollment within 30 months of the settlement and is the anticipated total settlement amount for future medical expenses and disability or lost wages over the duration of the settlement expected to be more than $250,000?7 Please note that the 30 months and $250,000 threshold is subject to change at any time.8

It is important to be familiar with basic eligibility rules for Medicare to determine whether the claimant is or will soon become eligible for Medicare enrollment. Generally Medicare is available for people age 65 or older, those who are receiving Social Security disability, and people with end stage renal disease (permanent kidney failure requiring dialysis or transplant).9

Please note that if the injury that gave rise to the workers’ compensation claim has rendered the claimant completely disabled by Social Security standards, then the claimant has a reasonable expectation of Medicare enrollment within 30 months of the disability, and therefore within 30 months of the settlement.

In general a person is eligible for Medicare only after having received Social Security disability income (SSDI) for 24 months.10 A person is not eligible for SSDI until he or she has been completely disabled for five full calendar months.11 Thus, if the claimant’s injury prevents him or her from working, it is reasonable to expect that he or she will be eligible for Medicare enrollment within 30 months of the disabling event.

CMS has further clarified what constitutes “a reasonable expectation” of Medicare enrollment within 30 months:

Situations where an individual has a “reasonable expectation” of Medicare enrollment for any reason include but are not limited to:

(a) The individual has applied for Social Security disability benefits;

(b) The individual has been denied Social Security disability benefits but anticipates appealing that decision;

(c) The individual is in the process of appealing and/or refiling for Social Security disability benefits;

(d) The individual is 62 years and six months old (i.e., may be eligible for Medicare based upon his or her age within 30 months); or

(e) The individual has end stage renal disease (ESRD) condition but does not yet qualify for Medicare based upon ESRD.12

Thus, if a settlement will close a claimant’s right to future medical treatment, and if the claimant is a Medicare beneficiary or has a reasonable expectation of Medicare enrollment within 30 months of the settlement and has a settlement in excess of $250,000, Medicare’s approval is necessary.

If a claimant in either of these scenarios receives CMS approval before entering into a settlement, Medicare...
has stated it will pay for future medical treatment related to the workers’ compensation claim.13

B. Seeking Medicare approval

CMS has the power to review a proposed settlement and issue a written opinion on which the parties may rely regarding whether the settlement has adequately considered Medicare’s interests per 42 CFR 411.46.14 A review of a proposed settlement may be comprised of a review of the settlement conditions or it may include review of a set-aside trust.

Counsel should contact Doug Rundle, the CMS regional office coordinator for Kansas, at (816) 426-6387 to request additional information about seeking Medicare’s approval in workers’ compensation settlements. However, proposals for Medicare approval should be sent directly to the Centers for Medicare and Medicaid Services, c/o Coordination of Benefits Contractor, Attn: WCMSA Proposal, Box 660, New York, NY 10274-0660 for expedited processing.15

If a set-aside trust is necessary, CMS must review documentation submitted in the case and decide whether the allocation for future medical expenses is reasonable. The reviewed documentation may include settlement agreements, life care plans, rated age, and medical records.17 Criteria utilized to determine reasonableness will include:

1. Date of entitlement to Medicare.
2. Basis for Medicare entitlement (disability, ESRD, or age).
3. Type and severity of injury or illness.
4. Age of beneficiary.
5. Workers’ compensation classification of beneficiary (permanent partial disability or permanent total disability).
6. Prior medical expenses incurred due to the injury or illness in the one- to two-year period after the condition has stabilized.
7. Amount of lump sum or structured settlement.
8. Whether the trust covers the lifetime of the beneficiary.
9. Is the beneficiary living at home, in a nursing home, or receiving assisted living care?
10. Are the expected expenses for Medicare covered items and services appropriate in light of the beneficiary’s condition?18

Once approved, Medicare will not make any payments for medical expenses associated with the claimant’s work-related injury until the trust proceeds are exhausted.19

IV. Ramifications for Failing to Consider Medicare’s Guidelines

Parties to a workers’ compensation settlement who fail to follow Medicare’s guidelines subject themselves to potential liability for future, post-settlement medical expenses.20 Medicare’s first remedy in this situation is to deny payment of medical expenses to the claimant.21

Where Medicare proceeds with conditional payments for the work-related medical condition, it may seek recovery against the workers’ compensation car-

V. Conclusion

In Kansas, review of Medicare's new guidelines is essential when entering into a workers' compensation settlement, which closes the claimant's right to future medical treatment. With a settlement that closes the claimant's right to future medical treatment, a written approval of a settlement from CMS is necessary if the claimant is currently a Medicare beneficiary or if there is a reasonable expectation of Medicare enrollment within 30 months of the settlement and the total settlement amount for future medical expenses and disability or lost wages over the duration of the settlement is expected to be greater than $250,000.

If the settlement closes the claimant's right to future medical treatment but allots no additional compensation for closing that right, and the claimant’s treating physician states to a reasonable degree of medical certainty that the claimant will not require additional Medicare-covered treatment for the work-related injury, obtaining Medicare's approval is fairly simple. However, if the claimant is receiving additional sums to close future medical expenses, the creation of a set-aside trust will likely be necessary to obtain Medicare's approval.

Once Medicare's approval is received, the parties may rest assured that Medicare will honor that approval in the future.

About the Author

Stephanie J. Haggard, Lawrence, is a workers' compensation attorney who has practiced on both sides of the fence. As a solo practitioner she represents injured workers almost exclusively. Haggard received her J.D. from Washburn University School of Law. She is president of the Young Lawyers Section of the Douglas County Bar and serves on the Board of Trustees for the Douglas County Law Library. She is vice president and co-founder of the Mid-America SportHorse Association, as well as an active member of the Inns of Court.

I. Overview

As the practice of law has become more complex, so has the law of lawyering. Constant attention must be paid to ethics, professionalism, and client relations – even while addressing the important and immediate needs of business development, firm management, and the actual representation of clients in the everyday practice of law. These issues confront every lawyer, from solo practitioners to those practicing with large firms.

At times these competing interests can seem to be adverse. They are certainly time-consuming. But if ethics is to be more than a once-a-year continuing legal education concern, significant attention needs to be paid to the issues of ethics and professionalism as a daily and constant theme.

The purpose of this article is to explore the ethical rules and considerations that confront lawyers in daily practice, to explore how those issues are handled in law firms, and then to suggest similar applications to law firms and solo practitioners generally. The question is whether a law firm should appoint a “general counsel” to take on responsibility for these rules and considerations.

Appointing a general counsel can have benefits. While the other members of the firm do not abdicate their professional responsibilities, they have a resource to whom questions and issues might be posed.

This article focuses mainly on the Kansas Rules of Professional Conduct (KRPC), as well as to the Third Restatement of the Law Governing Lawyers. The Kansas Model Rules are based on the Model Rules of Professional Conduct (MRPC). Thirty-eight states and the District of Columbia have adopted all or significant portions of the MRPC.

II. Is Your Practice a “Law Firm”?

The Official Comment to KRPC 1.10 loosely defines a “firm” as including “lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization or in a legal services organization.” The comment does not reference office-sharing arrangements, but acknowledges that whether a group of lawyers constitutes a firm will depend on the specific facts of the situation and the ethics rule being applied. Such a determination requires the examination of several factors: (1) do the lawyers present themselves to the public in a way suggesting that they are a firm; (2) do the lawyers conduct...
themselves as a firm; (3) do the lawyers have mutual access to confidential information; (4) the terms of the agreement between the lawyers; and (5) the purpose of the rule involved.\footnote{Id.}

Even if one’s practice is not a “law firm,” most of the KRPC apply to the lawyer’s practice, regardless of whether the lawyer practices alone or in a firm or other association of lawyers. Having reviewed the background of “law firms,” the next step is to examine the issues involved in getting, and handling, business.

III. General Counsel and the Attorney-Client Privilege

One benefit of designating a partner as general counsel may be to clothe communications with that partner in the protection of the attorney-client privilege.

In a federal appeals case from California,\footnote{U.S. v. Rowe, 96 F.3d 1294 (9th Cir. 1996).} a law firm assigned two associates to conduct an investigation to determine if one of the firm’s lawyers mishandled client funds. When a grand jury subpoenaed the associates to testify regarding their in-house investigation, the firm asserted the attorney-client privilege. The court found that the associates were acting as in-house counsel in conducting their investigation and held that the privilege would attach to their confidential communications with the members of the firm. \textit{Id.} at 1296-97.

For this protection to be accorded the partner should be officially designated with the title of general counsel, in-house counsel, firm counsel, or some such designation.\footnote{McCormick, Barstow, Shepard, Wayne & Carruth, 81 Cal. Rptr. 2d 30 (1998) (privilege denied because lawyer not designated as general counsel; communications were just partner-to-partner).}

In New York State Bar Ethics Opinion 789, the committee cited three recent cases that call into question the validity of the privilege between a lawyer and his or her in-house counsel, at least in a subsequent litigation between the law firm and the client.\footnote{NY State Bar Ass’n Comm. on Ethics and Prof’l Responsibility, Op. 789 (Oct. 26, 2005), available online at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Opinion_789.htm (hereafter “NYSBA Op. 789”) at ¶4, citing VersusLaw Inc. v. Stoel Rives LLP, 111 P.3d 866, 878, 127 Wash. App. 309, 332 (2005); Koen Book Distrib. v. Powell, Trachtman, Logan, Carle, Bowman & Lombardo, 212 F.R.D. 283, 283-85 (E.D. Pa. 2002); and Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 220 F. Supp. 2d 283, 286-88 (S.D.N.Y. 2002).} This is an evidentiary matter to be handled by the trial court, but the wisdom of such holdings could be questioned in view of the larger picture that consultation with counsel should be encouraged, even if that counsel happens to be a partner.

A. Applicable rules

The modern KRPC permit lawyers to advertise their services through public media, including telephone directories, legal directories, newspapers and other periodicals, and the Internet. Even outdoor advertising and radio and television promotion are acceptable.\footnote{Rule 7.2, KRPC. See, Linmark Assoc. v. Township of Willingboro, 431 U.S. 85 (1977).} Of course this permission runs contrary to the common tradition that lawyers, members of a dignified profession, should not promote themselves.

Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However the public’s need to know about legal services can be fulfilled in part by advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition.\footnote{Topeka • Overland Park • Wichita • Larned 785.273.9993 • security@GTrust.com www.GTrust.com}

Rather than being limited by constraints of dignity or taste, which may involve “matters of speculation and subjective judgment,”\footnote{Id. See also, Zander v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985).} the limitations on lawyer advertising are somewhat more objective: advertisements shall not be “false or misleading”\footnote{The Ethics 2000 modifications define “false or misleading” only as “containing a material misrepresentation of fact or law, or omit[ting] a fact necessary to make the statement ... not materially misleading.”} by containing material misrepresentations of fact or law, creating unjustified expectations about results, or making unjustifiable comparisons to the services of other lawyers.\footnote{Rule 7.1, KRPC. See also, Bates v. State Bar of Arizona, 433 U.S. 350, 383-4 (1977); In re Cole, 738 N.E.2d 1035 (Ind. 2000); Colorado v. Carpenter, 893 P.2d 777 (Colo. 1995).}
Direct solicitation of clients is also limited by Rule 7.3, which prohibits direct in-person or live telephone contact with prospective clients with whom the lawyer has no family or prior professional relationship. While this rule appears to be more observed in the breach, it should guide the practitioner in deciding how far to go in promoting prospective services.

The designated advertising reviewer should also keep in mind Rule 7.2(b), which requires that copies of all advertising materials (including Web and Internet advertising) be maintained for two years after the advertising has been published. Advertising review counsel should also keep in mind Rule 7.2(b), which requires that copies of all advertising materials (including Web and Internet advertising) be maintained for two years after the advertising has been published.18

B. General counsel’s duties

In law firms there should be a person assigned by the firm management or the general counsel to review all advertising and promotional materials. That person should be familiar with the particular iterations of Rules 7.1, 7.2, and 7.3 in each of the states where the law firm practices. The designated advertising counsel should review the advertising materials — before they are published — and consider whether they contain any material misstatements of fact.19 This may involve a discussion with the lawyers involved in the area of practice being promoted in the advertising.

Advertising review counsel should also consider whether the proposed advertising could create any unjustified expectations by implying the likelihood of particular results or costs.20 The advertising should be reviewed to ensure that it does not make objectively verifiable comparisons to the services offered by other lawyers or law firms.21

V. Checking Conflicts

A. Applicable rules

Rule 1.7(a) prohibits conflicts of interest with current clients. This means that a law firm cannot take on the representation of one client if that representation would be adverse to another existing client.22 The purpose for the rule is obvious: if a lawyer or his firm attempts to represent one client adverse to another client, neither can be sure of undivided loyalty.23 Rule 1.7(b) prohibits conflicts between a current client and the lawyer’s own interests, e.g., where the lawyer’s interest would be better served by a bad result for the client or where the lawyer’s personal interest runs contrary to that of the client.24 For example, a client wishing to sue a corporation may not be well-served by a lawyer who is a major shareholder in that corporation.25

Rule 1.9 prohibits conflicts with the interests of former clients, if the adverse representation of the new client is in a matter that is the same or substantially related to the prior matter on which the lawyer or his or her firm represented the “former” client.26 In addition, even if the lawyer or his firm are representing a new client against the interests of a former client in a matter that is not the same as that which was involved in the prior representation, the lawyer cannot use or disclose confidential information about the former client if that information was learned in the context of the former representation.27 Of course if the lawyer takes on adverse representation in violation of these rules, the result is often disqualification of the lawyer and his or her firm.28 Even if the representation is not taken on by the particular lawyer in the firm who represents the other “current client” or who personally represented the “former client,” Rule 1.10(a) provides for “imputed” disqualification; when one lawyer has brought a conflict with him or her to the firm based

16. Ethics 2000 adds “or real time electronic contact” and also adds lawyers and people with whom the lawyer has a close personal relationship to the list of people exempted from this rule.


21. See Medina County Bar Ass’n v. Grieselhuber, 678 N.E.2d 535 (Ohio 1997).


23. See In re Corn Derivatives Antitrust Litigation, 748 F.2d 157 (3rd Cir. 1984); see also, In re Johnson, 84 P.3d 637 (Mont. 2004).


on prior representation of another client in the same or substantially related matter, the entire firm is disqualified from the representation of the new client.\textsuperscript{29} The lawyer's former law firm, on the other hand, would not be precluded from taking on a representation adverse to the former lawyer's client, as the former lawyer takes the conflicts with him or her when he or she leaves.\textsuperscript{30}

Conflicts of interest may be waived, under certain limited circumstances. In order to even request a waiver the lawyer (1) must have the actual (subjective) and reasonable (objective) belief that the representation of one client adverse to another current client, or adverse to a former client in a matter that is the same or substantially related to the matter on which he previously represented the former client, will not adversely affect the lawyer-client relationship with either client; (2) must have consent of both clients; and (3) after “consultation,” meaning a full listing and description of all the negative things that might occur as a result of the adverse representation.\textsuperscript{31} Based on these stringent requirements the opportunities for a waiver are rare, and the actual giving of knowing consent after adequate consultation is even more rare.

B. General counsel duties

In order to comply with the requirements of these rules, it is necessary for a law firm to implement procedures to ensure that all new clients and matters are cleared before they are formally accepted for representation by the law firm. In many firms these procedures include the following:

1. The law firm should generate a database that includes all the clients of the firm, throughout its history. This database must be retrievable and legible. It also should include backup mechanisms to check multiple spellings of surnames or corporate names to aid in a broader search. While it is possible for such a database to be created and maintained manually, on hard-copy paper files, it is more common to build this database on a searchable computer records program.

2. The law firm should establish a policy requiring a new client worksheet to be prepared for all new matters. The worksheet should include the names and addresses of all of the prospective clients, corporate officers, directors, and major shareholders, as well as similar information for adverse parties and counsel.

3. The new client form should then be checked against the database of current and former clients, and any cross-references should be flagged and then discussed with the responsible attorneys reflected for the names that arise. Through discussion it can be determined whether the other client is a current client or a former client; there also can be discussion of whether the new matter is substantially related to the former matter.

4. If, after checking, conflicts appear to exist, then an evaluation may be made as to whether the conflict may be waived and, if it can, who should present the issue to the client/former client to make the full disclosure and to request the waiver. The “bad things” that can happen should be fully explained and the waiver either obtained or refused.

5. The database should be updated each time there is a change in the parties to a particular matter, with all new names being checked against the firm’s database, and any conflicts cleared as outlined above.

Of course whenever there is a conflict and that conflict is either not waiveable or not waived, the representation of the new client cannot continue. If there are no irreconcilable conflicts, then the representation of the client may proceed.

VI. Engagement

A. Applicable rules

Once it is determined that no irreconcilable conflicts exist, the representation may begin. As noted below, no confidential information should be received or accepted before that time, in case the representation does not proceed.

After discussions with the new client have reached the point of an agreement for the lawyer to represent the client, the lawyer and client should discuss the engagement and the basis for the fee. The lawyer's fee must in all instances be “reasonable,” based on the facts and circumstances at the time. KRPC Rule 1.5 lists no less than 15 factors to be considered in determining whether a fee is reasonable, under the circumstances. Contracts for a contingency fee must be in writing, and the distribution of proceeds and fees based on a contingency fee agreement must also be set forth in writing, explaining to the client how the proceeds were divided. Rule 1.5(d).\textsuperscript{32}


\textsuperscript{30} Rule 1.10(c), KRPC.

\textsuperscript{31} Rule 1.7 and Rule 1.9, KRPC. See also, Rules 1.7 and 1.9 KRPC (Official Comments); In re Guardianship of Lillian P., 617 N.W.2d 849 (Wis. App. 2000).

\textsuperscript{32} Rule 1.5(d), MRPC. (Modified in Kansas from the ABA Model Rule, MRPC 1.5(d), found at Rule 226, Rules of the Kansas Supreme Court.) See In re Barta, 277 Kan. 912, 89 P.3d 567 (2004).
B. General counsel duties

Many lawyers choose to send an engagement letter setting forth the terms of the relationship between the lawyer and client. Indeed, written engagement letters are required by the version of the MRPC issued by the ABA’s Ethics 2000 Commission. Such a letter helps to avoid disputes later as to the scope of the representation and the basis of the fee. KRPC Rule 1.2 provides that the client determines the scope of the representation. Later disputes about what the client expected the lawyer to do can be avoided, or at least reduced, by a clear letter setting forth the agreed scope of what the lawyer is expected to do.

VII. Work on File

A. Competence

1. Applicable rules

KRPC Rule 1.1 requires a lawyer to represent a client competently. This means that the lawyer will exercise “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

2. General counsel duties

In practice, the required proficiency for many matters “is that of a general practitioner.” In matters that require special expertise, the lawyer may take them on even if they are currently beyond his expertise; if it is “feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field;” or if “the requisite level of competence can be achieved by reasonable preparation,” through “necessary study.”

Often these requirements are met through consulting with partners, office associates, or mentors. And thoroughness of preparation is required in every case as a part of competence.

B. Confidentiality

1. Applicable rules

KRPC Rule 1.6 prohibits a lawyer from revealing information relating to representation of a client, unless the client consents after consultation. Other exceptions include disclosures – that are impliedly authorized to carry out the representation, such as admitting facts that cannot be controverted or disclosing facts in negotiations in order to facilitate a successful conclusion to a matter; – that are reasonably necessary to prevent the client from committing a future crime;
that are necessary to comply with court orders or rules of law, such as in answering pleadings or interrogatories; and

that are necessary to establish a claim against a client or defend against a claim made by the client in any proceeding against the lawyer.42

This rule requires the lawyer to be diligent in maintaining the confidence of information regarding the client or the representation. In this way the client will trust that his or her disclosures will remain confidential and thus will make more complete disclosure of the facts. That fuller disclosure, in turn, will allow the lawyer to give better and more complete advice, thereby fulfilling the societal goal of ensuring that clients get good legal advice. A fear of possible disclosure would necessarily chill the free exchange of information between client and lawyer, thereby reducing the effectiveness of legal representation and eventually eroding the institution of the lawyer-client relationship.

2. General counsel duties

In the law firm, procedures should be established to maintain the confidentiality of client information. Files should be maintained in a closed area, with no access by outsiders. If one shares space with other lawyers not in a law firm, those files should be kept in locked cabinets with access only by the lawyer and his or her personnel. And no client information should be included in any network to which others are permitted access, including home computers or networks in an office-sharing arrangement.

Facsimile transmissions and electronic mail communications should include a warning legend that the communication is confidential. Care should be taken that letters are properly addressed.

There should be no discussion of client matters outside of the law firm, even in casual conversation. Sometimes lawyers are tempted to talk about client matters because they are interesting and exciting or because they are sometimes, after all, matters of “public record.” Even then any nonpublic information should not be disclosed.

One may also wish to consult with another lawyer about a matter. In such circumstances client-identifying information should not be disclosed, and confidentiality should be maintained.

C. Law firm management

1. Applicable rules

Rule 5.1 requires a partner in a law firm to make reasonable efforts to ensure that the law firm has in place policies and procedures to make sure that all lawyers in the firm comply with the rules of professional conduct.43 Further, a lawyer with “supervisory authority” over a lawyer or a nonlawyer assistant must make reasonable efforts to ensure that the lawyer or assistant complies with the rules of professional conduct.44 Even then a lawyer is responsible for a violation committed by another lawyer or a nonlawyer assistant if the lawyer orders the conduct, ratifies the conduct, or — knowing about the conduct — fails to take remedial action at a time when consequences from the conduct can be avoided.45

2. General counsel duties

In practice these rules mean that a law firm should establish policies to require compliance with rules of ethics and procedures to ensure that compliance. Partners need to keep apprised of the applicable rules of ethics — and changes in those rules as they develop. Many firms accomplish this by designating an “in-house” lawyer responsible for implementing and overseeing the firm’s policies.46

Those policies should include recurrent training, to re-emphasize a focus on the rules, which prohibit conflicts of interest, which require confidentiality, and which require diligence and competence. In addition, early intervention with clients who raise issues with the firm’s representation or quality can help to alleviate those issues before they become complaints or malpractice lawsuits. Thus, on this topic, general counsel’s duties include:

(a) ethics:

– adoption, enforcement, and oversight of law firm policies, practices, procedures, and forms;
– ensuring bar examination passage and attorney registration in the courts where practicing;
– pro hac vice motions;
– compliance with requirements for continuing legal education;
– responding to and defending ethics complaints; and
– making and overseeing ethics complaints.

(b) loss prevention:

– adoption, enforcement, and oversight of law firm policies, practices, procedures, and forms;
– quality assurance, partner oversight training;
(c) claims:

– shopping for malpractice insurance, pricing, underwriting;
– applications and renewals;
– disclosure and reporting of claims;
– overseeing premium charges and payments;

(continued on next page)
Other management issues are being handled by every law firm, although perhaps not by a general counsel. Placing all of these responsibilities under a specific individual lawyer will help to centralize control, knowledge, and oversight—and will relieve other lawyers in the firm from addressing or worrying about the issues. It will also free them to concentrate on client matters, to the financial benefit of the firm. Other tasks include:

(a) firm corporate structure:
- partnership agreement, limited liability partnership, etc.;
- notices of meetings, formal meetings, minutes, quorum, procedures;
- annual financial reports and state-required filings;
- firm tax returns, K-1 and partnership returns;
- ensuring that partners are filing tax returns;
- and
- decisions and votes on admission to, or removal from, partnership.

(b) employment:
- advertising, application forms, interviews, hiring, employee discipline, and termination;
- conflicts of interest with prior employers;
- avoiding negligent hiring and retention issues;
- unemployment compensation claims;
- discrimination claims;
- lawsuits by current or former employees;

- adoption, funding, oversight, and administration of benefit plans and compliance with ERISA;
- health, life, disability insurance; and
- firm parties and potential “dram shop” liability.

c) property and contracts:
- lease of land and office;
- lease or purchase of computers, printers, and servers, as well as furniture and other equipment;
- general liability, business practices, premises liability insurance; and
- banking and trust accounts.

D. Sharing fees with nonlawyer, no partnership with nonlawyer

1. Applicable rules

Rule 5.4 provides that a lawyer or law firm shall not share legal fees with a nonlawyer except for payment related to work previously done by a lawyer now deceased or as part of a compensation profit sharing or retirement plan for employees. More importantly, the rule prohibits a partnership with a nonlawyer if any of the activities of the partnership include the practice of law (a so-called multiple discipline practice). And a referral source, or someone paying for the lawyer’s services (like the client’s liability insurance carrier), cannot be allowed to “direct or regulate the lawyer’s professional judgment in rendering” legal services to the client.


50. See, Rule 1.15(d)(i), KRPC (lawyer must maintain a separate trust account to hold client-identified funds, completely separate from the lawyer’s own funds). This account is subject to a surprise audit (compliance review) by the Disciplinary Administrator at any time. Rule 216A, Rules of the Kansas Supreme Court.

51. See also, Rule 1.8(f): “A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer’s independence of professional judgment or with the lawyer-client relationship; and (3) information relating to the representation of a client is protected as required by Rule 1.6.” And see, Comment to Rule 1.7: “A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty to the client.”
2. General counsel duties

These rules should impel a law firm to adopt policies that ensure the independence of professional judgment for clients and that prohibit the sharing of fees with nonlawyers. Fees or profits may be shared, but only with employees. Therefore, independent contractors should only be paid an agreed, set compensation on an hourly or other basis. Of course nonlawyer referral sources should not be paid a fee for referrals.

E. Law firm name and letterhead

1. Applicable rules

Rule 7.5 prohibits a lawyer from using a firm name or letterhead that is false or misleading in violation of Rule 7.1, and a law firm’s trade name cannot imply a connection with a government agency.53

2. General counsel duties

In practice, lawyers should be careful not to mislead the public by the adoption of a firm or trade name, such as one which might create unjustified expectations of results, or which makes unsubstantiated comparisons to the services of other lawyers. Words like “best” or “winners” are to be avoided.

VIII. Standards of Conduct

A. Applicable rules

In Rule 8.4 the authors provided for general rules of misconduct that are not specifically covered under other rules, such as criminal acts that reflect on honesty, trustworthiness, or fitness to practice; as well as dishonesty, fraud, and deceit; general misconduct that is “prejudicial to the administration of justice”; and “any other conduct that adversely reflects on the lawyer’s fitness to practice law.”54

B. General counsel duties

In practice, these problems can usually be avoided by adopting the practices and procedures outlined above, including designation of an in-house counsel, with procedures to keep lawyers up-to-date on evolving rules of ethics and policies to compel compliance, as well as designation of an ombudsman to receive and address potential problems early in their development.

IX. Conclusion

In a recent New York State Bar ethics opinion the value of in-house consultation was recognized.55 In analyzing this issue, the committee began with a review of a law firm’s duty to monitor and govern the conduct of its lawyer-members.56 The opinion recognizes the value — to the firm, to the clients, and to the public — of a firm’s monitoring of lawyer conduct and the consultation resulting from such monitoring. This monitoring and consultation should not require the engagement of outside counsel.

Either a law firm must address these issues with one of its own lawyers, or else look to others for this advice. To hold that a law firm must always seek guidance outside its halls in order to preserve an attorney-client relationship — that is to hire outside counsel (whose fiduciary duties may extend only to the firm) in every instance in which such an adversity arises — is simply impractical in the day-to-day life of many law firms, when issues of professional responsibility frequently require prompt responses from lawyers knowledgeable about the firm, its client relationships, and its culture. It also imagines a world in which a lawyer must hire another lawyer to practice law, thereby depriving the firm of the well-recognized right to represent itself.57

Seeking advice from an in-house lawyer, the committee holds, should be encouraged rather than discouraged because such consultation can only improve client service and quality of representation.58 Moreover the law firm need not disclose such consultation to its client, although there may be circumstances where disclosure may be appropriate, such as when the law firm determines that it has a conflict of interest and must withdraw or determines that the client has a legal claim against the law firm.59

Lawyers are ethical people. They want to practice ethically and professionally. They also want to make a living. If too much time and effort are expended on one of these aspects, the other may suffer. So a balance must be established. This starts with a commitment to ethics and professionalism. The firm sets the tone, keeps aware of the rules, continues its focus on ethics, and makes its decisions against the backdrop of these principles. By designating a partner to serve in the position of ethics and professional responsibility counsel, the task may be made easier, because a specific person is assigned to the various jobs necessary to help protect the firm. Even solo practitioners need to focus on all of the issues listed in this article, even if they act as their own “general counsel.”

About the Author

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

52. Lawyers may be paid a fee for referrals. “A division of fee, which may include a portion designated for referral of a matter, between or among lawyers who are not in the same firm may be made if the total fee is reasonable and the client is advised of and does not object to the division.”
53. Rule 7.5(a), KRPC.
54. Rule 8.4(b),(c), (d), and (g), KRPC.
56. Citing DR 1-104 and EC 1-8 of the Model Code of Professional Responsibility. The Model Rules counterpart is found at Rule 5.1, KRPC.
58. Id. at ¶16.
59. Id. at ¶21.
Attorney Discipline

IN RE JAMES B. PATTISON
ORIGINAL PROCEEDING IN DISCIPLINE
ONE-YEAR SUSPENSION
NO. 93,922 – OCTOBER 21, 2005

FACTS: Respondent, a practitioner from Hutchinson, was appointed to serve as a guardian ad litem (GAL) in child in need of care (CINC) cases in Barton County. In one case he served as GAL for four children. Throughout the representation, the assistant county attorney suspected respondent was personally involved with the mother of his clients. Prior to a hearing in January 2003 the prosecutor suggested that respondent should withdraw from the representation. He agreed but did not withdraw from the case until March. Eventually the matter was concluded, the children were returned to their mother and all five are now residing with respondent.

In three other cases, respondent was appointed to represent the father in a CINC case, represent the defendant in a criminal case, and serve as GAL in another CINC matter. However he failed to contact his clients or appear at scheduled hearings and was removed from the representations.

A hearing panel found violations of KRPCs 1.3 (diligence), 1.7(b) (conflict of interest), 4.2 (communicating with a represented party), and 8.4 (d) and (g) (misconduct). The panel considered several factors in aggravation and mitigation and recommended one-year definite suspension with a hearing required prior to reinstatement.

HELD: The Court found clear and convincing evidence to support the panel’s factual findings and conclusions of rules violations and ordered respondent suspended for one year from the practice of law.

IN RE BERNARD E. WHALEN
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 05,630 – OCTOBER 25, 2005

FACTS: Respondent, a practitioner from Goodland, wrote to the appellate clerk voluntarily surrendering his license to practice law pursuant to SCR 217. At the time of the surrender a three-count complaint was pending before the Kansas Board for Discipline of Attorneys. Allegations included lack of competence, assisting clients in violating the Kansas Securities Act, engaging in misrepresentation, breaching a fiduciary duty, engaging in a conflict of interest, and engaging in the unauthorized practice of law.

HELD: The Court examined the disciplinary administrator’s files, which included a prior published censure in 1995 and an informal admonition in 2004, and found that the surrender should be accepted and the respondent disbarred.

Civil

HABEAS CORPUS
LAYMON V. STATE
RICE DISTRICT COURT – REVERSED AND REMANDED
NO. 93,585 – NOVEMBER 10, 2005


ISSUE: Ineffective assistance of counsel

HELD: District court’s options when presented with 1507 motion are discussed. A lawyer’s failure to foresee a change in the law may lead to relief under 60-1507 if the failure was not objectively
reasonable. In this case, where defendant’s direct appeal from sentencing was not yet final when McAdam was decided, the failure of Laymon’s attorney to preserve the McAdam line of argument was objectively unreasonable and prejudiced his client. District court is reversed, Laymon’s sentence is vacated, and case is remanded for resentencing under McAdam.

CONCURRING (Luckert, J., joined by McFarland, C.J.): Agrees with majority’s decision to reverse summary denial of Laymon’s 1507 motion, but would remand to district court for a hearing on Laymon’s claim of ineffective assistance of appellate counsel.

STATEUTES: K.S.A. 2004 Supp. 60-1507 and K.S.A. 21-3302, 4721(c)(3), 60-1507, 4127c, 4159, 4161

INTELLECTUAL PROPERTY AND PUBLIC EMPLOYER-EMPLOYEE RELATIONS ACT
PITTSBURG STATE UNIVERSITY V. KANSAS BOARD OF REGENTS
SHAWNEE DISTRICT COURT – JUDGMENT OF THE COURT OF APPEALS REVERSING THE DISTRICT COURT IS REVERSED. JUDGMENT OF THE DISTRICT COURT IS AFFIRMED IN PART, REVISED IN PART, AND REMANDED WITH DIRECTIONS. NO. 91,305 – NOVEMBER 10, 2005

FACTS: Pittsburg State University (PSU)/Kansas National Education Association (KNEA), a recognized public employee organization representing some of the faculty of PSU, filed a complaint with the Public Employee Relations Board (PERB). KNEA alleged that the Kansas Board of Regents (KBR)/PSU committed a prohibited practice under the Public Employer-Employee Relations Act (PEERA) when it did not meet and confer with KNEA before adopting a policy regarding the ownership of intellectual property. PERB determined there was no obligation to meet and confer because federal and state law pre-empted the subject. The district court reversed this conclusion, but the Court of Appeals agreed with PERB and reversed the district court.

ISSUES: Whether ownership of intellectual property rights is a subject pre-empted by state or federal law and, therefore, not mandatorily negotiable under the PEERA. Whether the subject of ownership of intellectual property is a condition of employment and therefore mandatorily negotiable under PEERA. Whether the ownership of intellectual property falls with the management prerogative exception and therefore is not mandatorily negotiable under PEERA.

HELD: Court reversed the determination of the Court of Appeals, affirmed the district court’s holding, and concluded that neither state nor federal law pre-empted the subject of ownership of intellectual property from being included within the scope of a memorandum of understanding. The subject of the ownership of intellectual property is not “pre-empted” within the meaning of PEERA. Court held that under PEERA the KBR is required to meet and confer with a recognized public employee organization on the subject of the ownership of intellectual property only if ownership of intellectual property is a condition of employment. The ownership of intellectual property is a condition of employment. If the ownership of intellectual property is a condition of employment, the subject may be included in a memorandum of agreement if no exception applies, i.e., if ownership of intellectual property is not pre-empted by state or federal law, is not a right of a public employee, or is not a right of a public employer.

STATE V. CHEEKS
WYANDOTTE DISTRICT COURT – AFFIRMED NO. 92,254 – OCTOBER 28, 2005


ISSUE: K.S.A. 21-4724 requirements

HELD: K.S.A. 21-4724 applies only to convictions in grid blocks specified in statute, and it never has applied to Checks’ second-degree murder conviction. Checks has no rights under statute — no computation, no hearing, and no personal appearance at a hearing.

STATE V. FRANKLIN
SEDGWICK DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART NO. 91,432 – OCTOBER 21, 2005

FACTS: In the early morning hours, Robert Coleman, Mesia Green (Coleman’s girlfriend), and Ebony Williams (Coleman’s sister) were asleep in various rooms in the same house. Williams was awakened by a loud noise in the living room. Williams observed two people run out of the door with Green in pursuit. Green had been stabbed nine times in the back. She told officers that Franklin had stabbed her. Williams told officers she had seen Franklin running out of the house. Williams said that she had previously dated Franklin and that Franklin was jealous that Green was seeing Coleman. Franklin was charged with aggravated burglary, attempted first-degree premeditated mur-
der, and alternatively aggravated battery. At Franklin's trial, the state presented several text messages on Coleman's telephone allegedly sent from Franklin. Franklin presented alibi testimony that she was not in town the night of the stabbing. The jury convicted Franklin of attempted first-degree murder and aggravated burglary.

ISSUES: (1) Did the trial court abuse its discretion in admitting cell phone text messages into evidence? (2) Did the trial court abuse its discretion in admitting eyewitness identification evidence? (3) Was the eyewitness identification instruction erroneous? (4) Was there sufficient evidence to support the conviction for aggravated burglary? (5) Did the trial court prejudice Franklin by refusing to strike jurors for cause? (6) Did the trial court err in sentencing Franklin by not requiring the jury to determine her criminal history beyond a reasonable doubt?

HELD: Court affirmed in part and reversed in part. (1) Court held the trial court did not abuse its discretion in admitting the cell phone text messages. Court stated the evidence was relevant to establish Franklin's intent when she stabbed Green and a declaration of what the sender had done. Court concluded the evidence reasonably implied that Franklin sent the text messages to Coleman and accordingly the messages could be admitted as an exception to the rule precluding the admission of hearsay for admission of parties. (2) Court held there was not an impermissible one-person lineup shown to Green. Court stated that Green not only saw Franklin at the crime scene, but Green also identified her assailant by name and knew Franklin's address. Court held that under the circumstances, showing Green a photograph of Franklin a few days later to make certain that Green and the police had the same person in mind was not an impermissibly suggestive lineup. (3) Court held the trial court properly gave the jury the Pattern Instructions for Kansas for eyewitness identification. (4) Court reversed Franklin's conviction for aggravated burglary. Court held there was no evidence that Franklin lacked authority to enter the house. Court stated that even viewing the evidence in the light most favorable to the prosecution, the state's circumstantial evidence paled the admission of hearsay for admission of parties. (2) Court held there was not an impermissible one-person lineup shown to Green. Court stated that Green not only saw Franklin at the crime scene, but Green also identified her assailant by name and knew Franklin's address. Court held that under the circumstances, showing Green a photograph of Franklin a few days later to make certain that Green and the police had the same person in mind was not an impermissibly suggestive lineup. (3) Court held the trial court properly gave the jury the Pattern Instructions for Kansas for eyewitness identification. (4) Court reversed Franklin's conviction for aggravated burglary. Court held there was no evidence that Franklin lacked authority to enter the house. Court stated that even viewing the evidence in the light most favorable to the prosecution, the state's circumstantial evidence paled next to Franklin's testimony that she had authority to enter the house, coupled with the circumstantial evidence of her car in the garage and her clothing in the house. (5) Court stated that the state points out there was no proffer by Franklin that she was unable to remove a questionable juror for lack of pre-emptory challenges. Court held Franklin failed to show either an abuse of discretion in the trial judge's refusal to excuse the prospective juror for cause or prejudice from a jury that was not impartial. (6) Court rejected Franklin's argument that her sentence should not have been increased based on her prior criminal history as held in prior Kansas Supreme Court cases.

STATUTES: K.S.A. 2004 Supp. 60-460(a), (g) and K.S.A. 2001 Supp. 21-4704

DISSENT: Justice Beier authored a dissenting opinion in support of sufficient evidence to uphold Franklin's conviction for aggravated burglary. Chief Justice McFarland and Justice Luckert joined Justice Beier's dissent.

STATE V. GRAY
SEDGWICK DISTRICT COURT – REVERSED
NO. 93,089 – OCTOBER 28, 2005

FACTS: Gray pled guilty to two counts of forgery, and he was sentenced to 11 months’ incarceration and was granted probation for 18 months. Several weeks later the court issued a warrant for Gray’s arrest because he had been charged with attempted robbery for actions occurring before he was sentenced to probation. Gray admitted to committing the attempted robbery, but argued that he did not violate the terms of his probation and it should not be revoked for acts committed prior to the grant of probation. The trial court disagreed and revoked Gray’s probation.

ISSUE: Did the trial court err in revoking Gray’s probation for acts committed prior to the grant of probation?

HELD: Court reversed. Court held that when a trial court grants probation, the probationer is entitled to retain his or her liberty interest as long as he or she abides by the condition of probation. That probation cannot be revoked, then, unless the probationer fails to comply with those conditions during the period of probation. Court held that an offender’s probation may not be revoked based upon action that occurred prior to the offender being placed on probation.

STATUTES: K.S.A. 2004 Supp. 21-4603d(f) and K.S.A. 2004 Supp. 22-3716(a), (d)

STATE V. LIMON
MIAMI DISTRICT COURT – JUDGMENT OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT IS REVERSED. JUDGMENT OF THE DISTRICT COURT IS REVERSED AND REMANDED WITH DIRECTIONS.
NO. 85,898 – OCTOBER 21, 2005

FACTS: Matthew Limon received a 17-year prison sentence based on consensual oral sexual contact with a male co-resident of a group home. Limon was 18 at the time of the offense, and the victim was 15. The presumptive sentence for the same act involving members of the opposite sex would have been 13, 14, or 15 months imprisonment. Under the “Romeo and Juliet” statute, voluntary sexual intercourse and other sex acts with a child 14 or 15 when the offender is less than 19 years of age and less than four years older than the victim, the victim and offender are the only ones involved, and the victim and offender are members of the opposite sex, permits a lesser penalty. The statute would have applied to Limon except for the provision limiting its application to acts between members of the opposite sex. The Kansas Court of Appeals had earlier held that the sentencing disparity did not violate the U.S. Constitution, and the Kansas Supreme Court declined to review that decision. However, after an appeal to the U.S. Supreme Court, the matter was remanded back to the Kansas courts with directions to determine whether Limon’s sentence complied with Lawrence v. Texas, a decision the U.S. Supreme Court filed in 2003 declaring a similar statute in Texas unconstitutional. In a fractured ruling of three separate opinions, the Kansas Court of Appeals dismissed the application of Lawrence as factually and legally distinguishable.

ISSUE: Whether the Kansas unlawful voluntary sexual relations statute, K.S.A. 2004 Supp. 21-3522, violates the equal protection provision of the 14th Amendment to the U.S. Constitution.

HELD: Court reversed the judgment of the Court of Appeals and the trial court. The Court unanimously ruled that the Kansas “Romeo and Juliet” statute, which specifies significantly less punishment for unlawful sex acts between heterosexual minors compared to same-sex acts involving minors, violates the equal protection clause of the 14th Amendment. Writing for the Court, Justice Marla J. Luckert said the U.S. Supreme Court decision required a determination that the Kansas statute is unconstitutional as a violation of the U.S. and Kansas Constitutions. The Court stated that the law can remain in place by striking the words “and are members of the opposite sex” from it. Court granted Limon’s requested remedy of imposing a time limit upon further proceedings in this case and ordered that the state will have 30 days in which to (1) charge Limon under the statute without the words “members of the opposite sex” or (2) take other action.

STATE V. PHINNEY

HARVEY DISTRICT COURT – REVERSED; COURT OF APPEALS – FIRST APPEAL DISMISSED, SECOND APPEAL REVERSED AND REMANDED
NOS. 90,639 AND 91,068 – NOVEMBER 10, 2003

FACTS: Phinney pled no contest to possession of pseudoephedrine. He appealed the denial of his motion to reduce sentence based on State v. Frazier, 30 Kan. App. 2d 398 (2002). He also pursued a direct appeal out of time from his sentence, which the Court of Appeals retained pursuant to State v. Ortiz, 230 Kan. 733 (1982), as applied in State v. Willingham, 266 Kan. 98 (2002). In unpublished opinion, Court of Appeals held Phinney was not entitled to retroactive application of Frazier on his collateral attack. Phinney’s petition for review was granted.

ISSUES: (1) Motion to correct illegal sentence and (2) direct appeal

HELD: Phinney’s sentence was not illegal. District court never acquired jurisdiction to hear Phinney’s untimely motion to reduce the sentence, thus appellate courts lacked jurisdiction to hear Phinney’s appeal. Nor would Phinney be entitled to relief if motion were construed as filed under K.S.A. 60-1507 motion. That appeal is dismissed.

Facts underlying Court of Appeals’ finding of exception under Ortiz for a direct appeal out of time are reviewed under substantial competent evidence standard. Here the record is sufficient to find exception applies and narrow exceptional circumstances in Ortiz/ Willingham are satisfied. Phinney’s out of time appeal is to be treated as a timely filed direct appeal, which would have been pending when Frazier was decided. Case is remanded for resentencing pursuant to Frazier.

STATUTES: K.S.A. 2004 Supp. 22-3602(a), 60-1507; K.S.A. 2001 Supp. 65-4152(a)(3), -7006, -7006(a); and K.S.A. 22-3424(f), -3504, -3608(c)

(continued next page)
ISSUES: (1) Sufficiency of the evidence, (2) right to confront witnesses, (3) failure to record interviews, (4) admission of Torres’ statement to law enforcement officials, (5) lesser included offenses, (6) admission of autopsy photographs, (7) prosecutorial misconduct, (8) admission of demonstrative illustrations, (9) number of expert witnesses, (10) exclusion of expert testimony, and (11) cumulative error.

HELD: Court affirmed. (1) Court found sufficient evidence to support Torres’ conviction. Court stated Torres was the only person with Tianna when she became unconscious, Torres admitted to shaking her and throwing her toward the bed when she hit the night stand, and all the expert testimony was consistent with injuries sustained from severe child abuse. (2) Court held Torres’ Sixth Amendment right to confront witnesses was not violated when he was forced to choose between his Fifth Amendment right against self-incrimination and allowing the testimony of his confessions to go into evidence unchallenged. Court stated Torres was not compelled to disclose information to law enforcement, but he chose to do so. (3) Court rejected Torres’ claim of a violation of constitutional rights in the officers’ failure to record his interviews. Court stated Torres could not show the failure to record the interviews was done in bad faith. Court stated the Kansas Legislature has not passed legislation requiring all interrogations to be recorded. Court held Torres’ alternative argument for a limiting jury instruction was not clearly erroneous. (4) Court held the district court’s finding that Torres was not in custody at the time he gave his statements was supported by substantial competent evidence, and the district court properly concluded that the interviews were not custodial interrogations that would require Miranda warnings. (5) Court held the district court did not err in failing to instruct for certain felony-murder lesser included offenses such as reckless second-degree murder or reckless involuntary manslaughter. Torres did not request the instructions, and the Court held it was not clearly erroneous for the district court not to give them. (6) Court stated that it reviewed the two photographs that Torres claims were gruesome, cumulative, and lacking in probative value. Court only reviewed the two photographs Torres objected to at trial. Court held the district court did not abuse its discretion in admitting the photographs. (7) Court held the district court did not err in denying Torres’ motion for mistrial based upon allegations the prosecutor made threats to Susan that if she did not cooperate she would lose her son and her sister would go to prison. Court concluded that Torres failed to show that the district court abused its discretion in denying the motion for mistrial or in not conducting either an in camera meeting or an evidentiary hearing on the allegations of prosecutorial misconduct. (8) Court stated Torres timely objected to the six medical illustrations from textbooks and artistic renditions as demonstrative evidence now complained of on appeal. The district court ruled the evidence could be used to help explain testimony, but they would not be admitted into evidence. Court held the illustrations were not specifically of Tianna, but were a fair and accurate representation of the human body used in conjunction with actual photographs of Tianna’s brain to show where the injury occurred, and the mere use of these as demonstrative evidence was not error. (9) Torres complained that the sheer number of state’s six expert witnesses overpowered his one expert. Court found Torres only objected to one of the expert witnesses’ testimony as cumulative. Court held that while the admission of the expert witness objected to by Torres was cumulative in part, it was not an abuse of discretion to allow it. (10) Court held the district court did not err in failing to exclude state’s rebuttal testimony that Tianna’s death was a homicide and that the death was a case example for shaken baby or shaken impact syndrome. Court concluded that either statement by the rebuttal expert did not go to the ultimate question of Torres’ guilt or innocence and therefore was admissible. (11) Court failed to find any error in the trial court and consequently no cumulative error.

STATUTES: K.S.A. 21-3401, -3436, -3609; K.S.A. 22-3601(b)(1); K.S.A. 2004 Supp. 22-3414(3); and K.S.A. 60-404, -456(d)
DIVORCE AND CHANGE OF VENUE IN RE MARRIAGE OF YOUNT
COWLEY DISTRICT COURT – AFFIRMED
NO. 93,612 – NOVEMBER 18, 2005

FACTS: Laura Hulse and Brian Yount were married in January 1996. Yount filed for divorce in Cowley County in November 1998. At the time Hulse and the couple’s child were still living in Shawnee County and Yount was living in Wichita. Hulse testified that the divorce action was filed in Cowley County because she and Yount had an attorney friend there who could inexpensively handle their mediation. When it became clear the attorney would represent Yount in the divorce, Hulse obtained her own counsel. The district court entered a divorce decree and property settlement. There was a proviso in the property settlement that if any further litigation occurred concerning the minor child, venue would change to Shawnee County. Yount relocated to Oklahoma, and Hulse remarried and relocated to Johnson County. In 2001 Yount filed a motion to modify his parenting time and for travel expenses and to have venue changed to Shawnee County. Yount’s venue motion was never ruled upon and the Cowley district court entered a parenting plan. In 2003 Hulse filed a motion in district court to increase child support. In 2004 the district court modified child support. Hulse filed a motion in district court to have venue changed to Shawnee County. Yount now objected to the change of venue, moved for modification of parenting time, and requested change in location for exchange of minor child. The district court overruled Hulse’s motion to change venue and ordered the parties to mediation. The district court denied change of venue because Hulse no longer resided in Shawnee County and Hulse failed to establish a connection between Hulse and the child to Shawnee County. The court concluded that “jurisdiction” is a matter of statute and not a matter of agreement by the parties.

ISSUE: Did the district court err in denying the motion to change venue?

HELD: Court affirmed. Court held that although the district court did not err in refusing to apply a venue agreement contained in the parties separation agreement, it did err in denying a change of venue based upon the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJE), K.S.A. 38-1336 et seq. However the court affirmed the decision on other grounds, as the district court’s factual findings were sufficient under K.S.A. 2004 Supp. 60-609(a) to conclude a transfer would not be convenient for the parties. The court stated that the parties’ choice of venue, which was incorporated into the divorce decree, was not enforceable because the agreement concerned a matter excepted under K.S.A. 2004 Supp. 60-1610(b)(3) and because the parties, by their own actions, modified the provision by seeking modification of custody and child support in district court. The court also stated the parties’ venue agreement did not constitute a valid or enforceable forum selection clause, but even if it did, Hulse, by her own actions, waived enforcement of the clause.

STATUTES: K.S.A. 38-1337, -1349; K.S.A. 60-607; and K.S.A. 2004 Supp. 60-209(a), -609, -1610(b)(3)
INSURANCE, COVERAGE, NEGLIGENCE AND BAD FAITH BY INSURANCE COMPANY, AND ATTORNEY FEES
MARIA ORTIZ V. JOHN P. BISCANIN ET AL.
WYANDOTTE DISTRICT COURT – AFFIRMED
OPINION ORIGINALLY FILED DECEMBER 3, 2004
FACTS: Extensive litigation centered around Guaranty National Insurance Co.’s issuance of an auto insurance policy to Sandra Simental. The policy provided liability coverage of $25,000. The insured automobile was involved in an accident in Colorado while being driven by Simental’s boyfriend, Theodoro Hernandez. Hernandez and his passenger, Gilberto Ortiz, along with the driver of the other automobile, died in the accident. Hernandez’s fault was not in question. His vehicle crossed the center line of the highway and struck the other automobile. Hernandez’s blood-alcohol level was 0.546 at the time of the accident. Guaranty took the position that Simental lied in answering five questions on the insurance application form. Simental’s native language is Spanish, and her ability to speak in English is extremely limited. Simental claimed the insurance agent answered the questions for her. Maria Ortiz sued the administrator of the Hernandez estate (Biscaini) for the wrongful death of her husband. Maria Ortiz accepted a settlement of $500,000 in exchange for a covenant not to execute on the personal assets of the Hernandez estate. Guaranty paid its $25,000 policy limits into court. Guaranty was served with a garnishment in the Ortiz wrongful death action. Guaranty removed the case to federal court. The district court ultimately entered judgment against Guaranty for $475,000. The district court found that since Guaranty failed to pay without just cause or excuse, it was liable for fees of $158,333.33 to be split between the estate and Ortiz’s lawyers.

ISSUES: Is there substantial evidence to support the district court’s findings of negligence and bad faith by Guaranty? Were the attorney fees reasonable?

HELD: Court affirmed. Court found there was substantial competent evidence to support the district court’s findings that Guaranty acted negligently or in bad faith by not sending a reservation of rights letter to its insured, that after Guaranty filed the declaratory judgment action it acknowledged to the court that Kansas law required joinder of the various claimants and the tortfeasor but never amended its petition in order to do so, that Guaranty did not take actions to promptly resolve the coverage dispute, that Guaranty knew, or should have known, that it was unlikely that it would be able to prove by clear and convincing evidence that Simental knowingly and with intent to deceive signed an application she knew contained materially false statements, that Guaranty failed to diligently investigate the facts, and that Guaranty made no efforts to settle the Ortiz claim at any time. Court also found there was substantial evidence to support the district court’s determination that Ortiz and the Hernandez estate made a prima facie showing that the settlement was reasonable and in good faith and that the settlement was not the product of collusion. Court stated that since the decision affirming the district court’s ruling in the declaratory judgment action, the case continued for more than two years and included a removal and remand from the federal district court and a four-day trial before the district court. Court held that district court had ample evidence to draw upon in determining a reasonable fee.

STATUTES: K.S.A. 40-2,118(a) and K.S.A. 2003 Supp. 60-252

MEDICAL MALPRACTICE AND SCREENING PANEL
CUTLER V. SOSINSKI
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 94,092 – NOVEMBER 10, 2005
FACTS: Cutler filed a petition requesting a medical malpractice screening panel naming Dr. Sosinski as the respondent. The panel concluded that Sosinski did not depart from the standard of care and practice applicable at the time in question. Additionally, the panel reported that even if Sosinski failed to diagnose or failed to treat, it was reasonably probable that no harm or injury resulted to Cutler. Cutler complained to the district court that the panel did not fulfill its requirements to cite “corroborating references,” but the district court accepted the panel’s report and recognized its compliance with the pertinent statutes. Court filed an untimely motion to reconsider in a letter to the district court. The court found there was no procedure in the statutes to review and modify the report and that her remedy was to file suit. Cutler did not file suit against Sosinski, but filed a notice of appeal.

ISSUE: Did the district court abuse its discretion in denying Cutler’s motion to reconsider?

HELD: Court affirmed. Court held that it could dispose of Cutler’s appeal on the basis of an untimely motion to reconsider, creating an untimely appeal. However the court held Cutler’s position on the merits also failed. Court held that the provision in K.S.A. 65-4904(a), which states, “All written opinions shall be supported by corroborating references to published literature and other relevant documents,” is directory rather than mandatory. Corroborating citations in the panel’s report were not essential to preserve Cutler’s rights to file suit against Sosinski. The district court did not abuse its discretion in its decision denying Cutler’s motion to reconsider.

STATUTES: K.S.A. 60-259(f) and K.S.A. 65-4901 et seq., 4902, 4904(a), 4905

PROPERTY APPRAISAL AND CONSTRUCTION TYPE
ST. CATHERINE HOSPITAL V. ALAN ROOP, FINNEY COUNTY APPRAISER AND FARM GOLD V. ALAN ROOP, FINNEY COUNTY APPRAISER
FINNEY DISTRICT COURT
REVERSED AND REMANDED
NO. 93,437 – NOVEMBER 10, 2005
FACTS: Both St. Catherine Hospital and Farm Gold had the construction type of building material on their property misclassified as “fireproof” rather than “fire resistant” or composed of fire resistant materials rather than pre-engineered steel. The county agreed in both cases that the original classifications were a mistake and that an employee of the appraiser’s office viewed the buildings after they were built and guessed at their type of construction by viewing the exterior instead of viewing the properties during construction. St. Catherine and Farm Gold filed separate tax grievance applications. The Kansas Board of Tax Appeals (BOTA) ruled that it lacked jurisdiction over the applications because the errors were not clerical errors subject to retroactive remedy. BOTA denied the motion for reconsideration. The district court affirmed BOTA.

ISSUES: What is the definition of “clerical error” in property valuation? Were the appraiser’s mistakes clerical errors, which caused errors in the appraised value of the properties?

HELD: Court reversed and remanded. Court held that under the facts of this case, the types of clerical errors listed in K.S.A. 79-1701 all have as a major component an error that did not involve an act of discretion on the part of appraisal officials. The misclassi-
RATIONALE: The components of construction materials described in this case constituted a clerical error listed and described in K.S.A. 79-1701. Court remanded the case to BOTA for proceedings to allow the taxpayers the opportunity to present evidence as to how they were harmed by the errors.

STATUTES: K.S.A. 77-601 et seq., -621(c); K.S.A. 79-1701, -1702; and K.S.A. 2004 Supp. 79-1701

VETERANS' PREFERENCE STATUTE
LITTLE V. STATE OF KANSAS,
KANSAS BOARD OF TAX APPEALS ET AL.
SHAWNEE DISTRICT COURT – AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED
NO. 92,972 – OCTOBER 21, 2005

FACTS: Little filed suit, claiming each of the defendants violated the veterans' preference statute by refusing to hire him. He asserted that he was an honorably discharged and disabled veteran and that he is qualified and competent to fill all the positions for which he applied. He claims he applied for positions with the state of Kansas, Kansas Board of Tax Appeals (BOTA), Kansas Board of Healing Arts (BOHA), Kansas Department of Transportation (KDOT), Office of Judicial Administration (OJA), Department of Administration – Legal Section (DOA), Kansas Securities Commission (KSC), Kansas Bar Association (KBA), Kansas Legal Services (KLS), and the Washburn Endowment Association (WEA). Each defendant filed either a motion to dismiss, a motion for summary judgment, or a combination of the two. The district court granted the motions to each defendant.

ISSUE: Did the district court err in granting either a dismissal or summary judgment to each of the defendants?

HELD: Court affirmed in part, reversed in part, and remanded. Court reversed the granting of the motion to dismiss in favor of WEA. Little claimed that WEA is so closely related to Washburn University that it can be considered a government agency and that the preference should apply. Court stated that Washburn is not a state educational institution, and it was created as a municipal university. Court stated Little's theory against WEA is based on piercing the corporate veil that would treat WEA and Washburn University as one and measure WEA's acts by standards that would otherwise apply only to Washburn University. Court stated that logic compels the conclusion that if an organization that is completely dominated by a university can enjoy the benefits of statutory immunity from suit otherwise available only to a state university that such an organization should also be subject to statutory duties that would otherwise only be imposed on the university. Court reversed the motion to dismiss on the issue of whether WEA was overwhelmingly dominated by Washburn University and that Little has asserted an actionable claim against WEA that may or may not bear fruit. Court affirmed summary judgment in favor of KLS and KBA, which are not state agencies. Court affirmed the dismissal of BOT A, OJA, KSC, and BOHA finding the district court did not have subject matter jurisdiction based on a failure to exhaust administrative remedies. Court affirmed dismissal of KDOT and DOA finding Little failed to file suit within 30 days of their final agency action. Court also affirmed dismissal of the state of Kansas finding that since the claims against each of the state agencies he sued are without merit, any purported claim against the state necessarily fails.

STATUTES: K.S.A. 46-901 (Weeks); K.S.A. 60-212(b)(6), (c), -512(2); K.S.A. 73-201; K.S.A. 74-3201(b); K.S.A. 75-2948; K.S.A. 2004 Supp. 75-6103(a); K.S.A. 76-711(a), -12; and K.S.A. 77-601 et seq., -602(k), -606, -612, -613(b), (d), -614(b)(5)

WORKERS’ COMPENSATION AND GOING AND COMING RULE
RINKE V. BANK OF AMERICA ET AL.
WORKERS’ COMPENSATION BOARD – REVERSED
NO. 93,868 – OCTOBER 21, 2005

FACTS: Rinke worked at Bank of America. Her normal working hours were 6 a.m. to 2:45 p.m. While Rinke was walking on a direct route from the bank to the parking lot adjacent to the bank’s south side, she slipped on a patch of sand that had been placed on ice in the parking lot to prevent slipping. She was injured when her right hip, shoulder, and elbow hit the pavement. The bank leased the property it occupied from Argora Properties L.P., and the property had another tenant, Wesley Occupational Health. The parking lot was also owned by Argora, and the bank leased parking space for its employees. The parking lot was also used by Wesley, visitors, and the general public. Argora had responsibility for all maintenance of the parking lot. The administrative law judge (ALJ) determined that Rinke’s injuries were compensable because they occurred on the bank’s premises and the going and coming rule did not apply based on the premises exception to the rule. The Workers’ Compensation Board (Board) affirmed the ALJ’s conclusions but modified the ruling by utilizing a different method for computing the compensation award.

ISSUE: Did the Board err in finding Rinke’s injuries fell under the premises exception to the going and coming rule for workers’ compensation liability?

HELD: Court reversed. Court held the term “premises” in K.S.A. 44-508(f) is narrowly construed to mean a place controlled by the employer or a place where an employee may reasonably be during the time he or she is doing what a person so employed may reasonably do during or while the employment is in progress. The term “premises” is not restricted to the permanent site of the statutory employer’s business or limited to property owned or leased, but contemplates any place under the exclusive control of the employer where the usual business is being carried on or conducted. Court concluded that where an employee is injured in a fall in a parking lot leased by his or her employer but not maintained or controlled by the employer, the employee’s injury did not occur on the employer’s premises and is subject to the general going and coming rule. Court held that because the premises exception to the going and coming rule does not apply, Rinke’s claim is not covered by the Workers’ Compensation Act, and the Board’s decision was reversed.

STATUTES: K.S.A. 44-501, -508(f) and K.S.A. 77-601 et seq.

Criminal

STATE V. HANKERSON
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 92,207 – NOVEMBER 10, 2005

FACTS: Hankerson convicted of kidnapping, aggravated burglary, and three counts of attempted first-degree murder. On appeal he claimed (1) two of the three attempted murder charges for shooting at police officer were multiplicitous, (2) insufficient evidence supported the aggravated burglary conviction, (3) prosecutorial misconduct, and (4) error in calculating his criminal history score.

ISSUES: (1) Multiplicity, (2) sufficiency of evidence, (3) prosecutorial misconduct, and (4) criminal history

HELD: Multiplicity issue, raised for first time on appeal, is addressed. Under facts, each act of shooting at the officer stands as a
Evidence clearly shows Hankerson entered into and remained in victim's home intending to “confine” her and hold her as a shield or hostage. Rational factfinder could have found Hankerson guilty beyond a reasonable doubt.

Two statements in prosecutor’s closing argument were outside latitude allowed for discussing evidence, but error was harmless under the facts.

Criminal history claim is defeated by State v. Pennington, 276 Kan. 841 (2003), and State v. Ivory, 273 Kan. 44 (2002).

STATUTE: K.S.A. 21-3420(a), -3716

DUI, SENTENCING, AND MULTIPLE OFFENSES
STATE V. JARRELL
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 92,054 – MOTION TO PUBLISH
OPINION ORIGINALLY FILED APRIL 22, 2005

FACTS: On Sept. 26, 2002, Jarrell was charged with DUI and driving while suspended for offenses occurring on May 9, 2002, with prior convictions in 1998 and 2001. On Sept. 4, 2003, Jarrell was charged with DUI for an offense occurring on Sept. 19, 2002, with prior convictions in 1998 and 2001. Jarrell pled guilty in both cases on Dec. 8, 2003. The plea agreement disposed of both cases in one hearing; however, the cases were not formally consolidated, but the trial court stated at the sentencing hearing that it considered the matters to be a consolidated proceeding. Prior to sentencing, Jarrell filed a motion arguing that he should be considered a third-time offender for each of the new DUI convictions. The trial court disagreed and sentenced Jarrell as a third-time offender for the DUI offense charged in 2002 and as a fourth-time offender for DUI offense charged in 2003.

ISSUE: Should Jarrell have been sentenced as a third-time offender on each of the new DUI convictions?

HELD: Court affirmed. Court stated that the two cases were not formally consolidated, the charges did not arise from a single complaint, and the integrity of the separate complaints was maintained throughout the proceedings when Jarrell entered his guilty pleas separately according to case number and count. Court stated that Jarrell pled guilty to the offense charged in 2002 before he pled guilty to the offense charged in 2003. Court affirmed the trial court's sentencing of Jarrell as a third- and fourth-time DUI offender.

STATUTES: K.S.A. 8-1567(f), K.S.A. 2002 Supp. 8-1567(g), and K.S.A. 2002 Supp. 21-4710(a)

STATE V. LAFLEUR
SALINE DISTRICT COURT – AFFIRMED
NO. 92,886 – NOVEMBER 18, 2005

FACTS: Lafleur convicted of sale of methamphetamine and unlawful use of a communication facility. On appeal he claimed (1) trial court should have instructed jury on entrapment, (2) insufficient evidence supported conviction for unlawful use of a communication facility, (3) charging document for sale of methamphetamine was fatally defective because it omitted words “or intentionally,” and (4) severity level for crime of unlawful use of a communication facility should be determined by K.S.A. 65-4127c rather than K.S.A. 65-4141.

ISSUES: (1) Jury instruction, (2) sufficiency of evidence, (3) charging document, and (4) sentencing

HELD: Trial court correctly did not give entrapment instruction. Lafleur’s statement that he had innocent conversation with government informant was not an admission of wrongdoing for

entrapment instruction pursuant to State v. Einborn, 213 Kan. 271 (1973). Also record does not support Lafleur’s claim of “functional request” for entrapment instruction, and such an instruction would have been incongruent with Lafleur’s theory of defense.

K.S.A. 65-4141 does not require the existence of a pattern or habit to establish crime of unlawful use of a communication facility. Here, jury’s resolution of conflicting evidence was sufficient to support the conviction.

No error in denying Lafleur’s motion to arrest judgment. Terms “willful” and “intentional” are synonymous.

K.S.A. 65-4141(c) has a specific penalty contained in it and is not subject to general penalties of K.S.A. 65-4127c.

STATUTE: K.S.A. 21-3201, -3201(b), -65-4101 et seq., -4127c, -4141, -4141(c), 4152(a)(2), -4161, 70-5204

STATE V. JOHNSON
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 91,867 – NOVEMBER 4, 2005

FACTS: Johnson charged with aggravated indecent liberties with a child, K.S.A. 21-3504(a)(3)(B), and convicted of aggravated indecent solicitation of a child as a lesser included offense. On appeal he claimed district court lacked jurisdiction because principle crime was not correctly charged and aggravated indecent solicitation was not lesser included offense of that offense. Johnson also claimed trial court erred in not admitting report filed by officer unavailable due to military service in Iraq and claimed prosecutorial misconduct during closing argument.

ISSUES: (1) Jurisdiction, (2) hearsay, and (3) prosecutorial misconduct

HELD: K.S.A. 21-3504(a)(3)(B) prohibits soliciting child to engage in lewd fondling or touching of the person of another. Unfortunate that Johnson not charged under 21-3504(a)(3)(A), but mere fact that insufficient evidence supports 21-3504(a)(3)(B) conviction does not affect trial court’s jurisdiction to convict and impose sentence for a proper lesser included offense, as in this case. Johnson was properly convicted of aggravated solicitation of a child under K.S.A. 21-3511(a), notwithstanding legal impossibility of convicting him of the charged principal offense.

Exceptions for admission of double hearsay not met in this case. Even if report had been admitted to impeach witness, unlikely jury’s verdict would have changed.

Improper to argue in child sex crime prosecution that manner and circumstances of child’s allegations of inappropriate sexual conduct by the defendant lend credibility to the child’s testimony. Permissible to urge jurors to use their collective knowledge of 4-year-old children to determine whether child’s statements were false or rehearsed. While improper for prosecutor to generally discuss vulnerability of a child in prosecution for sex crime involving a child, under facts the few improper statements were not so gross or flagrant in this case as to prejudice jury and deprive Johnson a fair trial.

STATUTES: K.S.A. 2004 Supp. 60-460(d)(3) and K.S.A. 21-3501(4), -3504(a)(3)(A) and (B), -3505(a)(2) and (3), -3511, -3511(a), 60-404
STATE V. MCFADDEN  
KIOWA DISTRICT COURT – AFFIRMED  
NO. 91,572 – MOTION TO PUBLISH  
OPINION ORIGINALLY FILED FEBRUARY 18, 2005

FACTS: Two motorcyclists followed McFadden in his car for many miles watching him cross the center line and hit the rumble strip in the opposite lane before slamming on his brakes and correcting. One of the motorcyclists was a former sheriff's deputy, and they approached McFadden when he stopped at a co-op. They called the sheriff’s department. McFadden failed the field sobriety tests and then tested a blood alcohol level of 0.20 from a blood test. McFadden was charged with DUI and transporting an open container. McFadden took his case to trial and presented testimony on medical conditions making individuals appear intoxicated when they are not. McFadden's attorney argued that McFadden could testify to the drugs he was taking. Court refused, stating that McFadden was not a medical expert. McFadden proffered testimony that he would testify to the medical condition he believes he has and that after multiple consultations his conclusion is that he has severe adrenaline deficiency and he is prescribed the drug Cortisol. McFadden decided not to testify since the trial court would not let him give a full explanation of his condition to the jury. The jury found McFadden guilty of DUI and transporting an open container.

ISSUE: By prohibiting McFadden from testifying about his medical condition, did the trial court violate McFadden's constitutional right to testify on his own behalf and present a defense?  
HELD: Court affirmed McFadden's conviction. Court applied abuse of discretion standard of review. Court held that McFadden's proffer of testimony about his medical condition goes beyond the common knowledge of laypersons. Even if a jury had heard about McFadden's medical condition, and the fact that it could cause someone to be impaired, it would still not contradict the uncontroverted evidence that McFadden had a blood alcohol level of 0.20. The trial court had a legitimate interest in admitting only reliable evidence and did not abuse its discretion by prohibiting McFadden from testifying about his medical condition. Court concluded the trial court did not infringe upon McFadden's constitutional right to testify on his own behalf or present a defense. McFadden had the opportunity to offer factual testimony or to call an expert to offer medical testimony, but did not do so.

STATUTE: K.S.A. 60-456(a), (b)  
CONCURRING: J. Malone concurred with the majority opinion, but stated it was err for the trial court to refuse to allow McFadden to testify about his medical condition. However J. Malone stated the err was harmless in light of the evidence presented by the state.

STATE V. MONTGOMERY  
SHAWNEE DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART  
NO. 92,657 – OCTOBER 21, 2005

FACTS: After a single-car accident, Montgomery was charged with misdemeanor DUI and failing to maintain a single lane. She was served on May 14, 2003, and her first appearance was scheduled for July 9, 2003. On July 3, 2003, Montgomery's attorney filed a waiver of arraignment, that she understood the penalty if convicted, pled not guilty, and requested a trial. Trial was set for Oct. 15, 2003. On Oct. 14, 2003, the state moved for a continuance due to an unavailable officer and the trial was rescheduled for Jan. 6, 2004. On Nov. 7, 2003, an amended complaint was filed, which added charges of transporting an open container and leaving the scene of an accident. She was never arraigned on these two charges. One hundred-eighty days from July 3, 2003, is Dec. 30, 2003. On Jan. 2, 2004, Montgomery filed a tardy request for a jury trial, and it was continued from Jan. 6 to March 22, 2004. Montgomery requested another continuance to April 14, and then another continuance pushed the trial back to May 26, 2004. On May 26, 2004, Montgomery moved to dismiss the charges because she had been denied a speedy trial. Motion denied. Montgomery stipulated to the facts on all four charges and was found guilty on all charges.

ISSUES: Was Montgomery denied a speedy trial? Did the filing of Montgomery's waiver of arraignment on July 3, 2003, start the running of the 180-day speedy trial clock? Did the state's requested continuance on Oct. 14, 2003, temporarily suspend the running of the clock?

HELD: Court affirmed in part and reversed in part. Court stated that logic compels the conclusion that when a defendant purposefully waives arraignment and the court approves that waiver by accepting the defendant's not guilty plea and schedules the case for trial, the waiver is an effective substitute for the arraignment; there is no need for further arraignment proceedings to begin the running of the speedy trial clock. Court held Montgomery correctly argued the 180-day speedy-trial clock began to run on July 3, 2003. Court reversed the motion to dismiss because the court was unable to identify even in the most general way the nature of the evidence or testimony that the unavailable officer would provide or its materiality, or the efforts made by the state to procure the officer's attendance at trial. Court stated that without these facts there is nothing to demonstrate that the state's requested continuance stopped the running of the speedy-trial clock pursuant to K.S.A. 22-3402(3)(c). Court held the district court erred in finding that the prosecution of Montgomery for DUI and failure to maintain a single lane was not barred by the speedy-trial statute. On the remaining convictions, court held there was sufficient evidence to uphold Montgomery's conviction for transporting an open container, but insufficient evidence to uphold the conviction for leaving the scene of an accident. Court reversed the conviction for leaving the scene of an accident.

STATUTES: K.S.A. 8-1599(b), -1603, -1604(b); and K.S.A. 22-2202(3), -3205(a), -3402(2), (3)(c)

STATE V. SEDAM  
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS  
NO. 92,737 – NOVEMBER 4, 2005

FACTS: Billy Warfield was surety on the bail bond for Sedam when Sedam was charged with possession of methamphetamine. Sedam was ordered to appear on Dec. 16, 2003, for the preliminary hearing, and he was released on $10,000 bond posted by Warfield and Sedam. The language in the bond stated if the conditions are modified then the bond is null and void. Sedam failed to appear on Dec. 16, 2003, the bond was declared forfeited, and an alias warrant was issued for his arrest. On Dec. 19, 2003, Sedam appeared, waived his preliminary hearing, and entered a not guilty plea. His counsel requested the bond be reinstated because Sedam had simply shown up late on Dec. 16, and was taken into custody. The state confirmed. The trial court reinstated the bond in the same form, but with an additional condition that Sedam be supervised by pretrial services. Sedam was ordered to appear periodically at the pretrial services office. No notice of the revocation, reinstatement, or addition of a condition was given to the surety. On Jan. 8, 2004, Sedam tested positive for amphetamine
in a urine sample given to pretrial services and he failed to report. A warrant was issued for Sedam, and the court forfeited the bond. The state made another motion to forfeit when Sedam failed to appear on Feb. 9, 2004. The state filed a motion for judgment on the forfeiture of bond based on Sedam’s failure to appear on Feb. 9, 2004, and Warfield, as surety, was notified of the motion. The district court found that the added condition of Sedam having to appear before pretrial services did not act to the detriment of the bondsman, and judgment was entered against Sedam as principal and Warfield as surety for $10,000.

ISSUES: Did the district court abuse its discretion in entering judgment on the bond forfeiture?

HELD: Court reversed and remanded with directions to vacate the judgment against Warfield. Court stated that a material modification of a bond, which alters the surety’s obligation, made without the surety’s consent, will discharge the surety. Court applied an abuse of discretion standard of review to find that under the facts of this case, the court reinstated a forfeited bond with new conditions with no notice to the surety. Court held this gave the surety no opportunity to evaluate whether he wanted to assume the increased risk of forfeiture and imposing a money judgment against the surety under such facts was an abuse of discretion.

STATUTE: K.S.A. 2004 Supp. 22-2807

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STATE V. ZVOLANEK
NORTON DISTRICT COURT – AFFIRMED
NO. 93,448 – OCTOBER 21, 2005

FACTS: Zvolanek was charged with burglary of a dwelling and misdemeanor theft for stealing personal property in the middle of the night from an older residence used for storage on the Maddy's family farm. Zvolanek's defense was that he had been hired to haul trash from a house outside of Norton and claimed that he mistakenly hauled things away from the Maddy’s storage property. During trial the state elicited testimony from the undersheriff concerning Zvolanek’s post-Miranda silence, and several times the state examined Zvolanek concerning his failure to present his defense until trial. The state also elicited testimony from the Maddys that the stolen property had great sentimental value, and the prosecutor highlighted this sentimental value testimony during the closing argument. Zvolanek failed to object to any of the evidence he now complains on appeal was improperly admitted.

ISSUES: Did the prosecutor commit prosecutorial misconduct by offering evidence of his post-Miranda silence and by eliciting testimony regarding the sentimental value of the property taken by Zvolanek? Was there sufficient evidence to support Zvolanek's conviction?

HELD: Court affirmed Zvolanek's conviction. Court stated the evidence of post-Miranda silence and sentimental value of the property was clearly improper, but it was not objected to; there

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Kansas Bar Association
Bylaws Amendment
Adopted September 23, 2005

The Kansas Bar Association Board of Governors adopted the following bylaw at its Sept. 23, 2005, meeting held in Wichita, Kan.

Change made ...

5.3 **KBA ABA Delegate(s) to the ABA House.** There shall be elected delegates from the Association to the House of Delegates of the American Bar Association (ABA) who meet the qualifications established by the ABA, in the number that the ABA shall prescribe. Each Delegate of whom shall serve for a three (3) two year terms. **If there is more than one delegate, the expiration of the terms shall be alternated so that the terms are staggered.** No ABA State Bar Delegates may serve for more than three (3) complete consecutive terms. Candidates for KBA ABA State Bar Delegates to the ABA House shall be elected in the same manner as Association officers.

Reads like ...

5.3 **KBA Delegate(s) to the ABA House.** There shall be elected delegates from the Association to the House of Delegates of the American Bar Association (ABA) who meet the qualifications established by the ABA. Each Delegate shall serve for a two-year term. If there is more than one delegate, the expiration of the terms shall be alternated so that the terms are staggered. Candidates for Delegate shall be nominated by the Nominating Committee and/or by petition as the terms expire. KBA Delegates to the ABA House shall be elected in the same manner as Association officers.
was never a motion to strike the testimony; there was never an admonishment from the court or a mistrial; and there was never a request for cautionary instruction. Due to the lack of objection the court stated it would consider the issue in the context of whether Zvolanek is entitled to a new trial under the analysis of alleged prosecutorial misconduct. Court stated the evidence was clearly outside the wide latitude that the prosecutor is allowed in discussing or presenting the evidence, and that the sentimental value testimony was irrelevant during the guilt phase of the trial. However, the court stated there was no evidence of ill will on the part of the prosecutor sufficient to support a finding of prosecutorial misconduct. Court stated it was unclear whether the prosecutor was being intentionally overzealous by presenting inadmissible evidence or whether the prosecutor simply did not know better. Court also stated the evidence against Zvolanek was strong and that Zvolanek provided absolutely no corroborating evidence of his defense at trial. Court stated Zvolanek failed to raise the issue of dwelling versus nondwelling in the district court, and the court stated that it was not properly preserved for appeal. Nevertheless the court found sufficient evidence to support the finding of burglary of a dwelling.

STATUTES: K.S.A. 21-3715; K.S.A. 2004 Supp. 21-4718(b)(4), (5); and K.S.A. 60-401(b), -404

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