Joint Defense/ Common Interest Privilege in Kansas

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2006 KBA MEMBERSHIP APPLICATION
Through December 31, 2006

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   Informal Name __________________ Supreme Ct # ________________
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   Male □ Female □ Birthday (month/day/year) ___________________
   Law School: ___________________
   First Year Admitted to Practice: Year _______ State _______
   Year Admitted to Kansas Bar (if different from above): _______

By signing below, I give consent to receive faxes and/or e-mail sent by or on behalf of the KBA and its subsidiaries:

__________________________
Signature

B. PRACTICE INFORMATION

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

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

C. CONCENTRATION AREAS

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

   CATEGORY NAME
   □ Administrative Law □ Insurance Law (Regulatory)
   □ Agricultural Law □ Intellectual Property Law (Patent, Trademark & Copyright)
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   □ Civil Rights □ Litigation (General Civil Practice)
   □ Collections □ Municipal Law
   □ Construction Law □ Oil & Gas & Mineral Law
   □ Consumer Protection □ Public Utility Law & Regulated Industries
   □ Corp., Business & Banking □ Real Estate Law
   □ Criminal Law (Prosecution) □ School Law
   □ Criminal Law (Defense) □ Taxation
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   □ Family Law □ Workers’ Compensation

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   Dues year based on year of admission in Kansas.
   (Full-time government employee rates in parenthesis.)

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     includes YLS membership _____________________________ FREE
   □ Lifetime – Must have been a KBA member for 50 years _____________________________ FREE
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   Total Membership Dues _____________________________

E. SECTION ENROLLMENT (OPTIONAL)

   □ Administrative Law _____________________________ $15
   □ Al. Dispute Resolution _____________________________ $15
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   □ Construction Law _____________________________ $15
   □ Corp., Banking & Business _____________________________ $15
   □ Criminal Law _____________________________ $15
   □ Elder Law _____________________________ $15
   □ Employment Law _____________________________ $15
   □ Family Law _____________________________ $25
   □ Young Lawyers – Members to age 36 or admitted in past five years _____________________________ $10

   Total Section Dues _____________________________

F. KANSAS BAR FOUNDATION (OPTIONAL)

   KBF contributions are tax deductible; contributions do not count toward Fellows or Raising the Bar Campaign pledge payments.

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   Credit Card No. ________________ Exp. Date __________

   □ Check here to select automatic renewal. Dues will be charged to your credit card annually.

   Signature _____________________________

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   Gifts to the Kansas Bar Foundation are tax deductible as charitable contributions. In compliance with the Omnibus Budget Reconciliation Act of 1993, we estimate 11 percent of your KBA membership dues are not deductible as a business expense because they are allocable to lobbying expenditures. Eighty-nine percent of 2006 membership dues and 100 percent of section membership dues remain deductible as a business expense. Dues are not deductible as charitable contributions.
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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Washburn University School of Law 3L students: (left to right) Ryan P. Comeau, Pittsburg, Kan.; James E. Orth Jr., Hanford, Calif.; and (seated and standing) Kelly-Rose Garrity, Lawrence, Kan.

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THE JOURNAL
of the Kansas Bar Association
February 2006 • Volume 75 • No. 2

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8 Jury Service — It was Exciting!
11 A Reminder! KBA Officer and Board of Governor Elections in 2006; Petitions due by March 10

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Don’t forget!
Renew your KBA membership today!
The New Year has come and it’s time to face up to a sobering reality about the old one. 2005 was a bad year for the Kansas Bar Association and for the legal profession in this state. Sure, the KBA made progress on many fronts: Membership was up, the CLE program was reinvigorated, and the Journal was more appealing and readable than ever.

But by one very important measure 2005 was a good year to have behind us, and hopefully not soon to be repeated. We lost so many outstanding professionals during one calendar year that we will need many more years to even begin to fill the void left by their passing. A random sampling ...

February 14: J. Paul Maurin III of Kansas City, Kan. Paul served as President of the Wyandotte County Bar Association in 1982 and served eight years on the Board of Governors of the Kansas Trial Lawyers Association. In 2004 he finished six years as the District 11 Representative on the KBA Board of Governors. At his death he had been a KBA member for 33 years.

March 30: Justice Robert L. Gernon of the Kansas Supreme Court. Known as Bob to everyone he had ever met, he served on more KBA committees than we could keep track of. It was a tribute to Bob’s people skills that he successfully herded dozens of lawyers and judges for 16 years to produce the “Annual Survey of Law,” a comprehensive review of developments in cases and statutes. He was honored with the KBA’s Professionalism Award in 2001.

May 14: Patrick B. McNany of Kansas City, Kan. The second of four generations of McNany attorneys, he was a lifetime member of the Kansas Bar Association. The KBA recognized his 60 years of service to the bar in 1998.


June 9: William M. Ferguson of Wellington. He had the distinction of serving as president of the KBA in 1964 while also serving as Kansas Attorney General. Bill Ferguson joined the KBA in 1941 and attained the status of lifetime member in 1991.

August 1: Norbert R. Dreiling of Hays. He joined the KBA in 1949 and was a lifetime member.

August 31: Harry L. Depew of Neodesha. Harry served on many KBA committees and was a lifetime member after joining in 1951.

November 4: John C. Tillotson of Leavenworth. John served as President of the KBA in 1997-98 and continued his active involvement with the Association by serving as chairman of the Legislative Committee. He was the force behind creation of the Kansas Lawyers Fund for Client Protection, now administered under the auspices of the Kansas Supreme Court. John was given the KBA’s Distinguished Service Award in 2005 for continuous long-standing service on behalf of the legal profession.

December 16: Daniel J. Sevart of Wichita. Dan was President of the KBA in 2003-04 while also serving as chairman of the Kansas Governmental Ethics Commission. He had been president of the Wichita Bar Association in 1993-94, a member of the board of governors of the Kansas Trial Lawyers Association and served on numerous KBA committees.

This sampling doesn’t include all the many friends and colleagues we lost in 2005, and it doesn’t attempt to summarize the astonishing range of civic and professional contributions from these distinguished lawyers during their lifetimes. But each of these individuals was a giant of the legal world who felt it was important to add his personal strength to make the Kansas Bar Association a pre-eminent force among law professionals in this state.

Their heritage is to inspire the rest of us to find ways to continually improve the practice of law on behalf of our clients and the generations of lawyers who will follow us.

Richard F. Hayse can be reached by e-mail at rhayse@morrislaing.com or by phone at (785) 232-2662.
“I gave one of my first CLEs at the 2001 KBA Annual Meeting in Vail. Later, when I was president of the Young Lawyers Section, I helped the YLS develop a separate track of CLE designed and presented by young lawyers for the 2005 meeting. I considered it a remarkable success and am pleased that it will continue at the 2006 Annual Meeting in Overland Park.

The interaction I have had with others at KBA Annual Meetings has led to clients, referral business, job leads, and actual job offers. I am convinced my involvement, including my attendance, has greatly contributed to many of my successes in the law and, more importantly, in my development as a lawyer.

I can’t even begin to tell you how many judges, lawyers, justices, and legislators I have met through the KBA Annual Meeting. What’s even more remarkable than the sheer number of professionals that I have met through the KBA is their collective willingness to help those who express an interest in receiving it.”

Eric G. Kraft,
Duggan Shadwick Doerr & Kurlbaum P.C.,
Overland Park
KBA member since 1997
Young Lawyers Section President, 2004
Find and use Your Mentor
By Christopher J. Masoner, KBA Young Lawyers Section president

One of the harshest realities most of us face early in our careers is that we really know very little about how to be a lawyer when we come out of law school. Of course, law school teaches us how to write like a lawyer, how to speak like a lawyer, and how to think like a lawyer. We spend hours studying the Rule Against Perpetuities, Article 2 of the UCC, and the Federal Rules of Evidence. However, very little of what we learn teaches us how to be a lawyer. There are no law school courses titled “How to Handle a Divorce and Child Custody Case in Judge Leben’s Court,” “How to Handle a Bankruptcy Before Judge Sommers,” “What to Do When Your Client Drives His Car into the Arkansas River with a B.A.C. of 0.21,” or “How to Gracefully Handle a Client/Partner/Agency Director When You’ve Just Got Too Damn Much to Do and You’re Very Sorry But Their Issue is Just Not the Most Important Thing in Your Life Right Now.” Yet these are circumstances many of us are expected to deal with the minute the “J.D.” goes after our name and the name goes on the letterhead.

We can consider our first several years of practice as Phase II of our legal education. Phase I takes place in the relatively comfortable confines of law school, but Phase II takes place in the decidedly less comfortable Real World. Out here, we will make mistakes; and, if those mistakes are bad enough, they can have a lasting impact on the lives of the people we serve, not to mention our own careers. We owe it to our clients, our employers, and ourselves to minimize as much as possible the risk that we will make a mistake with significant lasting consequences. One of the best ways we can do that is to find and use a quality mentor.

Much emphasis has recently been placed on the importance of mentoring — not just in the legal profession, but in society as a whole. Of course, the Young Lawyers Section of the KBA coordinates a mentoring program where we attempt to match our newer members with more experienced attorneys in similar practice or geographic areas. Large law firms, like many other businesses around the country, have been taking part in the “mentoring movement” by developing formal mentoring programs to aid in the development of their newer lawyers. The American Inns of Court — which has seen rapid growth since the organization was established in 1980 — is likewise built on the concept of fostering “professionalism, ethics, civility, and legal skills” by encouraging interaction among lawyers of varying skills and experience. In fact, I was going to rip off my own firm’s mentoring newsletter and call this column “Mentoring Matters” — then I realized we share the name with any number of articles, books, and other publications stressing the importance of mentoring.

Mentoring, however, is not new to our profession. For centuries, lawyers learned how to practice law by working with and learning from more experienced practitioners. Even now that law schools provide the bulk of legal education to new lawyers, mentoring remains important. Every lawyer who has practiced for any significant length of time will be able to tell you about a more experienced colleague who provided invaluable support and guidance in their early careers. I am confident in this because a lawyer who practices without a quality mentor will not remain long in the profession.

For newer lawyers, it is imperative to seek out a quality mentor and work on developing a strong mentoring relationship. Formal mentoring programs can help, but they can only go so far as making the introduction. The real strength of a quality mentoring relationship comes from the commitment and the mutual respect between the mentor and the “mentee.” As with all interpersonal relationships, the people involved make all the difference.

Look around. Whether you practice in a small town or a large city, whether you are in private practice or a government position, chances are you already know your mentor. She may be a more senior lawyer in your firm or may be opposing counsel from a different firm. He may be a judge, a family member, or simply the lawyer around the corner. She is someone you trust and respect and is trusted and respected by others. You feel comfortable asking him questions about cases in which you are involved, and he always seems to be able to spare some time to “talk shop” with a younger lawyer.

In most cases, identifying the potential mentor is the easy part. The harder part comes with developing a successful mentoring relationship. By nature, most lawyers have a fairly healthy ego, and we have a difficult time admitting we don’t exactly know what we are doing. We feel uncomfortable asking our mentors for help. However, lawyers also love to hear ourselves talk, and we especially love to give other people advice. If you take the initial step and make the effort to identify and use your mentor, you will almost certainly become a better lawyer and enjoy a long healthy practice.

Christopher J. Masoner is an associate with the law firm of Blackwell Sanders Peper Martin in its Kansas City, Mo., office. He may be reached by phone at (816) 938-8264 or by e-mail at cmasoner@blackwellsanders.com.

FOOTNOTE
1. Yes, I do have spell check, and it is telling me “mentee” is not a real word. I’m going to stick with it, though, because (i) it works better than “pupil” or “protégé” or “person being mentored,” and (ii) I don’t generally like computers telling me what to do.
Lawyers are frequently called upon to provide services to other lawyers and their firms. Just like other businesses, law firms require legal services in connection with their corporate and partnership formation, governance activities, taxes, Employee Retirement Income Security Act (ERISA) responsibilities, and other routine business activities. Unlike most businesses, lawyers and firms also must comply with ethics codes and licensing requirements, with the force of law, that vary from state to state, but often require legal interpretation. Unfortunately lawyers and firms also require representation in litigation, and expert witness assistance concerning the standard of care in legal matters, in an increasingly litigious environment. It is the rare — and either brave or foolhardy — lawyer or firm that can and should perform all of its own legal work in these various areas.

But, if the prudent course is to hire competent and experienced outside counsel, does this give rise to conflict of interest issues? Can a lawyer or firm hire another lawyer or firm with whom it is ordinarily in competition for legal business, and against which the lawyer or firm battles in the interests of their respective clients? A pair of 1997 American Bar Association Formal Ethics Opinions provide a framework — if not definitive answers — for addressing these issues.

**Lawyer as Lawyer for or Client of Another Lawyer**

ABA Formal Ethics Opinion 97-406, “Conflicts of Interest: Effect of Representing Opposing Counsel in Unrelated Matter,” discusses the issues that arise when one lawyer or firm is engaged as the lawyer for another lawyer or firm. The complications arise when the lawyers (or their firms) given imputation of conflicts under Model Rule 1.10 represent other clients in transactional or litigation matters in which those clients are adverse. The opinion concludes that representation of a client adverse to another person is not ordinarily “directly adverse” to the lawyer for the other person in order to trigger the application of Rule 1.7(a). However, Rule 1.7(b) also limits a lawyer’s ability to accept or continue an engagement when the representation of a client “may be materially limited by a lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interest.” When one lawyer or firm represents another, the representing lawyer has responsibilities to the engaging lawyer and a financial stake in the engagement. The engaging lawyer or firm also has an interest in the representing lawyer’s time, advocacy, and support. Either of these interests, if sufficient, could call into question the possibility of effect on the vigorous representation of clients opposite the other lawyer or firm.

The opinion provides a nonexclusive list of factors to consider concerning whether a “material limitation” under Rule 1.7(b) may apply. These include (1) the relative importance of the matter to the represented lawyer, (2) the relative size of the expected fee to the representing lawyer, (3) the relative importance to the lawyers and clients of the matter in which their clients are adverse, (4) the sensitivity of each matter, (5) the similarity of the matters, and (6) the nature of the relationships between the lawyers and between the lawyers and clients. These factors appear to be intended to measure the materiality of a relationship between the two (or more) matters, such that the ability of either lawyer to vigorously represent their nonlawyer client — and the ability of the representing lawyer to simultaneously represent the law firm — could be questioned.

If this analysis results in a conclusion that a representation may be materially limited, the representation may still occur upon client consent with full disclosure, if full disclosure can be made. The opinion notes that, as with other conflict situations, Rule 1.6 may limit the ability to adequately disclose facts necessary to obtain informed consent. In addition, in circumstances in which an objective lawyer would conclude that a client should not agree to the representation under the circumstances, i.e., it creates an “unconsentable conflict,” then the representation may not be undertaken or maintained.

**Lawyer as Expert Witness or Consultant**

Although service as an expert witness is not the provision of legal services in an attorney-client relationship of the type that is expressly subject to the Model Rules, service in such a role may give rise to a material limitation under Rule 1.7(b) similar to that described above, according to ABA Formal Ethics Opinion 97-407, “Lawyer as Expert Witness or Expert Consultant.” Moreover, the lawyer’s (or his or her firm’s) representation of a client adverse to a party for whom the lawyer is serving as an expert may give rise to similar limitations. Furthermore, the receipt of confidential information in an expert capacity may give rise to duties under Rule 1.6 — or other substantive law — that are inconsistent with duties to other clients. In contrast, service as an expert legal consultant may be more akin to a traditional attorney-client relationship, a role to which the Model Rules fully apply. Accordingly, the opinion suggests that the nature of the relationship be fully explained and agreed from the outset.

**About the Author**

Mark D. Hinderks is the managing partner of the Overland Park office of Stinson Morrison Hecker LLP, practicing business litigation. He also serves as the firm’s co-general counsel and is a frequent speaker and author on matters of professional responsibility and trial practice.
For 50 years, I practiced law and was a trial lawyer on many, many occasions. I started early as an attorney for defendants in criminal matters. Life has been slow and reasons for appearing at the county courthouse and judges offices had been self-manufactured. I missed the people I worked with in the court offices … and then it happened.

I received notice in February 2005 that my name was among the people to be called for jury duty in Butler County District Court. The prospect of being a juror was exciting, and it came across to me that after I returned my information, the clerk would know I was 81 years old.

I went to see the clerk to let her know I really wanted to serve and that I thought I could do it. I’m a little hard of hearing, but the court has special hearing devices.

I concluded, after the first three weeks of March had passed, there would be no jury calling for me. I made myself feel better by a realistic acknowledgement that the trial attorneys would not likely call another attorney to sit on the jury for their side of the case anyway.

Then there was notice of a jury trial set for the morning of March 24, and I was to appear. There were 12 names called for the voir dire, and I knew it was to be a jury of six. Six of us would be eliminated.

It was exciting.

I was on the jury side of the courtroom sitting in one of the seats I looked at for years, filled with ordinary people, about to be selected to hear the evidence and render a verdict.

The judge and the attorneys each asked the prospective jurors questions, some of which reflected experiences. My life has been long and active – through almost three years in World War II, through a postwar work period, and premarital time of life when the worst comes out in most of us. I was a witness, if not activist, to a rough postwar era.

That experience, together with being both defense and prosecution counsel, added up to me as negative in being acceptable as a juror for either the state’s attorney or for the defendant’s attorney.

When the names of the people excused were read, my name was not called; and I remained with five women to sit as a juror in a misdemeanor criminal case.

At issue was the complaint against the young defendant of committing battery against a woman.

For the first time, I began to feel the weight of the responsibility as a juror. I knew both attorneys, though we never had cases opposite each other. The judge was a newly appointed successor to an active trial judge. The court services were all women, all of whom I knew. Everyone in the court, and associated with the trial, were friends.

I did not know any of the women on the jury. It seemed as if one of them was a face I recognized from somewhere, but none of them had been to my office, and I never learned their names.

The evidence was of a common occurrence. It was a combination of booze and people. There was no extreme physical confrontation as is often the case of drunkenness, but there was contact alleged by a female, which she claimed was the cause of a nosebleed and a busted lip.
A Nostalgic Touch of Humor

B-4-I-Die: My Short List
By Matthew Keenan, Shook, Hardy & Bacon, Kansas City, Mo.

Last month I was driving to work and was listening to sports radio. As the jocks were babbling about the porous Chiefs’ defense, I started to channel surf. Eventually I ended up at National Public Radio. And what I heard there captured my attention for a bit. I caught the start of a story about a new advertising campaign for Alaska tourism featuring billboards with the slogan “B-4-U-DIE” — or “before you die.” The point is to enlist senior citizens to head to Alaska before their name appears in the obituary section. I started to think about that notion as I dodged cars on I-35. At first it sounded pretty stupid, but as I continued my 30-minute commute to work, I concluded it wasn’t a silly notion after all.

I decided that maybe there were some things I wanted to do as a lawyer before I die. And in no time, my list began. And between 95th Street and 63rd, it had grown long. So here it is.

B-4-I-Die, I want to pick a jury and take a verdict in the Barton County courthouse where my dad was once the county attorney. In that trial, I want my local counsel to be my two brothers, Tim and Marty, who live in Great Bend. After that trial is over, I want to drive to Chase County and do an opening statement in the courthouse at Cottonwood Falls. I would even settle for a pre-trial conference there. There are a couple other spectacular courthouses I would love to visit on official business. Like the courthouses in Kingman, Russell, Thomas, and Harper counties. I want to finish a jury trial and have the jury foreman ask me for my business card. That would be cool.

B-4-I-Die, I want to use my e-mail to tell a billion BlackBerry users that “I’m waiting on a jury verdict right now, so I can’t respond to your messages anytime soon.” I want to be on the proverbial “short list” for an appointment to a judgeship to federal or state court with an accompanying photo that shows the benefits of digital enhancements. I want to win a pro bono case and have all my fees awarded with some additional premium added for “superior service.” B-4-I-Die, I want to free an innocent man. To have a client pay me before my bill is sent enclosing a letter using the kind of praise you consider framing.

My list continued to grow. B-4-I-Die, I would love to get off a plane and have my entire family greet me there, with balloons or something nice, like I see all the time with other passengers on my business trips.

There are some things outside the practice I would like to do. To live long enough to see my children marry. To see the sunrise in the Flint Hills. To get pulled over while speeding on Hi-way 56 and have the policeman say something like this: “Hey, aren’t you that guy who writes for the KBA Journal? You are probably trying to make your deadline. Just count this as a warning. Have a nice day.” I’d love to see one of my sons sworn into the U.S. Supreme Court, as I did with my dad last summer.

And as I parked my car, one other thought came to mind. It would be cool to have an adversary write me a letter and say something nice about me with the punch line “You remind me of your father.”

And once I accomplished all the above, then maybe a trip to Alaska might make my list.

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.
When you Take Classes off the Beaten Path, you may be Surprised by What you Learn

By Teresa M. Schreffler, University of Kansas School of Law

I am nearing one of the most dreaded tasks of law school. The application for admission by written examination to the Kansas bar consists of 48 pages of instructions, questions, and affidavits. Applicants must divulge their complete personal history in excruciating detail. Yes, applying for the bar exam is a dreaded task, perhaps second only to the pain of taking the exam. There is, however, one positive aspect: this mandatory reflection got me thinking about my law school preparation for taking the bar and practicing law.

In law school I have focused on taking classes I knew would be tested on during the bar exam. When friends mentioned, for example, international or comparative law classes they were taking, I made comments like: “Sounds fascinating, but there’s no time for that in my schedule. I still have to take estates and trusts — it’s on the bar.” Last semester, however, I chose a class that required me to step away from the principles-laden bar courses and focus on some of the practical aspects of being an attorney. I took an alternative dispute resolution class and realized that I had a lot to learn about some of the nontraditional — and client-focused — aspects of being a lawyer.

Essentially I viewed alternative dispute resolution as nothing more than a streamlined version of litigation — fewer formalities and rules and, therefore, faster and efficient resolutions. I learned over the course of the semester, however, that my assumption was incorrect. Alternative dispute resolution is, in fact, more about resolving the difference between (1) the end result a party to a dispute wants and (2) why that party wants it. This difference exists not only for clients, but also for the lawyers who represent them.

I assumed at the beginning of the semester that a client could only care about an attorney winning for them, but it wasn’t until the end of the semester that I realized the breadth and depth of what it means to “win” to a client, which is much larger than what it means to an attorney. I saw winning as only the narrow issue of what a court of law would rule given a particular set of facts. A client can, and often does, see winning as whether their underlying interests were addressed and resolved. Those interests being met may be more important to a client than how a court would rule in a particular case.

The class taught me to focus on a client’s underlying interests, rather than get bogged down in arguing a legal position and trying to “win” with that position without considering other aspects. A strategy of asking “what” and “why” a position is important to a client seems imperative. This approach allows clients to determine for themselves what is important to them before they enter the adversarial mindset and their focus on legal positions becomes entrenched. Further, an attorney can better serve a client when they understand the basis for that client’s position.

I hope to eventually work in the area of health law, which seems to have a large amount of client contact. It will be tempting to streamline advice to the pure legal position health care professionals may take, but it will be more helpful to clients if I take a bit longer to find out the bases for their concerns. For example, if a physician asks me to help her from losing her provider eligibility, I should learn the physician’s underlying interests in the dispute. Is the physician more worried about her reputation in the community or more worried about finding alternative providers for her patients? Is the physician concerned about losing a substantial portion of her income and mostly focused on a quick resolution or is she more concerned with clearing her name no matter how long it takes? These interests would be important to the handling of the case, and I hope that I have learned to ask these “why” questions to better serve my clients in the future.

Classes like alternative dispute resolution are important in developing a law student’s ability to step out into the real world of client contact. In the core-bar-exam classes, we are taught to “think like a lawyer” in the study of a principles-laden area of the law, and well-rounded law students obviously need to take classes to prepare them for the bar exam. But, being a lawyer is about more than understanding contract law — it is also about knowing how to interact with a client and advocate for the client’s interests. The bottom line is that law students shouldn’t be afraid to take a class off the beaten path. You never know what you could learn about “thinking like a lawyer.”

About the Author

Teresa M. Schreffler received her B.S. in health information management from the University of Kansas Medical Center and will be a May 2006 graduate of the University of Kansas School of Law. At KU Law, Schreffler was published by and is an articles editor for the Kansas Law Review. After graduation, Schreffler will join the U.S. District Court for the District of Kansas in Wichita as a term judicial clerk for the Hon. Monti L. Belot.
A Reminder! KBA Officer and Board of Governors Elections in 2006; Petitions due by March 10

The KBA Nominating Committee, chaired by immediate past president Michael P. Crow, Leavenworth, met on Jan. 27, 2006, to consider nominations for KBA officers. Those nominations were not available at press time, but can be obtained by calling KBA Executive Director Jeffrey Alderman at (785) 234-5696. In addition to being nominated by the Nominating Committee, individuals can submit a petition, signed by 50 KBA members, to run for a KBA officer position. Petitions are due by March 10, 2006, and can be obtained from Becky Hendricks at (785) 234-5696 or by e-mail at bhendricks@ksbar.org.

Board of Governors

Seven positions on the KBA Board of Governors are 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. 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

KBA Delegate to ABA House of Delegates

The Kansas Bar Association has two KBA Delegate positions to the ABA House of Delegates. The term of incumbent the Hon. David J. Waxse is up for election in 2006. He is eligible for re-election for a two-year term.

For more information:

Petitions for the Board of Governors or KBA Delegate to the ABA House of Delegates 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 longstanding service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

**Professionism 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.
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 ☐ Distinguished Service Award
☐ Outstanding Service Award ☐ Professionalism Award
☐ Outstanding Young Lawyer Award ☐ Pro Bono Award/Certificates
☐ Distinguished Government Service Award ☐ Courageous Attorney Award

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. 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
Angela M. Sullivan Adams has become assistant general counsel at Kansas Medical Mutual Insurance Co., Topeka. Traci L. Doering has joined the company as member services coordinator.
Laura K. Brooks has become an associate with Blackwell Sanders Peper Martin LLP, Kansas City, Mo.
Paula E. Day has joined Fisher & Phillips LLP, Kansas City, Mo., as of counsel.
Bryan J. Didier has joined Aquila Inc., Kansas City, Mo.
Kevin J. Fisher has joined Schmitt, Manz, Swanson & Mulhern P.C., Kansas City, Mo.
Julie A. Funk has joined the Kansas Department of Social and Rehabilitation Services, Wichita.
Sarah S. Johnston has joined the Jackson County Court Appointed Special Advocates, Kansas City, Mo.
Zachary A. King has joined Butler & Associates P.A., Topeka.
Katherine Kirk has joined Triad Associates Inc., Wichita.
Mark E. McFarland has joined Wallace Saunders Austin Brown & Enochs Chtd., Overland Park.
Julia Riggle McGee has joined FBD Consulting Inc., Overland Park.
Jody M. Meyer has joined Douglas County Legal Aid Society Inc., Lawrence.
Paul M. Mzembe has become an associate with Hite Fanning & Honeyman LLP, Wichita.
Jason B. Oxford has joined the Western Kansas Regional Public Defender’s office, Garden City.
Brain C. Perkins, Jennifer R. Sager, and P. Jay Skolaut have joined Hinkle Elkouri Law Firm LLC, Wichita.
Ruth A. Rithalder has become of counsel at Case, Moses, Zimmerman & Wilson P.A., Yates Center.

Jordon T. Stanley has joined the Jackson County Prosecutor’s office, Kansas City, Mo.
Holly A. Streeter-Schafer has joined The Wetiz Company LLC, Overland Park.
Angela S. Taylor has joined Polsinelli Shalton Welte Stuelhaus P.C., Kansas City, Mo.

CHANGING PLACES
Richard W. Hird has a new business address, 842 Louisiana St., Lawrence, KS 66044.
Manson & Karbank has moved its Kansas office to 10801 Mastin, Corporate Woods Bldg. 84, Suite 430, Overland Park, KS 66210.
Robert S. Redler has moved his office to 511 W. Bertrand, St. Marys, KS 66536.
Yonke & Pottenger LLC has moved to 1100 Main St., Suite 2450, Kansas City, MO 64105.

MISCELLANEOUS
William E. Carr, Lewis, Rice & Fingersh L.C., Kansas City, Mo., has been elected to the American College of Real Estate Lawyers Board of Governors.
Blaine B. Finch, Green & Finch Chtd., Ottawa, has become president of the Franklin County Bar Association.
Keith U. Martin, Payne & Jones Chtd., Overland Park, was presented the Justinian Award from the Johnson County Bar Association.
Harvey R. Sorensen, Foulston Siefkin LLP, Wichita, has been elected chairman of World Services Group.
Douglas P. Witteman, Coffee County Attorney, has become president of the Kansas County and District Attorneys Association.

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.

“Jest Is For All” by Arnie Glick

“Always remember the first rule of settlement negotiations: If a really good offer is made, don’t wag your tail!”
William Rodney “Rod” Ludwig

William Rodney “Rod” Ludwig, 54, Beloit, died Nov. 21. He was born Aug. 27, 1951, the son of William and Rachel (Riedel) Ludwig.

Ludwig earned his bachelor’s degree in political science from Kansas State University in 1972 and his juris doctorate from Washburn University School of Law in 1976. After law school, he joined Noah & Harrison P.A., Beloit. In 1981 he established a solo practice. That same year, he was elected Mitchell County Attorney, serving until 2004. In 1984 Ludwig formed Miller & Ludwig with Darrell E. Miller.

He was a member of the Kansas and Mitchell County bar associations, the Kansas County and District Attorneys Association, Phi Delta Theta fraternity, and the Kansas State University Alumni Association.

His father preceded him in death. Survivors include his mother, Beloit; daughters, Elizabeth, Overland Park, Jennifer, Denver, and Mary Kate, Manhattan; sisters, Kristine Hansen, Beloit, and Marilyn Herman, Wichita; and his fiancée, Carol Bingesser.

Robert L. “Bob” Smith

Robert L. “Bob” Smith, 68, Wichita, died Nov. 7. Smith was born in Oklahoma City, the son of Avery H. and Britta Hay (Holley) Smith.

He received his bachelor’s degree in geology from Wichita State University in 1961 and his juris doctorate from Washburn University School of Law in 1964. In 1966 he joined the former law firm of Boyer, Donaldson & Stewart, which merged with Gilliland & Hayes in 2002.

Smith was a member of the Kansas and Wichita bar associations and the Kansas Geological Society. He was also a member of the KBA Oil and Gas Section.

Smith was preceded in death by his parents and brother, Wayne. Survivors include his wife, Janet; sons, Rob, Overland Park, and Stephen, Fairfield, Conn.; brother, Kirk, Hamilton, Mont.; sister, Vicki Schmidlapp, Winona, Minn.; and four grandchildren.

Hon. Phillip L. Woodworth

Hon. Phillip L. Woodworth, 77, Overland Park, died Nov. 17. He was born to Clarence and Agatha Woodworth on Oct. 3, 1928.

After graduating from Baker University with his bachelor’s degree, Woodworth worked for William Volker & Co. while he attended night classes at the University of Missouri-Kansas City School of Law. In 1960 he graduated with his juris doctorate and started his own practice in Mission.

He served two terms on the Mission City Council and was Mission city attorney for four years. Woodworth also served two terms in the Kansas House of Representatives. In 1969 Woodworth was appointed as a Johnson County District Court judge and retired in 1993 as a senior judge. He continued to serve as a part-time judge until his death.

Woodworth was a member of the Kansas, Johnson County, and American bar associations. He was also a member of the Sigma Phi Epsilon fraternity and the Jaycees.

Survivors include his wife, Pauline; son, Stan; daughter, Nancy; brother, Lawrence; and three grandchildren.
Practical use of Criminal History Information by Kansas Employers
By Brent N. Coverdale, Seyferth Knittig LLC, Kansas City, Mo.

No company wants to hire a new employee only to discover after the fact that its newest employee has past serious criminal convictions. In the worst-case scenario, the employer hires a convicted criminal who later commits a similar crime while on the job, potentially exposing the employer to liability. Because of this, many companies now seek information regarding applicants to help make hiring decisions. For example, Wal-Mart, one of the nation’s largest employers, has recently undertaken a new plan requiring background checks for many job applicants.

This article discusses Kansas law regarding what arrest and conviction information employers can check and how employers can use the information that they obtain. The article also contains a brief discussion of federal law relating to background checks, especially the Fair Credit Reporting Act (FCRA). The article then discusses practical points to consider in obtaining and using arrest and conviction information concerning applicants and employees.

1. FCRA

Employers wishing to obtain and use background checks need to be aware of their obligations under federal law as well as Kansas requirements. Federal law does not restrict the use of arrest and conviction information, but it places restrictions on the process to be followed in obtaining information. The FCRA, 15 U.S.C. §§ 1681 et. seq., generally regulates the disclosure of “consumer reports” by “consumer reporting agencies.” This includes a report by a background check agency prepared on behalf of an employer for an employment purpose. According to the Federal Trade Commission, driving records and other public record information (such as records of arrests and the institution or disposition of civil or criminal proceedings) are consumer reports, because of the broad definition contained in the statute.

In essence, the FCRA does not restrict what criminal information an employer can use in making a hiring decision. Instead the FCRA focuses on protecting an applicant or employee from inaccurate information in a background report. The FCRA contains explicit notice and disclosure requirements. Basically, it requires an employer to tell an applicant or employee that it may ask for a consumer report for employment purposes and to obtain an authorization. This disclosure must occur before the employer obtains the report. If the employer then takes an adverse action based at least in part on information in the report, the employer must provide the applicant or employee with the name, address, and telephone number of the company that provided the report. The employer must also provide a copy of the consumer report and a specific notice called a Summary of Consumer Rights (SCR) (the reporting agency, which provides the consumer report to the employer, is legally required to provide this document to the employer as well). This process is designed to give the applicant or employee an opportunity to correct any incorrect information contained in the consumer report.

2. Equal Employment Opportunity Commission (EEOC)

In addition to the FCRA, the EEOC has concluded that the use of criminal history information may have a disparate impact on some races. This is particularly true for records of arrest. Employers should not rely solely on the fact that an individual was arrested. Employers wishing to use such information must dig deeper into the facts behind the arrest, in order to evaluate the likelihood that the individual actually committed the crime for which he was arrested. Further, employers should ensure a job-related purpose in obtaining conviction information on an applicant’s background, such as obtaining conviction information that is somehow connected to the job at issue. For example, information about theft convictions would obviously be connected to job duties that involve handling large amounts of money.

3. Kansas Law

a. Kansas statutes regarding usage of criminal history information

Kansas law is relatively favorable to employers wishing to use criminal history information in making employment decisions. While some states impose hefty restrictions on how, when, and why employers can use such information, Kansas permits employers to make wide use of criminal history information. Employers cannot be held liable for decisions based on criminal history information, as long as the information “reasonably bears” on the individual’s trustworthiness, or the safety or well-being of employees or customers. K.S.A. § 22-4710(f). Kansas law permits employers to look at any criminal history information, not just convictions. When appropriate, employers can use information regarding arrests and criminal charges even when no conviction ultimately results.

Kansas requires that an employer obtain a signed release from a job applicant before seeking criminal history records and only permits this information to be used “for purposes of determining the applicant’s fitness for employment.” K.S.A. § 22-4710(c). But, while an employer is free to use criminal history information as appropriate, an employer cannot require a person to inspect or challenge his criminal history record information as a means for obtaining a copy of the person’s record in order to qualify for employment. K.S.A. § 22-4710(a). Rather, the employer must obtain a release as dictated by subsection (c). Employers must also take care to properly use criminal history information. It is a misdemeanor to misuse criminal history information. K.S.A. § 22-4707(c).

b. Kansas Human Rights Commission guidance (KHRC)

The KHRC has also weighed in on the use of criminal history information in employment decisions. Following the EEOC’s approach, the KHRC has provided guidance on pre-employment inquiries, suggesting that it is inadvisable for employers to ask about number or kinds of arrests or about convictions that are not substantially related to the applicant’s ability to perform job duties. This is consistent with K.S.A. § 22-4710 as well, which also requires that the criminal history information have some reasonable connection to the employment decision.

c. Kansas consumer credit reporting requirements

In addition to laws specifically relating to criminal history information, Kansas also imposes additional procedural requirements as part of its fair credit reporting laws. Much
like the FCRA, Kansas requires that an employer request a consumer credit report only when it is to be used for purposes of employment for which an individual has specifically applied. The employer must notify the individual in writing of the employer’s request for the individual’s consumer credit report no later than three days after requesting the report. K.S.A. § 50-705(a). If the individual requests it in writing, an employer must provide a “complete and accurate disclosure of the nature and scope of the investigation requested.” K.S.A. § 50-705(b). The employer must send this disclosure in five days or less after (1) it receives the individual’s written request or (2) it requests a report, whichever is later. Id.

Like the FCRA’s requirements, if an employer uses information from the report to deny employment, the employer must inform the applicant of this fact and provide contact information for the agency that provided the report. K.S.A. § 50-714. Kansas sets forth several time restrictions on information contained in the report. Regarding criminal history information, the reporting agency can only report on arrests or convictions no older than seven years. K.S.A. § 50-704(a). These time limits do not apply, however, to individuals who will earn more than $20,000 per year. K.S.A. § 50-704(b)(3).

4. Practical Tips

As permitted by Kansas and federal law, employers should consider using arrest and conviction information to gain a more complete understanding of an applicant’s or employee’s background. Employers should consider an applicant’s criminal history as a part of the applicant’s total qualifications when comparing all applicants. Employers must also pay attention to Kansas and federal law on obtaining such information as part of a “consumer report” and know what procedures are necessary to properly request and use such a consumer report. As long as employers take the time to consider the applicable law, employers can be well-served by digging a little deeper into an employee’s or applicant’s background.

About the Author

Brent Coverdale practices with the firm of Seyferth Knittig LLC in Kansas City, Mo., where he focuses his practice on employment litigation and counseling as well as general commercial litigation throughout the country. Coverdale received his B.A. from Kansas State University and his J.D. from the University of Kansas School of Law.

Editor’s note: “Practical Use of Criminal History Information by Kansas Employers” was first published in the Winter 2005 edition of the Employment Law Line, which is published by the KBA Employment Law Section.

The Employment 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 with attorneys or law firms that specialize in employment 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.

Jury Service

(Continued from Page 8)

After 1 p.m., we returned. The women did most of the talking. They were very much into resolving the case. I helped as much as I could by reading the judge’s instructions again to the jurors. After about an hour, the fifth woman concluded there could be some doubt in her mind as to the actions of the young man in relationship to the complainant. As was expected, the women said they were ready for another vote, and the final count was six for not guilty.

We reported to the judge, in the presence of the attorneys, the defendant, and the courtroom guests; the verdict was read.

The thing that came across to me the most was that the attorneys are necessary for the preparation and presentation of the positions of each side, but their pleading and explanations to the jury were not that compelling.

I am really impressed with the intention of the jurors to render the right verdict. There was nothing personal against anyone. As the instructions said, they could use their experiences and knowledge to assist them in their conclusions drawn from oral testimony.

When it was over, I felt like I had reached the apex of good experience as a citizen. I wanted everyone to know how proud I am to have been chosen as a juror.

About the Author

Robert M. Green. El Dorado, graduated from the University of Wichita in 1949. He began law school at the University of Kansas in 1949. After being elected to the Kansas House of Representatives in 1950, he transferred to Washburn University School of Law. He graduated with his juris doctorate from Washburn in 1952.

Green was elected Butler County Attorney in 1956, serving for four years. He also served as a probate, county court, and juvenile judge for just a few months before serving as a U.S. attorney in Wichita for four years by appointment of Attorney General Robert F. Kennedy. He associated closely with the FBI, Secret Service, U.S. Postal Inspection, and the IRS special procedure section. He returned to private practice in 1964. Until his retirement in 2002, Green was in private practice with his son, Roger. In 2002 Green became a lifetime member of the Kansas Bar Association.
Lost in the shuffle?

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Volunteer Judges Needed
2006 High School Mock Trial Competition

The KBA Young Lawyers need judges for the 2006 High School Mock Trial Competition! Regional tournaments will be held Saturday, March 4, 2006, at the Sedgwick County Courthouse in Wichita and the Johnson County Courthouse in Overland Park.

Rounds are scheduled as follows:

<table>
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<tr>
<th>Round I:</th>
<th>8 a.m.</th>
<th>Round III:</th>
<th>1 p.m.</th>
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<tbody>
<tr>
<td>Round II:</td>
<td>10:15 a.m.</td>
<td>Round IV:</td>
<td>3:15 p.m.</td>
</tr>
</tbody>
</table>

We need at least 24 judges for each round. You will be judging a “mini-trial” where each side puts on three witnesses and presents opening statements and closing arguments. The “chief” judge for each round even gets to rule on objections. This is a great opportunity to be “wowed” by high school students who travel from across the state to compete in this worthwhile program. It is also your opportunity to wield a gavel and be addressed as “your honor.”

If you are interested in judging at the competition, or assisting one of the high schools prepare for the competition by judging practice rounds, contact Amy Fellows Cline at (316) 630-8100 or amycline@twgfirm.com. Hope you can help out!
Introduction

Civil and criminal defendants often need to share attorney-client privileged information for their mutual benefit. Sharing, however, may be construed as a privilege waiver. Over the past 100 years, the joint defense privilege has been adopted to allow defendants to share information without a waiver. The privilege has been embraced because it provides great value to the adversarial system. As one court explained, a joint defense provides defendants “a pooling of resources, a healthy exchange of vital information, a united front against a common litigious foe, and the marshaling of legal talent and advice.” All 50 states, recognizing the value, have adopted the joint defense privilege in some form, either by statute or common law. This article reviews Kansas authority, which is somewhat limited, and case law from other states that have adopted the privilege.

FOOTNOTES

2. The joint defense privilege, however, is not really a privilege, per se. Rather, it is an exception to the general rule that disclosure of confidential attorney-client information constitutes a privilege waiver. See Jerome G. Snider & Howard A. Ellins, Corporate Privileges and Confidential Information §4.01 (1999). For simplicity, this article uses the terms “joint defense privilege” or “joint defense agreement” to refer to any type of joint representation situation. The use, however, of the term “defense” is not intended to limit the discussion to defensive situations unless so noted. In other contexts, this “privilege” is often referred to as a “common interest” privilege. See, e.g., Boyd v. Comdata Network Inc., 88 S.W.3d 203, 213-14 (Tenn. Ct. App. 2002); Visual Scene Inc. v. Pilkington Bros., 508 So.2d 437, 442 (Fla. Dist. Ct. App. 1987). Some courts have, however, drawn a distinction between the joint defense and common interest privileges. For example, one court explained that the joint defense privilege “develops from the context of litigation as needed by joint litigants to promote a shared strategy therein” while the common interest privilege “includes both litigation and nonlitigation matters.” Lugosch v. Congel, 219 F.R.D. 220, 236 n. 10 (N.D.N.Y. 2003); see also Metro Waste Water Reclamation Dist. v. Cont’l Cas. Co. et al., 142 F.R.D. 471, 478 (D. Col. 1992).

3. Lugosch, 219 F.R.D. at 238; see also U.S. v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979) (“In criminal cases [the common-defense rule] can be necessary to a fair opportunity to defend.”); Young v. Presbyterian Homes Inc., No. 2000-C-990, 2001 WL 753031, *3 (Pa. Com. Pl. Jan. 16, 2001) (“As a policy matter, the joint defense doctrine is highly desirable because it allows for greater efficiency in the handling of litigation. ... With multiparty cases becoming so frequent and with litigation costs spiraling upwards — some would say out of control — the courts should not deny defendants the ability to pool their resources and coordinate their efforts on issues of common interest.”); Boyd, 88 S.W.3d at 213 (“The common interest privilege recognizes the advantages of, and even necessity for, an exchange or pooling of information among attorneys representing parties sharing a common legal interest in litigation.”); Susan Rushing, Note, Separating the Joint-Defense Doctrine from the Attorney-Client Privilege, 68 Tex. L. Rev. 1273, 1274 (1990) (“The joint-defense privilege fulfills the social goal of encouraging interparty communications by preserving their confidentiality.”).

In approximately half the states, a statute codifies the privilege. Some states have adopted an evidentiary rule proposed by the Supreme Court in 1971 for the Federal Rules of Evidence. Others have adopted a rule modeled after the Uniform Rule of Evidence 502(b), which requires pending litigation for the privilege to apply. The remaining states rely on common law.

Kansas has not adopted a statutory joint defense privilege, but the Court of Appeals appears to have recognized a common law privilege in *State v. Maxwell*. A Kansas federal court applied *Maxwell* to uphold the privilege. But the *Maxwell* parties were represented by the same attorney; therefore, the holding does not conclusively support a common law joint defense privilege, except in that circumstance. Likewise, the court in *Sawyer v. Southwest Airlines* rejected *Maxwell*’s applicability to communications between a defendant insured and its nonparty insurer, but recognized the “common interest doctrine” to shield their communications. In *Associated Wholesale Grocers Inc. v. Americold Corporation*, however, the Kansas Supreme Court reserved consideration for recognition of the privilege, suggesting that the matter might still be in doubt. At least one Kansas district court has specifically rejected a claim of joint defense privilege because the lawyer-client privilege statute, K.S.A. 60-426, is silent on the subject. Thus, the status of the joint defense privilege in Kansas remains in flux.

This article initially discusses decisions by Kansas state and federal courts concerning the joint defense privilege. It then presents issues raised by courts in other states that may provide guidance for Kansas courts and counsel. Finally, suggested points for inclusion in any joint defense agreement are offered.

**The Starting Point: State v. Maxwell**

*State v. Maxwell* is the first Kansas case to discuss the joint defense privilege. But this case actually addressed the privilege in the context of common representation by one attorney, so the facts do not provide clear support for a broader joint defense privilege.

In *Maxwell*, defendant Johnny Ray Maxwell appealed his conviction on one sale of marijuana count. He claimed that two other defendants, both of whom at the time shared common defense counsel with him, revealed that he was not their usual supplier, and that the night of his arrest was the first time they had purchased marijuana from him. He sought to use this evidence to impeach their trial testimony that Maxwell was their principal source of marijuana and had supplied it to them on previous occasions. The trial court, however, refused to admit statements made in the presence of their common counsel.

On appeal, Maxwell claimed that the communications by the other two defendants to their mutual attorney constituted a waiver of the attorney-client privilege. In the alternative, he asserted that if the attorney-client privilege attached to communications between all defendants and their common counsel, that privilege was waived through the subsequent disclosure of the information to the assistant district attorney. The Court of Appeals upheld the trial court’s ruling that the presence of the defendant at the time the other two defendants made their statements did not constitute waiver of the attorney-client privilege and reasoned as follows:

Where two or more persons employ an attorney as their common attorney, their communications to him in the presence of each other are regarded as confidential so far as strangers to the conference are concerned. [Citation omitted.] When a controversy arises between third persons and the several clients, communications made by the clients to their common attorney are entitled to the protection from disclosure, which the attorney-client privilege affords. [Citation omitted.]

The rule goes further and provides that where several persons employ an attorney and a third party seeks to have communications made therein disclosed, none of the several persons — not even a majority — can waive this privilege. [Citation omitted.] These rules are based on a “joint defense privilege,” which extends the attorney-client privilege to communications made in the course of joint defense activities. Where two or more persons jointly consult an attorney concerning mutual concerns, their confidential communications with the attorney, although known to each other, will be privileged in controversies of either or both of the clients with the outside world. [Citations omitted.]

In *dicta*, the court went on to note:

The assurance of confidentiality is as important and appropriate in a joint defense of defendants whose attorneys are separately retained as it is where co-defendants have engaged common counsel. *Matter of Grand Jury Realty Inc. v. St. Louis Housing Auth.*, 705 S.W.2d 565, 570 (Mo. Ct. App. 1986).


14. 10 Kan. App. 2d 62, 691 P.2d 1316 (1984). The Missouri Court of Appeals also has recognized that there is no waiver of the attorney-client privilege when information is communicated to a third party “where the third party shares a common interest in the outcome of the litigation and where the communication in question was made in confidence.” *Lipton Realty Inc. v. St. Louis Housing Auth.*, 705 S.W.2d 565, 570 (Mo. Ct. App. 1986).

15. *Id.* at 63, 1319.


18. *Id.* at 65, 1321.

19. *Id.* at 64-65, 1320.
LEGAL ARTICLE: JOINT DEFENSE PRIVILEGE

Subpoena [etc., Nov. 16, 1974], 406 F. Supp. [381], at 387-88 [S.D.N.Y. 1975]. We can see how no policy served by the privilege is disserved by recognition of the joint defense privilege. 23

Thus, the Court of Appeals broadly endorsed the joint defense privilege even though the issue before it concerned only common counsel. 21

Evolution of the Joint Defense Privilege in Kansas Courts

Maxwell’s statements concerning the joint defense privilege were relied upon by Judge John W. Lungstrum in Burton v. R.J. Reynolds Tobacco Co., 22 in holding that certain documents sought by the plaintiff through discovery were privileged. In Burton, the plaintiff, who had brought a product liability action against two tobacco companies, moved to compel certain documents – including some withheld under a joint defense privilege claim. The court applied Maxwell to analyze defendant R.J. Reynolds Tobacco Co.’s claim that information shared by its attorney with counsel for actual or potential codefendants was privileged. The court applied Maxwell to analyze defendant R.J. Reynolds Tobacco Co.’s claim that information shared by its attorney with counsel for actual or potential codefendants was privileged. The court then embraced Maxwell's views regarding the scope of the privilege: the joint defense privilege encompasses shared communications to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings. 24 Additionally, information among co-defendants must have been shared in confidence solely for assisting the common cause. 25

In Sawyer v. Southwest Airlines, 26 Judge David J. Waxse considered whether the common interest doctrine applied to protect from disclosure Southwest Airlines’ (Southwest) documents that had been shared with its insurer, Global Aerospace (Global). The plaintiffs had asserted that the disclosure to Global waived any attorney-client privilege. 27 In response, Southwest argued that Global also was a client of the same attorney, so there was an attorney-client relationship. Southwest further noted that Global’s claims attorney had requested legal advice, which was provided through written communications that were the subject of the motion to compel. 28 The court observed that, although not expressly asserted by name, Southwest had established all of the necessary elements of the common interest doctrine. 29 Judge Waxse noted that “[t]he common interest doctrine, however, affords two parties with a common legal interest a safe harbor in which they can openly share privileged information without risking the wider dissemination of that information.” 30 He further found, however, that Maxwell did not apply because Global was not a co-defendant in the case. 31 Although the court acknowledged that no Kansas statute or case recognized the common interest doctrine as a distinct privilege, it found that the documents in issue were protected from disclosure because the common interest doctrine is an exception to the general waiver rule. 32 Thus, the Kansas joint defense privilege appears to be alive in federal courts, although Burton was decided prior to the Kansas Supreme Court’s only discussion of the issue and Sawyer does not mention the Court's decision.

The Kansas Supreme Court subsequently declined to definitively rule on the privilege, and its statements raised the possibility that it might not be upheld. In Associated Wholesale Grocers v. Americold Corporation, 33 the Court held that the district court erred in disqualifying trial counsel for National Pacific Indemnity Co. (NPIC), an excess insurer for the defendant Americold. 34 The case arose out of a fire in Americold’s warehouse and subsequent disputes with its insurers and tenants. 35 NPIC disclaimed

20. Id. at 66, 1321.
24. Id.
25. Id.
27. Id. at *2.
28. Id.
29. Id.
30. Id. at *3.
31. Id. at *3, n. 13.
32. Id. at *3.
33. 266 Kan. 1047, 975 P2d 231 (1999).
34. Id. at 1058-59, 238-39.
35. Id. at 1048, 233.
coverage for fire damage under a pollution exclusion. Americold settled with its tenants and their subrogated insurers by agreeing to consent judgments against it in exchange for a covenant not to execute and assigning its claims against NPIC to them. The district court disqualified counsel because a member of his firm had represented, in a separate action, two subrogated insurers in bailment claims against Americold. The lawyer had entered into a somewhat ambiguous agreement on behalf of his plaintiff clients that the district court found created an implied attorney-client relationship among the signatories. The agreement stated the parties had joint interests in pursuing Americold and did not intend to waive the attorney-client privilege by sharing information. The party that brought the disqualification motion was a signatory and adverse to NPIC in the case before the district court. The parties disputed whether the agreement required confidentiality for information disclosed among the parties and whether the member had, in fact, received confidential information. The district court found that the agreement evidenced an intent to maintain confidentiality, and the member, therefore, had an implied attorney-client relationship with the moving party. Therefore, counsel before the district court was subject to disqualification based on an imputed conflict of interest arising out of the other lawyer's actions that prohibited him from representing NPIC. The court further noted the views of one commentator that "without a credible argument for recognition of the joint defense doctrine based on the language of the attorney-client privilege statute itself [K.S.A. 60-426] proponents of the joint defense doctrine are vulnerable to attack." Justice Six then reserved the question of the joint defense privilege in Kansas "for another day when the issue and policy considerations have been fully briefed and placed squarely before us." Thus, the vitality of the joint defense privilege in Kansas remains open. Either the Kansas Supreme Court or the Kansas Legislature would have to squarely provide for the privilege if Kansas attorneys are to confidently enter agreements to exchange confidential attorney-client information. The advantages provided by these agreements most likely outweigh any risks in most situations.

"Without a credible argument for recognition of the joint defense doctrine based on the language of the attorney-client privilege statute itself [K.S.A. 60-426] proponents of the joint defense doctrine are vulnerable to attack."

Practical Guidelines and Pitfalls for the Unwary

Because Kansas joint defense privilege law is not well-established, predictions concerning the outcome in any particular situation may be unreliable based on existing Kansas authority. Kansas attorneys should, therefore, research the joint defense privilege in other jurisdictions to obtain a broader perspective. The following are generally recognized principles regarding the joint defense privilege that have evolved in other states. Difficult issues and unusual rulings exist, however, some of which also are discussed below.

Generally recognized principles

The joint defense privilege is an exception to the general rules governing the attorney-client privilege and work product doctrine. The initial requirement, therefore, for a joint defense privilege is that the information at issue must be subject to the attorney-client privilege or constitute work product. The joint defense privilege is not an

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36. Id.
37. Id.
38. Id. at 1052, 235.
39. Id. at 1049-50, 233-34 and at 1053, 235.
40. Id. at 1049-50, 233-34.
41. Id. at 1049, 233.
42. Id. at 1050-52, 234-35.
43. Id. at 1052, 235.
44. Id. at 1053, 235.
45. Id. at 1057, 238.
46. Id. at 1058-59, 238-39.
49. Id.
50. Id. at 1059, 239.
51. Id.
52. Id. citing Pace, supra note 21 at 5. This same commentator also argued that inclusion of the word "associate" under the definition of what the term "communication" includes at K.S.A. 60-426(c)(2) constitutes proof the Legislature intended the privilege to apply to communications between co-counsel. The term "associate," however, could simply be intended to refer to what is commonly understood as an associate-level attorney at a law firm.
53. Id.
54. See Snider and Ellins, supra note 2 at § 4.01. "The burden of demonstrating the existence of a joint defense agreement falls on the person claiming it." United States v. LeCroy, 348 F. Supp. 2d 375, 381 (E.D. Pa. 2004). The party asserting the privilege claim also bears the burden of proving its applicability to the circumstances of a particular case. Id.
If the information qualifies as attorney-client privileged or work product, most courts further require that the parties share it for either actual or reasonably anticipated litigation. Parties must need a “common defense” as opposed to having a “common problem.” Thus, as one court explained, “one relying on the joint defense privilege must establish that (a) there was existing litigation or a strong possibility of future litigation; and (b) the materials were provided for the purpose of mounting a common defense against it. [Citation omitted.]” A joint defense agreement will, therefore, not be effective in many states if only appended to a transaction, such as a merger or acquisition, to protect the information related to that transaction. A few courts, however, have extended the privilege to situations in which parties to a transaction have mutual legal interests or, in some cases, mutual concerns regarding potential litigation stemming from the transaction. Thus, although a transaction may involve litigation-related concerns, it is important to understand that a joint defense agreement under certain circumstances. Thus, entering into a joint defense agreement may not be upheld unless the litigation connection requirements are satisfied.

The information also must have been shared pursuant to “an agreement, though not necessarily in writing, embodying a cooperative and common enterprise.” Some courts require the parties to demonstrate actual cooperation toward a common enterprise. The privilege, however, is not limited to communications or items generated during the term of a joint defense agreement. Pre-existing confidential communications and documents that otherwise meet the criteria for coverage under the agreement may be protected if confidentiality has not otherwise been waived.

Only potential co-parties and others “who have a community of interest in the subject matter of the communications” may prove the necessary common enterprise. Plaintiffs and even a plaintiff and defendant may, nevertheless, enter into a joint defense agreement under certain circumstances. Thus, in some courts, the “joint defense privilege” is (or should be) labeled the “common interest privilege.” The privilege does not require that all parties to the agreement have a complete unity of interests, and it can even apply “where the parties’ interests are adverse in substantial respects.” But parties that are sufficiently adverse may not be able to prove a common enterprise.

The parties must further prove that they agreed the communication was made in confidence. The communication must also have been maintained in confidence by the parties. Thus, the parties cannot share communications with an unrelated third party at any time and later claim the joint defense privilege. Confidential intent and confidentiality in fact are required.

57. See Lugosch, 219 F.R.D. at 237-38; Metro Wastewater Reclamation Dist., 142 F.R.D. at 478; but see Waste Management Inc. v. Int’l Surplus Lines Ins. Co., 579 N.E.2d 322, 328 (Ill. 1991); Restatement (Third) of Law Governing Lawyers § 76(1) (2000) (“If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged [as attorney-client communications] that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.”) (emphasis added).
60. See, e.g., Boyd, 88 S.W.3d at 215 n.16 (“The cooperation required to invoke the common interest privilege must be more than cooperation for business purposes or to address a common problem.”); Bank of Brussels Lambert v. Cred Suisse Fiduciary Bank Ltd. (Luxembourg Branch) v. Credit Suisse, 160 F.R.D. 437, 447 (S.D.N.Y. 1995) (“The common interest doctrine does not encompass a joint business strategy, which happens to include as one of its elements a concern about litigation.”); Actna Cas. & Sur. Co. v. Certain Underwriters at Lloyd’s London, 176 Misc. 2d 605, 676 N.Y.S.2d 727, 733 (N.Y. Sup. Ct. 1998) (“The attorney-client privilege, even as expanded by the ‘common interest’ exception, may not be used to protect communications that are business oriented or are of a personal nature.”); Lerner, supra note 4 at 1545 n. 277.
61. See Snider & Ellis, supra note 2 at §4.02[3].
63. Lugosch, 219 F.R.D. at 237.
64. See, e.g., Shamsi, 34 F. Supp. 2d at 893.
66. Id.; see also LeCroy, 348 F. Supp. 2d at 381 (“A person need not be a litigant to be a party to a joint defense agreement.”); Lugosch v. Congel, 219 F.R.D. 220, 238 (N.D.N.Y. 2003) (“The joint defense privilege should not be so narrowly construed to be limited solely to co-parties as long as the parties sharing the information have the same reasonable expectation of a shared legal bond and the anticipation of litigation is present.”).
67. See, e.g., Schachar v. Amer. Acad. of Ophthalmology Inc., 106 F.R.D. 187, 192 (1985) (holding there was sufficient mutuality of interest between the plaintiffs in an Illinois action and those in Georgia to invoke the joint defense privilege); Visual Scene Inc. v. Pilkington Bros., 508 So. 2d 437, 443 (Fla. Dist. Ct. App. 1987) (holding a plaintiff and one of the two other defendants, so information exchanged between the plaintiff and defendant was privileged).
68. Snider & Ellis, supra note 2 at §4.01n. 1, for a discussion of the varied and somewhat interchangeable use of the terms.
70. Id.
71. Id. at 453.
72. Lugosch, 219 F.R.D. at 237; Lipton Realty, 705 S.W.2d at 570.
74. See W. Fuels Ass’n v. Burlington N. R.R. Co., 102 F.R.D. 201, 203 (D. Wyo. 1984) (“[A] party to joint defense communications may waive the work product privilege by disclosing such privileged information to third parties in such a manner as is inconsistent with the purpose of maintaining the secrecy of such information from current or potential adversaries.”).
The privilege protects confidential communications between parties and their attorneys, regardless of whether the communicating client’s own attorney is present. Communications between any of the parties’ respective attorneys are also protected, even in the absence of the clients. Communications solely among clients, however, may not fall within the scope of protection, even in the face of a joint defense agreement.77

Some courts have found that a joint defense privilege cannot be waived without consent of all participating parties.78 The requirement of unanimous consent is viewed as needed to assure that “joint defense efforts are not inhibited or even precluded by the fear that a party to joint defense communications may subsequently unilaterally waive the privilege of all participants,”79 either on purpose or inadvertently. That said, courts have determined that a joint defense agreement “is not an escape-proof prison.”80 According to one court, public policy requires that participants are free to withdraw from such agreements unilaterally, but such withdrawal or waiver must be prospective only.81

Based upon the foregoing, courts have in some instances devised a test, such as the following, that must be satisfied by any party claiming a joint defense privilege:

1. That the otherwise privileged information was disclosed due to actual or anticipated litigation, (2) that the disclosure was made for the purpose of furthering a common interest in the actual or anticipated litigation, (3) that the disclosure was made in a manner not inconsistent with maintaining its confidentiality against adverse parties, and (4) that the person disclosing the information has not otherwise waived the attorney-client privilege for the disclosed information.82

Thus, any joint defense agreement entered into should include statements consistent with the general proof requirements and issues raised herein.

Special situations

As one commentator has noted: “[P]redictability in the application of the [joint defense] privilege ... is largely lacking in many areas.”83 In spite of the relatively consistent principles that can be drawn from many cases, there remain many unusual fact situations that may cause unpredictable outcomes. Examples of five special situations highlighting the need to proceed with caution are described below.

1. Disclosure of information and documents to potential adversaries may be deemed a waiver of the attorney-client privilege and work product protections.

Whenever a client is contemplating sharing information with another party either before or during the course of litigation, it should be determined whether the party will be deemed an adversary with whom a privilege could not be established. For example, in McKesson Corp. v. Green,84 documents provided to a potential adversary were deemed not privileged. Shareholders of a surviving corporation following a merger brought an action alleging securities fraud. Among other things, the shareholders moved to compel production of certain audit documents. McKesson Corp. had merged with HBOC Corp. (HBOC), which became a wholly owned McKesson subsidiary following the merger. The shareholders claimed McKesson waived work product protections when it voluntarily provided audit documents to the U.S. Securities and Exchange Commission (SEC) pursuant to a written confidentiality agreement. The trial court held that the audit documents were work product, but concluded that, because an adversarial relationship existed between the SEC and McKesson, McKesson had voluntarily waived any work product protections.85

The Georgia Court of Appeals agreed, rejecting McKesson's argument that it had a “common interest” with the SEC in determining whether any HBOC personnel had violated securities laws before the merger or had violated their corporate and public duties. McKesson pointed out that the SEC’s consideration of legal action occurred two years after the audit. It also argued the investigation eventually was terminated without any enforcement action, so no adversarial relationship ultimately existed.86 The shareholders responded that, at the time the documents were shared with the SEC, there was an adversarial relationship — or at least the potential for one.87

The Georgia Court of Appeals concluded that the trial court’s ruling that McKesson and the SEC were adversaries was supported by evidence in the record and, therefore, was not clearly erroneous.88 In considering the shareholders’ argument, the court noted that “[d]isclosure to an adversary, real or potential, forfeits the work product protection.”89 The court further explained that any disclosure inconsistent with maintaining secrecy “or that increases the chance that the material will be obtained by an adversary” also waives the work product protection.90

2. A corporation, absent a joint defense agreement, may unilaterally waive the attorney-client privilege as to communications between corporate counsel and corporate officers.

75. Boyd, 88 S.W.3d at 214.
76. Id.
79. P. Fuels Ass’n, 102 F.R.D. at 203.
81. Boyd, 88 S.W.3d at 214-15. Some courts have employed a three-part test, requiring proof that: (1) the communications were made in the course of a joint defense effort; (2) the statements were made in furtherance of that effort; and (3) the privilege has not been waived. LeCroy, 348 F. Supp. 2d at 382.
82. Id.
85. Id. at 451.
86. Id. at 452.
87. Id.
88. Id. at 453.
89. Id. at 452, citing United States v. Massachusetts Inst. of Tech., 129 F.3d 681, 687 (1st Cir. 1997).
90. McKesson Corp., 597 S.E.2d at 452.

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LEGAL ARTICLE: JOINT DEFENSE ...

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Corporate officers who may be personally named in litigation involving their corporation, as well as those who may be targets of criminal investigations related to corporate activity, should consider entering into a joint defense agreement with their employer at the first sign of potential legal difficulties. In the absence of a joint defense agreement, an individual corporate officer’s assertion of attorney-client privilege cannot prevent the disclosure of communications with corporate counsel if the corporation waives its attorney-client privilege. Of course, corporate counsel may balk at entry into an agreement that could eliminate some of its ability to negotiate with the government if both the corporation and individual officers become targets of a criminal investigation. The corporation may want to waive the attorney-client privilege as to certain information in exchange for leniency.

3. A joint defense agreement among competitors may raise antitrust concerns.

Consideration should be given to whether entry into a joint defense agreement allowing the sharing of confidential competitive information among competitors may raise antitrust concerns. For example, prospective merger partners that enter into a joint defense agreement in anticipation of an antitrust challenge must consider any potentially anti-competitive sharing of information between the parties prior to merger approval. Likewise, the sharing of information among groups of competitors in litigation could be challenged on antitrust grounds.

Thus, counsel should be sensitive about joint defense agreements and the information access they may provide. The shared information later may be judged to be anticompetitive, which could expose a party to potential antitrust liability. Consequently, an antitrust attorney should be consulted in the event counsel has any concerns about whether an agreement may result in competitive concerns. The joint defense agreement may need to include a prohibition on the exchange of certain types of information.

4. Communications among co-defendants in a criminal matter that are the subject of a joint defense agreement may not be privileged if one of the defendants turns state’s evidence, or, in the alternative, these communications may lead to disqualification of defense counsel.

Application of the joint defense privilege to criminal cases poses some unique challenges. One of those relates to the common situation of multiple defendants entering into a joint defense agreement at the outset of a case so information can be shared to formulate a defense. What happens when one of the parties to the agreement later decides to cooperate with the government? Some courts have found that cooperation with the government results in a waiver of the attorney-client privilege as to information shared under a joint defense agreement. Others have decided to take the opposite course and have upheld the privilege and disqualified counsel, which potentially may hinder a party’s defense.

For example, in United States v. Almeida, Juan Almeida was convicted of narcotics trafficking conspiracy, partly on the testimony of his co-defendant, Ludwig Fainberg, who abandoned a joint defense agreement with the defendant and turned state’s evidence. During the government’s case, the prosecutor advised the court that Fainberg would be her next witness and that she anticipated he would assert his attorney-client privilege with Almeida’s counsel based on the joint defense agreement. The prosecutor then claimed that Almeida’s counsel was impaired in his ability to cross-examine Fainberg because of a conflict of interest. She urged the court to prohibit Almeida’s lawyers from using confidential information during their cross-examination and to conduct a hearing so either a conflicts waiver could be obtained or Almeida’s counsel could be required to withdraw for purposes of the cross-examination. The trial court found that the joint defense agreement precluded Almeida’s counsel from using information obtained from Fainberg in connection with the joint defense and barred counsel’s use of Fainberg’s communications to cross-examine him.
On appeal, Almeida argued that his Sixth Amendment right to effective assistance of counsel was impaired because this right includes a right to have counsel untainted by conflicts of interest. The 11th Circuit, in dictum, rejected the notion that a duty of loyalty exists among parties to a joint defense agreement and determined that it is improper to conclude that all joint defense counsel represent all joint defendants. The court, however, ultimately determined that it need not decide the conflict of interest issue because it held that Fainberg waived his attorney-client privilege when he turned state’s evidence, thus removing any possibility of conflict of interest. The court held that when each party is represented by his or her own attorney, communications made by one co-defendant to the attorneys of other co-defendants lose their attorney-client privileged status. Thus, the communications among joint defendants may be freely disclosed for impeachment of a defendant who decides to testify on behalf of the government in exchange for a reduced sentence.

In United States v. Henke, a case involving charges of securities fraud and related matters, the 9th Circuit reached a markedly different conclusion than the 11th Circuit in Almeida. In Henke, three defendants entered into an oral joint defense agreement. Defendant Surendra Gupta allegedly told his attorney the right includes a right to have counsel untainted by conflicts of interest. The court held that when each party is represented by his or her own attorney, communications made by one co-defendant to the attorneys of other co-defendants lose their attorney-client privileged status. Thus, the communications among joint defendants may be freely disclosed for impeachment of a defendant who decides to testify on behalf of the government in exchange for a reduced sentence. 

The 9th Circuit reversed the convictions, concluding that a joint defense agreement “establishes an implied attorney-client relationship with the co-defendant” and that it also can create a disqualifying conflict of interest when information learned in confidence becomes an issue, as was the case in Henke. Thus, two federal circuit courts reached dramatically different results when faced with substantially the same issue. This should make any criminal law practitioner wary.

5. Inclusion of a cooperation provision in a joint defense agreement that provides a party with access to witnesses and documents of nonparties may be construed as providing the party with control over the other party’s documents.

Although it seems unlikely that a court would find that a party is obligated under a joint defense agreement to produce documents possessed by another party, this was precisely the outcome reported in an article authored by counsel involved in such a case. In Guy F. Atkinson v. Ohio Municipal Electric Generation Agency Joint Venture 5, a general contractor was permitted to discover the contents of a construction project owner’s joint defense agreement with its equipment suppliers and then use the agreement to compel the owner to produce documents retained by these suppliers and sub-suppliers, including companies located in five different countries.

The contractor, in its motion to compel, claimed production of the joint defense agreement was needed (1) to assess the owner’s claims of privilege for communications with third parties; (2) to explore matters related to credibility and bias; and (3) to determine whether the agreements contained terms related to the owner’s ability to obtain documents possessed by third parties. The magistrate ordered production of the joint defense agreement, and the district court affirmed without discussion. The contractor also claimed the joint defense agreement enabled the owner to obtain documents from its suppliers, including those in foreign countries, because the agreement provided for “access to documents.” The owner claimed that there was no legal authority for reaching that conclusion and that the document access provision was purely voluntary and could not be enforced. The magistrate judge in Atkinson compelled the owner to produce all documents possessed by foreign suppliers and sub-suppliers, requiring the owner to employ whatever legal process was needed to obtain the documents.

The district court affirmed, finding that the magistrate judge had not clearly erred nor acted contrary to the law. The court did, however, include a provision giving the owner the right to recover reasonable costs incurred to obtain the documents.

98. Id. at 1323.
99. Id.
100. Almeida, 341 F.3d at 1324.
101. Id. at 1326.
102. Id.
103. 222 F.3d 633 (9th Cir. 2000).
104. Id. at 637.
105. Id.
106. Id.
107. Id. at 635.
108. Id. at 637.
109. Disqualification based on knowledge gained through representation of a party to a joint defense agreement is not limited to the criminal arena. Attorneys who represent parties to joint representation agreements may be disqualified from representing any party in subsequent litigation between parties to the agreement. See GTE N. Inc. v. Apache Prod. Co., 914 F. Supp. 1575 (N.D. Ill. 1996); but see Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128, 132 (Tx. App. 1995) (court refused to disqualify counsel in subsequent litigation without evidence that confidential information was shared and that the first matter was substantially related to the later case.).
111. No. 6:99-0986 (S.D. W. Va.).
112. Id.
113. Branca & Swafford, supra note 88 at 28.
114. Id.
115. Id.
116. Id.
117. Id. at 29.
118. Id.
Clearly, joint defense privilege law includes many nuances and, in some instances, inconsistencies. Counsel should, therefore, give careful consideration to the creative arguments available to opposing counsel for use in seeking to pierce the joint defense privilege. Of course, all potential outcomes cannot be predicted since the law in the area still is evolving and, in many instances, stems from the common law and not statutes. As in many practice areas, counsel can look to the experience of others and find appropriate language to use in crafting an agreement that may alleviate some of the complications such as those described herein.

**Written Joint Defense Agreements: Some Suggested Provisions**

There is no stated requirement that a joint defense agreement be in writing. Nonetheless, the more prudent course is to memorialize any joint defense agreement. As one court explained:

> Too often the vagaries of an oral agreement cloud and pollute the true intent of the parties, especially when the parties claiming the privilege must establish that there was, in fact, an agreement and that the specific communication was protected thereunder. In re Bevill, Bresler & Schulman Asset Mgt. Corp., 805 F.2d 120, 126 (3d Cir. 1986) (the court denied the privilege because party failed to show that the communication was made during the course of a joint defense agreement); Power Mosfet Tech. v. Siemens AG, 206 F.R.D. [422,] at 425 [(E.D. Tex. 2000)] (a written agreement may not be necessary but with an oral agreement you run the risk).

Keep in mind, however, that parties cannot create a joint defense privilege by contract where none, in fact, exists. Parties may be hesitant to put their joint defense agreements in writing out of a fear that they may be discovered by opposing counsel or, if discovered and admitted, ultimately will leave the jury with the impression that the defendants are colluding. And if an agreement that has specific categories of protected information is discovered by opposing counsel, this may open the door to production challenges of noncovered protected information is discovered by opposing counsel, this may open the door to production challenges of noncovered protected information, if any, that are to be specifically excluded.

The cases described herein raise numerous issues that may be alleviated through a carefully drafted agreement that defines the intent of the parties at the outset. Many commentators have advanced suggestions concerning important, if not essential, provisions for any written joint defense agreement. Based upon a review of relevant articles and case law, the following items are suggested for inclusion in any joint defense agreement. This list of potential contractual provisions below is not, however, intended to be exhaustive. And, of course, the terms of any joint defense agreement would need to be adapted to the specific circumstances of the matter involved.

- Identify the persons or entities who are the parties to the joint defense effort, even if some have not yet been named in litigation.
- Identify the scope of coverage for those associated with the parties to the agreement, i.e., the party, their attorneys, employees, staff, expert witnesses, consultants, investigators, etc.
- Describe the legal nature of the common effort and its scope.
- Identify the types of information covered by the agreement, such as documents, conversations among parties and counsel, and witness interviews, as well as the types of information, if any, that are to be specifically excluded.
- State whether the parties intend to keep the agreement itself confidential.
- State that information made available under the agreement is to be used solely for purposes of the underlying legal matter and, as such, is not intended to constitute waiver of the attorney-client privilege or work product protections. Also state that no party should disclose such information other than as provided for in the agreement.
- State that disclosure to any third parties of information obtained pursuant to the agreement is prohibited without consent of all parties to the agreement.
- Certain circumstances, such as a merger, may potentially include distinctly defined classes of information for which varying degrees of confidentiality may be required, such as a prohibition on the sharing of potentially anti-competitive information between parties prior to approval of the merger.
- State that no party to the agreement has custody or control over any other parties’ documents and that the agreement is not to be construed as providing any party such control.
- State that all shared communications and documents that are the subject of the agreement are considered confidential and intended by all parties to remain confidential.

120. Lugoesch, 219 F.R.D. at 237.
121. See In re Grand Jury Subpoena A. Nameless Lawyer, 274 F.3d at 572-73.
122. See Boyd, 88 S.W.3d at 217 (“[W]hile the courts may review joint defense agreements in chambers, [citations omitted] the agreements are not discoverable by other parties.”).
124. But see U.S. v. Hsia, 81 F. Supp. 2d 7 (D.D.C. 2000) (holding that neither the existence or terms of the joint defense agreement were privileged).
• State the obligations of any party in responding to a subpoena for documents or information covered under the agreement, such as an obligation to notify other parties of receipt of a subpoena and agreement to take reasonable steps to prevent disclosure of information subject to the agreement.
• State that each party is represented only by his or her attorney and not by counsel for any cooperating party.
• State whether and under what circumstances a party may use its own confidential information and whether such information may later be used contrary to other parties’ interests.
• Identify the effective date of the agreement and whether it relates back to any communications that occurred prior to its execution.
• Include a waiver by the parties to any potential conflict-of-interest claims they may have.
• Include a waiver by the parties of any rights they may have to seek to disqualify any attorney who obtains confidential information under the agreement.
• Include a provision to address inadvertent disclosure of information subject to the agreement, such as a statement that such disclosure does not constitute waiver of the attorney-client privilege or work product protections. Also include procedures for addressing any inadvertent disclosures that may occur, such as a duty to notify the other parties to the agreement of the disclosure and an obligation to request that it be returned.
• Include a termination provision. This provision should contain: (1) a statement of whether confidential materials must be returned; (2) identification of any obligations on the part of the withdrawing party to maintain confidentiality of the information received while a party to the agreement; and (3) identification of the circumstances that may trigger withdrawal, such as the agreement by any party to cooperate with the government.
• Include a statement that any settlement agreement does not terminate obligations under the agreement.
• Consider including a choice of law and/or choice of venue provision to govern any disputes that may arise under the agreement.
• Include a statement that money damages will not provide an adequate remedy for any breach of the agreement and that injunctive relief is the only adequate remedy available.
• Include a statement that nothing in the agreement is to be construed as affecting the independent representation of each party by its own counsel in accordance with what counsel believes is in the party’s best interest. Also include mention that the agreement should not preclude counsel from representing any interest that may be construed as adverse to any other party and that nothing in the agreement gives rise to an attorney-client relationship between counsel and any party not specifically retained by such counsel in connection with the lawsuit.
• Include a statement that nothing in the agreement limits the right of any counsel to disclose documents or information for the benefit of his or her client(s) if that information was independently obtained and not subject to a claim of privilege by another party.
• Include a statement that the agreement constitutes the entire agreement and understanding of the parties relating to the subject matter contained therein and that it may not be altered, amended, or modified in any respect except by a writing duly executed by all of the parties.
• Include a severability provision.
• Include a statement that the agreement may be executed in counterparts.

Although inclusion of the above provisions cannot guarantee that all potential pitfalls of entry into a joint representation agreement will be avoided, they at least may provide language that could assist the parties reach the contemplated result if a dispute or difficulty arises during the course of the relationship.

Conclusion

The joint defense privilege is an important litigation tool that can increase efficiencies and enhance fairness. Kansas attorneys, however, should proceed with caution until the Kansas Supreme Court or Legislature provides clearer guidance concerning the applicability of the privilege in Kansas. In the meantime, the best approach is to enter into a joint defense agreement that spells out the specific terms applicable to any joint sharing. A carefully drafted agreement is the best hope counsel has of ensuring privileged information remains privileged.

About the Author

Joan K. Archer, Kansas City, Mo., is a partner with the law firm of Stinson Morrison Hecker LLP. Her practice is primarily focused in the areas of intellectual property and business litigation. She also has a Ph.D. in communication, with a focus on jury behavior. She received her Ph.D. in 1991 and J.D. in 1992 from the University of Kansas, M.A. from Wayne State University in 1984, and B.A. from Gonzaga University in 1982. From 1992 to 1994, Archer was the law clerk for Justice Fred N. Six of the Kansas Supreme Court.

126. One commentator has suggested that the withdrawing member should be required to waive his or her right to prevent use against him or her of the information supplied to the joint defense parties. Mark Mermelstein, Hanging Together: Well-Crafted Joint Defense Agreements Can Avoid Conflict of Interest and Obstruction Charges, 27 L.A. Law. 38, 41 (2004). This suggestion was made so the remaining parties to the agreement can freely cross-examine a withdrawing member who decides to cooperate with the government.
ATTORNEY DISCIPLINE

IN RE ANONYMOUS*
ORIGINAL PROCEEDING IN DISCIPLINE
NONPUBLISHED CENSURE
NO. 94,802 – DECEMBER 9, 2005

FACTS: Respondent, a private practitioner from Topeka, faced a disciplinary hearing on a formal complaint that alleged violations of KRPCs 3.3 (candor to the tribunal), 3.4(c) (fairness to opposing party and counsel), and 8.4(d) (misconduct). The complaint was based on proceedings in federal court in which respondent was sanctioned $1,000 for violating a sequestration order and $1,000 for violating an order in limine. In her answer, respondent admitted the 3.4(c) and 8.4(d) violations, and the panel found no violation of Rule 3.3.

The panel found three aggravating factors, including a prior disciplinary diversion, and four mitigating factors present. Because the decision in federal court had already been published, respondent requested nonpublished censure and suggested five conditions in addition to censure, including letters of apology to the court, counsel, and witness; additional continuing legal education in ethics; and maintaining her membership in the local Inn of Court. The panel adopted this request in recommending nonpublished censure to the Supreme Court.

HELD: No exceptions were filed, and the Court adopted the factual findings and conclusions of rules violations. A majority of the Court agreed with the panel’s recommended discipline, but a minority would have imposed a greater sanction.

* At the request of the Kansas Supreme Court, the respondent’s name is not published.

IN RE TARAK A. DEVKOTA
ORIGINAL PROCEEDING IN DISCIPLINE
PUBLISHED CENSURE
NO. 94,801 – DECEMBER 9, 2005

FACTS: Respondent, a practitioner from Kansas City, represented three defendants in a copyright case. He failed to respond to discovery requests, and a motion to compel was granted. The responses were filed late, and respondent signed his clients’ names to their interrogatory responses without their authority, a fact not revealed until their depositions.

A panel of the Kansas Board for Discipline of Attorneys found violations of KRPCs 1.3 (diligence), 3.4(d) (failure to make reasonably diligent effort to comply with pretrial discovery request), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). Noting three aggravating factors and two mitigating factors, the panel recommended published censure.

HELD: At the Supreme Court, respondent sought dismissal of the action; however, the Court found ample support in the record for the panel’s findings of fact and conclusions of rules violations. The Court unanimously adopted the recommended sanction of disbarment.

IN RE BRENT D. LANDRITH
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 94,333 – DECEMBER 9, 2005

FACTS: Respondent, a practitioner from Topeka admitted in 2002, faced a three-day disciplinary hearing on complaints arising from the representation of two of his first four clients. In a 57-page final hearing report, the panel found clear and convincing evidence of violations of six Kansas Rules of Professional Conduct involving competence, meritorious claims, candor toward the tribunal, fairness to opposing party and counsel, respect for rights of third persons, and misconduct.

In recommending disbarment, the panel noted respondent’s “total incompetence in the practice of law” and concluded he was “not equipped with the ethical or intellectual characteristics necessary to ever become an active and productive member of the bar of the state of Kansas.”

HELD: At the Supreme Court, respondent sought dismissal of the action; however, the Court found ample support in the record for the panel’s findings of fact and conclusions of rules violations. The Court unanimously adopted the recommended sanction of disbarment.

IN RE AMY R. MITCHELL
ORIGINAL PROCEEDING IN DISCIPLINE
TWO YEARS’ SUPERVISED PROBATION
NO. 94,803 – DECEMBER 9, 2005

FACTS: Respondent, a private practitioner from Olathe admitted in 1999, faced a disciplinary hearing on complaints arising out of the representation of four clients. The cases involved a slip-and-fall accident, a stepparent adoption, a child-support matter, and a divorce action. The hearing panel found violations of KRPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 8.1 (disciplinary matters), and 8.4(c) (misconduct) and SCR 207 (assisting the disciplinary system).

The panel found three aggravating factors and five mitigating factors, including inexperience. Respondent, through counsel, submitted a comprehensive plan for supervised probation of a limited practice. The panel recommended that respondent be suspended from the practice of law for one year but that the suspension be stayed subject to supervised probation on 17 express conditions.
IN RE KIEHL RATHBUN
ORIGINAL PROCEEDING IN DISCIPLINE
ONE-YEAR SUPERVISED PROBATION
NO. 94,804 – DECEMBER 9, 2005

FACTS: Respondent, a private practitioner from Wichita, faced a disciplinary hearing on six complaints. The hearing panel found clear and convincing evidence of violations of KRPCs 1.3 (diligence), 1.4 (communication), 1.15(b) (safekeeping property), and 3.1 (meritorious claims) and SCR 207 (assisting the disciplinary system).

The panel noted six prior cases resulting in imposition of discipline, most recently a three-year probation in May of 2003 based on eight complaints. Additional aggravating and mitigating factors were found. Respondent, through counsel, and the Disciplinary Administrator’s Office both requested that the current probation period be extended another year. The panel noted that the current misconduct occurred prior to the imposition of the 2003 probation and concurred in the recommendation to extend the probation until May of 2007.

HELD: The Court adopted the panel’s factual findings and conclusions of rules violations. A majority of the Court accepted the recommendation of extended probation under the prior terms and conditions and imposed three additional conditions.

CIVIL

CONDEMNATION, APPEAL, AND DOCKETING FEE
CONDEMNATION OF LAND FOR STATE HIGHWAY PURPOSES V. STRANGER VALLEY LAND COMPANY LLC
RUSSELL DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
NO. 93,113 – DECEMBER 9, 2005

FACTS: The Kansas Department of Transportation (KDOT) filed an eminent domain proceeding to acquire property owned by Stranger Valley Land Co. for state highway purposes. After the appraisers filed their report fixing the amount of compensation, KDOT deposited the stated compensation amount with the district court. Stranger Valley filed a notice of appeal with the district court but failed to pay the docket fee. The district court granted KDOT’s motion to dismiss the appeal for failure to properly docket the appeal and held that the district court lacked jurisdiction to extend the time. However, the district court reconsidered its decision and found the payment of the docket fee was not jurisdictional. The district court certified an interlocutory appeal.

ISSUE: Whether the district court acquired subject matter jurisdiction over Stranger Valley’s appeal from the appraiser’s award in the condemnation action.


KANSAS CRIMES VICTIMS COMPENSATION BOARD AND PROXIMATE CAUSE
GREG AND LINDA FISHER V. KANSAS CRIMES VICTIMS COMPENSATION BOARD
SHAWNEE DISTRICT COURT – REVERSED
NO. 93,701 – DECEMBER 9, 2005

FACTS: Fifteen-year-old Jeremy Fisher collided with an automobile in his own lane of traffic at approximately 8 a.m. on Dec. 7, 2002. Donny Taylor was driving the other automobile. Both Fisher and Taylor died as a result of the collision. There were no eyewitnesses, but officers determined that Taylor’s vehicle crossed the centerline into Fisher’s lane and struck Fisher’s vehicle head-on. Taylor as a new civil action does not defeat subject matter jurisdiction. Court reversed and remanded to the district court with directions to dismiss Stranger Valley’s appeal from the appraiser’s award in the condemnation action.
had a blood alcohol concentration of 0.15. Fisher had a blood alcohol concentration of 0.05, which exceeded the 0.02 legal limit for persons under 21. The Fishers filed an application for crime victims’ compensation in the amount of $5,000 for funeral expenses. The Kansas Crime Victims Compensation Board initially denied the claim, finding that Fisher’s actions leading up to the incident were a factor that contributed to his injuries and that Fisher was involved in “contributory misconduct” with regard to the incident giving rise to the claim because he was unlawfully operating a motor vehicle. However, the board later approved the claim, but partially reduced it by 25 percent due to the underage alcohol level of the victim and awarded $3,750. The district court affirmed the board’s order finding that Fisher was driving in violation of the law at the time of the accident because of his blood alcohol level, and the board took this into account as contributory misconduct.

ISSUES: Whether Fisher’s conduct on the morning of the accident, his blood alcohol concentration, contributed to his death under the provisions of K.S.A. 2004 Supp. 74-7305(c)(2). Were the Fishers entitled to attorney fees?

HELD: Court held the dictionary definitions, the cited case law, and the legislative history of K.S.A. 2004 Supp. 74-7305 all support a finding that the board erroneously interpreted and applied the term “contributory misconduct” in this case. Court stated “contributory misconduct” or “contributed to the infliction of his injury” was only found in cases where the claimant’s misconduct caused, contributed, or was the proximate cause of the injury. Although the board granted great deference in the interpretation of its statutes and regulations, Court concluded that the board’s application of the term “contributory misconduct” to the facts of this case disregards the meaning of “contributory” and the regulation’s requirement that the misconduct “contributed to the injury for which the claim is made.” Court found the board erred in reducing the Fisher’s compensation. Court also remanded to the board for a determination of whether attorney fees and expenses were appropriate for services rendered on appeal.

STATUTES: K.S.A. 8-1567(a); K.S.A. 20-3018(c); K.S.A. 74-7301, -7311; K.S.A. 2004 Supp. 74-7302(a), -7304(c), -7305(c)(2); and K.S.A. 77-601 et seq.

PRODUCTS LIABILITY AND REASONABLE ALTERNATIVE DESIGN

GRiffin ET AL. V. SUZUKI MOTOR CORPORATION

GEARY DISTRICT COURT – JUDGMENT OF THE COURT OF APPEALS REVERSING THE DISTRICT COURT IS AFFIRMED. JUDGMENT OF THE DISTRICT COURT IS REVERSED, AND THE CASE IS REMANDED.
NO. 89,466 – DECEMBER 9, 2005

FACTS: Griffin was seriously injured in a rollover accident involving a 1994 four-door Suzuki Sidekick. Griffin’s theory of liability was that the 1994 Sidekick was unreasonably dangerous and defective in design and that Suzuki negligently designed, manufactured, and tested the vehicle. Suzuki’s defense was that the driver, who was not Griffin, was negligent and the sole cause of the accident. Suzuki filed a motion in limine to prohibit all of Griffin’s references to Suzuki’s replacement for the Sidekick, the Vitara, as a reasonable alternative design to the Sidekick. The district court denied the motion, and the evidence of the Vitara as a reasonable alternative design was admitted at trial. The jury rendered a liability verdict, allocating 70 percent liability to the driver and 30 percent to Suzuki. Griffin’s damages were stipulated, and the result of final judgment for Griffin was against Suzuki in the amount of approximately $2.7 million. The Court of Appeals reversed and remanded for a new trial because it held that two evidentiary rulings by the trial court violated K.S.A. 60-3307(a)(1) and (2). The Court of Appeals held the district court should not have allowed into evidence Suzuki’s successor to the Sidekick, the Vitara, as a reasonable alternative design to the Sidekick. The Court of Appeals also held the district court should not have allowed into evidence certain engineering and testing standards to analyze the Sidekick because they were not in use when the vehicle had been manufactured in 1994.

ISSUES: Did the district court admit evidence in violation of K.S.A. 60-3307(a)(2) because it allowed the J-2 vehicle (Vitara) as a reasonable alternative design to the J-1 vehicle (Sidekick)? Did the district court admit evidence in violation of K.S.A. 60-3307(a)(1) because it allowed testing and engineering standards not in use when the 1994 Sidekick was manufactured?

HELD: Court affirmed the Court of Appeals’ decision that the district court erroneously admitted the evidence. Court held under the facts of this case, a “change in design” in a manufacturer’s small sport utility vehicle encompasses a “wholly different design” manifested in the same manufacturer’s later-generation small SUV serving as a replacement to the original. Evidence of the later vehicle is barred by K.S.A. 60-3307(a)(2). Court also held under the facts of this case, admitting evidence of a manufacturer’s subsequent product as a reasonable alternative design to the manufacturer’s original product could have led a jury to wrongly conclude that the original was defective and that the subsequent product repaired this defect with its new design. As a result, the admission of this evidence was reversible error. Regarding the testing and engineering standards, the Court held the evidence of advancements in technical testing knowledge that was not in existence at the time of the accident vehicle’s manufacture is barred by K.S.A. 60-3307(a)(1) and the admission of this evidence was reversible error.

STATUTES: K.S.A. 20-3018(b); K.S.A. 60-261, -407(f), -451, -452, -453, -454 -3307(a)(1), (2); and K.S.A. 1992 Supp. 60-3307(c)(2); and K.S.A. 77-601 et seq.

Criminal

STATE V. ADAMS

BUTLER DISTRICT COURT – AFFIRMED
NO. 90,318 – DECEMBER 9, 2005

FACTS: Adams convicted of first-degree felony murder for death of 11-month-old child in daycare operated by Adams’ wife. On appeal, Adams claimed district court erred in (1) denying motion for new trial, (2) refusing to admit evidence of earlier child abuse allegations made against victim’s mother, (3) allowing state to use PowerPoint to explain Shaken Baby Syndrome without giving cautionary jury instruction, (4) failing to instruct on lesser included offenses of second-degree murder and involuntary manslaughter, (5) admitting autopsy photographs, and (6) violating Adams’ right to confrontation by admitting Adams’ confession.

ISSUES: (1) Motion for new trial, (2) child abuse allegations, (3) demonstrative evidence, (4) jury instruction, (5) autopsy photographs, and (6) confrontation

HELD: Under circumstances, prosecutor’s failure to disclose pretrial conversations with victim’s parents regarding father’s withdrawal of Protection from Abuse Act petition filed against mother did not violate Brady or qualify as newly discovered evidence necessitating a new trial.

Third-party evidence rule discussed and cases examined. Under circumstances, district court’s refusal to admit evidence of earlier child abuse accusations against victim’s mother or of her visitation with her other children did not violate third-party evidence rule.


No error in not giving jury lesser-included offenses instructions.
STATE V. HANSON  
JEWEll DISTRICT COURT – AFFIRMED  
COURT OF APPEALS – AFFIRMED  
NO. 91.635 – DECEMBER 9, 2005  

FACTS: Hanson charged with driving under the influence, K.S.A. 8-1567(a)(1) and (2). Magistrate judge found Hanson guilty under K.S.A. 8-1567(a)(3). Hanson appealed to a district judge, who granted Hanson’s motion to arrest judgment and dismissed the case without prejudice. When state refiled charge, defendant filed a motion to dismiss based on double jeopardy. District court denied motion and convicted Hanson. In unpublished opinion, Court of Appeals affirmed. Hanson’s petition for review granted.

ISSUE: Double jeopardy

HELD: City of Salina v. Amador, 279 Kan. 266 (2005), is controlling. Hanson’s appeal from magistrate court conviction mandates a trial de novo in the district court, and the appealed conviction in the magistrate court must be conditionally vacated. When district court dismissed Hanson’s appeal without prejudice, the magistrate court conviction was vacated, leaving “no footprint” in the magistrate court. Prosecution starts over, and jeopardy does not attach. State’s refiling and prosecution of Hanson on same charge in district court did not violate his double jeopardy rights under federal or state constitutions.

STATUTES: K.S.A. 2001 Supp. 22-3609a and K.S.A. 8-1567(a)(1), (2), and (3) -1567(p), 21-3108(4)(a) and (c)

STATE V. JACKSON  
SEDGWICK DISTRICT COURT – AFFIRMED  
NO. 91.919 – DECEMBER 9, 2005  

FACTS: Jackson convicted of felony murder based on underlying felony of selling cocaine. On appeal she claimed (1) murder did not occur during course of drug transaction because she had abandoned drug sale prior to the murder; (2) an extraordinary, intervening event broke the causal connection; and (3) trial court failed to give requested instruction regarding causal connection between drug transaction and victim’s death.

ISSUES: (1) Res gestae of underlying crime, (2) break in causal connection, and (3) felony murder jury instruction

HELD: Evidence viewed in light most favorable to state supports jury’s conclusion that murder occurred during the drug transaction. Analysis in factually similar case of State v. Beach, 275 Kan. 603 (2003), is applied. Evidence supports inference that drug transaction was ongoing with shooting and drug transaction occurring simultaneously, and supports jury’s conclusion that shooting of victim was not an extraordinary intervening act.

Instruction considered as a whole, and in light of defense counsel’s closing argument, fairly and properly stated the law as applied to the facts without confusing the jury. No error in denying Jackson’s request for the additional instruction.


STATE V. MATTOX  
SHAWNEE DISTRICT COURT – AFFIRMED  
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART  
NO. 89,547 – DECEMBER 9, 2005  

FACTS: Mattox convicted of aiding and abetting unintentional second-degree murder and of aiding and abetting criminal discharge of firearm. District court found Mattox’s oral and written statements to Douglas County booking officer were admissible. In unpublished opinion, Court of Appeals affirmed. District court also found Mattox’s later statements to Topeka detectives, and the handgun discovered as a result, were admissible. Court of Appeals reversed. Petitions for review by both parties granted on these suppression issues.

ISSUES: (1) Admission of statements to Douglas County officer, (2) admission of statements to Topeka detectives and handgun, and (3) independent basis for admission of handgun

HELD: Substantial competent evidence supports district court’s finding that Mattox initiated communication with booking officer. District court’s substantiated findings permit independent conclusion that under totality of circumstances Mattox’s rights were knowingly and voluntarily waived, and that oral and written confessions were properly admitted into evidence.

Substantial competent evidence supports trial court’s finding that second interview with Topeka detectives was a continuation of first interview. Second Miranda warning was not required. Issue of Mattox’s possible re-invocation of his right to counsel is considered abandoned. State’s argument based on U.S. v. Pattane, 542 U.S. 630 (2004), is rendered moot by affirmance of district court on handgun issue.

DISSENT (Allegrucci, J.): (no dissenting opinion)

STATUTE: K.S.A. 60-2101(b)

STATE V. OLIVER  
SEDGWICK DISTRICT COURT – AFFIRMED  
NO. 88,987 – DECEMBER 16, 2005  

FACTS: Oliver appeals convictions and hard 50 sentences on two counts of first-degree premeditated murder and two counts of first-degree felony murder in quadruple homicide. Issues on appeal are whether (1) police had probable cause to support arrest; (2) district court erred in limiting expert testimony about psychological disorders that could have led to false confession; (3) district court erred in denying Oliver’s request for jury instructions on second-degree murder and voluntary manslaughter as lesser-included offenses of capital and premeditated murder, and request for compulsion instruction relevant to underlying felony of aggravated robbery; and (4) hard 50 sentencing statute is unconstitutional.

ISSUES: (1) Warrantless arrest, (2) expert testimony, (3) jury instructions, and (4) hard 50 sentence

HELD: Considering all information the police possessed, and other circumstances in case, Oliver’s warrantless arrest met both statutory and constitutional standards. No error in denying motion to suppress confession following his arrest.

Survey of authorities, including Crane v. Kentucky, 476 U.S. 683 (1986), and State v. Kleypas, 272 Kan. 894 (2001), regarding admission of expert testimony on false confessions and psychological disorders. Following clear majority of jurisdictions, a criminal defendant against whom a confession will be admitted may be permitted to introduce expert psychological or psychiatric testimony bearing on ability to respond reliably to interrogation. It is essential, however, that the testimony actually tell jurors something they would not otherwise know from their usual human experience and that it remain hypothetical or theoretical. It must stop short of expressing the expert’s judgment on the defendant’s reliability in the specific instance of the confession submitted for the jury’s consideration. Under facts of this case, district judge’s refusal to admit expert testimony on Oliver’s psychological conditions was not an abuse of discretion.
STATE V. RUPNICK  
BROWN DISTRICT COURT  
AFFIRMED IN PART, REVERSED IN PART  
NO. 92,193 – DECEMBER 16, 2005

FACTS: Rupnick charged with three violations of felony computer crime, K.S.A. 2004 Supp. 21-3755(b)(1)(C). Jury found him guilty of lesser-included misdemeanor computer trespass, K.S.A. 2004 Supp. 21-3755(d), on two counts, and guilty as charged on third count. Rupnick appealed, and case transferred from Court of Appeals to Supreme Court. On appeal Rupnick claimed: (1) district judge erred in refusing to suppress evidence from laptop seized without a warrant, (2) a valid warrant was required to search laptop's hard drive, (3) the felony and misdemeanor computer crime statutes are unconstitutionally vague, (4) statements made to law enforcement agents should have been suppressed as a custodial interrogation without Miranda warnings, and (5) district court lacked territorial jurisdiction because no evidence Rupnick accessed data on laptop in Kansas.

ISSUES: (1) Seizure of computer, (2) search of hard drive, (3) constitutionality of computer crime statutes, (4) suppression of incriminating statements, and (4) territorial jurisdiction

HELD: Under facts, probable cause and exigent circumstances excused warrantless seizure of Rupnick's laptop computer.

Issue of first impression in Kansas. Following 10th Circuit cases, a warrant is necessary for such a search unless a recognized exception applies. In this case, the search warrant was invalid. Its execution outside jurisdiction designated by K.S.A. 22-2503 was not mere technical irregularity. It affected substantial rights of Rupnick, enabling his conviction on a felony. Evidence from laptop should have been suppressed. Rupnick's felony computer crime conviction is reversed and case is remanded for further proceedings on that charge.


Under facts, no lesser-included jury instructions on second-degree murder or voluntary manslaughter, or jury instruction on compulsion, were necessary. Although some minimal evidence that Oliver was under the influence of another person during the killings, there was no evidence supporting the degree of compulsion necessary to merit an instruction on that defense.

Hard 50 sentencing statute is constitutional.

STATUTES: K.S.A. 2004 Supp. 21-3402, -4635, 22-2401(c)(1) and K.S.A. 21-3401(a), -3403, -439(a)(6), 22-3215, -3215(5), -3209, -3219, 60-456, -456(d)

STATE V. THOMAS  
SEDGWICK DISTRICT COURT – AFFIRMED  
COURT OF APPEALS – AFFIRMED  
NO. 91,437 – DECEMBER 9, 2005

FACTS: Officers with felony arrest warrant against Prouse for probation violation chased Prouse into Thomas' house. Thomas convicted on evidence of methamphetamine production in plain view in his house and of drugs discovered on his person. Thomas appealed. In unpublished opinion, Court of Appeals affirmed Thomas' conviction but remanded for resentencing. Review granted on Thomas' claim that trial court should have suppressed evidence discovered in warrantless entry of his residence.

ISSUES: (1) Seizure of computer, (2) search of hard drive, (3) constitutionality of computer crime statutes, (4) suppression of incriminating statements, and (4) territorial jurisdiction

HELD: Under facts, where defendant's current felony convictions were required by law to run consecutive to a prior felony conviction for which he was on probation and there is no evidence that imposition of a consecutive sentence would result in manifest injustice under K.S.A. 1996 Supp. 21-4720(a), and where record of sentencing is silent on this point, district court may act upon a nunc pro tunc motion to impose the present felony sentences consecutive to defendant's prior felony conviction for which he was on probation. Because files and record conclusively show Love is entitled to no relief, no abuse of discretion in summary dismissal of his motion.

District court clearly articulated reasons for denying Love's motion to correct an illegal sentence, and nunc pro tunc order was properly utilized by district court. No need to remand for further findings of fact or conclusions of law.

STATUTES: K.S.A. 21-4603(f), -4608(a), -4608(c), 22-3504, -3504(1), -3504(2), 60-1507, -1507(a); K.S.A. 1996 Supp. 21-4603d, -4603d(a), -4720(a); and K.S.A. 1982 Supp. 21-4608, -4608(3)

Access to Justice Grant Applicants Sought

The Access to Justice Fund is administered by the Kansas Supreme Court and is intended as a source of grant funds for the operating expenses of programs that provide access for persons who would otherwise be unable to gain access to the Kansas civil justice system. It provides increased access to legal assistance for pro se litigation, legal counsel for civil and domestic matters, as well as other legal advice, and dispute resolution services.

Applications for grant funds will be due May 31, 2006. Grant application packets may be requested from the Office of Judicial Administration, 301 W. 10th St. Rm. 337, Topeka, KS 66612. Please direct telephone inquiries to Art Thompson at (785) 291-3748.
ISSUE: Fourth Amendment
HELD: Issue of first impression. Neither Fourth Amendment nor § 15 of Kansas Constitution Bill of Rights prohibits entry of law enforcement officers into a home when officers are in hot pursuit of subject of a felony arrest warrant who has fled from public area into the house, even though arrestee does not own or reside in the house, and even though the officers do not have a search warrant for the house. Under specific facts and circumstances of case, deputies were justified in making warrantless entry into Thomas' residence in hot pursuit of Prouse and in seizing evidence in plain view.


STATE V. WALKER
RENO DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 91,271 – DECEMBER 9, 2005

FACTS: Appeal involving question whether provisions of K.S.A. 2004 Supp. 21-4720(b)(2) require sentencing court, when sentencing defendant for multiple felony convictions, to designate defendant's severity level 1 crime, which is sentenced as a severity level 4 crime according to State v. Frazier, 30 Kan. App. 2d 398, rev. denied, 274 Kan. 115 (2004), as the primary crime. Trial court designated Walker's severity level 2 crime as the primary crime, and Court of Appeals affirmed in unpublished opinion. Walker's petition for review granted.

ISSUE: Identical offense rule
HELD: District court's designation of primary crime under facts of this case was appropriate. Cases involving identical offense rule in Frazier are reviewed. Application of Frazier does not actually change severity level of crime of conviction but is merely a "sentence reduction remedy." To avoid unreasonable and absurd results, K.S.A. 2004 Supp. 21-4720(b)(2) is interpreted to require the primary crime be the crime of conviction with the highest severity ranking, which is actually sentenced, using that severity level's applicable penalties to effect legislative intent that primary crime be crime with longest sentence imposed under sentencing guidelines.

STATUTES: K.S.A. 2004 Supp. 21-4270(b) sections (2), (4), and (8), -4705 and K.S.A. 20-3018(b), -4152, -4159, -4159(a), -4160, -4161, -7006

STATE V. WASHINGTON
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 92,438 – DECEMBER 9, 2005


ISSUES: (1) Aggravating circumstance and (2) constitutionality of hard 50 sentence
HELD: Viewing evidence in light most favorable to prosecution, case is analogous to State v. Alford, 257 Kan. 830 (1995). Preponderance of evidence supports trial court's finding that murder was committed in an especially heinous, atrocious, or cruel manner. No error in trial court's weighing of aggravating and mitigating factors.

Constitutional challenge was rejected in Washington's direct appeal. Kansas hard 50 sentencing scheme is not unconstitutional under Apprendi.

STATUTES: K.S.A. 2004 Supp. 21-4635(a), -4635(b), -4635(c), -4636(a), -4636(f) subsections (3) and (7), -4638; and K.S.A. 21-4637(b), -4637(e), -4637(f)

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

Briefs With Separate Sections

There are three briefs that have two separate sections under a single cover: Appellee/Cross-Appellant, Appellee/Cross-Appellee, and Cross-Appellee/Reply brief. The separate section for the Appellee/Cross-Appellant and Appellee/Cross-Appellee should be comparable to that of an appellant under Rule 6.02 except without duplication of statements, arguments, or authorities already contained in the appellee's brief. See Rule 6.03(f). The Cross-Appellee/Reply brief is the same except the reply section should resemble a stand alone reply brief. See Rules 6.04 and 6.05.

The cover color for an Appellee/Cross-Appellant brief is blue, while the Appellee/Cross-Appellant brief and Cross-Appellee/Reply brief are yellow. See Rule 6.07(b). The page limits for Appellee/Cross-Appellant and Appellee/Cross-Appellee briefs are 60 pages, while the Cross-Appellee/Reply brief may only contain a maximum of 25 pages in the cross-appellee section and 15 pages for the reply section. See Rule 6.07(c). These briefs only need a single table of contents, but the contents and authorities of each separate section should be fully listed.

Motions for Rehearing

Motions for rehearing are requests by parties for the appellate court to reconsider a ruling or order. Both appellate courts have provisions for motions for rehearing. Each court has a different time frame for the timely filing of these motions. In the Court of Appeals, a party has 10 business days after a decision to file a timely motion for rehearing. See Rules 7.05(a) and 1.05(c). In the Supreme Court, a party has 20 calendar days after a decision to file a motion for rehearing. See Rules 7.06(a) and 1.05(c). These motions do not receive mail time.

If you have any questions about these or other appellate court rules and practices, call the Clerk's Office at (785) 368-7170 and ask to speak with Jason Oldham, the chief deputy appellate clerk.
ACCOUNTANTS AND AGREED-UPON PROCEDURE
DEBERRY V. KANSAS STATE BOARD OF ACCOUNTANCY
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 93,814 – DECEMBER 23, 2005

FACTS: DeBerry has been a CPA in private practice for 25 years. In 2001 DeBerry joined the board of directors for the First State Bank of Kiowa and also owned stock in the bank. In May 2002 DeBerry entered an agreement to perform a director’s examination of the bank, commonly known in accounting terms as an agreed-upon procedure. DeBerry completed the examination in November 2002 and submitted the report on his CPA letterhead. When DeBerry renewed his CPA permit in July 2002, he did not check the box labeled “agreed-upon procedure.” In February 2002 DeBerry also signed an agreement for referral fees for clients he referred to the bank for loans, and he received $422.50 in such fees. In May 2003 the Kansas State Board of Accountancy requested information about DeBerry’s director’s examination and his contractual relationship with the bank. After an evidentiary hearing, the board found DeBerry violated accountant regulations by performing an agreed-upon procedure for the bank while serving on its board of directors. The board also found that DeBerry willfully violated accountant regulations by accepting a referral fee for the sale of services to a client. The board also found DeBerry violated CPA standards and regulations by failing to obtain the proper registration status and peer review services. The board suspended DeBerry’s CPA permit for 90 days, fined him $2,000, and ordered professional ethics training. The trial court affirmed the board’s findings, concluding that the board’s action was supported by substantial competent evidence.

ISSUES: Are the board’s findings supported by substantial competent evidence? Agreed-upon procedures, referral fees, constitutionally vague regulation to register as a firm, signature of board’s executive director, and administrative review

HELD: Court affirmed. Court stated that it was undisputed that DeBerry did not conform to the statements on standards for attestation engagements from the accountant professional standards when performing an agreed-upon procedure because he failed to seek the appropriate level of peer review. Court stated that to prove a willful violation of a CPA’s professional standards and regulations, the board must only prove that the CPA intended to commit the forbidden act or to abstain from doing something the CPA was required to do. By DeBerry’s own admissions, court found there was substantial competent evidence to prove and support the findings of his willful violation of the board’s regulations when he performed a director’s examination of the bank while serving on the bank’s board of directors. Court found the statutes regarding attest services and peer review could not be more clear and that it is undisputed that DeBerry performed attest services for the bank and was required to register as a firm with the board. Court stated that DeBerry failed to raise the issue of the signature of the executive director before the board or district court and it would not be addressed on appeal. Court disagreed with DeBerry that the timing of the issuance of the board’s final order was in any way deliberate to fall during tax season and cause him to lose clients. Court stated the board is free to implement its own standard in requiring DeBerry to achieve a score of 90 percent or higher on the comprehensive ethics exam. Court stated there was no problem with requiring DeBerry to pay the $2,000 fine and not allowing payment with credit card. Court found the board has discretion to establish method of payment. Court found validity in allowing the board’s practice of accepting anonymous, oral complaints. Court stated there was no departure from rationality in the board’s analogy to the Enron and WorldCom scandals as both violated professional standards relating to independence. Court found the fine imposed by the board was not unconscionable. Court also found the board member with a prior relationship with DeBerry recused himself from the hearings and did not participate in the deliberations, thus there was no bias or prejudice. Court thoroughly reviewed all of DeBerry’s claims and determined that the board’s decision was valid.

STATUTES: K.S.A. 1-308, -311(a), (b), -501 and K.S.A. 2004 Supp. 77-518(c)(7), 526(g), -621

CIVIL RIGHTS, PRISONER LITIGATION, AND
EXHAUSTION OF ADMINISTRATIVE REMEDIES
BLOOM V. MUCKENTHALER ET AL.
LEAVENWORTH DISTRICT COURT
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED WITH DIRECTIONS
NO. 93,574 – AUGUST 12, 2005
(MOTION TO PUBLISH GRANTED NOVEMBER 3, 2005)

FACTS: Bloom filed a civil rights lawsuit against the Kansas Department of Corrections (KDOC) and various named and unnamed employees alleging claims of violating free speech, denied communication, denied funds to pay filing fee, unjust prison punishment, denial of a constitutional right, mail was intercepted illegally, denial of the right to work, and violation of the federal constitution under the 11th Amendment. The trial court held Bloom had not met the standard and had failed to state a claim. The district court also held Bloom had not proven exhaustion of his administrative remedies.

ISSUES: (1) Qualified immunity and (2) failure to exhaust administrative remedies

HELD: Court held the absence of Bloom’s responsive pleadings from the record on appeal deprived the court of its ability to consider the qualified immunity issue under the correct standard. Court stated that it would still consider whether Bloom had exhausted his administrative remedies. The court held the documents Bloom attached to his petition and included in the appendices showed an appeal to the Secretary of Corrections of two grievances (Nos. 16 and 20), which were both determined against him and appealed in this case. Court stated the balance of Bloom’s claims were not exhausted and, as a result, must be dismissed without prejudice. Court held Bloom’s claim for violations involving prison mail did not support an action for breach of his constitutional rights. Court stated that to properly allege a constitutional violation, an inmate must show a pattern of censorship or other practices that chill or impede the inmate’s access to legal representation and the courts, and Bloom did not meet this standard. Regarding Bloom’s claim that he was not allowed out of his cell to attend Donnelly College, the court found this claim was frivolous as Bloom refused on his own volition to attend the course at the college. Court held that claims 16 and 20
were properly dismissed with prejudice, but reversed and remanded to dismiss the remaining claims without prejudice.

**STATUTES:** K.S.A. 60-212(b)(6); K.S.A. 2004 Supp. 60-1501; and K.S.A. 75-52,138, 6101 et seq.

**DUI, LICENSE SUSPENSION, AND PROBABLE CAUSE BUTCHER V. KANSAS DEPARTMENT OF REVENUE SUMNER DISTRICT COURT – REVERSED NO. 93,657 – DECEMBER 30, 2005**

**FACTS:** Officer Patterson saw Butcher driving a vehicle and he knew that Butcher’s license had been suspended within the previous months and that Butcher had prior DUI suspensions as well. Patterson ran the license tag number, turned his vehicle patrol car around, and tried to find the vehicle. Patterson located the vehicle approximately 14 minutes later. When he stopped the vehicle, Butcher was in the passenger seat and someone else was driving. At no time did Butcher admit to driving the vehicle. Butcher was abusive, combative, profane, and threatening during the stop. He appeared to be intoxicated based on the odor of alcohol, slurred speech, bloodshot eyes, and difficulty communicating. Butcher refused to complete field sobriety tests or a chemical test. Based on the refusal, Butcher’s driver’s license was suspended for three years, due to a lengthy DUI history. Butcher appealed his suspension arguing the officer did not have probable cause to make the stop because the license suspension information was stale and there was no showing that he actually operated the vehicle. The administrative hearing officer upheld Butcher’s suspension finding probable cause. The district court reversed Butcher’s suspension and held there was no evidence the officer had reasonable grounds to believe Butcher was operating or attempting to operate a vehicle while under the influence of alcohol or drugs when the reason the officer stopped the vehicle was Butcher’s suspended license, and not any suspicion of DUI. The Kansas Department of Revenue appealed the district court’s reversal of Butcher’s suspension.

**ISSUE:** Did the district court err in not finding reasonable grounds existed to believe Butcher was operating a vehicle while under the influence of alcohol or drugs?

**HELD:** Court reversed and reinstated Butcher’s suspension. Court held Patterson had reasonable grounds to believe that Butcher was driving while intoxicated, and the district court erred in finding to the contrary. The court stated the district court was not presented with circumstantial evidence that Butcher was actually operating or had operated the vehicle. Rather, Patterson witnessed Butcher driving the vehicle. Within a 14-minute window, Patterson located the same vehicle and, based on his knowledge of license suspension, had probable cause to stop the vehicle. The stop was valid. Court stated that considering the 14-minute delay between witnessing Butcher driving the vehicle and observing Butcher’s intoxicated condition, Patterson had reasonable grounds to believe that Butcher had operated the vehicle while under the influence of alcohol.

**STATUTES:** K.S.A. 8-1001(a); K.S.A. 8-1020(h)(1), (k), (q); and K.S.A. 12-4211(c), (d)

**DIVORCE, MAINTENANCE, AND MILITARY RETIREMENT BENEFITS IN RE MARRIAGE OF GURGANUS BUTLER DISTRICT COURT – AFFIRMED IN PART, REVISED IN PART, AND REMANDED WITH DIRECTIONS NO. 93,727 – DECEMBER 16, 2005**

**FACTS:** Alton and Kimberley Gurganus were married in 1987 and divorced in 1997. As part of the parties’ settlement agreement, spousal maintenance was provided as one-half of Alton’s military retirement pay to Kimberley intended to substitute for formal spousal support payments, and it also stated in the military retirement section of the settlement agreement that the court awarded one-half of Alton’s military retirement pay to Kimberley. From Alton’s military benefits, Kimberley received $474 for child support, $500 for maintenance, and $26 for child support and maintenance arrearages until September 2004 when Alton filed a motion to terminate child support and Kimberley’s payments. Alton claimed overpayment of child support and military benefits in lieu of spousal maintenance, that the children ceased living with Kimberley in 1997 and were not a “family unit,” and that Kimberley was not entitled to spousal maintenance because military benefits are not considered part of marital property unless the parties had been married for 10 years or more. The trial court determined that the income withholding order for Alton’s military retirement pay should not have been filed and the court ordered the withholding ceased. However, under the terms of the settlement agreement, the military retirement pay was marital property, and the parties intended to set aside one-half of the payments to Kimberley. The court found no jurisdiction to modify the agreement that Alton should pay one-half retirement to Kimberley, and since the retirement benefits were marital property, there was no overpayment.

**ISSUE:** Did the trial court abuse its discretion in awarding Kimberley one-half of Alton’s military retirement benefits?

**HELD:** Court affirmed in part, reversed in part, and remanded with directions. The court agreed with the trial court’s determination that the settlement agreement was not ambiguous, but disagreed with the interpretation that Alton’s military retirement benefits were marital property. The military retirement benefits were only mentioned in the spousal maintenance section and in the military retirement section, and not listed anywhere else in the settlement agreement. Court found the payments were clearly intended to be maintenance and had tax implications for both parties. Court found that although Kimberley could not receive military retirement pay as spousal support under 10 U.S.C. Sec. 1408(d)(2), there is no prohibition on parties contracting to pay an ex-spouse a portion of the military retirement payments. Court held Alton agreed to pay Kimberley one-half of his monthly military retirement benefits, and he must make those payments to Kimberley himself. The court disagreed that the military retirement benefits paid to Kimberley were conditioned upon the children living with her. Court also found there was no evidence that Kimberley received over one-half of the military retirement benefits and the trial court did not abuse its discretion in determining that Alton was not entitled to any reimbursement. Court remanded with directions to the trial court to designate Alton’s military retirement pay as spousal maintenance.

**STATUTES:** No statutes cited.

**HABEAS CORPUS GOLDSMITH V. STATE COWLEY DISTRICT COURT – REVERSED AND REMANDED NO. 93,377 – DECEMBER 23, 2005**

**FACTS:** Detailed history in criminal case involving collection of extensive physical evidence and Goldsmith’s conviction on charges, including rape. Conviction based on circumstantial evidence because the few biological items tested did not connect Goldsmith to the crime. Sole issue on appeal is whether trial court erred in dismissing Goldsmith’s post-conviction motion for DNA testing as time barred under K.S.A. 2004 Supp. 60-1507(f). On appeal, state argued dismissal of the motion was also warranted because Goldsmith cannot establish existence of noncumulative, exculpatory evidence, warranting DNA testing.

**ISSUE:** DNA testing

**HELD:** K.S.A. 2004 Supp. 21-2512 is construed and applied. Nothing in statute imposes a one-year limitation on Claims for DNA testing, thus district court erred in dismissing Goldsmith’s request

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for DNA testing under K.S.A. 2004 Supp. 60-1507(f). As in Bruner v. State, 277 Kan. 603 (2004), Goldsmith alleged throughout course of postconviction proceedings that further DNA testing of hair samples, victim's underwear, and many other pieces of physical evidence would produce exculpatory evidence. These allegations warranted at least a hearing and appointment of counsel. Statute clearly provides right to DNA testing of biological material not previously subjected to DNA testing, related to the criminal investigation, and currently in actual or constructive possession of the state. District court's summary dismissal of Goldsmith's request for DNA testing cannot be deemed correct for the wrong reason. Reversed and remanded for appointment of counsel and evidentiary hearing.

STATUTES: K.S.A. 2004 Supp. 21-2512, -2512 (a) and (c), 60-1507(f)

OIL AND GAS

DAVIS ET AL. V. KEY GAS CORP. ET AL. BARBER DISTRICT COURT

REVERSED AND REMANDED WITH DIRECTIONS NO. 94,308 – DECEMBER 16, 2005

FACTS: Davis granted two oil and gas leases to Thomas Energy, and the leases were later assigned to Key Gas. The oil and gas leases contained a condition precedent requiring Key Gas to charge transportation costs and other expenses to the leases before Key Gas became liable for these expenses. Because the costs in question were not charged to the leases that exist between Key Gas and Davis, but rather were deducted by ONEOK under the gas purchase agreement from the amount given to Key Gas by ONEOK for gas purchased, the condition precedent that would trigger Key Gas' liability for these costs was never fulfilled. Davis sued Key Gas.

ISSUE: Whether Key Gas was required to pay Davis' portion of the transportation costs and other expenses deducted under the gas purchase agreement that Key Gas had entered with ONEOK.

HELD: Court reversed and remanded. Court found that Key Gas had control of this condition precedent under the oil and gas lease and had an implied obligation to protect Davis against transportation costs and other expenses that would reduce Davis' royalty. Key Gas made the completion of the condition impossible when it entered into the gas purchase agreement with ONEOK and allowed ONEOK to deduct transportation costs and other expenses. Court stated there was no evidence in this case that Key Gas used reasonable diligence to retain control of the costs and charge them to the oil and gas leases, thereby protecting Davis from these costs. Court held that Key Gas will not be allowed to use its own action that prevented the condition precedent from being fulfilled to escape liability for these costs. Court reversed and remanded with directions that Davis recover from Key Gas the amount charged by ONEOK for gas treatment, dehydration, compression, transportation, or water hauling, plus interest.

DISSENT (McAnany, J.): The dissent stated that Davis seeks, and the majority awarded, a royalty based upon the value of gas from the well at an inflated price that ignored the realities of the market that affect price after the gas left Davis' leased property. The dissent would affirm the sound and common-sense decision of the district court.

STATUTES: No statutes cited.
findings and conclusions of law that the will be admitted to probate. Remanded with directions to allow the parties to proceed with the will contest following a reasonable period of time of discovery. 

STATUTES: K.S.A. 60-226, -237, -245, -245a, -427; K.S.A. 2004 Supp. 59-606, -2224; and K.S.A. 2004 Supp. 60-2001, -226(a), -230(a), -231(a), -234(c), -245a(b), (d), (e)

WORKERS' COMPENSATION AND GOING AND COMING RULE
RIDNOUR V. KENNETH R. JOHNSON INC. AND GENERAL CASUALTY
WORKERS' COMPENSATION BOARD – AFFIRMED
NO. 94,149 – DECEMBER 16, 2005

FACTS: Ridnour worked as an operations and warehouse manager for Kenneth R. Johnson Inc., and he was injured in a traffic accident. Ridnour arrived at work at 6:45 a.m. and had scheduled a crew to start work at 7 a.m. When he got to work, Ridnour realized he forgot his keys to the warehouse and decided to go home to get them because the employees were paid hourly, instead of waiting for another manager to arrive at work. Ridnour left the warehouse, drove to his house, retrieved the appropriate keys, and was struck by another vehicle on the way back to the warehouse. The administrative law judge concluded the going and coming rule did not exclude Ridnour from receiving an award stating that Ridnour had departed on an errand on his employer’s behalf to secure keys to unlock the building. The Workers’ Compensation Board agreed and found the sole purpose of Ridnour’s trip was a business errand and he had authority to run such errands.

ISSUE: Does the going and coming rule apply?

HELD: Court affirmed. Court held there was substantial competent evidence to support the board’s finding that the sole purpose of Ridnour’s trip was a business errand when the accident occurred and the employer acknowledged that he had the authority to run similar errands.

Consequently, Ridnour’s injuries are compensable under the Workers’ Compensation Act.

STATUTES: K.S.A. 44-501(a); K.S.A. 2004 Supp. 44-508(f); and K.S.A. 77-601 et seq., -621(c)(4), (7), (8)

WORKERS' COMPENSATION AND OFFSET FOR RETIREMENT BENEFITS
MCINTOSH V. SEDGWICK COUNTY
WORKERS' COMPENSATION BOARD – REVERSED AND REMANDED WITH DIRECTIONS
NO. 93,762 – DECEMBER 9, 2005

FACTS: McIntosh sustained injuries while working as a security officer for Sedgwick County. He received permanent and total disability. The parties agreed that the county was entitled to an offset for McIntosh’s retirement benefits from the Kansas Public Employees’ Retirement System, but the administrative law judge (ALJ) held that the county was not entitled to an offset for McIntosh’s Social Security retirement benefits. The Workers’ Compensation Board affirmed the ALJ. On appeal in a previous decision, this court reversed the board’s decision and held that the county was entitled to an offset for the Social Security retirement benefits as well. On remand the board calculated the offset and also held that unlike compensation for a permanent partial disability, a permanent total disability award has no limitation on the number of disability weeks, only a statutory limitation of $125,000. The board reduced the amount of weekly compensation and the $125,000 maximum by the amount of retirement offset.

ISSUE: Did the board properly limit the number of weeks for permanent total disability payments before the $125,000 statutory cap had been reached?

HELD: Court reversed and remanded. Court stated that in construing K.S.A. 44-510c(a)(1) and K.S.A. 44-510f(a)(1), the Legislature intended for permanent total disability payments to continue until the employee no longer suffers from such disability or until the $125,000 statutory cap on an employer’s liability is reached, whichever occurs first. Court stated there is no indication that the Legislature intended for the workers’ compensation offset under K.S.A. 44-501(h) to reduce the $125,000 cap on an employer’s liability for permanent total disability payments, thereby limiting the number of weeks that permanent total disability benefits are payable. Court held that because the board’s decision terminated McIntosh’s workers’ compensation benefits after 341 weeks and before the $125,000 statutory cap on the employer’s liability would have been met, the award was improper. Court reversed and remanded with directions that the payments ordered by the board shall continue until McIntosh’s permanent total disability has ended or until the $125,000 maximum allowable payment for permanent total disability has been exhausted, whichever occurs first.

STATUTE: K.S.A. 44-501(h), -510c(a)(1), -510e, -510f(a)(1)

WORKERS' COMPENSATION AND WHOLE BODY DISABILITY VERSUS TWO SCHEDULED INJURIES
CASCO V. ARMOUR SWIFT-ECKRICH
WORKERS’ COMPENSATION BOARD – REVERSED AND REMANDED WITH DIRECTIONS
NO. 93,984 – DECEMBER 2, 2005

FACTS: Casco performed repetitive work for Armour, including looping and tying sausages, hanging sausages above shoulder level on a chain, filling boxes with meat, carrying 30- to 40-pound boxes, and placing the boxes on pallets. Casco felt pain in his left shoulder and eventually received a left rotator cuff exploration and repair and then continued physical therapy. Casco was ordered not to use his left arm. Continued discomfort caused Casco to receive a left rotator cuff repair. Casco returned to work with restrictions, and he performed his duties using only his right arm. He began experiencing pain in his right shoulder and eventually he had decompression surgery on his right shoulder. Armour told Casco they had no work within his restrictions, and they would coordinate Casco’s return to work with his attorney. Casco, because he was in Maryland living with his son, could not return to work by the day set by Armour. When Casco reported for work as soon as he returned to Kansas, Armour told him they did not have any work for him. The administrative law judge found that Casco’s right shoulder injury was a natural and probable consequence of the left upper extremity injury and awarded a whole body injury of 69.5 percent work disability for a total award capped at $100,000. The Workers’ Compensation Board found that Casco’s injury to his right shoulder resulted from a separate accident, and, therefore, the natural and probable consequence rule could not be used to treat Casco’s injuries as a whole body injury instead of two separate scheduled injuries. The board found 27 percent permanent partial disability to the left shoulder and 6 percent permanent partial disability to the right shoulder for a total award of approximately $35,000.

ISSUE: Is Casco entitled to workers’ compensation for a permanent partial general disability or compensation for two separate scheduled injuries?

HELD: Court reversed and remanded with directions for the board to reinstate the award of permanent partial general disability. Court found that Casco performed repetitive work where he first hurt his left shoulder and then, because he was compensating for that injury, his right shoulder hurt from overuse. Court held that Casco is entitled to receive permanent disability benefits because if a worker is injured in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury. Court held the right shoulder repetitive use injury
suffered by Casco due to overuse while compensating for his injured left shoulder is a continuation of his left shoulder injury, and he is entitled to receive an award for permanent partial general disability. 

**STATUTE:** K.S.A. 44-501c, -510d, -510e, -520, -520a

### Criminal

#### STATE V. BANNING

**SEDGWICK DISTRICT COURT**

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS**

**NO. 93,305 – DECEMBER 23, 2005**

**FACTS:** Banning pled guilty to forgery. She was given probation, but her community corrections was revoked for failure to remain in the community corrections lobby and for admitted drug use. The district court reinstated Banning's probation with the same conditions except that she enter and successfully complete Labette Correctional Conservation Camp. Banning was convicted of the new drug charges and ordered to probation and completion of the Labette program. Banning violated her probation by being removed from Labette for various violations. The district court revoked Banning's probation and ordered her to serve the underlying prison sentences.

**ISSUE:** Should the sentencing court have placed Banning on community corrections instead of ordering her to prison?

**HELD:** Court affirmed in part, reversed in part, and remanded with directions. Court stated that from the plain language of the statutes, Labette Correctional Conservation Camp is not a community corrections service program but a state correctional institution and, therefore, assignment to Labette as a condition of probation does not satisfy the assignment to community corrections requirement of K.S.A. 2004 Supp. 22-3716(b). Court stated that the conviction in Banning's new drugs charges did not arise out of the same events as the original drug charges, and there were separate plea and sentencing hearings for both cases. Court remanded with directions to assign Banning to community corrections or to make the specific findings necessary under K.S.A. 2004 Supp. 22-3716(b)(3).


#### STATE V. BROWN

**WASHINGTON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, SENTENCE VACATED, CASE REMANDED**

**NO. 92,413 – DECEMBER 23, 2005**

**FACTS:** Brown convicted of driving under influence of alcohol (DUI) and involuntary manslaughter while DUI. Brown appealed, claiming district court erred in (1) denying motion to dismiss on speedy trial claim, (2) not striking prospective juror (J.F.) for cause, and (3) failing to instruct jury on DUI as lesser-included offense of involuntary manslaughter while DUI. Brown also contends (4) charges of involuntary manslaughter while DUI and DUI are multiplicitous, which requires reversal of manslaughter conviction; (5) there was insufficient evidence to convict him of involuntary manslaughter while DUI because state failed to prove Brown's DUI was proximate cause of victim's death; and (6) trial court erred in applying enhanced criminal history scoring provisions of K.S.A. 2002 Supp. 21-4711(c)(2) on Brown's conviction for involuntary manslaughter while DUI.

**ISSUES:** (1) Speedy trial, (2) challenge for cause, (3) jury instruction, (4) multiplicitous charges, (5) sufficiency of evidence, and (6) sentencing

**HELD:** Under facts, delay from date judge granted defendant's motion for continuance of trial until rescheduled trial date was chargeable against the defendant for speedy trial purposes pursuant to K.S.A. 22-3402(1).

While it would have been safer to excuse J.F. from jury service in this case, no abuse of discretion by trial court or prejudice to Brown's defense.

DUI is lesser included offense of involuntary manslaughter while DUI because all elements of K.S.A. 2004 Supp. 8-1567(a)(2) are identical to some of elements of K.S.A. 2004 Supp. 21-3442. Here, jury considered each charge separately and found Brown guilty of both. Although jury should have received lesser included offense instruction, there was no clear error requiring reversal.

Charges of involuntary manslaughter while DUI, K.S.A. 2004 Supp. 21-3442, and DUI, K.S.A. 2004 Supp. 8-1567(a)(2), are multiplicitous. Brown's conviction for DUI, the less severe offense, is reversed and sentence on that charge is vacated.

On evidence viewed in light most favorable to the state, rational jury could have found Brown guilty beyond a reasonable doubt.

Under facts, special sentencing provision of K.S.A. 2002 Supp. 21-4711(c)(2) only applies to convictions for involuntary manslaughter while DUI of both alcohol and drugs. Brown's two prior DUI convictions were improperly scored as two person felonies, which resulted in an illegal sentence for involuntary manslaughter while DUI. That sentence is vacated and case is remanded for resentencing.

**DISSENT** (Greene, J.): Majority's construction and application of K.S.A. 22-3402 is inconsistent and contrary to Kansas authorities. Brown was not brought to trial within period required by K.S.A. 22-3402, and he should have been discharged from further liability for crimes charged.

**STATUTES:** K.S.A. 2004 Supp. 8-1567(a)(2) and (3), 21-3107(2)(b), -3442, 22-3402(c); K.S.A. 2002 Supp. 21-4711(c)(2); and K.S.A. 21-4701 et seq., 22-3402(1), -3402(3)(c), -3410, -3410(2) sections (g), (h), and (i)

#### STATE V. COPPAGE

**WYANDOTTE DISTRICT COURT – APPEAL SUSTAINED**

**NO. 92,648 – DECEMBER 23, 2005**

**FACTS:** Coppage was arrested for domestic violence and charged with aggravated battery. Trial court dismissed charge prior to completion of state's evidence because at trial victim recanted her initial allegations against Coppage. State appealed, seeking to reverse the dismissal and allow retrial. K.S.A. 2004 Supp. 22-3602(b)(1). Alternatively, state appealed pursuant to K.S.A. 2004 Supp. 22-3602(b)(3) on question reserved by the prosecution.

**ISSUES:** (1) Double jeopardy and (2) jurisdiction for state's appeal

**HELD:** Because trial court resolved factual issues in finding state could not meet burden of proof, dismissal of charge amounted to judgment of acquittal. Accordingly, double jeopardy bars further prosecution of Coppage for aggravated battery.

Appeal considered under K.S.A. 2004 Supp. 22-3602(b)(3). The protection of victims of domestic abuse is issue of statewide interest, and factual scenario in Coppage's case is likely to arise in future cases. Trial court erred by dismissing aggravated battery charge simply because victim recanted her original statements to the police. There was sufficient evidence of Coppage's guilt to submit case to jury. Despite trial court error, however, double jeopardy prevents further prosecution of Coppage for aggravated battery.

**STATUTES:** K.S.A. 2004 Supp. 22-3602(b)(1) and (3) and K.S.A. 21-3108, -3108(1)(a) and (c)
STATE V. HERBISON
RENO DISTRICT COURT – AFFIRMED
NO. 93,386 – DECEMBER 23, 2005

FACTS: Herbison convicted of attempted manufacture of methamphetamine, possession of drug paraphernalia with the intent to manufacture a controlled substance, and possession of methamphetamine. Applying State v. McAdam, 277 Kan. 136 (2004), district court imposed 15-month sentence for attempted manufacture of methamphetamine conviction, pursuant to statute identical to K.S.A. 65-4159, which provides a lesser penalty, K.S.A. 65-4161. Herbison later claimed his 15-month sentence was illegal because he was entitled to a six-month reduction under K.S.A. 21-3301(d). The court agreed and reduced Herbison's sentence by six months. State appealed, arguing K.S.A. 65-4159(c) prohibits application of the six-month sentence reduction in K.S.A. 21-3301(d).

ISSUE: Sentencing

HELD: McAdam clearly controls. Although Herbison was charged with violating K.S.A. 65-4159, the district court still had jurisdiction to sentence Herbison under K.S.A. 21-3301 since (1) the defendant was also charged with an attempt in violation of K.S.A. 21-3301, the statute, which provides for the six-month reduction in sentence; and (2) issue is one of sentencing, and under the circumstances the statute with the lesser penalties controls.

STATUTE: K.S.A. 21-3301(d), 65-4159, -4159(c), -4161

STATE V. MOORE
GEARY DISTRICT COURT – AFFIRMED
NO. 93,386 – DECEMBER 23, 2005

FACTS: Moore was pulled over for following too close to the vehicle in front of him. Officers testified Moore exhibited a high degree of nervousness, and the car had a faint odor of fabric softener, which is commonly used to conceal the odor of drugs. Officers originally were told Moore's license was suspended, but that was a mistake. The officer gave Moore a warning citation for following too closely and told him he could leave. Before stepping away from the vehicle, officers asked Moore if he would answer a couple more questions. In answer to questions, Moore said he did not have any weapons or drugs, and the officer said he received permission to search wherever he wanted. Moore said the consent was limited to the duffle bag in the car. The officer conducted a thorough search of the vehicle and found a package of marijuana wrapped with fabric sheets in a false quarter panel. Moore was arrested and a later search revealed a total of 55 pounds of marijuana concealed throughout the vehicle. The district court denied Moore's motion to suppress and also a motion for a continuance. Moore requested a continuance to investigate a claim that the person who loaned him the vehicle had been indicted on federal drug charges in Maryland. The district court found Moore guilty of possession of marijuana with intent to distribute and failure to affix Kansas drug tax stamps.

ISSUES: Did the district court err in refusing to suppress the evidence obtained in the search of his vehicle? Did the district court err in refusing to grant a continuance in light of new evidence?

HELD: Court affirmed the denial of the motion to suppress and Moore's conviction. Court found the officer's initial stop of Moore's vehicle for following too closely was valid. However, the court found that Moore's detention after return of his license was not consensual. Court stated that when the two officers were standing next to Moore's vehicle, presumably with the emergency lights in the patrol vehicles still activated, no reasonable person would feel free to drive away. Although the detention was not consensual, court found the circumstances provided a reasonably prudent law enforcement officer reason to think that the vehicle was being used for drug trafficking, namely, the car was not registered to Moore, he was traveling from Las Vegas to Maryland, he carried little clothing, the interior smell of dryer sheets, and Moore's extreme nervousness. Thereafter, Moore's consent to search justified the continued detention and search of his property. Court held Moore's general consent enabled police officers to search all readily opened containers and compartments, including the ashtray, which revealed the hidden compartment in the quarter panel. Court also found the trial court did not abuse its discretion in denying Moore's motion for continuance on the day of the bench trial. Court stated that by Moore's own admission, he had been aware of the arrest of the person who gave him the car three weeks prior to trial. Court stated even if he feared for his life in revealing the information, there was no explanation why revealing the information to his attorney would have jeopardized his life or that of his family. Court also found Moore was able to present this evidence at trial anyway.

DISSENT: (Green, J) Dissent concluded that police officers had insufficient factors to establish reasonable suspicion to extend Moore's detention. Dissent would have reversed the district court and suppressed the fruits of the search of Moore's vehicle.

STATUTES: K.S.A. 8-1523(a); K.S.A. 22-2402; K.S.A. 65-4163(a)(3); and K.S.A. 79-5204(a)

Rules Governing Court Reporting Board are Amended

Effective Jan. 3, 2006, the Kansas Supreme Court has extensively amended the Rules Relating to the State Board of Examiners of Court Reporters. See Supreme Court Rule 301, et seq. Most of these rules are of more immediate interest to court reporters than to the practicing bar; however, some areas may be of general interest.

• Kansas will become the 25th state to recognize voice writers. See Rule 308.

• Reporters who have passed an examination in a state with equivalent or more stringent testing standards than Kansas may, under certain conditions, be certified without taking the Kansas examination. See Rule 309(d).

• Certified court reporters in Kansas will be subject to an annual registration, beginning July 1, 2006. See Rule 310(b). Attorneys who seek to employ a certified court reporter for depositions will be able to verify certification by calling the Appellate Clerk's Office.

• Due process procedures have been formalized for handling complaints against certified court reporters. See Board Rule 9.

Certified court reporters include reporters who work in an official capacity for the courts as well as those who engage in freelance reporting. Freelance reporters are not required to be certified.

To view the text of these rule changes, go to http://www.kscourts.org/ctruls/2005SC163.pdf.
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- Pre-game activities: dinner at Brancato’s Bullpen, parade around the infield, and drawings for prizes!
- Field Plaza tickets to the Chicago White Sox vs. Kansas City Royals 7:10 p.m. game.
- See your KBA President Rich Hayse throw out the first pitch!

Tentatively Scheduled CLE Topics

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