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

The Journal of the Kansas Bar Association is published monthly with combined issues for July/August and November/December for a total of 10 issues a year. Periodical Postage Rates paid at Topeka, Kan., and at additional mailing offices.

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Cover photo by David Gilham, KBA desktop publishing coordinator. Molly Bush, Topeka, subject. Thank you to Knoll Patient Supply, Topeka, for use of wheelchair and Susan Liotta, principal of Williams Science and Fine Arts Magnet School, Topeka, for location.

KANSAS BAR ASSOCIATION 124th Annual Meeting of the Kansas Bar Association June 8-10, 2006 Overland Park Marriott www.ksbar.org

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From the President
Richard F. Hayse

Don’t Bet on Immortality

Topeka attorney Ruth Graham has been asking attorneys this rather provocative question: “What if you walked out of your office on Friday evening and didn’t come back on Monday morning?” No, we’re not talking retirement; your absence is entirely unplanned. Ruth is a solo practitioner, and recent health issues forced her to confront the kinds of questions most of us have been avoiding.

For example, who in your office knows or can learn the deadlines you face this week or this month? Is there a central calendar system that would allow your secretary, assistant or colleague to quickly get a handle on filing deadlines, court appearances, scheduled client conferences? Ruth makes these questions tougher in the continuing legal education seminar she leads. She forces us to assume that you can’t communicate because you’re either dead, comatose or disappeared.

If we practice in a group setting, we probably assume that one of our colleagues would step in to help on an emergency basis. But that assumption is based on another assumption, namely that the colleague knows what needs to be done. To the extent that we only carry in our heads the next step to be taken in each of our files, it may take someone else days or even weeks to piece together enough information to try to pull our practice out of a crash dive. One solution is a brief memo in each file to note the next step or sequence of steps that needs to be taken. Such a tickler system would also offer the fringe benefit of heading off lots of malpractice opportunities while we’re still in the picture.

But there’s yet another problem if you are a private practitioner. Your client files are confidential and another person who is not a member of your practice group probably has no right to breach that confidentiality without the consent of the client. This obstacle can be solved by scrambling around to obtain client consent after the fact, but that could be a daunting task in a high-volume practice. A better solution would be to include language in each representation agreement to authorize another attorney to represent the client on a temporary basis in the event of your death or disability. We all obtain representation agreements from each client anyway, don’t we?

Next test: Who has authority to sign checks in your office? And let’s make that one a little tougher too by including your trust account in the question. The very fact that you are holding the funds of a client is part of the attorney-client privilege which would be breached if someone outside your practice group had access with signature authority over the account. The problem is toughest of all for solos who practice without a secretary or other assistant. Again, client consent in the representation agreement is probably the best preventive medicine, coupled with a careful grant of authority to another attorney to access your account.

While you are still alive, many of the difficulties other than client consent can be addressed with a limited durable power of attorney to another lawyer which would spring into effect only upon your disability. Your colleague could be given express authority to gain access to your office, bank accounts and files, to hire and fire employees and generally keep your practice going during your absence. That person should probably also have a HIPAA waiver to gain information about your medical condition in order to make informed decisions.

Finally, there’s no substitute for careful post-mortem instructions in a thoughtfully drawn will or trust, together with a designated successor to either liquidate or assume your practice. The alternative is to have the district court appoint a receiver, with attendant delays, fees and uncertainties.

My thanks to Ruth Graham for reminding us of the potential for trouble and for making us realize that an expectation of eternal life should not be our default solution to these worldly problems.

Richard F. Hayse can be reached by e-mail at rhayse@morrislaing.com or by phone at (785) 232-2662.
“As an attorney practicing law in a more ‘remote’ part of the state, the KBA Annual Meeting affords me the opportunity to meet with colleagues from across Kansas to exchange ideas and network once a year.

When I started practicing law, one of the senior partners in my firm impressed upon me the importance of professional affiliations and activities, including the KBA Annual Meeting. It seems that with each passing year, I understand and appreciate his words more and more. I have attended many annual meetings over the past 16 years and always come away with a sense of pride in my chosen profession. I truly believe that through our participation in the KBA and its Annual Meeting, not only do we as individual attorneys benefit, but also the entire bar benefits as well.

In today’s world we all have busy schedules and have to carefully pick and choose how to spend our precious time. I hope you will choose to attend this year’s KBA Annual Meeting.”

Tamara L. Davis,
Tamara L. Davis P.A.,
Dodge City
KBA member since 1990
Annual Meeting Task Force Chair, 2005

124TH ANNUAL MEETING of the
KANSAS BAR ASSOCIATION
JUNE 8-10, 2006
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Visit www.ksbar.org for more information
Bench-Bar Committee Reviewing Accelerated Appellate Procedures
By Hon. Benjamin L. Burgess

It’s often said that there are two things you should not watch being made: sausage and law. As chairman of the KBA’s Bench-Bar Committee, I want to discuss one of the issues the committee is looking at — or, stated differently, to talk about one of our pieces of sausage.

This particular issue is of some interest to me personally, given the fact that I recently completed my third year as a district judge, and I just completed an assignment in the Civil Department of the 18th Judicial District in Sedgwick County. The matter I will discuss centers on the effective and efficient utilization of resources, in particular judicial resources, while also streamlining at least one facet of appellate practice.

In the state of Oklahoma, they have a Supreme Court rule that allows for an accelerated procedure for handling certain appeals and dismissals. It’s Oklahoma Supreme Court Rule 1.36, which deals with appeals of summary judgments and motions to dismiss for failure to state a claim or lack of jurisdiction.

The centerpiece of the rule is contained in subsection (g), which provides in pertinent part, the following: “The appellate court shall confine its review to the record actually presented to the trial court. Unless otherwise ordered by the appellate court, no briefs will be allowed on review.” (Emphasis added.) Under another subsection, the appellate court has the discretion to decide the case either with or without argument. The Web site containing the rule is http://www.oscn.net/applications/oscn/deliverdocument.asp?citeID=438279.

Former U.S. Supreme Court Justice Felix Frankfurter once said, “To some lawyers, all facts are created equal.” It seems to me that this rule is the equivalent; all the facts equally created shall be provided to the appellate court — the same as to the district court.

At this point, the Bench-Bar Committee has proposed the rule to the KBA Board of Governors with its recommendation that the board, in turn, recommend the rule to the Kansas Supreme Court and/or the Kansas Judicial Council for further consideration.

Our members’ input is also encouraged and can be sent to my attention at bburgess@dc18.org.

Hon. Benjamin L. Burgess

Warren E. Burger Writing Competition

The Warren E. Burger Writing Competition is designed to encourage outstanding scholarship “promoting the ideals of excellence, civility, ethics, and professionalism within the legal profession,” the core mission of the American Inns of Court.

Chief Justice Burger was a lifelong advocate of legal ethics and civility and the “founding father” of the American Inns of Court Movement. The American Inns of Court is a national association of judges, lawyers, and professors of law and their students who endeavor to maintain the highest standards of the legal profession.

The American Inns of Court invites judges, lawyers, professors, students, scholars, and other authors to participate in the competition by submitting an original, unpublished essay of 10,000 to 25,000 words on a topic of their choice addressing issues of legal excellence, civility, ethics, and professionalism.

The winning entry will be decided by a panel of judges comprised of Dean Stephen Gillers of New York University School of Law, Professor Geoffrey C. Hazard of the University of Pennsylvania Law School, Professor Robert M. Wilcox of the University of South Carolina School of Law, and Professor Nancy J. Moore of Boston University School of Law.

The author of the winning submission will receive a cash prize of $5,000, and the winning essay will be published in the South Carolina Law Review. The Warren E. Burger Prize will be presented to the author at the American Inns of Court Annual Celebration of Excellence at the U.S. Supreme Court on Oct. 21, 2006. Other submitted works may also be eligible for law journal publication or featured in The Bencher, the national magazine of the American Inns of Court.

Complete rules of the Warren E. Burger Writing Competition may be downloaded from the American Inns of Court Web site, www.innsofcourt.org. Click Awards and then Warren Burger Prize.

Sincerely,
Hon. Deanell Reece Tacha
President, American Inns of Court
The Importance of Perceptions

By Christopher J. Masoner, KBA Young Lawyers Section president

In the February 2006 issue of the American Bar Association Journal, there was a letter to the editor commenting on the importance of a lawyer’s appearance. The writer was responding to an article from an earlier issue of that journal on business casual attire. His argument was that the original article missed something by ignoring the importance of physical fitness toward conveying “respect for the profession.” He even went so far as to claim that a physically fit lawyer in slacks and a sport coat “presents a far more professional appearance that a business suit stuffed with 30-plus extra pounds of flesh.” (ABA Journal, February 2006, pg. 10.)

I consider myself to be a fairly competent lawyer, and I have as much respect for the profession as the next lawyer, even though I haven’t been to the gym in a while and I may carry a few (really … just a few) pounds over my ideal weight. I take exception to the writer’s argument and fail to see the correlation between a lawyer’s physical fitness and his or her competence and professionalism. I do not believe most lawyers would place such emphasis on their colleagues’ physical fitness. However, the letter does raise an important issue regarding the importance of perceptions.

I have written in previous columns about the importance of remembering that the practice of law is a profession — not just a business. It is equally important, however, to remember that the legal profession is also a service industry. We do not manufacture and sell a useful household product; we sell the brilliance of our legal reasoning and the uncompromising strength of our personalities. Clients pay our fees and employers pay our salaries largely because of who they perceive us to be. That being the case, the perceptions others have of us — our reputations — are one of the most important business assets we have.

Socrates (apparently) said, “Regard your good name as the richest jewel you can possibly be possessed of — for credit is like fire; when once you have kindled it you may easily preserve it, but if you once extinguish it, you will find it an arduous task to rekindle it again. The way to gain a good reputation is to endeavor to be what you desire to appear.” (This “Internet” thing is brilliant.) The advice is well-taken for young lawyers.

As you embark on your practice, you have very little “professional capital” on which your reputation will be based. Those new lawyers who ranked at the tops of their classes or attended what are perceived to be top law schools may be perceived as better lawyers (though this is not necessarily the case); but in the early years of our practice, the differences in our backgrounds will largely be ironed out, and our professional reputations will be founded primarily on the work we do in these years.

Socrates is correct as to the way to gain a good reputation. The fundamental key to having a reputation as a good lawyer is to do good work — especially in the early years. However, Socrates does not go far enough. We must not only “endeavor to be what we desire to appear;” it is imperative that we also pay attention to the perceptions others have of us. We can do very good legal work for our clients or employers; but if they do not appreciate the work we are doing, we have lost the opportunity to build our professional capital. Because these are the consumers of our legal services, their perceptions are paramount.

This is not to say we should go around town telling everyone we meet what good lawyers we are. Some lawyers make the mistake of spending so much time promoting themselves that they do not pay enough attention to the work they are hired to do. The key to having a successful legal career is, first, doing good work for the people paying us to do it; and, second, communicating with those people to make sure they appreciate the work we are doing. As a practical matter, that means staying on top of all of our files and always letting our clients or employers know that we are doing so.

Time and attention spent cultivating the perceptions others have of us in the early years of our careers will certainly pay off in the long-term. As Socrates said, once the fire of our reputation is kindled, it is easily preserved. An Irish proverb states the matter differently (and perhaps more cynically): “If you get a reputation as an early riser, you can sleep till noon.” (Did I mention that I love the Internet?) The point is this: If we establish a reputation as a hard-working and capable lawyer in the early years of our practice, that reputation will be easier to maintain as we progress in a long and successful career. ■

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.

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THE JOURNAL OF THE KANSAS BAR ASSOCIATION
Collecting Lawyers of Different Styles

By Beth Warrington, publications coordinator

Whether a novice or a professional collector, art tends to offer an opportunity to reflect on one’s craft. John J. Jurcyk Jr. began his collection of lawyer art after his wife, Rita, of 48 years bought him his first painting.

The painting, by artist John Poderbarac, was an abstraction of a lawyer objecting in trial before the bench. Having been in more than 200 jury trials, Jurcyk found the artistic depictions of lawyers in trials to be inspiring and reflective, as well as lighthearted and funny. He values different ones for different reasons. In terms of market value, he has one created in silver and marble that he brought back from a trip to Israel in 1996. He has one by an Italian sculptor named Moreto because the figure is whimsical and playful.

“I also like a plastic one of Snoopy as a lawyer,” he said, “because I’m a fan of art parable, and the comic strip ‘Peanuts’ is definitely art parable.”

His collection now stands at more than 100 figurines and scenes of law and continues to grow. Rarely does Jurcyk purchase pieces himself for his collection; most come to him as gifts. Jurcyk is known to loan out his collection, including being a featured collector at “Tons More Things People Collect” that ran last July at the Crown Center Showplace in Kansas City, Mo.

His collection is divided into several different categories, including the barrister; famous figures in law (i.e., Lincoln, St. Thomas More, and Rumple); the country lawyer; the clown lawyer; the lawyer with his or her briefcase; animals as lawyers; and scenes of lawyers before a jury, judge, or client.

Jurcyk’s hero, St. Thomas More, is a prominent feature in his collection. More worked for peace and justice and defined justice as knowing and doing good. Jurcyk said More is a great model for attorneys and politicians who must stand firm despite public opinion or pressures to win at any cost, as he himself paid the ultimate price for truth.

Jurcyk’s daughter, Alison, gave him a statue of More to add to his already large collection.

“If wanting to start your own collection,” Jurcyk said, “just tell people what you collect and the pieces will come to you. For example, my daughter-in-law, Sarah, has a collection of bunnies. It’s natural for my wife and me, wherever we are, to look for a special bunny to give to her.”

Jurcyk also recommends that people keep an index of their collection. He said it is as simple as making a filing card for each new piece explaining the circumstances of its acquisition, price, artist, etc.

“As Socrates said, ‘the unexamined life is not worth living.’ I think that art with ‘the lawyer’ as its subject helps us reflect on our craft,” Jurcyk said.

While studying history at Rockhurst University in Kansas City, Mo., Jurcyk had originally planned to become a college professor. But he said spending time in the bunkers of Korea changed his mind and also gave him the G.I. Bill to attend law school. He earned his juris doctorate in 1957 from the University of Kansas School of Law.

Jurcyk currently works for the Unified Government of Wyandotte County/Kansas City, Kan. Prior to joining the unified government, Jurcyk was a partner with the firm McAnany, Van Cleave & Phillips P.A. in Kansas City, Kan., which he joined in 1958.

Jurcyk and his wife have five children, including three who work in the legal profession.

Jurcyk is a member of the Kansas, Wyandotte County, and Johnson County bar associations; National Lawyers, National Diocesan Attorneys, and American Arbitration associations; and the American College of Trial Lawyers. He is admitted to practice in Kansas, the U.S. Supreme Court, the U.S. District Court for the District of Kansas, and the U.S. Court of Appeals for both the 8th and 10th circuits.

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Attached to this page of the Journal is an invitation for a very special inaugural event for the Young Lawyers Section and the KBA. The Section is proud to announce that we will be hosting a dinner and auction benefiting the Justice Robert L. Gernon Scholarship Fund.

Justice Gernon passed away last spring; in his memory, a scholarship fund has been created to benefit students attending either Kansas law school. The YLS hopes that this event will raise enough money to get the scholarship program off to a good start, and that this event will become a special part of the KBA annual social calendar. The dinner is open to anyone who would like to attend.

The event is scheduled for Saturday, April 22, 2006, at the Topeka Country Club. Tickets are $50 per person or $75 per couple. This black-tie optional dinner will start with a cocktail reception at 6:30 p.m., with a silent auction to take place throughout the evening. We hope that the weekend date will allow KBA members from across the state to attend.

We are currently in the process of gathering items for the auction. If you have something to donate, such as nights at a time-share, frequent flier plane tickets, or a special bottle of wine, please contact Chelsey Langland by phone at (785) 291-3916 or by e-mail at langlandc@kscourts.org. We hope to have interesting items, which will spur competitive bidding; remember, the money is going to a good cause.

Justice Gernon was a friend to all of us. Upon meeting him, most people received a warm handshake and heard him say, “Hi, I’m Bob; I work for the state.” He was also a special friend of the KBA. Justice Gernon received the KBA Outstanding Service Award in 1991 and the Professionalism Award in 2001. He was recognized posthumously with the 2005 KBF Robert K. Weary Award. He was honored for his dedication to fostering the welfare, honor, and integrity of the Kansas legal system and to enhancing public opinion of the role of lawyers in our society.

This event allows the KBA to add to Justice Gernon’s enduring legacy in the legal community. In addition, Justice Gernon’s friends know that he would have liked nothing better than to have a group of people gathered together for the purpose of having a good time.

The YLS hopes you will be able to attend this event and help make it a success. YLS President Chris Masoner said, “We are very excited about starting this annual event where lawyers from around the state can gather to have a good time, honor the memory of a good friend, and support a worthy cause in his honor.” Tickets may be obtained by calling the KBA at (785) 234-5696. We look forward to seeing you in April.

Robert K. Weary Award

The Board of Trustees of the Kansas Bar Foundation established the Robert K. Weary Award in 2000 to recognize lawyers or law firms for their exemplary service and commitment to the goals of the Kansas Bar Foundation.

Despite his objection, the Board of Trustees selected Bob Weary as the initial recipient of the award in recognition of his decades of service to his community, the Kansas Bar Foundation, and the legal profession in Kansas. Tragically, Mr. Weary passed away in early 2001.

Justice Robert L. Gernon was recognized posthumously with the 2005 Robert K. Weary Award. He was honored for his dedication to fostering the welfare, honor, and integrity of the Kansas legal system and to enhancing public opinion of the role of lawyers in our society.

Nominations for the Robert K. Weary Award should be submitted to Jeffrey Alderman, KBF executive director, P.O. Box 1037, Topeka, KS 66601-1037, by March 31, 2006.
The Downfall of Legal Education

By Tim Hurley, Washburn University School of Law

Legal pads full of case briefs, analyses, and interpretations. Textbooks with notes and highlighting that indicate that one read and perhaps reread the cases. A tape recorder to record and reheat the lecture. Weekends at the law library. Sharpened pencils. The fear of a challenging professor. Attentive students. Punctuality. Respect. Is this not what law school is supposed to be like? I can only imagine. Did “The Paper Chase” lie? As they say, “times have changed.” I guess. Professor Kingsfield surely would not be happy. So, what happened?

Whatever the professor is saying must be important. Students are striking the keys on their laptops, which must have replaced the legal pads in class, with such fury. Of course, I cannot hear in the back of the class because a cell phone just rang and was answered. I am sure the call was important. I look to my neighbor’s laptop so I can scribble down the notes that I missed. Wait … she just got an instant message, which is now the fourth on her screen. After she responds, she closes it and reveals what appears to be an intense solitaire game. I look to my other neighbor. He is looking at pictures from a very nice vacation. I look around the room and almost every laptop I can see has one or more conversations, a solitaire game, or the Internet opened to something other than Lexis or Westlaw. There are no notes to obtain.

The professor calls on a student to give the facts of the case. The response from the student is, “what case are we on?” The professor states the case name. The student responds, “I didn’t read that case.” The professor calls on the next person on his list and gets the same response. Finally, he asks for a volunteer. The Socratic method works, if at all, only if the student reads the case. A student recently explained to me that he never reads the cases for class because he does not get anything from them. Moreover, why brief? Lexis briefs for you.

There is no question that technology has helped the legal profession. Case opinions reach the world in record time. Lexis and Westlaw tell us if a case is still good law. We can type and edit a memo more quickly. We can cut and paste from our briefs (for those of us that do them) to our class outline. We can type our notes. We can e-mail. However, technology usage has gone awry. Law schools have good intentions by putting wireless Internet in the school and professors have good intentions when allowing laptops in the classroom. They should be used for note taking and searching for cases when professors ask us to. Students cannot possibly learn everything from class when they have four conversations going and a solitaire game. Am I missing something? Is law school that easy? Furthermore, students cannot learn when they have not read the cases.

So what happened? Technology happened. Technology is robbing students of a good legal education. Technology is robbing us from learning from each other in class. In addition, technology is robbing society from having well-trained lawyers.

Have law schools failed us? This is not just an issue at my present law school, as I am a transfer student and have seen its effects elsewhere. Nevertheless, the screening process, although different at every school, seems to be working. I am in class with mostly intelligent students. The wireless Internet helps those that use it appropriately. Laptops help those that use them appropriately. The solution to this issue is up to the professors, law schools, and the students.

Professors should be more demanding. Allowing students to miss six classes before any retribution, allowing students to get away with not reading repeatedly, and allowing students to come to class whenever and leave whenever are inappropriate in law school. In addition, the admissions process can do a better job of selecting students; there are plenty of applicants. Several students have commented to me that they are only in law school because they did not want to get a job; yet they do not intend to practice law. Certainly, there are candidates that are more qualified that deserve admission to law school. As for the students, we should prepare for class, pay attention in class, use the laptop as intended during class, and show up as if we had court that day. A judge is not going to let us come and go as we please.

Professors are intelligent men and women; otherwise, they would not be law professors. The students are intelligent men and women; otherwise, they would not be law students. Both groups must realize that this is a problem, yet there has not been any corrective action from either of us. It is time to return the law school experience to what it should be; the most demanding, challenging, grueling three years possible. In the end, law schools, professors, students, and the legal profession will be better for it.

About the Author

Tim Hurley is a first-year law student at Washburn University School of Law. He transferred to Washburn after completing one semester of law school at the University of Akron. He holds a bachelor of science in accounting from Ohio State University and a master of business administration in executive management from Ashland University, Ashland, Ohio. He has held various accounting and management positions in Ohio and, most recently, California.
Life has its share of mysteries, but one that has befuddled me is why our culture seems obsessed with making old people look young again. These days it seems the fastest growing profession is plastic surgery. Ads for antiaging creams are everywhere. Folks in Hollywood brag about their Botox injections. I’m tired of the ads for “Just for Men” — a product that gets rid of the gray in men’s hair. These feature actors who stare in the mirror and say “even though I’m 69, I want my hair to be black as coal.” And no one seems bothered by this.

Except me. In my book, age is a good thing. Aging, as I see it, is a sign of experience, seasoning, maturity, and responsibility. I trust someone with gray hair. It’s that “been there done that” look to them. “I’ve had this happen before. Let me tell how I handled it.”

Nowhere do I feel more strongly about this than when I get on an airplane. When I do, my first act is to peek in the cockpit. All I want to see is silver hair. Someone who looks like they are not taking their maiden voyage at my expense. Someone who does not shrink at the prospect of midair turbulence. Someone who resembles Paul Newman or Robert Redford, with crows feet at the corners of their eyes. In other words, not a clone of Johnny Depp. The same is true of my doctor. We all choose our own doctor and do so wisely. My nightmare is when I take one of my children to the ER and the doctor looks like that Doogie Howser guy who graduated from med school at age 16. “Mr. Keenan, your son needs major surgery. I’ll get right on it.”

I take this perspective into my law practice. All of us do. When I interview a company witness, I want to see white hair. If my guy still has an acne problem, then I have a problem. Which means I need to get more authority.

So I chock this one up to another reason why I’m happy to be in the legal profession. The original drafters of the Constitution — mostly lawyers — had the good sense to say that you have to be at least 35 to run for president. I think they should have raised that age by another 30 years. Ronald Reagan was nearly 78 when he completed his second term, eight years older than the next-oldest president, Dwight D. Eisenhower. The last time I checked, Ronnie was one great leader.

In athletics you want to be young, but in coaching you want to be old. Take Penn State’s Joe Paterno, for example. This guy is 79 years old. He was the coach who beat KU in the 1968 Orange Bowl. I was 9 at the time. KU has hired and fired 10 coaches since then. Yet Paterno is at the top of his game. Last week the college football writers declared Joe’s Penn State recruiting class to be in the top five in the country. Why, you ask? Because parents like to send their sons to someone who has “been there, done that.” Bobby Bowden, coach at Florida State, is 76. Another top 10 recruiting class.

And if you think I’m going on a frolic and detour, consider that some of the worst trial outcomes were due to attorneys whose hair was black, not gray. Like the O.J. Simpson trial, for example. I did some quick math and learned the average age of his defense team was 55. The average age of the prosecutors? Eleven. My dad is 76, and his law practice has never been busier. Guess what color his hair is? White.

I looked at disasters outside the courtroom. The captain of the Titanic was actually pretty old, 62, but he obviously wasn’t quite old enough. I suspect he aged pretty quickly once he saw that iceberg. General Custer was 36 when he arrived at Little Bighorn. Any questions?

So I for one am declaring an end to the youth movement. I’m old but getting older. I can hardly wait.

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. You may reach Matt at mkeenan@shb.com.

Annual Kuether Memorial Golf Scramble
Sponsored by the Washburn Student Bar Association
Saturday, April 1, 2006
Lake Shawnee Golf Course, Topeka, Kan.
Continental Breakfast – 8 a.m. • Tee time – 9 a.m.
Cost of the event – $75 per person
(includes breakfast, lunch, green fees, and cart)
Net proceeds go to the John F. Kuether Memorial Endowed Scholarship, which provides scholarships to Washburn Law students.
For additional information or to sign up, contact Ho Son at ho.son@washburn.edu or by phone at (785) 640-0802.
2006 KBA Nominating Committee Nominations

The KBA Nominating Committee recently met and nominated candidates for KBA officer and KBA Delegate to the ABA House of Delegates positions. Listed below are the officer candidates as of Jan. 27, 2006. Biographical information for these and any additional candidates will be published in the Journal of the Kansas Bar Association prior to the voting deadline.

2006 KBA Officers Nominations

KBA President: David J. Rebein, Dodge City
KBA President-elect: Linda S. Parks, Wichita
KBA Vice President: Ernest C. Ballweg, Overland Park
KBA Secretary/Treasurer: Timothy M. O’Brien, Overland Park, and Thomas E. Wright, Topeka
KBA Delegate to the ABA House of Delegates: Hon. David J. Waxse, Kansas City, Kan.

Open Seats on the Board of Governors

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

• District 1: Incumbent Timothy M. O’Brien is not eligible for re-election. Johnson County.
• District 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 7: Incumbent Rachael K. Pirner is eligible for re-election. Sedgwick County.

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 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.

Elections will be held by secret ballots mailed in April for any contested positions. Uncontested nominees will be declared elected. All terms for elected officers and board members will commence at the conclusion of the KBA Annual Meeting in Overland Park, June 8–10, 2006.

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.

1. Nominations for officer and KBA Delegate to the ABA House of Delegates positions can also be made prior to March 10, 2006, by submitting a petition signed by 50 regular members of the KBA to the KBA executive director.
Members in the News

CHANGING POSITIONS

Jeremy C. Adest, Stacy M. Bunck, W. Christopher Hillman, and R. Chace Ramey have joined Polsinelli Shalton Welte Suelhaus P.C., Kansas City, Mo., as associates.

Larry L. Askew II has joined SIZEWise Rentals LLC, Kansas City, Mo.

Jeffrey C. Baker and Curtis O. Roggow have been elected partners at Sanders Conkright & Warren LLP, Overland Park.

Julie A. Beswick has joined Advantage Trust Co., Abilene.

Robert P. Burns and Jarrod C. Kieffer have joined Stinson Morrison Hecker LLP, Wichita.

Eric V. Calvert has joined the Kansas Court of Appeals, Topeka, as a research attorney.

Brian R. Collignon has joined Fleeson, Gooing, Coulson & Kitch LLC, Wichita, as an associate.

Christopher C. Confer has joined Yeretsy & Maher LLC, Overland Park.

Jennifer E. Conkling has joined the Appellate Defender Office, Topeka.

Heather L. Counts has joined Vincent & Fong LLC, Kansas City, Mo.

Vincent M. Cox has joined Fisher, Patterson, Sayler & Smith LLP, Topeka, KS 66612.

Christine H. DeMarea and Lisa A. Veselich have joined Blackwell Sanders Peper Martin LLP, Kansas City, Mo.

Kara M. Dorssom has become a senior litigation attorney for Kansas City Power & Light Co., Kansas City, Mo.

Bradley L. Farney has joined Stewart Title Guaranty Co., Kansas City, Mo.

Lyle J. Fuller has joined Smith Hartvigsen PLLC, Salt Lake City.

Matthew S. Gough, Linda K. Gutierrez, and David J. Rempel have joined Barber Emerson L.C., Lawrence.

Tim S. Haverty has joined Doster Mickes James Ullom Benson & Guest LLC, Kansas City, Mo.

Nicholas J. Heiman has joined the Lyon County Attorney’s Office.

Paula N. Johnson has joined the Kansas Corporation Commission, Topeka.

Robert E. Keeshan has joined Scott, Quinlan, Willard & Barnes LLC, Topeka.

Amanda J. Kiefer has joined Security Benefit Corp., Topeka.

Robert E. Lastelic and Jill D. Olsen have joined South & Associates P.C., Overland Park.

Joseph G. Lauber has become an associate with Gilmore & Bell P.C., Kansas City, Mo.

Crystal C. Marietta has joined Phalen, Bicknell & Markle, Pittsburg.

Jeffrey S. Nichols and Kevin D. Weakley have been elected shareholders and directors of the firm of Wallace, Saunders, Austin, Brown & Enochs Chtd., Overland Park. Jennifer J. Mickelson has joined the firm.

John C. Peterson has joined Capitol Strategies LLC, Topeka.

Samantha H. Seang has joined the U.S. Bankruptcy Appellate Panel of the 10th Circuit, Wichita.

James C. Spencer has joined Hinkle Elkouri Law Firm LLC, Wichita.

CHANGING PLACES

Anderson Law Offices have a new business address, 6363 College Blvd., Suite 100, Overland Park, KS 66211.

Charles C. Baylor has a new business address, 933 S. Kansas Ave., Suite 200, Topeka, KS 66612.

Brenda J. Bell PA has moved to 327 Foyntz Ave., Suite 201, Manhattan, KS 66502.

Franke Schultz & Mullen has moved to 8900 Ward Parkway, Kansas City, MO 64114.

Franklin Law Offices have moved to 727 N. Waco, Suite 550, Wichita, KS 67203.

Sharonda L. Friday has started her own firm, located at Southwest Plaza Office, 3601 S.W. 29th St., Suite 207, Topeka, KS 66614.


Michael G. Grimmett has a new business address, 120 E. 5th, P.O. Box 219, Augusta, KS 67010.

Bridget M. Guth has started Guth Law Firm LLC, 404 E. 65th Terrace, Kansas City, MO 64131.

Law Offices of Daniel E. Doherty have moved to 8500 College Blvd., Suite 113, Overland Park, KS 66210.

Patricia L. Lear-Johnson has started her own firm, located at 401 W. 58 Highway, P.O. Box 316, Raymore, MO 64083-0316.

Murry, Tillotson & Wiley Chtd. has moved to 119 Delaware, Leavenworth, KS 66048.

Jayne A. Pearman has started Jayne A. Pearman L.C., 4901 W. 119th St., Suite 204, Overland Park, KS 66209.

South & Associates P.C. has moved its Kansas City, Mo. office to 6363 College Blvd., Suite 100, Overland Park, KS 66211.

The Law Firm of Shelley Scheibel Patterson LLC has moved to Mainmark Building, 1627 Main St., Suite 410, Kansas City, MO 64108.

The Post Law Firm LLC has moved to 4700 Belleview, Suite 404, Kansas City, MO 64112.

(continued on next page)

Dan’s Cartoon by Dan Rosandich

“You Said I Should Bring A Mouthpiece.”
OBITUARIES

Spencer L. Depew
Spencer L. Depew, 72, Wichita, died Dec. 15. He was a member of Depew Gillen Rathbun & McInteer.

Depew earned his bachelor's degree from Wichita State University in 1955 and his juris doctorate from the University of Michigan Law School in 1960. He joined the Kansas Bar Association in 1960 and was a member of the KBA Corporate Banking and Business; Oil, Gas, and Mineral; Real Estate, Probate, and Trust; and Tax Law sections. He was also a member of the Kansas Independent Oil & Gas Association.

He was preceded in death by his parents, Claude and Frances (Bell) Depew. Survivors include his wife, Donna, of the home; son, Clifford, Wichita; daughter, Sally Finegold, Leawood; sisters, Mary Campbell, Redington Beach, Fla., Mina Bush and Jeanette Graber, both of Wichita, and Nancy Lauck, Reston, Va.; and four grandchildren.

Frank C. McMaster
Frank C. McMaster, 78, Wichita, died Dec. 17. He was born June 9, 1927, in Wichita. He served in the U.S. Navy in 1945-1946.

He attended the University of Kansas, earning his B.A. in 1950 and his LLB in 1952. McMaster was admitted to practice in all state and federal courts in the state of Kansas, the U.S. Court of Appeals for the 10th Circuit, and the U.S. Supreme Court. In 1952 he joined the Kansas Bar Association, becoming a lifetime member in 2002. He was a member of the Kansas House of Representatives, 1969-1974, and he was a founding member of St. Thomas Aquinas Catholic Church, Wichita.

He was preceded in death by his wife, Margaret. Survivors include sons, John, Wichita, and Kevin, Lawrence; daughter, Susan, Colorado Springs, Colo.; brother, D. Lee, Wichita; and eight grandchildren.

Phillip S. Mellor
Phillip S. Mellor, 80, Wichita, died Dec. 28. He was born March 31, 1925, in Wichita.

Mellor earned his bachelor's degree from Friends University, and in 1953 he earned a law degree from Washburn University School of Law. He was admitted to the Kansas bar and the U.S. District Court for the District of Kansas that same year. He was a lifetime member of the Kansas Bar Association and was also a member of the Wichita Bar Association, serving as its president from 1984-1985. He was a fellow of the Kansas Bar Foundation.

Mellor was appointed to the Kansas Judicial Council in 1991, serving for 11 years. He was a member of the council's Eminent Domain and Civil Code committees.

Mellor was an active Boy Scout leader and served the Quivira Council as district commissioner, executive board member, and council vice president. He was also commodore of the Ninnescah Yacht Club.

Survivors include his wife, Babs; son and daughter-in-law, Mark and Kedre; and two grandchildren.

Steven W. Rogers
Steven W. Rogers, 74, Fredonia, died Jan. 7 in Wichita. He was born March 13, 1931, in Kansas City, Mo., the son of Louis W. and Margaret Stevenson Rogers.

He served as first lieutenant in the U.S. Army Artillery from 1953 to 1955, where he was stationed in Germany. After earn-

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Members in the News
Continued from Page 13

MISCELLANEOUS

David J. Brown, Lawrence, has been selected as one of the winners in The Benchers' creative writing contest. His entry, "It Just Didn't Add Up," will be in the March/April issue.

Timothy McKee, Triplett, Woolf & Garretson LLC, Wichita, has been appointed to the new Kansas Electric Transmission Authority by Gov. Kathleen Sebelius.

Sabrina K. Standifer, Adams & Jones Chtd., Wichita, has been named chairwoman of the Governmental Ethics Commission by Gov. Kathleen Sebelius.

Todd N. Thompson, Thompson Ramsdell & Qualseth, Lawrence, has been elected president of the Kansas Association of Defense Counsel.

Robert Van Cleave, Overland Park, has been appointed to oversee the Kansas Lottery Commission by Gov. Kathleen Sebelius.

Correction: In the January issue of the Journal, it was reported that Jason D. Stitt had joined Kutak Rock in Kansas City, Mo. Stitt joined the firm's Wichita office.

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.

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THE JOURNAL OF THE KANSAS BAR ASSOCIATION
KBA Committees and Sections Seek Volunteers

The KBA relies heavily on members who volunteer their time, talent, and energy to committees, panels, and sections. The KBA’s standing committees and panels function throughout the year, along with task forces appointed for specific tasks. In addition, the KBA has 19 sections (including the Young Lawyer Section) that focus on areas of practice and help develop legislative proposals and CLE offerings. This is the time of year that we collect information from individuals who are willing to serve on committees, panels, or sections.

Below is a volunteer form that you can use to let incoming KBA President Dave Rebein know of your interest as he considers appointments for the coming year. The section volunteer forms will be forwarded to the appropriate section officers.

**KBA Committee and Section Call Form**

Please designate which committee/panel you are interested in serving on. If indicating more than one committee, please number your choices for first, second, and third preferences.

( ) Annual Meeting (Wichita 2007)  
( ) Awards  
( ) Bench-Bar  
( ) Continuing Legal Education  
( ) Diversity  
( ) Ethics Advisory  
( ) Journal Board of Editors  
( ) Law-Related Education  
( ) Lawyers Assistance Program  
( ) Legal Aid and Referral  
( ) Paralegals  
( ) Legislative  
( ) Media Bar  
( ) Membership  
( ) Nominating  
( ) Standards for Title Examination

**Panels**

( ) Ethics Grievance Panel  
( ) Fee Dispute Resolution Panel

Please designate which section or sections to which you belong and are interested in serving as an officer or volunteer, e.g., to help with section newsletters, review legislation, develop CLE programming, etc. If volunteering for more than one section, please number your choice to indicate first, second, and third preferences.

( ) Administrative Law  
( ) Alternate Dispute Resolution  
( ) Bankruptcy and Insolvency Law  
( ) Construction Law  
( ) Corporation, Banking, and Business Law  
( ) Criminal Law  
( ) Employment Law  
( ) Elder Law  
( ) Family Law  
( ) Government Lawyers  
( ) Health Law  
( ) Insurance Law  
( ) Intellectual Property Law  
( ) Litigation  
( ) Oil, Gas, and Mineral Law  
( ) Real Estate, Probate, and Trust Law  
( ) Solo and Small Firm  
( ) Tax Law  
( ) Young Lawyers Section

Please note any special qualifications that you may have for the committee(s) and/or panel(s) you have selected:

__________________________________________________________________________

__________________________________________________________________________

Name ___________________________ Telephone ___________________________

Address _________________________________________________________________ KBA/Court # _______________________

City ___________ State _______ Zip Code _________ E-mail _______________________

Please return by April 14, 2006 to  
KBA - Committee and Section Coordinator  
P.O. Box 1037, Topeka, KS 66601-1037; Fax (785) 234-3813
Hiring a paralegal is among the most important personnel decisions a law firm, legal department, or individual attorney makes. A sharp legal assistant is a valuable addition to the legal team, improving service and supporting higher billing rates while helping control the total cost to clients.

Choosing the right person for this important work entails identifying someone with proven expertise, adaptability, and commitment to continued professional development. Employers can significantly improve the odds of choosing someone who meets these criteria by considering candidates who are professionally certified.

Since the Certified Legal Assistant/Certified Paralegal (CLA/CP) program was launched by the National Association of Legal Assistants (NALA) in 1976, it has become widely recognized as the definitive credential for paralegals. More than 25,000 individuals have participated in the program, and some 12,500 paralegals are on the certification rolls today.

How Certification Helps
Voluntary certification programs are an esteemed tradition in most professions, and have been described as the single most important movement in the area of human resources. Usually established and administered by a profession's association, certification programs help individuals proceed from education and training into the challenges of the workplace. These programs affirm the knowledge, skills, and expertise needed to perform at a high professional level, Paralegal certification also speaks volumes about individual dedication and commitment to stay abreast of developments in the legal field.

Certification programs are valuable to all employers, whether large or small businesses, corporations, or sole proprietorships. Three important ways that certification programs help those who hire paralegals are:

1. Assisting hiring decisions. No interview or single assessment tool can predict performance on the job with complete reliability, but certification is a compelling indication of strong commitment to a chosen career and the ability to meet real world standards.

2. Verifying educational background and experience. Certification programs provide the professional education and experience documentation that many employers need.

3. Helping develop recognition and incentive programs. As models for employee training plans, certification programs build confidence and competence in all employees, and they help employers provide greater service to clients. Certification programs are easily adaptable for employee training programs.

Differences
Certification programs are different from licensing programs. Licensing is the means by which a government permits a person to do something. The purpose of licensing programs is to protect the public from incompetent practice by requiring a valid license to work. This is unrelated to the purposes of certification programs.

Certification programs promote high standards of knowledge and skill. The CLA/CP program serves as a valuable and needed way for paralegals to distinguish themselves from others in the profession.

Professional certification programs are not the same as “Certificates of Completion,” which are awarded to graduates of paralegal programs. This is often a point of confusion, and it is important for prospective employers to verify what the “Certified” on a resume actually means.

Benefits
Because of the benefits of certification and the opportunities provided for professional development, creating a paralegal certification program was a top priority of NALA when the association was founded in 1975. A program was sought that would help employers identify proficient paralegals, assist paralegal curricula development, and provide an ongoing professional development program for paralegals. With the ensuing 30 years of research and development, the CLA/CP program has met and exceeded these goals.

For employers, certification means that the employee’s educational background has been checked and verified — an increasingly important detail — and that standards developed by those in the profession have been met. For private law firms, certification allows higher billing rates.

After becoming certified, paralegals must participate in at least 50 hours of approved continuing legal education every five years to maintain the CLA/CP credential.

Throughout its 30-year history, the CLA/CP certification program has garnered respect and recognition as a sound process of professional development. For example, the program is approved by the U.S. Department of Defense as a GI benefit so that veterans, or those still in uniform, may have their CLA/CP examination costs reimbursed by the government.

There is also widespread use of the CLA/CP credential by paralegals in law firms and corporations to make clear the expertise of a professional staff. This is allowed by bar associations throughout

FOOTNOTES

2. A nonprofit professional association with headquarters in Tulsa, Okla. The association, with more than 6,000 members, provides continuing education and professional development programs for paralegals nation wide, and publishes the award-winning quarterly magazine, Facts & Findings.
the nation, provided that the paralegal's nonlawyer status is clearly indicated — the CLA/CP initials alone are not sufficient.3

The program
The CLA/CP certification program may be approached by a number of paths. It is available to graduates of ABA approved paralegal instruction programs, or to college graduates with bachelor's degrees plus paralegal training. Working paralegals who have extensive experience may also sit for the examination. The rigorous eight-hour exam, administered over a two-day period, is offered each March, July, and December at testing centers located throughout the United States.

The test includes objective questions, plus two written essays that are part of the Communications and the Judgment and Legal Analysis sections. The exam covers the following:

- Communications
- Ethics
- Legal research
- Judgment and legal analysis
- Substantive law, consisting of five mini-examinations covering the American Legal System, plus four of the following areas as selected by examinees:
  - Administrative law
  - Bankruptcy
  - Business organizations/corporations
  - Contracts
  - Family law
  - Criminal law and procedure
  - Litigation
  - Probate and estate planning
  - Real estate

Advanced certification
Paralegals with the CLA/CP credential who wish to demonstrate advanced knowledge in particular practice areas, may pursue the Certified Legal Assistant Specialist (CLAS) credential. Since the CLAS program was introduced in 1982, more than 1,100 paralegals have achieved this advanced certification by passing a four-hour written examination. Advanced certification is available in the following areas:

- Bankruptcy
- Civil litigation
- Corporate/business law
- Criminal law and procedure
- Intellectual property
- Probate and estates

(Continued on next page)
• Real estate
• California Advanced Specialty (advanced certification on a state specific law and procedure in the areas of civil litigation, business organizations/business law, real estate, estates and trusts, and family law).

Something new

Work began in 2002 on a restructured Advanced Paralegal Certification (APC) program slated to begin in 2006. The new program will be curriculum based and offered exclusively by way of the Internet. A CLA/CP certified paralegal will be able to participate in a Web-based training program and be awarded advanced certification credentials by demonstrating mastery of the material in a battery of tests.

There are advantages to this model of certification beyond the convenience of a Web-based program. The clearly defined subject matter in a curriculum-based program makes better sense to employers.

In the former CLAS program, it was difficult to explain what advanced certification in an area as broad as civil litigation actually meant. When certified paralegals complete the advanced program under the new model, employers will receive a list of specific areas that were mastered, offering a much better understanding of the preparation required and the depth of the material.

Courses for the advanced curricula are written by experts in training and development programs and in sequential learning. They are guided by an outline developed by a task force of experienced legal assistants, paralegal educators, attorneys, and paralegal managers. The new programs meet the same high standards of certification and educational programs long sponsored by NALA. They may be relied upon by employers and paralegals alike.

The benefits of voluntary professional certification programs such as the CLA/CP and APC programs extend to the entire legal profession — educators, attorneys, and managers as well as paralegals. These programs encourage paralegals to participate in local study groups, and they promote inclusion of CLA/CP review programs in paralegal school curricula. A number of exam review publications, as well as online seminars and workshops, have been developed by NALA that benefit all paralegals.

Through the certification program, paralegals take charge of their professional and career development, and demonstrate a commitment to professional growth that rivals that of any profession. Firms and organizations which employ paralegals with CLA/CP or APC credentials can be confident that their interests are being well served.

About the Author

Debra J. Monke is a certified legal assistant specialist and intellectual property administrator for State Farm Insurance Companies in Bloomington, Ill. She has been a member of NALA since 1985 and served in a number of leadership positions before her election as president in July 2004.

When you can’t take the case…
we’ll find someone who can!

Sometimes a prospective client comes to you with a case that you just can’t take. When this happens, the KBA Lawyer Referral Service urges you to call a trusted source and let the LRS help the client meet their needs.

With more than 300 participating members covering over 25 different practice areas, the LRS wants to be Kansas’ trusted source for finding an attorney. So if you ever find yourself in a bind, and with a client’s needs on the line, think of the KBA Lawyer Referral Service.

For more information on the Lawyer Referral Service, call (785) 234-5696 or log on to www.ksbar.org.

The trusted source for finding the right attorney.
Advanced Directives: What Direction Does Kansas Allow?
By Emily A. Donaldson, Stevens & Brand, Lawrence

The recent thunderstorm of political and media attention garnered by the Terry Schiavo case has made one point saliently clear: lawyers should be increasingly diligent in counseling clients on the use and importance of advanced directives. Given the wide spectrum of personal opinions fueled by moral/religious values and political views (both from the patient’s and the physician’s perspectives), the need for a written expression regarding medical decisions, treatment, and care is vital in the event of one’s incapacity. Although for most clients the concern manifests from the thought of “being kept alive by machines,” the planning process of discussing and executing advanced directives provides a comfort, albeit a modicum of control over an unknown future, both for the client and the attorney.

Three documents fall under the umbrella of advanced directives: a living will, power of attorney for health care decisions, and a do not resuscitate (DNR) directive. A living will provides an express direction of a patient’s wishes regarding certain types of medical treatment in the event of certain circumstances, while a power of attorney for health care decisions appoints an agent to act on behalf of a principal for the sole purpose of making medical decisions. Although Kansas provides separate statutory provisions governing these documents, it is possible to combine both documents into one, as long as all statutory requirements are met. In addition, Kansas law provides that a DNR directive may be executed by an individual, or a DNR order made by a physician, for the purpose of preventing any medical procedure being used to restart breathing or heart functioning.1

Kansas’ statutory scheme must be viewed first in the context of the applicable federal law. One of the most famous cases in this area, the Nancy Cruzan case, held that every competent person has a constitutionally protected liberty interest, under the due process clause of the 14th Amendment, in refusing life-sustaining medical treatment, including artificially supplied hydration and nutrition.2 In addition to this constitutional protection, Congress enacted the Patient Self-Determination Act of 1991, which provides that every Medicare and Medicaid provider furnish written information to each patient concerning his or her rights under state law to make decisions concerning medical care, including the right

(continued on Page 20)

FOOTNOTES

Supreme Court of the United States Swearing-In Ceremony for Kansas Bar Association Members

The Kansas Bar Association is arranging a three-day excursion to Washington, D.C., for KBA members who desire to be sworn-in before the Supreme Court of the United States. Members can enjoy the excitement of D.C. Oct. 15-17, 2006, with the swearing-in ceremony scheduled for Oct. 16 and a tour of the White House on Oct. 17. Look for more information to come on the KBA Website at www.ksbar.org.

If you have questions or would like to sign up, please contact Cindy Diederich, manager of member services, at (785) 234-5696 or at cdiederich@ksbar.org.
to accept or refuse medical or surgical treatment and the right to formulate advanced directives.\textsuperscript{3} In other words, health care providers must notify a patient of his or her right to execute advanced directives, but should not require a patient to execute advanced directives upon entering the facility. Furthermore, the medical provider must document in a prominent part of the individual’s current medical record whether the individual has executed an advance directive.\textsuperscript{4}

In 1979 the Kansas Legislature enacted its statutory version of a living will provision, known as the Kansas Natural Death Act. The act states that “adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn in instances of a terminal condition.”\textsuperscript{5} The Legislature further stated that “in order that the rights of patients may be respected even after they are no longer able to participate actively in decisions about themselves, the Legislature hereby declares that the laws of this state shall recognize the right of an adult person to make a written declaration instructing his or her physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition.”\textsuperscript{6} This statute codifies the common law living will, but is more restrictive in its definition of when the declaration is invoked.

As always with legislation, the language used requires definition. A “life-sustaining procedure” means any medical procedure or intervention that would only serve to prolong the dying process and where, in the judgment of the attending physician, death will occur whether such procedure or intervention is utilized.\textsuperscript{7} It does not include the administration of medication or the performance of any medical procedure deemed necessary to provide comfort and care or to alleviate pain.\textsuperscript{8}

In order to be a “qualified patient,” one must have executed a declaration in accordance with this act and been diagnosed and certified in writing to be afflicted with a terminal condition by two physicians who have personally examined the patient, one of whom shall be the attending physician (the physician primarily responsible for treatment and care). Interestingly enough, “terminal condition” is not defined in the act, but instead is presumably left to the medical profession to define according to its standard terms.

It is questionable whether nutrition and hydration, commonly referred to as feeding tubes, are included in the definition of “life-sustaining procedure.” As the act does not specifically address nutrition and hydration, lawyers should include this topic in their discussion with clients and, if appropriate, expressly specify in the declaration the clients wishes regarding nutrition and hydration. Since the act requires the patient to be diagnosed in a “terminal condition” before the declaration is invoked, it does not necessarily cover a patient diagnosed in a persistent vegetative state. However, nothing precludes a person from making a declaration broader in scope covering circumstances such as persistent vegetative state. This express direction will further assist an agent under the power of attorney for health care decisions in making decisions when the patient is incapacitated, but not in a terminal condition.

The formal requirements for execution of the declaration are as follows:

- must be an adult (18 or over),
- must be in writing, and
- must be signed by declarant (or by another person in declarant’s presence and by declarant’s expressed directions).
- May either be signed in the presence of two or more witnesses at least 18 years old.

But the witnesses cannot be:

- the person who signed the declaration on behalf of or at the direction of the declarant,
- related to the declarant by blood or marriage,
- heirs at law or under declarant’s will, and
- person directly financially responsible for declarant’s medical care.
- May be acknowledged by a notary public.\textsuperscript{9}

After the declaration is executed, it is the declarant’s responsibility to notify his/her attending physician and, once notified, the physician must comply with the declaration. When the patient is diagnosed in a terminal condition, the burden is on the attending physician to take the necessary steps so that a declarant becomes a “qualified patient.”\textsuperscript{10} If the physician does not comply, his action will be deemed to be a refusal to comply.\textsuperscript{11} This places a further burden on the attending physician by requiring that, if they refuses to comply, they must transfer the qualified patient to another physician. If they do not, they have committed an act of unprofessional conduct as defined under the Kansas Healing Arts Act.\textsuperscript{12}

The act also carries criminal penalties for any person who intentionally destroys, conceals or falsifies a declaration, or conceals a revocation.\textsuperscript{13} However, the declaration may be revoked at any time by being destroyed, through written revocation by the declarant, or through a verbal expression of intent to revoke the declaration (in presence of adult witness who signs a writing confirming the expression).\textsuperscript{14}

The Legislature was very clear in stating that compliance with the act does not equal suicide.\textsuperscript{15} Further, compliance is not mercy killing and is for no purpose other than to permit the natural process of dying.\textsuperscript{16} Finally, the declaration of a pregnant woman shall have no effect during the course of pregnancy.\textsuperscript{17}

As indicated above, a power of attorney for health care decisions allows an individual (the principal) to designate an agent to govern all medical decisions. Kansas law provides that an

\begin{itemize}
\item 6. Id.
\item 7. K.S.A. 65-28, 102.
\item 8. Id.
\item 9. K.S.A. 65-28, 103.
\item 10. K.S.A. 65-28, 105.
\item 12. K.S.A. 65-2837.
\item 13. Id.
\item 14. K.S.A. 65-28, 104.
\item 15. K.S.A. 65-28, 108.
\item 17. K.S.A. 65-28, 103.
\end{itemize}
individual can execute a “durable” power of attorney by using the following magic words:

“This power of attorney for health care decisions shall not be affected by subsequent disability or incapacity of the principal” or “this power of attorney for health care decisions shall become effective upon the disability or incapacity of the principal” or similar words showing the intent that the power survives the principal’s subsequent disability or incapacity. This provision overrides the common law principle that a power of attorney is void upon the disability or incapacity of the principal.

The statute also provides for portability of a power of attorney, meaning that if the document was valid when signed under the laws of the state in which the principal was a resident, it will be valid under Kansas law. Under a durable power of attorney for health care decisions, an agent may have the following authority, paraphrased from the statute:

1. To consent, refuse consent, or withdraw consent to any medical care, including decisions about organ donation, autopsies, and disposition of the body;
2. To make all necessary arrangements at or with a medical provider, including admission to long-term care facilities; and
3. To access any medical information belonging to the principal.

An agent may not invoke or invalidate a Natural Death Act declaration and cannot exceed the powers established in the power of attorney. An agent also has an express duty to act consistently with the expressed desires of the principal. This provision clearly exemplifies the importance of the declaration, or living will, since the declaration manifests the expressed desires of the principal. The living will declaration, power of attorney for health care decisions, and DNR directive are useful tools to help clients manage and control medical decisions in the event of incapacity, especially given the medical advancements that, although they might continue life, might not continue the type of life the client desires.

About the Author

Emily A. Donaldson, Lawrence, is an associate with Stevens & Brand, practicing primarily in the areas of elder law and estate planning. She is a graduate of the City University of New York School of Law, and practiced for the Legal Services for the Elderly in Queens. Donaldson returned to her roots to pursue an LL.M. in estate planning from the University of Missouri-Kansas City.

Editor’s note: “Advanced Directives: What Direction Does Kansas Allow?” was first published in the Winter 2006 edition of the General Practitioner, which is published by the KBA Solo and Small Firm Section.

The Solo and Small Firm Section plans and promotes education programs; supports and recommends legislation; distributes information through newsletters, bulletin boards, or other means of communication; and provides networking opportunities for practitioners from solo and small firms.

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21. K.S.A. 58-629(b), (c).
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2006 KBA Annual Meeting
June 8-10 • Overland Park Marriott
Annual Meeting At-A-Glance

Thursday, June 8
Time    Event
10 a.m.  Registration opens
10:30 a.m. YLS/Justice Gernon Scholarship Golf Tournament – Falcon Lakes Golf Course, Basehor, KS
1 p.m.    Sporting Clays Presented by Whitney B. Damron P.A., Topeka – Powder Creek Shooting Park
4:30 p.m. SOABs Board Meeting, Reception, and Dinner
6 p.m.    Fellows Reception and Dinner
7 p.m.    “Blues, Brews, and BAR-B-Q” Welcome Reception
7 p.m.    WU Law School Reception

Friday, June 9
Time    Event
6:30 a.m. Registration and Exhibit Area opens
7 a.m.    ABOTA Breakfast
7 a.m.    Sunrise CLE
7:30 a.m. Fellows of the ABF Breakfast
8:45 a.m. President’s Welcome
9 a.m.    Keynote Address CLE
10:15 a.m. General Session CLE
12:05 p.m. “Brown Bag and Bull” Section Roundtables and Lunch
1:30 p.m. Afternoon CLE Presentations begin
5 p.m.    Dinner (on your own)
8 p.m.    The Johnson County and Wyandotte County Bar Show

Saturday, June 10
Time    Event
6:30 a.m. Registration and Exhibit Area opens
6:45 a.m. SK Legal Runaround
7 a.m.    Eggs and Issues Forum Breakfast: “How to get the Most From Your KBA Membership”
7:30 a.m. Washburn Law Association Board Breakfast
8:30 a.m. Political Forum: Kansas Gubernatorial and Attorney General Candidates
9 a.m.    KBF Board of Trustees Meeting
9:30 a.m. Morning CLE Presentations begin
12:30 p.m. Law School Lunches
1:30 p.m. Afternoon CLE Presentations begin
2 p.m.    KBA Board of Governors Meeting
6 p.m.    President’s Reception
7 p.m.    Awards Banquet and Changing of the Guard Ceremony

A block of rooms has been reserved at the Overland Park Marriott; please mention you are with the Kansas Bar Association when making your reservations. Price of rooms (if reserved by May 17): $94 single/double occupancy. Room reservations: Call (800) 228-9290 or (913) 451-8000.

Look for the full Annual Meeting registration form in the April issue of the Journal.
Individuals with Disabilities Education Act — The Right ‘IDEA’ for all Childrens’ Education

By Cynthia L. Kelly
The Individuals with Disabilities Education Act (IDEA), the federal law mandating special education programs in public schools, has ensured educational opportunities for children with disabilities for 30 years. In providing rights to children with disabilities and their parents, the law places a myriad of responsibilities on public school districts and their employees. The complex laws and regulations, at both the state and federal level, have resulted in a multitude of administrative proceedings and court cases that continue to refine the contours of the law.

I. A Brief Legislative History

Since the passage of the original legislation, the Education of All Handicapped Children Act of 1975 (EAHCA), access to education for children with disabilities has increased dramatically. Today more than 6 million children with disabilities are served in the nation’s public schools under IDEA’s provisions; more than 65,000 students are served in Kansas alone.

Legislation to assist individuals with disabilities was not prevalent prior to the 1960s. In 1970 public schools in the United States educated only 20 percent of children with disabilities. Many states had laws that specifically excluded certain students from school, including those who were deaf, blind, emotionally disturbed, or mentally retarded. For some children, although access was not totally blocked, opportunities to receive an appropriate education were limited.

Following the U.S. Supreme Court decision in Brown v. Board of Education, advocates for children with disabilities brought equal educational opportunity arguments to the courts. Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania and Mills v. Board of Education were two influential cases. Premised on equal protection and due process theories, each of these class action cases ultimately resulted in settlement agreements that recognized the state’s obligation to provide appropriate educational opportunities for children with disabilities. Both settlement agreements provided for parental participation in determining an appropriate educational program and placement and provided the resolution mechanisms for any disputes that the parents might raise.

FOOTNOTES
1. 20 U.S.C. § 1400 et seq.
3. In fiscal year 2003 Kansas schools served 65,146 children with disabilities, 9,190 aged 3 to 5 in early childhood programs, and 56,056 aged 6 to 21. In addition to children with disabilities, the state’s Special Education for Exceptional Children Act, K.S.A. 72-961, et seq., mandates similar services for gifted children. An additional 15,803 students were served in gifted education programs. Kansas IDEA Part B and Gifted Child Counts, http://www.kansped.org/ksde/mis/reports/fy03/FY03Count.pdf.
4. The legislative history of the 1975 act suggests approximately 1.75 million children of school age with disabilities were totally excluded from free public schooling, and another 2.2 million were in programs that did not meet their needs. See Weber, Mark, Special Education Law and Litigation Treatise (LRP Publications Inc. 2002), pp. 1:1-1:2.
9. Despite widespread support for the legislation, in his statement on the signing of P.L. 94-142, President Ford expressed reservations about the act’s overall effectiveness. “I have approved S. 6, the Education for All Handicapped Children Act of 1975. Unfortunately, this bill promises more than the [f]ederal [g]overnment can deliver, and its good intentions could be thwarted by the many unwise provisions it contains. Everyone can agree with the objective stated in the title of this bill — educating all handicapped children in our [n]ation. The key question is whether the bill will really accomplish that objective.” (Ford, 1975).
11. Although Part B is permanent legislation, Congress has tinkered with its provisions almost every time it has reauthorized the discretionary programs under the act. Reauthorizations of the discretionary programs are scheduled to occur every five years, but often take longer.
The most sweeping amendments to IDEA came in 1997. For the first time, amendments to IDEA attempted to address the education of children with disabilities within the context of education reform. Focus shifted from access to educational opportunities to improvement of performance and educational achievement. Access to the general curriculum and participation in assessments were key components of the 1997 legislation and remained central in the 2004 amendments. In addition, the law strengthened the role of parents in educational decision making for their child by encouraging the use of mediation for dispute resolution and by including measures to prevent misidentification and mislabeling of students. Finally, the amendments attempted to balance safety and learning concerns for all students with the rights of children with disabilities through codification of comprehensive disciplinary procedures.

The amendments of 2004 shift the focus of IDEA from bureaucratic compliance with procedures to student outcomes and student achievement. The amendments attempt, at times imperfectly, to dovetail the IDEA requirements with student performance standards and teacher quality requirements set forth by Congress in the No Child Left Behind legislation.

One of the most troublesome aspects of the law for schools is the lack of adequate funding for special education programs at both the state and federal levels. Recognizing there are costs above those involved in educating a regular education child, the federal law originally authorized federal funding to cover 40 percent of this excess cost. Current law calculates this amount based on 40 percent of the average per pupil expenditure in public elementary and secondary schools in the United States. However, appropriations have never approached the authorized expenditure level. For many years, federal appropriations did not cover even 10 percent of the excess cost. Although federal appropriations have increased substantially over the past decade, they still cover less than 20 percent of the cost involved in providing these programs, and they have declined precipitously since resources have been diverted to the war on terror.

II. Which Students Receive Services?

In order to be eligible for special education and related services under IDEA, a student must be a child with one of the specific disabilities included in the law, and, as a result, the student must need special education. If a child has one of the specified disabilities, but does not need specialized instruction in order to receive educational benefit, the child is not eligible for services under IDEA.

Schools cannot wait for children with disabilities to arrive at their doorstep. They must affirmatively attempt to locate children with disabilities and offer to provide services to these children through “child find” screening activities. Since the passage of the EAHCA in 1975, the number of children receiving special education and related services...
nationwide has steadily increased. In the past decade, the number of students served under IDEA increased almost 30 percent. This growth rate far exceeded growth in the resident population and in school enrollment. Although the law recognizes 13 categories of disability, about half of the students served under the law are categorized as having specific learning disabilities such as dyslexia or other reading or math deficits. Speech or language impairments (18.9 percent), mental retardation (10.6 percent), and emotional disturbance (formerly called behavior disorders in Kansas) (8.2 percent) are the next largest categories. The fastest-growing low incidence categories include children with autism and children classified as “other health impaired” due to attention deficit disorder or attention deficit hyperactivity disorder. In addition to students ages 6 to 21, preschoolers, infants, and toddlers are also served under IDEA.

The state picture mirrors the federal picture in many respects. Kansas schools currently serve more than 65,000 children in special education programs. An additional 15,800 students are served in gifted programs throughout the state. Today more than 6,500 professionals and 7,600 paraprofessionals are employed in Kansas schools to meet the needs of exceptional children.

III. The Components of IDEA

As a condition of receiving federal funding under IDEA, the state must agree to provide a free appropriate public education to students with disabilities who qualify for services under the federal law’s provisions. Six concepts underlie IDEA. These are:

1. free appropriate public education,
2. appropriate evaluation,
3. the individualized education plan,
4. placement in the least restrictive environment,
5. parent and student participation in the process, and
6. procedural safeguards.

The first four elements involve the child and his or her education program directly. The child is evaluated to determine eligibility for services. An individualized education program (IEP) that addresses the unique educational needs of the child is then developed by a group of individuals called the student’s IEP team. The program developed must provide a free appropriate public education in the least restrictive environment. To ensure compliance with these requirements, two layers of protection are provided. First, parents, and students if appropriate, are given rights to participate in decision making about educational programming throughout the process. In addition, a number of procedural safeguards provide parents with avenues for getting information about their child or challenging decisions with regard to evaluation, eligibility, placement, or the provision of a free appropriate public education when they disagree with the school on these issues. Each of these six concepts must be fully understood when litigating special education matters. They are discussed below.

As a condition of receiving federal funding under IDEA, the state must agree to provide a free appropriate public education to students with disabilities who qualify for services under the federal law’s provisions.

A. Free appropriate public education

At its core, IDEA requires the state and local school districts to provide eligible children with disabilities with a free appropriate public education. Free appropriate public education is defined as special education and related services that:

- are provided at public expense, under public supervision;
- meet state educational standards;
- approximate the grade levels used in regular education; and
- comport with the child’s IEP.

“Special education” is instruction that is specially designed, at no cost to parents, to meet the unique needs of a child with a disability. It can include instruction in the classroom, in the home, in hospitals or other institutions, or in other settings. Instruction in physical education is specifically included in the definition of special education. “Related services” include transportation and other developmental, corrective, or supportive services that are required to assist a child with a disability to benefit from special education.

Federal law and cases interpreting federal requirements suggest a child is not eligible for special education if the child needs only a related service. However, federal law allows a state to treat a related service as “special education.” Kansas has adopted this approach. The Kansas regulatory definition of special education defines that term to include “paraeducator services, speech-language pathology services, and any other related

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23. For national special education statistics, see the U.S. Department of Education annual reports to Congress, available online at http://www.ed.gov/about/reports/annual/osep/index.html.


27. The term “related services” means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; social work services; counseling services, including rehabilitation counseling; orientation and mobility services; and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education and includes the early identification and assessment of disabling conditions in children. 20 U.S.C. § 1401(26).

service, if it consists of specially designed instruction to meet the unique needs of a child with a disability” and “occupation-
al or physical therapy and interpreter services for deaf
children if, without any of these services, a child
would have to be educated in a more restrictive
environment.29

Although IDEA sets forth elaborate pro-
cedures, schools must follow to design
educational programs for students in
conjunction with parents, the law does
not attempt to define what constitutes an “appropriate” education. In the first
case under IDEA reaching the U.S. Su-
preme Court, Board of Education of the
Hendrick Hudson Central School Dis-
trict v. Rowley,30 the Court was called
upon to interpret the free appropriate
public education requirement under IDEA. Rowley instructs lower courts to
make a two-fold inquiry in determining if
a violation of the right to a free appropriate
public education has occurred:
1. Has the school district complied with
IDEA procedures?
2. Is the child’s IEP, developed through IDEA pro-
cedures, reasonably calculated to enable the child to receive
educational benefits?

Rowley remains the key case interpreting free appropriate
public education requirements under IDEA. It has been ap-
plied and interpreted in thousands of cases and remains a con-
stant influence on future litigation.

1. Applying Rowley – the procedural prong

IDEA provides a plethora of procedural protections for
parents.31 In light of these procedural protections, the Rowley
Court indicated, that in most cases, compliance with these re-
quirements should go far in ensuring a child is provided with
a free appropriate public education.

Since Rowley, several cases have considered whether procedural
violations, standing alone, are sufficient to result in a finding that
a child was denied a free appropriate public education. Most

29. K.A.R. 91-40-1(jjj)(2) and (3). State regulations mandate that the
need for a related service can be deemed a need for “special education,” al-
lowing students to qualify for services under IDEA even though they need a
related service only. This creates a dual-edged sword. On one hand, districts
can use IDEA funding to provide services to this population of students.
On the other hand, parents and students covered by the act are entitled to
IDEA’s cumbersome and sometimes expensive procedural safeguards.
31. See notes 81-107 and accompanying text.
32. 144 Fed. 692 (10th Cir. 1998).
33. The 10th Circuit adopted the rational basis test first set forth by
the 1st Circuit in Roland M. v. Concord Sch. Comm., 910 Fed. 983 (1st Cir.
1990).
34. Hall v. Vance County Bd. of Educ., 774 Fed. 629 (4th Cir. 1985); Jaynes
35. Amanda S. v. Webster City Cnty. Sch. Dist., 27 IDELR 698 (N.D.
Iowa 1998).
36. See the portion of this article addressing the composition of the IEP
team at note 58 and accompanying text.
37. Bd. of Educ. of County of Cabell v. Diemelts, 843 Fed. 813 (4th Cir.
1988); see also Spielberg v. Henrico County Pub. Schs., 853 Fed. 256 (4th Cir.
1988) (school’s determination to change placement before developing IEP
violated parental right to participate in developing the IEP).
38. Knable v. Besley City Sch. Dist., 238 Fed. 755 (6th Cir. 2000); see
also Tice v. Botetourt County Sch. Bd., 908 Fed. 1200 (4th Cir. 1990) (six-
month delay in evaluating child and developing IEP deprived child of
right to a FAPE).
39. See, e.g., O’Toole, supra; Doe v. Alabama Dep’t. of Educ., 915 Fed.
651 (11th Cir. 1990); Logue v. Shawnee Mission Unified Sch. Dist. No.
1998) (mem.).
40. M.L. v. Federal Way Sch. Dist., 341 Fed. 1052 (9th Cir. 2003); Mc. S.
ex rel. G. v. Vashon Island Sch. Dist., 337 Fed. 1115 (9th Cir. 2003); Black-
41. Rowley, 458 U.S. at 197.
43. See, e.g., Barton County Special Educ. Coop., U.S.D. No. 428, 38
IDELR 284 (SEA KS 2003).
44. Florence County Sch. Dist. Four v. Carter, 114 S. Ct. 361 (1993);
Polk v. Central Suquamish Intermediate Unit 16, 853 Fed. 171 (3rd Cir.
The 5th Circuit has adopted a four-factor test for determining whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA. These factors are whether (1) the program is individualized on the basis of the student’s assessment and performance, (2) the program is administered in the least restrictive environment, (3) the services are provided in a coordinated and collaborative manner by the key “stakeholders,” and (4) positive academic and nonacademic benefits are demonstrated. Other courts confirm schools must provide services that meet each child’s needs. If the school cannot provide those services in-house, it must look to other sources and pay the cost of providing the services in that manner. When schools base educational programming or placement on the category of disability or availability of services rather than the unique needs of the child, there is a strong likelihood free appropriate public education has been denied.

Disputes regarding educational benefit often focus on the teaching approach, methods, materials, or “methodology” used to teach the child. The regulations governing IEP’s require the parties to discuss methodology, but case law makes it very clear the school can determine the methodology to use with any given student. Parents succeed on methodology issues only when the methodology chosen by the school does not provide the student with a free appropriate public education. So long as the child is receiving educational benefit from the program, courts have deferred to the expertise of school personnel and have consistently rejected arguments that parents have a right under IDEA to compel the school district to provide a specific program or employ a specific methodology for the education of their child. Similarly, parents do not have a right to dictate which teachers or related service providers will provide services for their child.

Violations of a student’s right to a free appropriate public education can also be premised on failure to provide an extended school year, failure to provide appropriate related services or assistive technology, which includes any type of equipment used to improve the functional capabilities of a child with a disability; or failure to provide adequate transition services that allow a student to transition from high school to post-high school life.

45. Cypress-Fairbanks Indep. Sch. Dist. v. Michael E, 118 F.3d 245, 253 (5th Cir. 1997). While the 10th Circuit has not specifically adopted this four-factor test, these factors, particularly the first and fourth, are typically considered by most courts in analyzing free appropriate public education challenges.

46. T.H. v. Bd. of Educ. of Palatine Cty. Consol. Sch. Dist., 55 F. Supp. 2d 830 (N.D. Ill. 1999). (School district required to fund an ABA/DTT in-home program after administrative law judge determined that district recommended placement based upon availability of services, not the child’s needs); Letter to Anonymous, 37 IDELR 126 (OSEP 2002) (decisions regarding the provision of services that are appropriate for an individual child must be based on the child’s unique needs, and not on the disability category in which the child is classified).

47. O’Toole v. Olathe Unified Sch. Dist. No. 233, 28 IDELR 177 (10th Cir. 1998) (determining the best methodology for educating a hearing-impaired child is precisely the kind of issue which is properly resolved by local educators and experts); CJN by SKN v. Minneapolis Pub. Schs., 38 IDELR 208 (8th Cir. 2003) (as long as a student benefits from education, it is up to educators to determine the appropriate methodology).


Parents also have no right to dictate methodology in related service areas. See Erickson by Erickson v. Albuquerque Pub. Sch., 31 IDELR 156 (10th Cir. 1999) (district not required to continue “hippotherapy,” a particular type of occupational therapy, where it provided occupational therapy as required by the IEP).
B. Appropriate evaluation

IDEA requires that children with disabilities be appropriately evaluated to determine if they are eligible for services under IDEA and to determine appropriate educational programming. Parental consent to initial evaluation is required.\(^{53}\) If parents refuse to consent, the school can, but is not required to, pursue mediation or due process options.\(^{54}\)

Because evaluation drives educational programming, accurate evaluation and interpretation of evaluation results are critical. Improper evaluation or misinterpretation of results can result in mislabeling children, mistakenly identifying children as needing special education, or worse, mistakenly determining a child is not eligible under IDEA when the child actually has a qualifying disability and needs services.

The law includes the following safeguards to protect against inaccurate evaluation:

- evaluators must be knowledgeable and trained in the use of the evaluation materials they administer;
- eligibility cannot be based on a single test; a variety of instruments and procedures must be used to gather information about the student and determine if the student has a disability; and
- tests must be selected and administered in a manner that is not racially or culturally biased and discriminatory.

IDEA requires comprehensive evaluation of a student for all known, and even suspected, disabilities prior to providing services. In most cases, parents and the school work in harmony and parents are willing to provide the school with many of the student’s medical records. However, if parents refuse to provide this information, and the school district needs medical information to identify the child’s disability, the school must seek parental consent and pay for the medical evaluation.

Even without requests for assistance from parents, deteriorating student behavior and declining grades should always raise a red flag for schools, and the need for regular education interventions or special education evaluation should be considered. Under Kansas regulations, regular education interventions should precede evaluation in most circumstances.\(^{55}\)

Comprehensive re-evaluation of the student is required at least once every three years.\(^{56}\) However, the IEP team may examine existing data on the student and determine that additional data from testing is not needed. If this decision is reached, the team must give notice to the parents of the decision. Unless the parents request additional evaluation, one is not required.

If parents disagree with the school’s evaluation, they have a right to seek an independent educational evaluation.\(^{57}\) Unless the school requests a due process hearing to show its evaluation is appropriate, the independent educational evaluation is generally at public expense.

C. The individualized education program

The IEP is the cornerstone of the special education process and the blueprint for a child’s educational services. IDEA requires that the education program for each child not only be appropriate, but also be individualized to meet each child’s unique needs. This is accomplished through the IEP, a written statement that defines the student’s educational program and services. It is developed by an IEP team and reviewed and revised at least annually. However, it may be revised at any time if the child is not making expected progress or if something unexpected occurs. An IEP should be in effect for each special education student at the beginning of each school year. The IEP must include:\(^{58}\)

- a description of the child’s present levels of academic achievement and functional performance;
- measurable annual goals;
- a description of how the child’s progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided;
- a statement of the special education and related services and supplementary aids and services that will be provided to the child;
- an explanation of the extent to which the child will not participate with nondisabled children in the regular class and in the extracurricular and other nonacademic activities; and
- a statement addressing the child’s participation in state or districtwide assessments;
- a statement of the projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications;
- at age 14, postsecondary goals based on appropriate transition assessments and transition services; and
- at age 17 or younger, a description of the rights that will transfer to the child upon reaching the age of majority.

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55. K.A.R. 91-12-7.
56. 20 U.S.C. § 1414(c).
57. Upon request for an Independent Educational Evaluation (IEE), the school must provide parents information about where an IEE may be obtained and the applicable criteria for an IEE. 34 CFR § 300.502(c)(1) and (e)(1). The school must set criteria under which an IEE can be obtained at public expense, including the qualifications of the examiner, which must be the same as the criteria that the school uses when it initiates an evaluation, unless those criteria would result in the denial of an IEE to the parent. 34 CFR § 300.502(e)(1). A school district may require parents to use an IEE examiner from an approved list, but the list must be exhaustive and include all qualified individuals within a geographic location. Letter to Young, 39 IDELR 98 (Office of Special Education Programs 2003).
For each child, his or her own IEP team develops the IEP. The IEP team is a group of individuals who have knowledge about the child or the child’s disability. The team also includes individuals from the school who have knowledge of the educational opportunities that are available in the school system. IEP development is based on a system that allows those most familiar with the child and his or her needs to design an educational program to meet those needs.

The team must include the following individuals:

- the parents of the child;
- at least one of the child’s regular education teachers (if the child is or may be participating in regular education);
- at least one of the child’s special education teachers or service providers;
- a representative of the school who is qualified to provide or supervise special education, has knowledge of the general curriculum, and has knowledge of the availability of school resources;
- an individual who can interpret test results;
- the child, if appropriate; and
- other individuals, invited by either the parent or the school, who have knowledge or special expertise about the child.

In the vast majority of cases, the IEP team members all agree on the child’s program. When there is disagreement, individuals sometimes believe the participants “vote” and the majority rules. This is not true. Ultimately, the representative of the school must agree to commit the resources the IEP will require. Without this agreement, the IEP cannot be implemented. If parents believe the proposed program does not provide a free appropriate public education or they disagree with the proposed placement of their child, the law’s procedural safeguards provide avenues for challenging the program.

School staff and parents should both come to IEP meetings prepared to discuss educational programming for the student. Preparing a draft IEP ahead of time often helps to focus the discussion at the IEP meeting and reduce the amount of time it takes to complete it. As long as the draft is used as a springboard for discussion, and the school is open to parental input, it is unlikely a procedural violation of IDEA will occur. However, no final decisions should be made prior to the IEP and placement meetings.

IEPs are often challenged as denying a free appropriate public education when there is a lack of clarity in services or the amount of service to be provided, or when goals and objectives are not easily measurable, or when required components of an IEP are missing from the document. As with other procedural issues under IDEA, the claims will likely fail unless they are accompanied with a showing that the student did not receive necessary services.

D. Least restrictive environment

Once a student’s IEP is developed, the program must be offered in the least restrictive environment in which the student can achieve educational benefit. The LRE component of the law presumes students with disabilities will be educated with their nondisabled peers to the maximum extent appropriate. However, schools must ensure that a full continuum of alternative placements is available to meet the needs of children.

59. 20 U.S.C. § 1414(d)(1)(B). Failure to have appropriate personnel at the IEP resulted in a denial of FAPE. W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23, 18 IDELR 1019 (8th Cir. 1992); Arlington Cent. Sch. Dist. v. D.K. and K.K., 2002 WL 31521158, 37 IDELR 277 (S.D. N.Y. 2002) (abscence of general education teacher at an IEP meeting for LD student denied him free appropriate public education); but see M.L. v. Federal Way Sch. Dist., 341 F.3d 1052 (9th Cir. 2003) (failure to include a regular education teacher on the IEP team did not deny free appropriate public education where the student was not in a regular classroom at the time the IEP was developed); Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, 317 F.3d 1072 (9th Cir. 2003) (failure to include a regular education teacher on the IEP team did not deny free appropriate public education where the student was not in a regular classroom at the time the IEP was developed); Shapiro v. Paradise Valley Unified Sch. Dist. No. 69, 317 F.3d 1072 (9th Cir. 2003) (failure to include a student’s parents and a teacher from her private school denied him free appropriate public education); Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp. 2d 1213 (D. Ore. 2001) (IEP was sufficiently flawed to find a denial of free appropriate public education because no district representative who was “qualified to provide or supervise the provision of special education” services attended the meeting).

60. The school must give parents notice of who will participate in the IEP meeting for the school. Parents are not required to give notice of their participants. Whether individuals invited to IEP meetings “have knowledge or special expertise regarding the child” is determined by the party inviting the individual. 34 C.F.R. 300.344.

61. White ex rel. White v. Sch. Bd. of Henrico County, 549 S.E.2d 16, 36 Va. App. 137, 35 IDELR 7 (Va. Ct. App. 2001); Doyle v. Arlington County Sch. Bd., 806 F. Supp. 1253 (E.D.Va. 1992), aff’d, 39 F.3d 1176 (4th Cir. 1997) (IEP was sufficiently flawed to find a denial of free appropriate public education). See also 34 C.F.R. § 300.501(b)(2), which provides that a meeting does not include informal or unscheduled conversations involving school personnel or conversations on issues such as teaching methodology, lesson plans, or coordination of services if those issues are not addressed in the child’s IEP or meeting and would not include preparatory activities that school personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

62. Spielberg v. Henrico County, 853 F.2d 256 (4th Cir. 1988) (Placement determined prior to the development of the child’s IEP and without parental input was a per se violation of the act).

63. O’Toole v. O’Toole by O’Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692 (10th Cir. 1998) (although the IEP lacked a statement of the specific amount of related services to be provided, there was no evidence the student failed to receive any related services, and therefore no denial of free appropriate public education).

64. Peter G. v. Chicago Pub. Sch. Dist. No. 299, 38 IDELR 94 (N.D. Ill. 2003). The fact the parents’ expert believed the IEP could have contained more and better goals did not mean the goals did not offer free appropriate public education.

65. Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 973 (10th Cir. 1996) (failure to include a statement of transition services in the IEP did not render it invalid where the student received an appropriate education).

with disabilities. Aside from the regular classroom, this may involve placement in special education classrooms, day school programs, public or private residential institutions, public or private hospitals, or home instruction.

Placement in the student's neighborhood school in the regular education classroom is the first option the team should consider. In deciding whether a regular classroom placement is appropriate, the team must consider the possible range of supplementary aids and services needed to ensure the student can be satisfactorily educated in the regular classroom environment. When the nature or severity of a child's disability is such that education in the regular classroom, even with supplementary aids and services cannot be achieved satisfactorily, the team may consider other environments.

Placement of a child under IDEA must be based on the child's needs and the ability to receive educational benefits in the selected environment. Placement decisions should not be based on factors such as the category of disability, configuration of service delivery system, and the availability of staff. In determining if a particular setting is the least restrictive environment for a particular child, IEP teams should consider:

- the academic benefits provided in the setting;
- the nonacademic benefits, such as modeling of behavior or language;
- the effect of the student on the environment; and
- the cost.

However, unless the cost is so high it substantially impacts the school's ability to provide educational services for all children, courts are generally unsympathetic to what may seem to be high costs for one student. Similarly, unless the student's needs or behaviors are such that the student substantially disrupts educational activities for all students or takes an inordinate amount of the teacher's time, courts will not require a more restrictive learning environment.

While not true across the board, courts have been more inclined to agree to inclusion for younger students with a focus on social skills and interaction with nondisabled peers for modeling, but have approved more restrictive environment for older students, particularly where lack of academic progress is evident. In looking at least restrictive environment issues, providing a free appropriate public education is paramount. If a student cannot receive educational benefit in the regular classroom, placing a student in that environment would deny the student's right to a free appropriate public education, and the setting, while least restrictive, is not appropriate.

Sometimes parents vehemently disagree with a school district's proposed program or placement for their child. Parental consent to initial placement in special education is required by both federal and state law. Further, Kansas law requires parental consent to a change of placement if the change constitutes a material change in services or a substantial change in placement. Traditionally, school districts have been allowed to seek due process when parents refuse to consent to a change of placement. However, the 2004 amendments to IDEA make it clear a school district cannot seek due process if parents refuse to consent to initial placement of their child in special education.
Parents have the ultimate authority and can remove their child from school. However, parents must place their child in another public or private school that satisfies state compulsory attendance requirements. Parents may be entitled to reimbursement for any tuition they pay if it is later determined the school district’s proposed program did not provide the student with a free appropriate public education. Tuition reimbursement is appropriate only if the parent provides the school with appropriate notice of the intent to withdraw the student from school, the school district did not provide or offer a free appropriate public education, and the private school in which the parent placed the child does offer an appropriate program for the child.  

If the placement decision is made unilaterally by the parents, the private placement does not need to meet state requirements for providers of special education. However, if the placement decision is made by the IEP team, the provider must meet state requirements.  

IDEA does not prohibit a school from providing special education services in a centralized location. There is a difference between “educational placement” and the location in which the program is provided. Parents participate in the IEP development and educational placement component, but where to physically locate the child is an administrative matter for the school district to decide. Location must be discussed in the IEP meeting, but consent to location is not required.  

In addition to providing special education services for students attending public schools, children who are voluntarily placed in private schools by their parents must have a genuine opportunity for participation in IDEA programs. Federal law requires consultation with representatives of private schools in determining how to spend a proportionate share of federal IDEA funding on students enrolled in private schools. Kansas law grants greater rights than federal law to private school students, requiring at least average cost expenditures for all identified private school students who desire special education services.  

E. Parent and student participation in decision making  

To ensure students receive the services they need, IDEA requires that students with disabilities and their parents be involved in decision making at every step. Parents have intimate knowledge of their child. They observe the child on a daily basis and can provide school staff with information about the child’s development, history, strengths, weaknesses, health, and abilities. Because of the insights they can provide, the law has always mandated parental participation. The 1997 amendments to IDEA recognized strengthening the role of parents as a key purpose for the amendments. The law now requires parents to be involved on the teams that:

- consider evaluation results and determine eligibility for special education,
- develop the IEP,
- review existing evaluation data and determine if additional testing is required, and
- make placement decisions for the child.  

IDEA’s procedural requirements afford parents the right to detailed, written notice of actions schools propose or refuse to take. In some cases parental consent is even required before any action can be taken. Under IDEA, parental consent is required prior to evaluation, re-evaluation, or initial placement in special education. Kansas law requires parental consent for some changes in placement or level of services as well. Additionally, parents have a right to receive progress reports about their child.  

Parents have responsibilities under IDEA as well. Parents must notify the school system if they intend to send their child to a private school and seek tuition reimbursement. They also must notify the school when they intend to file a due process hearing. This notice must articulate their disagreement with the school’s proposed program and set forth their desired solution to the problem. They must, in an attempt to resolve the issues without a hearing, either participate in mediation or in a resolution meeting with the school prior to the commencement of the due process hearing. These provisions help the school better understand the areas of disagreement and may allow for amicable resolution of the problem.  

Students with disabilities have been involved in the decision making process to a lesser extent. Provisions defining the IEP team have always indicated the

(continued on next page)
student should be a member of the IEP team “if appropriate.” Students should be invited to participate in their own IEP meetings, but it is up to the student and his or her parents to determine if the student will actually participate. The 1990 amendments to IDEA strengthened the role students play in determining their transition services. When the IEP team is considering transition services, the school must invite the student to participate in the meeting. Even if the student does not attend the meeting, the team must consider the student’s interests and preferences in determining transition services.

F. Procedural safeguards

The procedural safeguard provisions of IDEA protect the rights of parents and students by ensuring they have adequate information when making educational decisions and providing methods for resolving disputes. The procedural safeguards notice must be provided to parents at least once a year. It must also be provided when the child is initially referred for an evaluation, whenever parents lodge a due process complaint, or whenever parents request it.92

The procedural rights notice must inform parents of the following,93

• the right to an independent educational evaluation if they disagree with the school’s evaluation;
• the right to prior written notice when the school proposes or refuses to take special education actions;
• the need for parental consent prior to taking certain actions;
• the right to access the child’s educational records;
• the right to present and resolve due process complaints, including the time period for bringing complaints, the opportunity of the school to resolve the complaint, and the availability of mediation;
• the right to have the child stay put during the pendency of due process proceedings;
• the right to certain procedures in disciplinary contexts;
• the right to reimbursement for private school tuition if certain conditions are met;
• the right to mediation for settling disputes if the school agrees to use mediation;
• the right to a due process hearing;
• the right to appeal the result of a due process hearing to a state review officer;

Even though IDEA is built on the premise of consensus decision making, there are times when schools and parents disagree about the child’s needs or program. IDEA provides three different mechanisms for resolving disputes:

• parents may file a complaint with the Kansas State Department of Education (KSDE),94
• parents may request mediation,95 or
• parents may request a due process hearing.96

Mediation is generally the best method for resolving disputes under IDEA, but it can be used only if both the parents and the school agree to its use. The KSDE maintains a list of qualified mediators and appoints a mediator at the request of a school. By law, the state must pay the cost of mediation.97 According to KSDE data, 80 percent of these cases are resolved at mediation. The average time for resolution is 20 to 30 days.98 In contrast, the time for resolution of issues at due process ranged from 10 to 151 days.99

When due process proceedings are initiated, unless the parent and school agree otherwise, the student remains in his or her last agreed-to placement pending the outcome of the due process proceedings.100 However, the stay-put provision of the law does not apply when parent and school agree to changes in the services previously delivered.101

Plaintiffs must exhaust all IDEA administrative remedies before proceeding to court on IDEA issues. Additionally, IDEA remedies must be exhausted in most cases before proceeding with claims under 42 U.S.C. § 1983 or § 504 of the Rehabilitation Act of 1973.102 However, exhaustion may be excused in some circumstances.103

Procedural safeguards also place restrictions on the school’s ability to suspend or expel a special education student for more than 10 days.104 Suspension in excess of 10 days is allowed only if the student’s misconduct is not a manifestation of the student’s disability. Even if suspension is allowed, IDEA requires schools to continue to provide a free appropriate education to students who are suspended or expelled from school.105 To balance the safety interests of all students against the special education student’s right to an education, the law

95. 20 U.S.C. § 1415(e); K.S.A. 72-988(b)(5) and K.S.A. 72-996.
96. 20 U.S.C. § 1415(f); K.S.A. 72-988(b)(9).
100. 20 U.S.C. § 1415(j).
102. See Cudjoe v. Indep. Sch. Dist. No. 12, 297 F.3d 1058 (10th Cir. 2002) (exhaustion of IDEA remedies required even though student had never been identified under IDEA where the disability clearly rendered the child eligible for special education under IDEA); Padilla v. Sch. Dist. No. 1, 233 F.3d 1268 (10th Cir. 2000) (parents cannot avoid IDEA administrative procedures based on the character of the ultimate remedy sought (monetary damages) and 42 U.S.C. § 1983 causes of action may not be used to remedy IDEA violations); Eads v. U.S.D. No. 289, 184 F. Supp. 2d 1122 (D. Kan. 2002) (parents required to exhaust administrative remedies even if monetary damages being sought were not available administratively); Markanta G. v. U.S.D. No. 497, 167 F. Supp. 2d 1303 (D. Kan. 2001) (same). See also Frazier v. Fairhaven Sch. Comm., 276 F.3d 52 (1st Cir. 2002) (allowing plaintiffs to avoid IDEA’s requirements by using a “back door,” such as seeking money damages, would circumvent the legislative intent of IDEA that education professionals have the first opportunity to correct shortcomings in a disabled student’s IEP); Robb v. Bethel Sch. Dist. No. 403, 308 F.3d 1047 (9th Cir. 2002) (because parents alleged injuries that could be at least partly redressed by IDEA, they were required to exhaust administrative remedies under IDEA before seeking judicial remedies such as monetary damages); N.B. v. Alachua, 84 F.3d 1376 (11th Cir. 1996) (same).
103. Murphy v. Arlington Central Sch. Dist., 297 F.3d 195 (2nd Cir. 2002) (exhaustion does not apply to an action to enforce the stay-put provision).
allows schools to unilaterally move students with disabilities to an interim alternative educational placement if they engage in conduct that causes serious bodily injury to another or bring drugs or weapons to school.

If parents prevail in due process proceedings, and if the statutory requirements are met, parents may be able to recover attorney fees. A number of cases have addressed the issue of whether the Supreme Court decision in *Buckhannon Bd. & Care Home Inc. v. W.V. Dep't of Health & Human Resources* foreclosed use of the catalyst theory under the IDEA attorney fee provisions. To date, a majority of courts addressing the issue have concluded a catalyst theory for recovery of attorney fees under IDEA is simply not viable after *Buckhannon*. While *Buckhannon* precludes fees for voluntary settlements that occur at the IEP stage, fees are still available if parents prevail in an administrative hearing. Attorney fees are generally not recoverable under IDEA for participation in IEP meetings, mediation, or the state complaint review procedures. The 2004 amendments allow school districts to recover attorney fees from opposing counsel, but only if the litigation is frivolous or unreasonable. Fees may be recovered against parents if actions are brought with an improper purpose, such as to harass the school or increase the cost of litigation.

**Conclusion**

The Individuals with Disabilities Education Act has opened the doors to education for thousands of students with disabilities. At the same time, the complex procedural requirements and ofttimes ill-defined standards under the law have resulted in endless litigation. Practitioners in this area need a good understanding of the administrative procedures and unique aspects of the law. Most of all, however, all parties and their attorneys need to keep the best interest of children with disabilities and purpose of the law — providing educational services to students with disabilities — at the forefront.

**About the Author**

**Cynthia L. Kelly** has been an attorney with the Kansas Association of School Boards (KASB) in Topeka for 19 years. She served as a member of the Board of Directors of the National School Boards Association Council of School Attorneys from 1993-2004 and served as chair of that group in 2000-2001. Working with the KASB Federal Relations Network and the Council of School Attorneys Legislative Committee, Kelly has been actively involved in the last three reauthorizations of the Individuals with Disabilities Education Act. Additionally, she has represented several school districts in special education matters, has authored several publications, and speaks frequently on this subject. Kelly received her B.A. from the University of North Dakota and her J.D. from the University of Kansas School of Law. Prior to joining the KASB legal staff, she worked as a research attorney for the Kansas Court of Appeals.

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108. 20 U.S.C. § 1415(h)(3)(D); *Vultaggio v. Bd. of Educ.*, 343 F.3d 598 (2nd Cir. 2003) (state complaint review procedure is not an “action or proceeding” that falls within the IDEA attorney fee provisions).
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Court of Appeals

Civil

CHILD CUSTODY, THIRD-PARTY PLACEMENT, AND PARENTAL PREFERENCE
IN RE MARRIAGE OF NELSON
NORTON DISTRICT COURT – AFFIRMED
NO. 94,443 – JANUARY 13, 2006

FACTS: Rachael and Blain Nelson were married in 1993. They had two children, one in 1995 and one in 2002. They separated frequently and eventually divorced in 2003. They agreed to equal-share time with the children and that Rachael would not allow the children to have contact with her boyfriend, Doug Marsh, because of his diversion for inappropriate sexual contact with a 4-year-old. In March 2004 Blain filed a motion for temporary custody alleging Rachael had refused to allow him parenting time and Marsh had contact with the children. After a hearing, Rachael and Blain signed custody orders agreeing to third-party placement of the children with Blain’s sister. The order stated in part that third-party placement was in the best interest of the minor children and would continue until a material change in circumstances. The order was approved by the district court. In September 2004, after Rachael and Marsh had married, Rachael filed a motion to change custody and to terminate the condition prohibiting contact with Marsh. Rachael argued that she could provide a stable environment and that since the third-party custody order, she had completed a favorable parenting evaluation and Marsh had completed an evaluation finding there was no evidence of sexual deviance. Blain opposed the change of custody. Blain’s sister intervened arguing there was no material change in circumstances and moved to dismiss the motion. The court held a hearing on the parties’ waiver of the parental preference doctrine in signing the third-party custody order. The court found Rachael knowingly and voluntarily waived her parental rights and that Rachael failed to demonstrate a material change in circumstances such that it was in the best interests of the minor children to change custody.

ISSUE: Does the parental preference doctrine require the district court to award custody of the children to the mother although she voluntarily entered into a third-party custody order?

HELD: Court affirmed. Court stated there is substantial competent evidence to support the district court’s finding that Rachael knowingly and voluntarily waived the parental preference doctrine and that she had agreed that third-party placement was in the best interests of the minor children. Court found that Rachael never raised the issue of whether notice and consent of the minor children is necessary for waiver of the parental preference doctrine. Nevertheless, the court stated that the children were not adults, and the issue did not involve determining either child’s parentage. Court also stated there is no case law or statutory mandate that compels the appointment of a guardian ad litem for the minor children under the circumstances of the case. Last, court stated it would not reweigh the evidence on whether there was a material change in circumstances and stated there was substantial competent evidence that no material change in circumstances had occurred.


OIL AND GAS
SCHWATKEN V. EXPLORER RESOURCES INC.
MONTGOMERY DISTRICT COURT – AFFIRMED
NO. 94,195 – JANUARY 13, 2006

FACTS: Schwatkens leased acreage to Explorer Resources Inc. for three years for oil and gas exploration and production. Paragraph 18 provided that the lease expired as to all lands outside a “producing unit” at end of primary term. Explorer assigned lease to Quest Cherokee LLC. No drilling or production on leasehold until 10 days before termination of lease, but well produced gas in paying quantities once completed after lease expiration date. After Quest started second well, Schwatkens filed suit to cancel lease. District court granted summary judgment to Quest. Schwatkens appealed, arguing (1) district court did not construe lease strictly against lessee-producer, (2) entire lease expired because Quest did not have any producing unit by end of primary term, and (3) habendum clause should have controlled any conflict with paragraph 18.

ISSUES: (1) Strict construction, (2) producing unit, and (3) habendum clause

HELD: Paragraph 18 should be construed strictly against Schwatkens, as its author, and rest of lease should be construed strictly against Quest as successor in interest to its author.

Defining “unit” consistent with Schwatkens’ argument would be incongruent to rest of lease and to general industrial terminology. Under circumstances, test is what reasonable person as lessee would have understood paragraph 18 to mean, not what Schwatkens as authors meant to say. Because paragraph 18 does not clearly define “producing unit” and was drafted by Schwatkens, and because construction advanced by Schwatkens would result in forfeiture of Quest’s entire leasehold interest, there was no viable reason for application of general rule that habendum clause should control. Quest commenced drilling during the three-year term and continued drilling and production activities in timely fashion thereafter. No error by district court in sustaining Quest’s motion for summary judgment.

STATUTES: None
PEER REVIEW ARTICLE

IN RE PARENTAGE OF SHADE

LEAVENWORTH DISTRICT COURT – REVERSED AND REMANDED

NO. 93,921 – JANUARY 20, 2006

FACTS: Katie was born in 1986 while mother, Shade, was living with Wistuba, who was listed as father on birth certificate. Shade and Wistuba separated a year later, and Wistuba stopped financial assistance for Katie. In 1990 Shade sought Social and Rehabilitation Services (SRS) assistance, and SRS suit against Wistuba for paternity and child support was dismissed without prejudice. In 2003 Shade filed action for parentage and past child support. District court found presumption of paternity was overcome by dismissal of 1990 action based on Shade's noncooperation; presumption not reinstated by 2004 test confirmation of Wistuba's paternity; and doctrines of laches and "unclean hands" applied to case. District court awarded Shade partial back child support from 2004 when testing proved Wistuba's paternity. Shade appealed.

ISSUES: (1) Presumption of paternity, (2) child support, and (3) equitable doctrines

HELD: Case reversed and remanded. District court erred in finding the presumption of paternity, created by Wistuba's voluntarily allowing his name on Katie's birth certificate, was rebutted by any action or inaction of Shade in 1990 paternity action brought by SRS.

On remand, district court is to recalculate support from date presumption of paternity arose, rather than from 2004 paternity testing.

District court erred in relying on doctrine of laches and improperly admitted hearsay evidence of Shade's noncooperation in SRS paternity action. Child support is to be calculated without consideration of equitable doctrines of laches and clean hands.

STATUTES: K.S.A. 2004 Supp. 38-1121(c), 60-208(c); and K.S.A. 38-1110 et seq., -1111, -1114(a)(4), -1114(b)

PROPERTY AND ADVERSE POSSESSION

THOMPSON V. HILLTOP LODGE INC. ET AL.

MITCHELL DISTRICT COURT – AFFIRMED

NO. 94,006 – JANUARY 20, 2006

FACTS: This case involves a dispute over ownership of a tract of land located on the north edge of property owned by Hilltop Lodge Inc. and on the south edge of property owned by Ray and Theresa Thompson. The Thompsons commenced an action to quiet title to the disputed property and appealed the trial court's determination that they did not acquire title to the disputed piece of property by adverse possession.

ISSUE: Did the trial court err in finding the Thompsons did not acquire title to the subject property by adverse possession?

HELD: Court affirmed. Court found there was substantial competent evidence that both parties cared for the property in various ways, with no indication that the Thompsons were exclusively providing the maintenance. Court also found there was substantial competent evidence to support the trial court's determination that the Thompsons' use of the property did not give unequivocal notice to Hilltop of the Thompsons' claim of title to the tract and that the Thompsons did not have exclusive possession of the disputed tract of land for 15 years. Court also stated the discussions between the parties about improvements showed the lack of good faith belief of ownership by the Thompsons. Last, the court stated there were no facts to support the contention that the Thompsons occupied the property under "color of title," and the Thompsons were not entitled to damages for improvements.

STATUTE: K.S.A. 60-503, -1004

WORKERS' COMPENSATION AND

GOING AND COMING RULE

SUMNER V. MEIER'S READY MIX

WORKERS' COMPENSATION BOARD – REVERSED

NO. 93,546 – JANUARY 13, 2006

FACTS: Sumner drove a truck for Meier's Ready Mix. In September 2002 Sumner died as a result of a one-vehicle accident. Although Sumner was driving a company truck when he died, the parties stipulated that at the time of the accident, he was engaged in a personal errand with no business purpose. An administrative law judge (ALJ) found that Sumner's death arose out of and in the course of his employment. The Workers' Compensation Appeals Board reversed the ALJ's decision and stated that Sumner was driving to Junction City when he received word that there was an emergency at his home in Council Grove. Sumner received permission to go home, and he agreed that he would deliver the load that day if possible. The board found the accident occurred on Sumner's way back to Council Grove and that Sumner was subjected to the going and coming rule.

ISSUE: Did the board err finding that Sumner was not entitled to compensable based on the going and coming rule?

HELD: Court reversed the board. Court stated that the board's conclusion that there was no evidence indicating how long Sumner planned to stay in Council Grove ignored the circumstantial evidence that he was near the end of his regular 12-hour shift. Court also found Meier's policy of allowing drivers to take trucks home furthered Meier's interest by saving unnecessary travel. Court held there was no time to make the next delivery to Junction City that same day and Sumner's trip to his home falls within the going and coming exception. Court held Sumner was entitled to workers' compensation and the board's decision was reversed. Court also held Sumner's injury occurred on a highway that was not his only route to work and it was a public highway. Court stated it was unnecessary for the court to determine if a truck is a special risk or hazard.

STATUTES: K.S.A. 44-501 et seq., -501(a) and K.S.A. 2004 Supp. 44-508(f)

WORKERS' COMPENSATION AND

OCCUPATIONAL DISEASE

GARCIA V. TYSON FRESH MEATS INC.

WORKERS' COMPENSATION BOARD – AFFIRMED

NO. 94,179 – JANUARY 5, 2006

FACTS: Garcia began working for Tyson in 1988. For nearly three years, he worked in the intestine room, trimming fat off intestines. The intestines were full of fecal matter and Garcia had to pick the intestines out of dirty water to trim them. Though Garcia wore gloves, dirty water got inside the gloves and on his hands. Garcia began having skin problems in 1991 or 1992. His hands became weak, painful, itchy, swollen, and discolored. Garcia was treated with hand creams, he was assigned to a different job in the paint room, and his condition lessened. After two years, Garcia was transferred back to the intestine room, and the condition returned. After approximately three years, a physician recommended Garcia be transferred to a different position. Garcia was assigned to washing cows with a hose and when he continued to have minor problems with his hands, he was assigned to the laundry room where he remained for four to five years. At the time of the second regular hearing, Garcia was cleaning and sharpening knives. A doctor for Garcia diagnosed Garcia as suffering from bilateral dermatitis caused by Garcia's lengthy exposure to chemicals. The administrative law judge found that Garcia had a functional impairment of 10 percent to the body as a whole, but found that Garcia did not suffer any loss of earning capacity as he was earning the same or greater wage than he was when the disease first affected his hands, and therefore, he was not entitled to a monetary award for his injury. The board agreed with the 10 percent functional impairment rating, but awarded Garcia permanent partial disability compensation of $11,547.38.
ISSUE: Did the board err by awarding permanent partial disability benefits when Garcia had not lost any wages as a result of the injury?

HELD: Court affirmed the board’s award of permanent partial disability. Court stated that Tyson agrees that Garcia’s condition qualifies as an occupational disease, and Garcia agrees that his disability had not resulted in a loss of wages. Court stated the Workers’ Compensation Act contemplated the situation where an employee has been disabled but is still capable of earning wages comparable to his or her preinjury wages. In those situations the employee is not entitled to receive compensation, which is in excess of his or her functional impairment; however, the employee is not precluded from receiving any compensation for his or her injury. It is not unreasonable to find that 44-5a01(a) requires that an employee who has been affected by an occupational disease caused by employment should be compensated for the effects of the disease. While a disability may not preclude a worker from earning a comparable wage, it may have permanent adverse affect on his or her quality of life or his or her ability to work at other employment.

STATUTE: K.S.A. 44-5a01, -5a04(a) -5a22, -510d, -510e(a), -574(a)

Criminal

STATE V. HANEY
SALINE DISTRICT COURT – AFFIRMED
NO. 93,924 – JANUARY 6, 2006

FACTS: On Jan. 3, 2003, Haney was charged with misdemeanor sexual battery. In October 2003 he filed a motion to dismiss based on speedy trial grounds. The trial court granted the motion finding Haney was not brought to trial within 180 days. The state appealed, and the Court of Appeals concluded that the state only caused a delay of 120 days. The mandate from the clerk of the appellate courts was issued on Oct. 28, 2004, and received by the trial court on Oct. 29, 2004. Upon remand, the state filed a notice of hearing for Nov. 29, 2004. At that hearing, it was agreed by both parties that Haney’s trial court be held on Jan. 27, 2005. On Jan. 26, 2005, Haney filed a second motion to dismiss based on speedy trial grounds. The trial court granted the motion and dismissed the charges against Haney.

The court found 210 days had elapsed.

ISSUE: Were Haney’s speedy trial rights violated?

HELD: Court affirmed the trial court and dismissed the charges against Haney. Court stated that the time during which an interlocutory appeal by the prosecution is pending is not counted for purpose of determining whether a defendant is entitled to discharge for the state’s failure to provide a speedy trial. However, once the mandate is filed and received by the trial court, the time starts to run again, and any days that elapse are attributed to the state. Court found that at the time the mandate was filed, there were 120 days on the clock charged to the state. Ninety days elapsed between the filing of the mandate and Haney’s trial date. Court held the trial court properly granted Haney’s motion to dismiss for lack of a speedy trial.

STATUTES: K.S.A. 22-3604(2) and K.S.A. 2004 Supp. 22-3402

STATE V. LOCKE
JOHNSON DISTRICT COURT
REVERSED AND REMANDED
NO. 93,234 – JANUARY 6, 2006

FACTS: Locke filed K.S.A. 22-3210 motion to withdraw plea prior to sentencing. District court denied the motion, finding no showing of manifest injustice. Locke appealed.

ISSUE: Withdrawal of plea

HELD: Burden on a defendant to show good cause to set aside plea before sentencing is less than the burden to show manifest injustice to set aside plea after sentencing. Under facts, Locke is entitled to rehearing on motion to withdraw plea in order for district court to apply correct standard in considering the motion.

STATUTE: K.S.A. 2004 Supp. 22-3210(d)

STATE V. MARINO
FORD DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART
NO. 93,645 – JANUARY 13, 2006

FACTS: Marino convicted of aggravated battery and conspiracy to commit aggravated battery. On appeal he claimed his conspiracy conviction should be reversed because state failed to allege a specific overt act in the complaint. He also claimed trial court erred in admitting journal entry of co-defendant’s guilty plea to conspiracy charge, in refusing to instruct jury on misdemeanor battery as lesser included charge, and in admitting evidence of Marino’s prior bad acts.

ISSUES: (1) Complaint, (2) co-defendant’s journal entry, (3) jury instruction, and (4) previous bad acts


Analysis in Bruton v. U.S., 391 U.S. 123 (1968) not applicable because Marino and co-defendant were not tried jointly. State failed to provide evidence that co-defendant’s confession contained particularized guarantees of trustworthiness, thus it is considered unreliable pursuant to Lilly v. Virginia, 527 U.S. 116 (1999). Co-defendant’s journal entry had little if any probative value and was highly prejudicial. District court erred in admitting this evidence, but error was harmless because evidence of guilt was overwhelming.

Under facts, Marino not entitled to instruction on lesser included charge.

Issue not properly preserved for review. Because evidence against Marino was overwhelming, any error in admitting prior bad act evidence was harmless.

STATUTES: K.S.A. 2004 Supp. 21-3412 and K.S.A. 21-3302(a), -3414(a)(1)(A) and (B), 22-201(b), 60-404

STATE V. TAYLOR
RENO DISTRICT COURT – AFFIRMED
NO. 91,994 – JANUARY 20, 2006

FACTS: Taylor appealed convictions for possession of anhydrous ammonia with intent to manufacture controlled substance and possession of drug paraphernalia, claiming insufficient evidence supported the convictions. He specifically challenged evidence of K-9 dog tracking and footprints in snow. He also claimed jury improperly inferred that he knew of drug paraphernalia and anhydrous ammonia in car in which he was a passenger, that he was manufacturing methamphetamine in garage apartment behind mother’s home, and that tank in car contained anhydrous ammonia.

ISSUE: Sufficiency of evidence

HELD: Substantial competent evidence supports both convictions. A defendant’s mere presence with another person in car where drugs or drug paraphernalia are found is not enough to support a conviction for possession of drugs or drug paraphernalia. However, presence of other factors can supply link between defendant and drug evidence. Those circumstances can include any suspicious behavior by defendant, such as, in this case failing to stop when police activated lights and siren, attempting to elude police in 25-minute chase, and jumping from moving car and running from scene.

STATUTES: None
STATE V. WILLIAMS
NORTON DISTRICT COURT
REVERSED AND REMANDED
NO. 93,887 – JANUARY 6, 2006

FACTS: After revoking Williams’ probation, trial court ordered him to serve underlying sentence. Williams appealed, arguing trial court failed to consider placement at Labette Correctional Conservation Camp.

ISSUE: Sentencing

HELD: Williams’ crime and criminal history placed him in presumptive nonprison block on sentencing grid. K.S.A. 2004 Supp. 21-4603d(g) requires court to consider placement in Labette prior to revocation of Williams’ nonprison sanction of probation. Notwithstanding affidavit before trial court that Williams did not meet general eligibility criteria for Labette placement, it cannot be assumed trial court made the statutory consideration absent a clear indication on the record. Case remanded for trial court to note its consideration of Labette on the record.

STATUTE: K.S.A. 2004 Supp. 21-4603d(g)

Apellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Oral Argument in the Supreme Court

If oral argument is granted in a case, the Supreme Court will designate on the docket the amount of time allowed. Time is limited to 15 minutes each for the appellant and appellee unless otherwise designated on the docket. Additional time is granted in five-minute increments. The appellant may reserve a portion of the designated time for rebuttal by making an oral request at the time of hearing. See Supreme Court Rule 7.01(e). The oral request for reservation of rebuttal time must be made to the chief justice at the beginning of appellant’s argument; a request made after argument has begun may be denied.

To request oral argument in excess of 15 minutes, note the amount of time requested on the cover of the brief in the lower right-hand corner under the party/attorney contact information. See Rule 7.01(e). If a case is assigned to the Supreme Court’s summary calendar docket, a motion for oral argument must be filed within 15 days after mailing of the summary calendar notice. See Rule 7.01(c)(4). The Court grants or denies those motions at its discretion.

When debating whether to file a brief in a matter, counsel should be mindful that a party must file a brief in order to present an oral argument. See Rule 7.01(e).

If you have any questions about these or other appellate court rules and practices, call the Clerk’s Office and ask to speak with Jason Oldham, chief deputy clerk, (785) 368-7170.
In the Supreme Court of the State of Kansas
Rules Relating to Judicial Conduct

Rule 601A
Code of Judicial Conduct

Supreme Court Rule 601A, Canon 5C(4) is hereby amended, effective the date of this order.

(4) An incumbent judge who is a candidate for retention in office without a competing candidate and whose candidacy has drawn active opposition may campaign in response thereto in the manner provided in Section 5C(1)(b)(i), (ii), and (iii) and may obtain publicly stated support and campaign funds in the manner provided in Section 5C(2). An incumbent judge may, however, establish a committee in a manner and for purposes consistent with Section 5C(2) no earlier than 12 months prior to the election, but funds may not be expended (except for production of campaign materials) nor may statements in support or such materials be disseminated by said committee unless and until such candidate has drawn active opposition. For purposes of K.S.A. 25-4157, a committee formed under this provision shall be deemed terminated 60 days after the election.

By order of the Court, this 30th day of January, 2006.

Kay McFarland, Chief Justice

Kansas Association of Legal Assistants
March and April 2006 Meetings

March 7, 2006
Epic Center, 3rd Floor
301 N. Main
Wichita, Kan.
Speaker: Bonnie Bing

April 4, 2006
Epic Center, 22nd Floor
301 N. Main
Wichita, Kan.
Speaker: J. Michael Morris
Bankruptcy Overview

Contact Julie Daniels, CLA, at (316) 291-9520 or jdaniels@foulston.com for information.

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