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From the President
Richard F. Hayse

The Need for Judicial Performance Evaluation

Kansas needs a judicial performance evaluation system, one that is unbiased and uniform across the state. The good news is that such a system has been created and awaits implementation. The bad news is that legislative interest is lacking and funding remains merely an aspiration.

Why do we need to evaluate our judges? One of the most frequent complaints about retention elections is that no one knows the record of a judge who is up for retention. This creates an information vacuum which is too inviting for groups with a philosophical axe to grind. We’ve seen recent instances in district court retention races in Douglas and Shawnee counties where narrow focus groups attacked judges running for retention by distorting the judge’s performance record to suit the objectives of the attack group. Without unbiased information the voting public is faced with deciding judicial qualifications by sound bites.

Even actively practicing attorneys may not have adequate experience with every judge in the district to form a fair appraisal of the qualifications of each judge. Especially in our urban districts, with more than a dozen divisions of the court, it’s virtually impossible for each attorney to be well-informed about each judge’s performance. Which of us would want to have our job and livelihood decided on the basis of second-hand gossip in the coffee shop or the tavern? But just as important, each judge could benefit from fair and impartial feedback about how well he or she is living up to the ideals of the position. Only a few local districts have had any evaluation, and those tend to be sporadic and unscientific.

The Kansas Judicial Council recognized the need in November 2004 and created a Judicial Performance Advisory Committee composed of fourteen men and women from across the state. The group was chaired by Kansas Court of Appeals Judge Stephen Hill and included judges, lawyers and representatives of many groups with a stake in the administration of justice. In December 2005 the committee issued its report, calling for a program of judicial performance evaluation for all district court judges and all appellate court judges and justices.

The program would be administered by a new Commission on Judicial Performance created as an independent committee of the Kansas Judicial Council. The new Commission would retain experts to create the proper polling methods which would be distributed, collected and tabulated confidentially. The objective would be to evaluate judges and justices on legal ability, integrity, impartiality, communication skills, professionalism, temperament and administrative capacity.

The results of the surveys would be given to each judge and to voters in retention districts. Because the program would be publicly funded, the committee ultimately decided not to distribute results in elected district court races to avoid having taxpayer dollars used in partisan political contests.

Draft legislation was prepared by the committee and introduced in the 2006 Legislature as House Bill 2612. The bill proposes to fund the costs of judicial evaluation through increases in docket fees. The Kansas Bar Association has a long-standing policy favoring objective judicial evaluations and quickly endorsed this bill, despite concerns about further docket fee increases. The bill found itself in competition with other bills in the Legislature which also depended on docket fee increases or reallocation.

As this is written, the legislation has not progressed, thwarting the desire of committee members to have evaluation results available before the November 2006 elections. This election is virtually certain to feature attacks on sitting judges and justices because of perceived public dissatisfaction over recent court rulings on school finance and capital punishment. Without a system of fair and objective evaluation, Kansas risks losing good judges to the tactics of attack ads and anonymous rumor-mongering. The citizens, lawyers and judges of the state deserve better. Kansas needs a judicial performance evaluation system.

Richard F. Hayse can be reached by e-mail at rhayse@morrislaing.com or by phone at (785) 232-2662.
“I attended my first organized bar association meeting while I was still in my last year of law school — several months before I was admitted to the Bar. It was the midwinter meeting of the Southwest Kansas Bar Association, held in Dodge City, December 1946. My wife and I were invited to attend the meeting by Maurice A. Wildgen, a Larned lawyer, who later served as president of the Kansas Bar Association and as a district judge. He was a great advocate of the importance of lawyers participating in bar association activities, and I always felt that same obligation.

My first introduction to bar association activities made a lasting impression on my career. I have always maintained membership in local and state bar associations and the American Bar Association, and attended all of them very regularly. In fact, my participation has been so important to my career that I have attended every Kansas Bar Association Annual Meeting since 1948 and served 10 years on the board of governors of both the KBA and ABA.

The benefit and importance of attending bar conventions is perhaps best capsulized in the mission statement of our own Kansas Bar Association, stating that ‘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 fellowship and camaraderie enjoyed by all of us with our fellow lawyers at the Annual Meeting of the KBA is the catalyst for respectful relationships and productive practice.”

Glee S. Smith Jr.
Of Counsel — Smith, Burnett & Larson LLC, Larned
Of Counsel — Barber Emerson L.C., Lawrence
KBA member since 1947
Casemaker Countdown

Free online legal research on the way to KBA members

By Jeffrey Alderman, KBA executive director

If you were to read some of the minutes taken from Annual Meetings of the Kansas Bar Association in the late 1800s and early 1900s, one frequently discussed topic would be evident. Members often grumbled that the dues were “too high,” and they also questioned, “what do I get for my dues?”

In those days, the dues were rather inexpensive, ranging from nothing to a dollar or two!

Back then, state bar members were given few benefits; the most prominent was the opportunity to shape the way law was to be practiced. In fact, I have some minutes from 1887, and the first general discussion item was a presentation by then-KBA President Albert H. Horton on “The Death Penalty in Kansas.”

Ironically, not much has changed. Members are still talking about the death penalty, some still question the cost of dues, and others still debate the value of membership.

For 124 years, the KBA has been at the forefront of offering a wide range of benefits that enhance the practice of law in our great state. Our dues remain among the lowest in the country, and we continually strive to provide our members with a competitive edge.

As we approach our 125th anniversary, we are pleased to announce one of the best member services that we have ever seen, and we are very excited about bringing this benefit to the legal profession in Kansas: Free Online Legal Research.

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Recently, Casemaker earned national acclaim from legal practitioners when it was selected as a TechnoLawyer Awards finalist. TechnoLawyer serves the legal community by providing product reviews, technology tips, and other information.

(continued on Page 27)
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A NOSTALGIC TOUCH OF HUMOR

Attorney Phobias: My Top 10
By Matthew Keenan, Shook, Hardy & Bacon, Kansas City, Mo.

All professionals, deep down, have job-related phobias. I know surgeons do. They get in surgery and worry that they don’t have the equipment they need. Or that the right foot to be amputated is the left foot. Question to the scrub nurse: “Let’s see, it’s the Left foot, right? Nurse: “Right.” Two hours later they are calling the claims department. Medical misadventures are not limited to the operating suite, of course. Clinicians might worry about someone opening the door while administering the prostate exam. Or at least I hope my doctor does. Architects probably have their share as well. For example, designing a home with no bathrooms (not a problem my architect had, by the way).

But none of these other professions share the distinction of attorneys – when they screw up we know who ends up picking up the pieces. We deal with the disasters that keep most people up at night. And we rarely blink at the notion of a doctor who sawed off the wrong limb. Until we realize the person at risk for a Titanic-like mistake is counsel of record. That’s you.

Ninety-nine percent of the time, the worst fear is the fear itself. And that’s the point of this month’s column: the Kaopectate moments that revisit us every couple of months. Sometimes the phobias are the product of actual screw ups, though that has never happened to me, of course. Or you.

So I crafted my “Top 10” attorney phobias. But mine may not be yours. So read mine, and then tell me yours. I’ll dedicate a column to it and someday win the Pulitzer Prize. So here we go.

1. **Missing outlines.** Opening up the briefcase and seeing the witness outline/key exhibits are gone. For a deposition, it can ruin your day. For a trial, it can ruin your career.

2. **Missing witnesses.** Witnesses not showing up, or worse, dying. “Mrs. Jones, please take care of yourself. You are my only witness. You are also 90. Trial is set on May 1, 2020.”

3. **Court reporters.** We gotta have them. When they don’t show up it’s horrible. When they show up at the wrong location it’s worse. “Your secretary said the courthouse in Hays, not Haysville.” “I’m sorry. I said Pittsburg KANSAS.” Grab the Tums!

4. **Upset stomach.** This, literally, is the Kaopectate moment. No one, absolutely no one, is impervious to this. I seem particularly susceptible. Not sure why. I had this happen in Oklahoma City one time. I had the proverbial nervous stomach. The deposition was huge. I sucked down one too many cups of “Joe.” Mother Nature was more than calling. She was screaming. The bathroom was the size of a phone booth. When attorneys take breaks, they all flood the bathrooms. So I made my visit, only to be followed by co-counsel who wanted to “chat me up” while I was taking care of business. And business was going south, if you know what I mean. Top 10 worst days ever.

5. **Landing in the wrong city.** OK, it’s strange, but it’s mine. Every time I get on a plane I ask the attendant one question, “Where are we going?” This phobia kicks into high gear at those “hub airports.” The ones where the gates are six inches apart and the gate agent just graduated from middle school. And it’s his job to separate Laredo from Lawrence. No thanks.

6. **NOYEL, e.g., “Not on your exhibit list” objection.** Sustained before a cast of thousands, including your client. “Counselor, this is not on your exhibit list. I will sustain the objection.” Head to Osco now.

7. **You sent the fax to what number?** Try CVS pharmacy.

8. **Inexperienced paralegal.** Telling your new paralegal to “blow up this exhibit” has the potential for confusion. Particularly when the Fourth of July is two weeks away and she just got promoted from your courthouse runner.

9. **Problems from home during a deposition or trial.** “It’s the principal calling. Your son is in her office. And he’s not getting a special honor.”

10. **Your client and your car.** Another phobia that may be mine. The client wants to ride in your car, and your car is in the shop, and the car you drove is your wife’s minivan. Deffenbaugh’s trash truck carries less garbage. Grab the Rolaids. You can find them in the back seat.

So these are mine. Send me yours: mkeenan@shb.com.

About the Author
Matthew Keenan grew up in Great Bend and attended the University of Kansas, where he received his B.A. in 1981 and his J.D. in 1984. For the last 20 years, Keenan has practiced with Shook, Hardy & Bacon.
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Trustees Approve Changes to Bylaws

The Kansas Bar Foundation Board of Trustees approved amendments to the KBF bylaws at its board meeting Feb. 17 in Topeka. The Foundation’s bylaws now state:

**Article III. MEMBERS’ MEETINGS**

3.1. Members. The Foundation shall have two classes of members — voting and nonvoting. The designation of each class and the qualifications of the members of each class shall be as follows:

A. Voting Members. Voting members shall be the Board of Trustees of the Foundation.

B. Nonvoting Members. Nonvoting members of the Foundation shall be:

1. Fellows. A “fellow” shall be a person admitted to practice law under the Rules of the Kansas Supreme Court who has contributed an aggregate total of $1,000 to the Foundation, or has pledged in writing to contribute at least $1,000 in 10 or fewer consecutive annual installments, has made the first installment, and is current on such pledge.

2. Associate Members. An “associate member” shall be any other person, firm, association, or corporation making a financial contribution to the Foundation.

Please note that all current sustaining members will now be recognized as associate members. If you have any questions about the amendments please contact Bar Headquarters at (785) 234-5696.

Pro Bono Attorneys Needed

The Kansas Bar Association is working in conjunction with Kansas Legal Services Inc. to recruit additional attorneys for pro bono assignments statewide. If you are interested in joining fellow attorneys in providing much-needed pro bono services, please contact Marilyn Harp at harpm@klsinc.org with your name and the geographic region in which you will be able to serve. You’ll be glad you did!

Mark your calendars for the 2006 Fellows Dinner on June 8!

The 2006 Fellows Dinner has been scheduled for June 8 at the beautiful Lake Quivira Country Club. The dinner will coincide with the KBA’s Annual Meeting in Overland Park, which will be held June 8-10. Members added to the published roll of Fellows and those who have reached a new contribution level will be honored at the dinner. This black-tie-optional gala event of the year provides a wonderful opportunity to salute the new Fellows, introduce new officers, and reminisce with old friends and colleagues. Formal invitations will be mailed in April. For more information, please contact Janessa Akin at (785) 234-5696.
Free Falling From 10,000 Feet
By Beth Warrington, publications coordinator

By definition, skydiving is the sport of jumping from an airplane at a moderate altitude, in Kansas between 10,000 to 11,000 feet, before pulling the ripcord of a parachute. Some believe that it is falling, but to others, like Wichita attorney M. Duane Coyle, it is a feeling of flying. “Think Peter Pan,” said Coyle, who serves as of counsel at Hinkle Elkouri Law Firm LLC.

He made his first jump in 1995 alongside his wife, Donna, at Jayhawk Skydivers (now Air Capital Drop Zone) in Wichita. They jumped at 3,500 feet while hanging from a Cessna’s strut and then just letting go.

Coyle is the type of person who is willing to try almost anything at least once. He said he was scared when he first jumped but made the decision to jump a second time a few weekends later to get rid of the nerves of jumping the first time. He has made around 1,100 jumps to date.

“When I first started jumping, I was nervous the first 10 to 15 jumps,” he said. “Then I moved on to what I call the exhilaration stage, and then the learning stage. It gets less scary after you start to learn the equipment is safe.”

Coyle really began to focus on jumping after he and Donna moved to Orlando, Fla., in 1998, leaving a partnership at Wallace, Saunders, Austin, Brown & Enochs in Wichita. For the first two years, he focused on jumping, with a little scuba diving thrown in. His home drop zone was Titusville, Fla., at Skydive Space Center and then almost three years at Skydive DeLand in DeLand, Fla.

In Florida, he said, the jump altitude is around 13,500 feet. When falling on your stomach, you can go about 120 mph on average. You are in the sky for about 60 to 70 seconds once you reach terminal velocity, which is around 5 to 6 seconds per 1,000 feet before deploying (opening the parachute) at 2,500 feet.

After two years of focusing on his jumping, Coyle decided to return to the practice of law. He took the bar exam in Florida in 2000 and worked for almost three years as an associate at Luks & Santaniello, an insurance defense firm based in Fort Lauderdale, Fla., with an office in Orlando.

After five years of living in Florida, the Coyles made the move back to Wichita to be closer to family. He joined Hinkle Elkouri in 2003.

Although he doesn’t get to jump as much as he did in Florida, Coyle still makes time. He said there are primary differences between Florida and Kansas while jumping, including the types of planes and the weather.

In Florida, he said, they would fly Twin Otters and Skyvans that could carry 22 jumpers to altitude. In Kansas, Cessna 182s are primarily used and carry four to five jumpers to altitude at about 10,000 feet. The weather is another factor, he said. In Florida, the weather was excellent; in Kansas, it is windy and there is winter, so it is not as much of a scene.

“Every once in a while there will be a boogie in Kansas,” Coyle said, “which is bringing in a special plane like an otter. Then, 22 to 23 people can make jumps instead of three or four. Everyone comes out of the woodwork for a boogie.”

Coyle said, “There are free fliers; belly fliers; and CRW [Canopy Relative Work] dogs (a term applied to this type of jumper), who do canopy formations and are some of the most dangerous. They fly with special canopies.”

People can become so absorbed by it that they could get seriously injured and then turn around two months later and jump without a care. Coyle himself had a canopy collision with another guy. He said that neither of them were paying attention, and Coyle went through the other guy’s lines.

To Coyle, there is no nervousness from making the actual jump, but the nerves come while deploying and remembering what to do.

“The biggest moment is when you are getting ready to deploy your main chute,” he said. “You have to be ready and react immediately.”

Coyle finds jumping to be quite relaxing and not the adrenaline high that nonjumpers seem to think. It is instead about skill, concentration, and relaxation. While the thrill is still there, it is actually less in the free fall part of the jump and more about the canopy control part of the jump, like the landing.

Every year in Rantoul, Ill., Coyle attends the World Free Fall Convention with friends from around the country and even a few from around the world. Close to 5,000 skydivers jump over a 10-day period. As a member of the Flying Hellfish, Coyle will meet up with other members and jump together at Rantoul.

“Jumpers include lawyers, pilots, doctors, the wealthy, aircraft mechanics, and people with normal jobs,” he said.

According to Coyle, nobody cares who you are. The only thing they care about is, “Can he jump?” or “Is he any good?”

“Bill Gates could come and it wouldn’t matter, unless he wanted to pay for everyone’s jumps,” he said. “It’s a classless society.”

Skydiving is a little hidden world that few know about.

“This is a wide community of people — from military to people you wouldn’t want your daughter to go out with,” Coyle said. “There are free fliers; belly fliers; and CRW [Canopy Relative Work] dogs (a term applied to this type of jumper), who do canopy formations and are some of the most dangerous. They fly with special canopies.”

The newsletter is posted every Monday on the KBA members’ only Web site.

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Oyez Oyez is the KBA legislative newsletter that contains up-to-date information on legislation that impacts your practice in Kansas.

The newsletter is posted every Monday on the KBA members’ only Web site.
A doctor and a lawyer in two cars collided on a country road. The lawyer, seeing that the doctor was a little shaken up, helped him from the car and offered him a drink from his flask. The doctor accepted and handed the flask back to the lawyer, who closed it and put it away. “Aren’t you going to have a drink yourself?” asked the doctor. “Sure, after the police leave,” replied the lawyer.

There they go again, those conniving lawyers, always trying to take advantage of someone else to better their own position. And in this case, the poor saintly doctor was the victim. This was the image that greeted me a few days ago on my daily calendar: another lawyer joke. Another attempt to show that lawyers are sneaky and money hungry, or even worse, wishing them misfortune. And to think my 13-year-old niece gave me this calendar for Christmas. They are starting them young these days.

Before I started law school, I didn’t pay much attention to the standard lawyer joke. It went in one ear and out the other. But during the last three years I have been especially cognizant of all the lawyer barbs I hear. The thing is I don’t think most of them are so much jokes as they are testaments to the dislike and distrust many people in our society have toward lawyers.

In fact, a cottage industry of sorts has developed surrounding lawyer jokes and stereotypes. Everywhere I go I see a calendar or book, a movie, and even a video game that embraces the anti-lawyer culture that has developed in this society. Many people are embracing this culture right to the bank.

Why do so many people dislike lawyers? I have no clue. But I do know that when I tell people I am graduating law school in a couple of months, most of them put their free hand on their wallet and say with a half-hearted chuckle, “You’re not going to sue me, right?” In contrast, my friend who is graduating from medical school this year gets an entirely different response. He gets hugs and kisses on the cheek, while people tell him he is going to make a difference in the world, and we need more people like him. But no one has ever told me anything along those lines. In some people’s minds, doctors are the heroes, lawyers are the villains.

I am sure my audience reading this has thicker skin to these types of comments or jokes than I do, being that my legal career is less than three years old, but it’s tough to know that when I attend my girlfriend’s company Christmas party I will be venturing into enemy territory. My girlfriend is a nurse practitioner, so her Christmas party is well attended by doctors who seem to have a certain pronounced dislike of those of us in the legal profession. And, believe me, I get no special favors when I explain to them I plan to be a trial attorney. I think we all know where these doctors’ thoughts go when I explain that to them. The myths they tell me are endless and sensational. From the 70 percent contingency fees myth, to attorney’s planting nurses to distribute business cards, to many other outlandish myths. Remember, these are doctors telling me this; imagine what others think?

I doubt most of these people who harbor such animosity toward lawyers have ever been the victim of botched medical procedures or have been severely injured in an accident because of the negligence of another. Hopefully it would not take a tragic event like a serious auto accident to make someone see the good in the legal profession. I know that as my law school career comes to an end and my career as an attorney begins, I will be faced with many situations where someone has preconceived notions about me because of my choice of careers. Let’s face it, when someone needs a trial attorney to help them they are usually facing a less-than-desirable situation. Generally, either they believe they have been wronged in some manner or someone is accusing them of committing a wrong. Neither is a pleasant situation to be in.

I hope that as I enter this “honorable profession,” people will indeed see me as an honorable person and attorney. I know that jabs at lawyers will continue for years to come, but I hope that the animosity some people feel toward lawyers will subside. As I doubt this will happen, I’d better get ready to roll with the punches and remember I’m about to join the profession Americans love to hate.

About the Author

Michael DiPasquale is a third-year student at the University of Kansas School of Law. A native of Wichita, he received his undergraduate degree from the University of San Diego, where he was a four-year letterman in football. He will work for Franke Schultz & Mullen in Kansas City, Mo., after he graduates in May.
Lawyers: Know Thyself

By Christopher J. Masoner, KBA Young Lawyers Section president

B y the time this issue of the Journal is published, the annual Kansas High School Mock Trial Competition, sponsored by the Young Lawyers Section, will have just concluded with the state championships on April 1st. On March 4, regional competitions were held in Olathe and Wichita. I was able to attend the Olathe regional and judge several rounds of the competition. Every time I have judged for mock trial, I have been truly impressed by the work that the students have put into their preparation.

The case for 2006 involved some very serious issues. The defendant, a restaurant owner, was on trial for second-degree murder in connection with the death of a former employee. The fact pattern given to the students was complex — including issues of whistle-blowing, homelessness, and gang violence. Yet the students tackled these complex issues with poise, maturity, and enthusiasm. It is certainly encouraging to see such talented young people (even including some in the eighth grade) with such a strong interest in becoming the next generation of young lawyers.

Assuming that they graduate from college in five years and then work for a year or two before going to law school, the high school seniors participating in Mock Trial will be sworn into the bar in 2016. By that time, the young lawyers of today will be in the prime of our careers, and we will be setting the tone for the profession. What will we do with that responsibility?

In thinking about the issue, it is instructive to know something about who we (young lawyers) are. In 2004, the National Association for Law Placement Inc. (NALP) Foundation and the American Bar Foundation published the first results of their After the JD (AJD) study. Over the course of the 10-year study, the AJD research team will track a representative sample of approximately 10 percent of all lawyers entering the practice of law in the year 2000. The 2004 report reflects the data obtained from the early years of these lawyers’ practice.

The great news contained in the report is that most of us really like being lawyers. Eighty percent of the AJD respondents expressed that they were “moderately” or “extremely” satisfied with their decision to enter the profession. This appears to be true whether we work for large firms, small firms, government practice, or public interest. However, there is a significant difference among practice settings with respect to those aspects of our jobs with which we are most satisfied. The AJD respondents practicing in smaller firms, government, and public interest tended to be most satisfied with the substance of their work, their work environments, and their work’s social value, but they were less satisfied with their compensation and opportunities for advancement. Perhaps not surprisingly, those respondents practicing in larger firms were most satisfied with their compensation and opportunities for advancement but not quite as satisfied with the other aspects of their practice.

A related issue is the increased mobility that has occurred for young lawyers in recent years. Although we tend to be generally satisfied with our decision to enter the profession, we are changing specific jobs earlier and more often. Most of the AJD lawyers had practiced for three or fewer years; however, more than one-third of them had already changed jobs at least once, and 18 percent had changed jobs twice or more. Furthermore, nearly half (44 percent) of the respondents reported a current plan to change jobs within two years. Think of your current colleagues and your friends from law school, and I suspect you will find most of them have or will have changed jobs (many more than once) within five years after graduating from law school.

Interestingly, the AJD study found that lawyers in larger firms are less likely to change jobs than their contemporaries in solo and small-firm practice. Only 16 percent of those lawyers in the largest firms had changed jobs, while half of those in solo practice and 42 percent of those in small firms (two to 20 lawyers) had moved. When compared with the data on young lawyers’ satisfaction with their jobs, it seems satisfaction with compensation and advancement potential is more likely to keep them in the same place. On the other hand, lawyers who are most satisfied with the more substantive aspects of their jobs may be more willing to look for other opportunities.

Many other important issues are addressed by the AJD study. While we, as a profession, have made great strides in including women and minorities in the profession over the last several decades, the study continues to find significant income gaps between male and female lawyers and between minority and nonminority lawyers. The reasons behind these gaps are complex and go well beyond the scope of this column, but there is no question we could still do a lot better at including those who do not traditionally have the same connections to the profession that most of us have enjoyed.

As the famous Greek maxim says, it is crucial to “know thyself.” Only by knowing where we are as young lawyers, can we know where we will be going tomorrow as the leaders of the profession. I encourage everyone to take the time to read the first results of the After the JD study and to look for further reports as they come out.

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.

FOOTNOTES
1. After the JD: First Results of a National Study of Legal Careers, The NALP Foundation for Law Career Research and Education and the American Bar Foundation, 2004. The full text of the report is available in PDF on either organization’s Web site: www.nalpfoundation.org or www.abf-sociolegal.org. It is well worth reading for anyone in the legal profession — whether a young lawyer, a not-so-young lawyer, or even a prelawyer.
2. The AJD study defines large firms as having more than 251 lawyers, and includes significant representation from the four largest legal markets (New York, Chicago, Washington, D.C., and Los Angeles). Given these facts, it seems the study may be more heavily weighted toward large-firm lawyers in those cities. I do not believe the data found in the study with respect to large-firm lawyers are necessarily representative of those of us practicing in larger firms in the Wichita and Kansas City areas. We are fortunate to practice in a region where the culture of most firms seems to be a little less intense than that of their counterparts in those larger markets.
CHANGING POSITIONS

H. David Barr has joined Baty, Holm & Numrich P.C., Shawnee.
Matthew R. Bergmann has joined Davis, Unrein, McCallister, Biggs & Head LLP, Topeka, as an associate.
Leslie C. Byram has joined the Jones Law Firm P.A., Overland Park, as an associate.
Brent N. Coverdale has joined Seyferth Knittig LLC, Kansas City, Mo.
Michael A. Doll has become the new Dodge City municipal court judge.
Summer A. Duke has joined the Disability Rights Center of Kansas, Topeka.
Ryan M. Evans has joined Midland Loan Services Inc., Overland Park.
John P. Fleenor has joined the Kansas Attorney General’s Office, Topeka.
David R. Frye and Michael A. Williams have been promoted to partners with Lathrop & Gage L.C., Kansas City, Mo.
Gretchen M. Gold has joined the firm as partner, Ruth J. Brackney as of counsel, and Courtney M. Lieb and Joe D. Growney as associates.
Kimberly K. Gibbens has joined Blackwell Sanders Peper Martin LLP, Kansas City, Mo.
Michael C. Grimmett has joined Gaines & All Law Firm, Augusta.
Stacey J. Gunya has joined Dwyer, Dykes & Thurston L.C., Overland Park, as of counsel.
Jason M. Hans has become a shareholder of Rouse Hendricks German May P.C., Kansas City, Mo.
Brette S. Hart and Stacey J. Lett have joined Harris McCausland, Kansas City, Mo., as associates.
Christopher J. Leopold has joined Stinson Morrison Hecker LLP, Kansas City, Mo.
Timothy P. McConville has joined Pulte Homes Inc., Lenexa.
Jason B. Moore has become an associate with Husch & Eppenberger LLC, Kansas City, Mo.
Sidney J. Palmer has joined Renders Kansas L.C., Wichita.
Walter R. Randall Jr. has joined American Century Investments, Kansas City, Mo.
Robert B. Rogers has joined Fastener & Hose Technology Inc., Olathe.

Carmen San Martin has joined IMG & Associates Chtd., Salina, as an associate.
Mark B. Schaffer has joined Frischer & Associates, Overland Park.
Sabrina K. Standifer has become a shareholder of Adams & Jones Chtd., Wichita.
Peter L. Sumners has joined Levy and Craig P.C., Kansas City, Mo., as an associate.
Mary Gowin Thrower has been named as the new magistrate judge for the 28th Judicial District.

CHANGING PLACES

Scott R. Ast and Todd A. Scharnhorst have started Scharnhorst & Ast P.C., Kansas City, Mo. 64112.
Norman L. Davidson Jr. has started his own practice, located at 719 Massachusetts St., Suite 114, Lawrence, KS 66044.
Patrick E. Henderson has started Henderson Law Office, 627 Commercial, P.O. Box 349, Atchison, KS 66002.
Paul W.S. Joslin has a new business address, 5350 W. 94th Terrace, Suite 205, Shawnee Mission, KS 66207.
McCollum & Parks L.C. has moved to 4330 Shawnee Mission Parkway, Fairway, KS 66205.

Lauren E. Reinhold has started Reinhold Law Office LLC, 1046 New Hampshire St., Suite 51, Lawrence, KS 66044.
Jacob W. Stauffer has started Stauffer Law Firm LLC, 204 W. Main St., West Plains, MO 65775.
Stinson Morrison Hecker LLP has moved its Overland Park offices to 10975 Benson, Suite 550, 12 Corporate Woods, Overland Park, KS 66210.
Zimmerman Law Office has moved to 13200 S. Lakeshore Dr., Olathe, KS 66061.

MISCELLANEOUS

Bibler, Newman & Reynolds P.A. has changed its name to Newman, Reynolds & Riffel P.A. The firm has offices in Topeka, Wichita, and Salina.
Michael C. Brown, Mulvane, has been elected to serve as president of the State Board of Directors for Kansas Legal Services.
Michael A. Williams, Lathrop & Gage L.C., Kansas City, Mo., received the University of Missouri-Columbia's 2006 Arts and Science Recent Alumni Award.
Winton A. Winter Jr., Peoples Bank, Lawrence, has been appointed to the State Banking Board by Gov. Kathleen Sebelius.

Editor’s note: It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.

“Jest Is For All” by Arnie Glick

Sometimes the speed of the discovery process just takes my breath away!
Hon. Jules Verne Doty Jr.

Hon. Jules Verne Doty Jr., 82, Ottawa, died Feb. 20 in Olathe. He was born Oct. 29, 1923, in Trece, the son of Jules Verne and Irene Jane (Gatiff) Doty. He earned his bachelor’s and law degrees from Washburn University and its School of Law. He joined the Kansas Bar Association in 1950.

He practiced law in Columbus and was Cherokee County attorney before moving to Ottawa in 1958 to join Thomas and Doug Gleason in the practice of law. He was active in Democratic politics, including chair of the Third Congressional District of Kansas for John F. Kennedy’s presidential campaign.

Doty served as commissioner of the Kansas Corporation Commission from 1968 to 1974 and later worked as a national tax attorney for the Kansas Department of Revenue. Doty was appointed as a judge for the Fourth Judicial District in 1983. He retired from law in 1995.

He is survived by two daughters, Sara Miller, Desoto, and Julie Lemons, Salina; one son, Mark, Olathe; and five grandchildren. Doty was preceded in death by his wife, Martha; one brother, Claude Wilkinson; and two sisters, Helen Doty and Crystal Wilkinson.

L. LaVerne Fiss

L. LaVerne Fiss, 71, Johnson, died June 26 in Johnson. He was born March 8, 1934, in Johnson, the son of Royce and Wilma Tucker Fiss.

He graduated from the University of Kansas and its School of Law. He was a member of the Phi Gamma Delta fraternity. Fiss joined the Kansas Bar Association in 1960 and was also a member of the American Bar Association.

In addition to his private law practice, he served as Stanton County Attorney and as city attorney for Johnson. He was a member and past president of the Johnson Rotary Club, as well as a Paul Harris fellow and a member of the Jaycees and the State Legal Council.

Survivors include his wife, Faydean, of the home; and two sons, Greg, Johnson, and Andy, Hugoton.

Warren R. Southard

Warren R. Southard, 80, Wichita, died Feb. 5 at his home. He was born July 14, 1925, in Stockton. He joined the Navy before attending Wichita State University in 1943. He graduated with his bachelor’s degree in 1948, followed by his law degree, with honors, from Washburn University School of Law in 1951.

Southard was a practicing attorney in Kansas for 55 years. He was a lifetime member of the Kansas, Wichita, and American bar associations and was admitted to practice before the U.S. Supreme Court. Southard was a fellow in the Kansas Bar Foundation and was the first recipient of the Howard C. Cline Award for Distinguished Service from the Wichita Bar Association.

He was a member of the Bestor G. Brown and Albert Pike Masonic lodges, Wichita Scottish Rite Consistory, Midian Shrine, Jesters Organization, and was a charter member of the Midian Pipes and Drums.

Survivors include his wife, Claudine, of the home; sons, Jeff, Lawrence, and Steve, St. Joseph, Mo.; daughter, Jan Anderson, Winfield; brother, John, Orlando, Fla.; and 12 grandchildren.
Top 10 Tips for Writing

By Stephanie L. Anglin, Anglin Law Office LLC, Overland Park

10. Leave out the “legalese.”

The aforementioned author of said article recommends not using said language in writing aforementioned legal briefs as set out hereunder. It is no longer necessary to use “legalese” in order to make your point and sound like a lawyer. You will keep your reader’s attention longer by stating your arguments clearly and concisely.

9. Address both strengths and weaknesses of your case.

While it is easy to point out all of the great strengths in your case, it is not always easy to admit that there are some weaknesses as well. The other side will undoubtedly point out your weaknesses in their response, so you will lessen the impact of their argument by addressing the weaknesses in your initial brief.

8. Be civil to the opposing attorney.

Unless you are writing a motion for sanctions, you should not attack the character of the opposing attorney in your legal briefs. You should concentrate on convincing the judge why your position should win rather than accusing the opposing attorney of being unethical.

7. Avoid long block quotes.

While it is okay to quote relevant language from cases to strengthen your point, there is no need to set out page-length block quotes from cases in your briefs. Instead, it is more persuasive to summarize the case and explain why the case applies in your situation.

6. Don’t repeat the same argument over and over.

Except for summarizing your argument in the conclusion, it is not necessary to repeat arguments in your briefs. Saying the same thing over and over will not strengthen your case and could cause your reader to skip over portions of your brief to avoid reading the same argument again.

5. Organize with headings and subheadings.

The use of headings and subheadings can help organize your arguments and assist the reader in going back to find a certain argument without re-reading a large portion of the brief. This is especially helpful when drafting a long fact pattern.

4. Use the art of persuasion.

Don’t forget that the sole purpose of writing your brief is to persuade the judge to accept your argument over your opponent’s argument. Even if there is no controlling precedent, make sure that you give the judge sound reason to adopt your view.

3. Proofread, proofread, proofread.

No matter how great an argument is, if there are misspellings or other glaring mistakes, it will reflect poorly on your attention to the brief. The extra time it takes to thoroughly read over the brief before signing it may make all the difference in the impression you leave on the judge and the other side.

2. Remember your audience.

When possible, put yourself in the judge’s position and concentrate on the issues the judge would see as critical to deciding the case. Also make it easier for the judge to understand your position by writing as clearly and succinctly as possible.

1. Read the rules.

Both trial and appellate courts have rules relating to the length and format of briefs and motions. Make sure to research the applicable rules thoroughly before starting your brief in order to ensure that your brief is accepted for filing by the court.

About the Author

Stephanie L. Anglin, Overland Park, is a solo practitioner with Anglin Law Office LLC. Her practice focuses on legal research and writing at both the trial and appellate levels. Anglin received her J.D. in 1998 from Washburn University School of Law, where she was a member of the Washburn Law Journal staff.

Editor’s note: “Top 10 Tips for Writing” was first published in the Winter 2005/2006 edition of the YLS Forum, which is published by the KBA Young Lawyers Section.

The Young Lawyers 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 young practitioners.

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

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2006 Outstanding Speakers Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars for January, February, and March. Your commitment and invaluable contribution is truly appreciated.

Robert L. Baer, Cosgrove Webb & Oman, Topeka
Michael E. Baker, Shook, Hardy & Bacon, Kansas City, Mo.
David C. Carpenter, Carpenter & Beavers Law Office LLP, Topeka
Kevin J. Cook, Law Office of Kevin J. Cook, Topeka
David R. Cooper, Fisher, Patterson, Sayler and Smith LLP, Topeka
Kimberly Corum, Corum Law Office, Manhattan
Hon. Rawley J. (Judd) Dent, Montgomery County Judicial Center (Ret.), Independence
Doug D. Depew, Depew Law Firm, Neodesha
Timothy Feathers, Stinson Morrison Hecker LLP, Kansas City, Mo.
Megan Fliskamper, Polsinelli Shalten Welte Suelthaus P.C., Clayton, Mo.
Autumn L. Fox, Law Office of Autumn Fox, Abilene
David S. Fricke, Commerce Bank & Trust, Topeka
Mark A. Galloway, Telthorst & Associates LLC, Wichita
Stephanie E. Goodenow, Goodenow & Moore LLC, Leawood
Ruth E. Graham, Topeka
Patricia Hamilton, Wright Henson Clark, Huton, Mudrick & Gragson LLP, Topeka
Richard F. Hayse, Morris Laing Evans Brock & Kennedy Chtd., Topeka
Stanton A. Hazlett, Kansas Supreme Court – Disciplinary Administrator, Topeka
Bernard J. (B.J.) Hickert, Newbery, Ungerer & Hickert LLP, Topeka
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Karen Hiller, Housing & Credit Counseling, Topeka
Matthew H. Hoy, Stevens & Brand LLP, Lawrence
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Maj. Gen. Lloyd E. (Gene) Krase, Kansas Division of Emergency Management, Topeka
L.J. Leatherman, Palmer, Leatherman & White LLP, Topeka
Charles D. (Chuck) Lee, Martindell Swearer & Shaffer LLP, Hutchinson
Richard E. Lenza, Shughart Thomson & Kilroy P.C., Kansas City, Mo.
Mary E. May, Office of the U.S. Trustee, Wichita
Hon. Patrick D. McNaney, Kansas Court of Appeals, Topeka
Roberta Sue McKenna, Kansas Department of Social and Rehabilitation Services, Topeka
Lt. Gen. John Randolph (Randy) Mettner Jr., Special Assistant to the Adjutant General of Kansas (Ret.), Topeka
Anne Burke Miller, Attorney at Law, Manhattan
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Amy Morgan, Shughart Thomson & Kilroy P.C., Overland Park
J. Michael Morris, Klenda Mitchell Austerman & Zuercher LLC, Wichita
Hon. Robert E. Nugent, U.S. Bankruptcy Court, Wichita
K. Kirk Nystrom, Attorney at Law, Topeka
Jill D. Olsen, South & Associates P.C., Overland Park
Robert W. Parnacott, Assistant County Counselor, Sedgwick County, Wichita
John C. Peck, Professor of Law, University of Kansas, Lawrence
Rebekah R. Pinick, U.S. Department of Health and Human Services, Kansas City, Mo.
Paul D. Post, Law Office of Paul D. Post P.A., Topeka
Robert L. Pottroff, Myers Pottroff & Ball, Manhattan
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Linda Scott Skinner, Deffenbaugh Industries, Shawnee
Wesley F. Smith, Stumbo, Hansen & Hendricks, Topeka
Marty Snyder, Assistant Attorney General, Topeka
Hon. Dale L. Somers, U.S. Bankruptcy Court, Topeka
Kelly D. Stohs, Shughart Thomson & Kilroy P.C., Overland Park
Bradley A. Stout, Adams & Jones Chtd., Wichita
Hon. Deanell R. Tacha, Chief Judge, U.S. Court of Appeals, Olathe
Robert M. Telthorst, Telthorst & Associates LLC, Topeka
Trisha Thelen, Foulston Siefkin LLP, Wichita
Hon. Linda S. Trigg, Johnson County District Court, Olathe
David J. Wood, First American Title, Wichita
Candidates for Kansas Bar Association Officers Positions

President:
David J. Rebein, Dodge City

President-elect:
Linda S. Parks, Wichita

Vice President:
Ernest C. Ballweg, Overland Park

Secretary/Treasurer:
Timothy M. O’Brien, Overland Park
Thomas E. Wright, Topeka

KBA Delegate to the ABA House of Delegates:
Hon. David J. Waxse, Kansas City, Kan.

Candidates for Kansas Bar Association Board of Governors

District One:
Eric G. Kraft, Overland Park

District Two:
Gerald R. Kuckelman, Atchison

District Four:
Nominee to be selected

District Five:
Martha J. Coffman, Topeka

District Six:
Gabrielle M. Thompson, Manhattan

District Seven:
Rachael K. Pirner, Wichita

District 10:
Glenn R. Braun, Hays
Timothy M. O’Brien is a partner in the Overland Park office of Shook, Hardy & Bacon LLP. He practiced at the Logan and Martin firm in Overland Park until the firms merged in 1985. Previously he was a law clerk for Hon. Earl E. O’Connor. He is a 1980 graduate of the University of Kansas and earned his juris doctorate from the University of Kansas School of Law in 1983.

O’Brien has long been active in bar association activities in Kansas. He has served since 2000 as District One Representative to the Kansas Bar Association Board of Governors and also serves on the KBA Bench-Bar and Diversity committees. He co-founded the Johnson County Young Lawyers Section and served as its first president in 1988. He has served the Johnson County Bar Association (JCBA) as membership chairman, chair of Law Day, and as editor of The Barletter. He served on the JCBA Board of Directors, 1993 to 1996, and as trustee of the Johnson County Bar Foundation.

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

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

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

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

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

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

Thomas E. Wright is a partner in the Topeka law firm of Wright, Henson, Clark, Hutton, Mudrick & Gragson. Wright was a member of the Kansas Bar Association Board of Governors from 1998 to 2005. From 1987 to 1989, he was the chair of the KBA Legislative Committee and the Committee on Prevention of Legal Malpractice. He received the KBA Outstanding Service Award in 1989 and the Topeka Bar Association’s Warren W. Shaw Distinguished Service Award in 2003.

Wright chaired the Topeka Shawnee County Consolidation Commission in 2005 and the Governor’s Gaming Committee in 2003. He was president of the Sam Crow American Inns of Court in 2004 to 2005.

During his time as a member of the Kansas Supreme Court Nominating Commission, 1995 to 2003, the commission presented two different governors with the names of a majority of the current Kansas Appellate Courts members.

Wright has been active at Washburn University School of Law teaching as an adjunct professor in the Trial Techniques Program in the early 1980s. From 2001 to present, he has taught as a part of the National Institute for Trial Advocacy at Washburn and, in March 2005, at Loyola Law School in Chicago.

He was a member of the Washburn University Board of Regents and chairman of that body, 1986 to 1988.

In addition to the KBA, Wright is currently a member of the American College of Trial Lawyers, Kansas Association of Defense Counsel, the ABA, and Kansas Bar Foundation.

(continued on next page)
**David J. Rebein**, Dodge City, is a partner in the firm of Rebein Bangerter PA. He practices personal injury, commercial litigation, and complex litigation.

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

He has served on the KBA Board of Governors since 1997, when he was appointed to fill the vacant seat of the Governor for District Nine.

Rebein is a past member of the KBA Board of Editors and past president of the Litigation Section. He serves on the Professional Ethics Grievance and Bench-Bar committees and is a Kansas Bar Foundation Fellow. He was appointed to the Kansas Supreme Court Nominating Commission in 2003.

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

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

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

She earned her B.A., summa cum laude, in political science from Washburn University in 1979 and her J.D., cum laude, from Washburn University School of Law in 1983, where she was a staff member of the Washburn Law Journal. Parks is a member of the Kansas and Wichita (WBA) bar associations and the Kansas Women Attorneys Association. With the KBA, she currently serves on the Raising the Bar and Law Related Education committees and the Ethic Grievance Panel.

She is a Silver Fellow with the Kansas Bar Foundation and has served for five years as the KBA’s delegate to the ABA’s House of Delegates. She is currently serving as vice president of the KBA and serves on its Executive Committee.

She has been a member of the American Bar Association since 1983. As the KBA delegate to the ABA, she was on the Commission on Mental and Physical Disability Law, State Membership Chair, Select Committee of the House of Delegates, Minority Caucus, and National Caucus of State Bar Associations to the ABA. Parks is a Fellow of the American Bar Foundation, and she also serves on the board of the National Conference of Women’s Bar Associations.

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

Parks has been with numerous charitable and civic organizations. She currently serves on the board of the Wichita YWCA and Wichita Greyhound Charities Inc.

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

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

He is a fellow of the Kansas and Johnson County bar foun-
dations and a member of the Kansas Trial Lawyers Associa-
tion. Ballweg is president of the Johnson County Bar Senior
Lawyers Section. He is admitted to the 10th U.S. Circuit
Court of Appeals and the U.S. Supreme Court.

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

KBA Delegate to ABA

Hon. David J. Waxse, Kansas City, Kan., is a past president
of the Kansas Bar Association and is currently one of the KBA
delegates to the American Bar Association House of Delegates.
He has served on the KBA Board of Governors since 1988.
He is a U.S. magistrate judge in Kansas City, Kan. Prior to be-
coming a judge, he was a partner of Shook Hardy & Bacon LLP,
Overland Park, where he practiced from 1984 to 1999. He was
with Payne & Jones Chtd. for 14 years prior. He received his B.A.
from the University of Kansas and his J.D. from Columbia Uni-
versity in New York.

Waxse has served as chair of the Kansas Commission on Judi-
cial Qualifications, a member of the Kansas Justice Commission,
the board of the Lawyer's Committee for Civil Rights, the Civil
Justice Reform Act Advisory Committee of the U.S. District
Courts in Kansas, the Board of Directors of the American Ju-
dicature Society, and of the Miller-Marley Youth Ballet. He has
been a member of the Professionalism Committee of the ABA
and on the Board of Editors of the Professional Lawyer, an ABA
publication. He is currently a member of the executive com-
mittee of the National Conference of Federal Trial Judges of
the Judicial Division of the ABA. He is a member and past
president of the Earl E. O’Connor Inn of Court. He has served
as a lecturer in law at the University of Kansas School of Law
and has presented CLE programs for various professional or-
ganizations. Waxse has served as chair of the KBA committees on
Legal Aid, the Unauthorized Practice of Law, Access to Justice,
and Nominations. In 1982, he received the KBAs Outstanding
Service Award. He is also a Fellow of the Johnson County, Kan-
sas, and American Bar foundations. His other bar memberships
include the American, Wyandotte County, Johnson County,
and Kansas City Metropolitan bar associations.

District One

Eric G. Kraft practices with Duggan, Shadwick, Doerr &
Kurlbaum P.C. in Overland Park in general and civil litigation
with an emphasis in real estate litigation.

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

He is licensed to practice in Kansas, Missouri, the U.S.
District Court for the Western District of Missouri, the U.S.
District Court for the District of Kansas, and the 10th U.S. Cir-
cuit Court of Appeals.

In addition to being a member of the KBA, Kraft is a mem-
ber of the American, Missouri, Kansas City Metropolitan, and
Johnson County bar associations.

He served as president of the KBA Young Lawyers Sec-
tion and as a member of the KBA Board of Governors as the
Young Lawyers Section Representative, 2004 to 2005. He was
a member of the KBA CLE Committee and was chair of the
CLE Committee for the 2001 KBA Annual Meeting. Kraft
served as the KBA YLS Delegate to the American Bar Associa-
tion, 2003 to 2005. He is a member of the ABA Public Ser-
vice and Member Service Subgrant Judging Committee.

For the 2005 KBA Annual Meeting, Kraft organized the first
CLE track of seminars designed for young attorneys. It met
with success and will be offered again at the 2006 meeting.

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

District Two

Gerald R. Kuckelman, Atchison, is a general practice at-
torney and a partner in the firm of Garrity & Kuckelman. He
is also currently the Atchison County attorney; judge of mu-
cipal court, Elwood, 1990 to present; and judge pro tem,
municipal courts of Atchison, Wathena, and Highland.

Following graduation from Washburn University with a B.A.
in 1981 and a J.D. in 1985, he became assistant county attor-
ney for Harvey County and later served as an assistant attorney
general in the Criminal Division.

Kuckelman was appointed to the Kansas Real Estate Com-
mission by Gov. Bill Graves in 1997 and was appointed to a
second four-year term, serving through 2004. While on the
commission he served a term as chairman.

(continued on next page)
He has been a member of the KBA since finishing law school and is currently a member of the KBA Bench-Bar Committee and will be serving his second three-year term on the KBA Board of Governors. He is a member of the Atchison County Bar Association, serving as president, 1998 to 1999 and is also a member of the Leavenworth County Bar Association.

In addition, he is chairman of the Advisory Committee for Atchison County Community Corrections, a member of the multidiscipline team for abused children in Atchison County. This team is charged with reviewing child abuse cases and advising Social and Rehabilitation Services in the proper handling of such matters. He has served on the board for Legal Aid of Northeast Kansas, 1993 to present.

Kuckelman is admitted to practice before all courts of Kansas, the U.S. District Court for the District of Kansas, the U.S. Court of Appeals for the 10th Circuit and was admitted to the U.S. Supreme Court in 2004.

Martha J. Coffman, Topeka, is currently director of advisory counsel for the Kansas Corporation Commission. She joined the Corporation Commission in 2000 after serving for nine years as director of central research staff for the Kansas Court of Appeals. She has been a member of the KBA since graduating from the University of Kansas School of Law in 1979. She has served on the Board of Editors for the Journal of the Kansas Bar Association since 1990. In addition, she served for several years on the KBA Legislative Committee and was twice elected president of the KBA Criminal Law Section.

Coffman previously served as a research attorney for Justice Donald Allegrucci of the Kansas Supreme Court, was an assistant appellate defender, and was in private practice in Lawrence for several years. Upon graduation from law school, Coffman served two years as a law clerk for the Hon. Earl E. O’Connor. In addition to her involvement in the KBA, Coffman has been active for many years in the Topeka Women Attorneys Association and is a member of the Topeka Bar and the Kansas Women Attorneys associations.

Coffman was appointed to the Board of Governor from District Five in 2004 to complete the term of Rich Hayse.

Gabrielle M. Thompson, Manhattan, is the managing attorney of the Kansas Legal Services offices in Manhattan and Seneca. Prior to joining Kansas Legal Services in 1994, she was a deputy district attorney in Sedgwick County and an assistant county attorney in Riley County for a total of 12 years. She practices in the areas of family, elder, disabilities, and farm law and is a certified mediator. She was admitted to practice in Kansas in 1982 and before the U.S. Supreme Court in 1988.

Thompson is a 1982 graduate of the University of Kansas School of Law and a 1979 graduate of Kansas State University. She has been active on the KBA Law Related Education Committee and is past president of the Elder Law Section. She is a member of the Sam A. Crow American Inn of Court and of the Kansas Women Attorneys Association (KWAA). She serves on the executive committee or counsel of her Inn, the KWAA, and the KBA Board of Governors. She has frequently provided trainings for professionals serving the needs of children and the elderly in protection proceedings. Thompson served as a member of the Board of Directors of Kansas Legal Services, 1991 to 1994; on the 21st Judicial District Nominating Commission, 1996 to 2000; and is active in community activities particularly serving children and the elderly.

Rachael K. Pirner, Wichita, is a member of the Triplet, Woolf & Garretson LLC law firm. Her areas of practice include probate general litigation and assisted reproductive law.

She will be serving her second term as District Seven Governor to the KBA Board of Governors. Pirner is a member of the KBA Litigation Section and has served on the KBA CLE, Nominating, and Fee Dispute committees.

She is also active with local bar activities. She has been on the Wichita Bar Association’s Legislative, Public Relations, Probate, Diversity, Unauthorized Practice of Law, and Nominating committees. She currently chairs the Probate Committee. She has also participated in the Bar Show.
Pirner has been active in the Wichita Women Attorneys Association (WWAA) since she graduated from the University of Nebraska School of Law in 1989. She has held all offices of WWAA. She has also served the Kansas Women Attorneys Association as its president, vice president, secretary, regional coordinator, and as a chair of the Public Relations Committee. She has also been the co-chair of the annual women attorney’s Lindsborg CLE, which draws approximately 140 women attorneys from across the state for the three-day seminar.

She received the Louise Maddox Award, given by the WWAA, which honors persons who have worked to advance opportunities for women in law.

Pirner has long participated in the Lawyer’s Care Project through Kansas Legal Services. She has volunteered to represent women seeking Protection from Abuse orders and prepares advance directives for indigent persons in hospice care.

She serves on the board of the Wichita YWCA, on the Community Council for Women’s Studies at Wichita State University, and for Harry Hynes Hospice for Needed Legal Services.

Glenn R. Braun, Hays, is a partner in Glassman, Bird & Braun LLP, where he has practiced law for the past 25 years. He represents plaintiffs in personal injury actions and handles domestic cases, felony criminal defense, and other areas associated with the general practice of law. In addition, he is the city of Hays prosecutor and previously served two terms as Ellis County attorney.

Braun is a graduate of Kansas State University and received his juris doctorate in 1981 from Washburn University School of Law, where he was the Washburn Student Bar Association president.

Braun is a member of the Ellis County Bar Association and previously served as president and secretary/treasurer.

He has served on the KBA Annual Meeting Committee and currently volunteers on the KBA Elder Law Hotline.

Braun is a member of the 23rd Judicial District Bench-Bar Committee and has completed the KBA Mediation Training Program. He is a member of the American Bar Association and the American and Kansas Trial Lawyers associations.

The Young Lawyers Section would like to thank BLACKWELL SANDERS PEPER MARTIN for their generous sponsorship of the YLS Barristers’ Ball.

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Glenn R. Braun
Legislative Midsession Update

By James W. Clark, KBA legislative counsel

At the time of this writing, the Legislature has just finished “turnaround,” when bills either pass out of their original house or are dead, with the exception of bills referred to exempt committees. The good news is that the perennial issues, such as repealing the Frye test in favor of a Daubert or another test based on federal rules or repealing the collateral source rule, seem to have been staved off for one more year. The bad news is that legislation by constitutional amendment and funding a large part of state government through docket fees seem to have become the norm, rather than the exception. While efforts to change the method of selection of Supreme Court justices have been unsuccessful so far, there is still a large number of legislators who hold a great deal of hostility toward courts in general, the Supreme Court in particular. In addition to the various constitutional changes being proposed, two different measures to increase judicial salaries appear to have been tossed by the wayside.

A couple of things seem certain at this point. The concept of a uniform docket fee seems to have become a thing of the past for a large number of legislators. In addition to the added fees for service of process, bills have been introduced that would require a significant fee for requesting a jury trial for chapter 60 cases, and in domestic cases, an increase in docket fees to fund child exchange and visitation centers. The other certainty is that a majority of legislators do not look on small claims court as a way to process those cases where an attorney’s services are just not feasible. Instead, it appears that most legislators view small claims court as a feasible way to avoid attorneys. Two years ago, the financial limit was raised from $1,800 to $4,000. This year, HB 2704, which would raise the number of claims per entity from 10 to 20 per year, appears to be well on its way to become law.

It is difficult to comment on legislative issues before the legislative session ends, or to predict what is going to happen or will have happened by the time your receive this issue. There is one constant that I would remind my fellow KBA members: the Kansas Bar Association continually strives to represent its members before the Kansas Legislature. This year we have been fortunate to have Natalie Haag as our Legislative Committee chairwoman. Haag currently works for Security Benefit Group, where she has legislative responsibilities, but previously worked as general counsel for former Gov. Bill Graves. Even though the KBA is fortunate to have someone with her expertise and energy, your help is still critical. There is no better influence on a legislator than hearing from one of his or her own constituents. I value so much the efforts many of you have made, efforts I may never know about, in contacting your legislators while they are at the Capitol or back home. Thank you, and keep up the good work.

Uplifting Legal Education

Law students today don’t resemble law students of the past. Students come equipped with backpacks stuffed with laptops and iPods. Our backgrounds are as diverse as our futures. No longer is it only political science majors entering law schools, nor is it only law firm associates going out. Students pursue a legal education for the value of the education itself, not just with aspirations of practicing law. Indeed, law degrees are increasingly put to use in a variety of fields.

Technology is incorporated into the classroom to prepare students for the reality they will encounter after graduation. Online legal research programs connect lawyers with more resources than ever before, and the legal process is becoming more efficient as technology becomes available. Law professors certainly recognize the possibility of distraction with classroom technology and have successfully experimented with ways to minimize that possibility. Although the increased use of laptops in the classroom may distract a small number of students, access to the largest legal research databases in a few keystrokes provides benefits for all students.

As diversity fosters cooperation, technology allows the quality of our education to keep pace. Indeed, far from harming the legal community, these trends serve as a benefit to the profession by arming future lawyers with the tools they need, widening the base of people who understand the intricacies of the law, and creating respect and cooperation within the profession.

The influx of students with diverse backgrounds and aspirations and the onset of technology encourage schools to become communities focused on quality, cooperation, and professionalism. The curriculum is still designed to be rigorous, and the demand for quality work in the classroom is still present — if this were not so, law degrees would not be in high demand by such a wide variety of people. Obviously, a level of competition will always be inherent in such an environment. But increasingly, today’s law students are learning that there is value in viewing classmates as fellow professionals rather than distractions that lead to the downfall of legal education. By merging these values, law students of today are on their way to becoming highly successful professionals of tomorrow.

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By Hon. Steve Leben

Judge Richard Posner has said that “[t]he most important thing that law school imparts to its students is a feel for the outer bounds of permissible legal argumentation at the time when the education is being imparted.” His point is a good one. When the common law develops case by case, the end result is necessarily uncertain—and the work of lawyers arguing at “the outer bounds” of potential future legal pronouncements keeps it that way.

One might think a rules-based area like legal ethics would be less uncertain. After all, we have the written Model Rules of Professional Conduct to guide us. That’s true to a point, but a combination of unclear rules and technological change have left us with many new areas of inquiry in which the best we can do at present is to chart the potential arguments and consider what is prudent given the possibilities.

The topic for this column is what happens when a lawyer inadvertently discloses privileged information through hidden computer data—called metadata—found lurking in a word processing document sent to opposing counsel. Without appropriate protections, this could easily occur. Perhaps the lawyer sent a settlement proposal to the client for review and the client added comments in the document. The lawyer may have removed the client’s comments before sending the document to opposing counsel. Yet the word processing program may have retained the former version of the document in hidden text, giving the opposing lawyer the ability to use software to discover the hidden text—and the actual settlement authority granted by the client.

Has the lawyer who inadvertently produced this hidden text violated his ethical duty under Rule 1.6 to keep client information confidential? Has the lawyer who has used some computer software to reveal the hidden data violated her ethical duties? An argument well within the bounds of current law certainly may be made that the answer to both questions is yes.1

First, let’s discuss the disclosing lawyer. He has a duty to keep client secrets confidential. Most courts say that he must use “reasonable efforts” to do so. If he hasn’t taken the time to learn about metadata and what might be done to prevent its inadvertent disclosure, that’s probably not a reasonable effort. That might mean both that he’s violated the Model Rules and that a court would find the applicable privilege waived, so that the inadvertently disclosed material could even be used in evidence. (Of course, in our hypothetical disclosure of the client’s settlement authority, whether a court finds waiver of the privilege won’t be important: the cat’s already out of the bag on that one.)

What about the recipient attorney? Only one state bar’s ethics advisory committee has addressed the issue. In that opinion, New York’s Committee on Professional Ethics concluded that it was unethical for a lawyer to “use available technology to surreptitiously examine” electronic documents to find hidden information.2 They noted that lawyers may not engage in conduct “involving dishonesty, fraud, deceit, or misrepresentation” or engage in “conduct that is prejudicial to the administration of justice.” Given “the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship,” they concluded that using technology to discover inadvertently-produced protected information “would violate the letter and spirit” of these rules. Even if that view of attorney ethical obligations becomes widely accepted, it doesn’t eliminate problems for the disclosing attorney since clients and nonattorneys are not necessarily subject to these restrictions.

Metadata may include who has worked on the document, what changes have been made in it, legal issues raised by the client or lawyer as comments, and other information. British Prime Minister Tony Blair discovered this in February 2003 when a security document on Iraq was posted on the Web in Word format—its metadata revealed the identity of four civil servants who worked on it and several other documents related to it.3

What can you do to avoid inadvertent disclosure of metadata? Although common wisdom suggests that converting the document to PDF may work, it appears that some, more limited metadata will still be present.4 Beyond conversion to PDF there are several companies that have products to “scrub” documents of metadata so that they can be safely sent to others.5 Or you can scan a printed copy of the document into a PDF file, in which case no relevant metadata would be present. (Please note that I am not talking here about production of documents in response to a request for documents in a civil case. In that instance, you may be required to produce the document with its metadata intact unless you timely object, get an agreement, or get a protective order.)6

Do the metadata-scrubbing products work 100 percent of the time? I don’t have the technical knowledge to say. I’m told that it takes a “binary editor” to see some metadata, and the KU Journalism School just didn’t give me training in that kind of editing. What I can report, though, is that there’s a much better chance you will be held to have exercised “reasonable efforts” to protect your client’s confidential information if you’ve taken the time to explore options and do something than if you haven’t.

FOOTNOTES

4. According to Campbell Steele, however, PDF files still contain some metadata. See Steele, supra note 1, at 936. Nonetheless, converting a document to PDF may be an improvement over sending it in word processing format. Even if you don’t have the full version of Adobe Acrobat, there are online services that will convert a document to PDF, such as PDF Online, available at www.gohtm.com.
6. Williams v. Sprint/United Management Co., 230 F.R.D. 640, 652 (D. Kan. 2005) (“[W]hen a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.”).
Casemaker Countdown

(continued from Page 6)

Legal practitioners around the country understand and appreciate the real benefit of having an online legal research tool like Casemaker at their fingertips. Casemaker allows lawyers to fulfill most, if not all, of their computer-assisted online legal research needs. For practice management and potentially for consumers of legal services, Casemaker is a cost-saving tool that ranks with the best.

Simply stated, Casemaker is a computer-assisted legal research program that allows each member bar to share its library with all other member bars. It levels the playing field for the many lawyers who are sole practitioners or who practice in small firms. Larger firms also realize cost savings when their lawyers use Casemaker before turning to more expensive tools. The goal of Casemaker is to take care of the research needs of 90 percent of lawyers 90 percent of the time.

Lawyers can start their search on Casemaker — at no charge because it is included in their bar membership — then move to pay-per-use services to expand their search.

KBA President Richard F. Hayse said, “I can’t think of a more meaningful member benefit. Casemaker will include a comprehensive online research library available to our members as part of their bar membership. Kansas lawyers will soon have access to online legal research for not only their own state and the federal courts, but 23 other states as well.”

Other bar associations in the consortium include Alabama, Colorado, Connecticut, Georgia, Idaho, Indiana, Kentucky, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington State, and West Virginia.

Thus, these state libraries will also be available to KBA members. In addition, Michigan case law is available to consortium states.

The Kansas Bar Association plans to bring Casemaker online in October 2006. Please be sure to watch this space or visit us on the Web at www.ksbar.org for updates and follow the “Casemaker Countdown.”

By the way, just send me an e-mail if you are interested in seeing a copy of historical minutes of the KBA. I can have them delivered by Pony Express right to your doorstep …

Jeffrey Alderman can be reached by e-mail at jalderman@ksbar.org or by phone at (785) 234-5696.

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**The Kansas Bar Association**

**APRIL 2006 – 27**
I. Introduction

Whether as a result of removal from state court or the client being sued in federal court, a Kansas lawyer can unexpectedly find himself or herself in federal court. The infrequent federal court practitioner should not make the mistake of assuming that the conventions of civil practice from Kansas courts will apply. Despite the similarities between the Kansas Code of Civil Procedure and the Federal Rules of Civil Procedure, there are some significant differences between state and federal practice that the Kansas lawyer should know in order to avoid unfortunate surprises.

II. A Different Environment: ECM/ECF

Perhaps the most dramatic recent change in the U.S. District Court for the District of Kansas has been the implementation of Electronic Case Management/Electronic Case Filing (ECM/ECF). In March 2003, the District of Kansas became one of the first federal district courts to implement this electronic system. ECF establishes and requires a “paperless” court file, with all documents (except the initial complaint, summons, and civil cover sheet) submitted and recorded in electronic form only. Filings and service are made via the Internet, using the court’s electronic interface, not e-mail. Notices and orders from the court are also issued in electronic form only.

This electronic environment is now a fact of life. In order to appear and file papers in federal court, a lawyer must register and participate in electronic transmission of documents. The ECF system affords 24-hour electronic access to court documents and permits round-the-clock filing. Each document filed or generated by the ECF system may be downloaded or viewed once at no charge. After the initial viewing of a document, access to the court’s electronic case file is subject to a per page fee.

FOOTNOTES
1. D. Kan. R. 5.4.1 provides in part: “All civil cases are assigned to the Electronic Filing System unless otherwise ordered by the court. All petitions, motions, memoranda of law, or other pleadings and documents filed with the court in connection with a case assigned to the Electronic Filing System must be filed electronically unless otherwise permitted in these rules or the administrative procedures guide or unless otherwise authorized by the court. The filing of the initial papers, including the complaint and the issuance and service of the summons, will be accomplished as set forth in the administrative procedures guide, which is authorized by D. Kan. Rule 5.4.13” (Emphasis added). Section II.A.2 of those administrative procedures still permits physical delivery and filing of a paper complaint, or submission (in PDF) by e-mail, on 3.5-inch floppy disk, or CD. Administrative Procedure for Filing, Signing and Verifying Pleadings and Papers by Electronic Means in The United States District Court for the District of Kansas, at p. 6.
2. Individual federal district judges have different requirements regarding the submission of paper copies of certain motions and briefs, in addition to the ECF filing, available at http://www.ksd.uscourts.gov/cmecf/rules/special.php.
The technological requirements include a PC running a recent version of Windows or Macintosh, Internet access, a reliable browser, a scanner (for documents to be filed as exhibits), WordPerfect software (for submission of proposed orders), and Adobe Acrobat or other software capable of creating and viewing a PDF image file. Free ECM/ECF training is available from court staff, and the Kansas Continuing Legal Education Commission has approved this program for two hours of CLE credit.

The court has adopted Administrative Procedures for ECM/ECF, which are available on the court’s Web site, along with the court’s published local rules.3

III. Standing Orders and Judges’ Guidelines

Upon learning of the judge assigned to the federal district court case, it is imperative that counsel review any standing orders and written guidelines issued by that particular judge. These items can be accessed and reviewed on the federal district court’s Web site under the Chambers and Judges link.5 It is strongly recommended that these be reviewed early, rather than on the eve of trial. The orders and guidelines cover a number of different topics, such as required chamber’s copies of electronically-filed motions and memos, limits on the length and format of briefs, exhibits, instructions, and general courtroom conduct rules.

IV. Commencement of Action – Service Issues

The differences between federal and state practice begin with the initial pleading. A civil action is commenced in federal court by filing a complaint,6 while in state court, such a pleading is titled a petition.7 Commencement of federal claims is governed by federal law.8 Under Fed. R. Civ. P. 3, an action “is commenced by filing a complaint with the court,” and the plaintiff then has 120 days to obtain service of the summons and complaint, under Fed. R. Civ. P. 4(m). Commencement of state law claims filed under federal diversity jurisdiction is governed by state law.9 Under K.S.A. 60-203, an action is commenced if filed and service obtained within 90 days, unless extended for good cause.10

Timely service is important in a case filed close to the expiration of the statute of limitations. Under Fed. R. Civ. P. 4(m), a plaintiff has 120 days to obtain service of the summons and complaint, but the court can extend the time for service for an “appropriate period” upon a showing of good cause. Federal courts have held that “good cause is more than simple inadvertence, mistake, or ignorance,”11 and “neither reliance upon a third party or process server nor half-hearted efforts by counsel to effect service constitute good cause.”12 Likewise the fact that the defendant has actual notice of the lawsuit and the absence of prejudice to the defendant does not constitute good cause.13 The plaintiff has the burden of showing good cause.14 If the plaintiff fails to show good cause, the court must then consider whether a permissive extension of time is warranted or whether the case should be dismissed without prejudice.15

Under K.S.A. 60-203, a plaintiff has 90 days to obtain service, but the court can grant a 30-day extension for good cause. The 30-day extension must be requested and granted within the initial 90-day period.16 Failure to have a summons issued or take other steps to obtain service within the first 90 days may result in the denial of the extension request.17

V. Punitive Damages

In 1987, the Kansas Legislature enacted a set of procedural and substantive statutes to govern the award of punitive damages in tort actions.18 When a state tort claim for which punitive damages may be recoverable is litigated in federal district court, you must not assume that all of the punitive damages provisions of the Kansas Code of Civil Procedure will apply. Kansas state law provides the following rules, both substantive and procedural, for an award of punitive damages. Great care must be exercised in identifying those rules that are applied in federal court and those that are not.

A. Pleading

In state court, no claim for punitive damages may be included in the original petition or pleading. The party seeking an award of punitive damages must move the court for permission to amend the pleading to add such a claim. The motion must be filed before the date of the final pretrial conference. On the basis of supporting and opposing affidavits, the court may allow the amendment where the movant has established a probability that it will prevail on the claim for punitive damages.19

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7. K.S.A. 60-203(a); 60-207.
11. Esparza v. United States, 52 F.3d 838, 841 (10th Cir. 1995).
14. This state law is now found at K.S.A. 60-3702 and 60-3703.
15. K.S.A. 60-3703.
Our Kansas federal district courts have consistently held that the pleading procedure of K.S.A. 60-3703 does not apply in a diversity action. Punitive damages are items of “special damage” that must be set forth in the complaint in accordance with Fed. R. Civ. P. 9(g), and there is no requirement of court approval for a request for such damages.19

In federal district court a claim for punitive damages must be included in the initial pleading containing the cause of action for which such damages are recoverable (e.g., the complaint, counterclaim, or cross-claim). If your state court tort action is removed to federal district court, your petition will likely not include a request for punitive damages. In that case, you must move, at the earliest opportunity, to amend your pleading to include such a claim. In Section 3(a) of the federal district court’s Rule 16 scheduling order, the parties will be provided with a deadline to move to amend the pleadings. For a plaintiff in a removed case, this should be treated as the deadline for moving to amend the pleading to include a claim for punitive damages.

B. The decision to award punitive damages

In Kansas state courts the trier of fact (usually the jury) determines, concurrent with all of the issues presented, whether punitive damages should be awarded. However, the jury does not set the amount of punitive damages.

In Kansas state courts the trier of fact (usually the jury) determines, concurrent with all of the issues presented, whether punitive damages should be awarded. However, the jury does not set the amount of punitive damages.20

Questions often arise regarding the jury’s role in a diversity tort action trial involving a claim of punitive damages. Implicated in such questions are the *Erie* doctrine,21 the Seventh Amendment right to trial by jury,22 and Fed. R. Civ. P. 38(a).23 There are many examples of cases where Kansas federal district court judges have themselves determined the amount of punitive damages to be awarded in a diversity jury trial action, in apparent compliance with the procedure set forth in K.S.A. 60-3702(a). In fact, a majority of published District of Kansas cases hold that the court should follow K.S.A. 60-3702(a) and set the amount of punitive damages to be awarded.24 However, in a recent and thorough discussion of the role of a jury in a diversity tort case wherein punitive damages are sought, authored by Senior Judge Wesley E. Brown, the court held that there is a right to jury trial on the amount of punitive damages.25

Following a detailed analysis of the interplay between the Seventh Amendment and the *Erie* doctrine and a discussion of the history of the treatment of this issue in the U.S. District Court for the District of Kansas, Judge Brown determined that K.S.A. 60-3702(a)’s provisions for a court determination of the amount of punitive damages are not applicable in federal district court:26

> [T]he Court holds that, if the facts at trial support a submission of punitive damages to the jury, Plaintiff has a right under the Seventh Amendment and Fed. R. Civ. P. 38(a) to a jury determination of the amount of punitive damages.

Thus, in federal court, the amount of punitive damages may be determined by a jury.

C. Substantive factors, limits, and caps

K.S.A. 60-3702 contains a series of substantive rules that govern the award of punitive damages. Included among these are the following:

1. The burden of proof

The party seeking an award of punitive damages must prove, by clear and convincing evidence, that the other party acted toward it with willful or wanton conduct, fraud, or malice.27

2. Limits on vicarious liability

Punitive damages may be awarded against a principal or employer (for the acts of an agent or employee) or an association, partnership, or corporation (for the acts of a member, partner, or shareholder) only where such party authorized or ratified the questioned conduct.28

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22. “In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rule of the common law.” U.S. Const. Amend. VII. This amendment is not binding upon the states.
23. “The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.” Fed. R. Civ. P. 38(a).
27. K.S.A. 60-3702(c).
3. Factors in determining amount
There are seven factors that may be considered in determining the amount of punitive damages to award.29

4. Limits on punitive damages
Various limits are set on the amount of punitive damages tied to the defendant's annual gross income and net worth and the profitability of the misconduct.30

These portions of the Kansas Code of Civil Procedure embody substantive laws within the meaning of the Erie doctrine, and they are applicable in federal district court in a diversity action:

Other provisions within § 60-3702, such as the factors justifying punitive damages, § 60-3702(b), or the limits on the amount of punitive damages, § 60-3702(e), are binding on the federal court because they are substantive and provide the law to be applied by the trier of fact, whether court or jury.31

VI. Case Management and Discovery

A. Magistrate judges

1. Discovery
One significant difference between state and federal practice in Kansas is the use of magistrate judges to oversee discovery and case management in federal court. Our federal district judges typically assign their cases to a magistrate judge to oversee discovery and to ensure that the case is prepared for trial or is otherwise resolved. Although the district court judge retains jurisdiction over dispositive motions,32 the magistrate judge may make a recommendation.

2. Consent to trial by magistrate judge
With the consent of all parties and the approval of the district court judge, a case may be referred to a magistrate judge for trial and decision on dispositive motions. The consent form33 must be filed with the clerk, who then transmits it to the district court judge for consideration. The approval of the district court judge is required.34

B. Conference of parties (counsel) and planning report
As with most matters of civil procedure, there are substantial similarities between our state (K.S.A. 60-226) and federal (Fed. R. Civ. P. 26) rules governing discovery. However, the procedures leading to the courts' issuance of a scheduling order differ significantly.

Shortly after the filing of the answer or other responsive pleading, counsel in a federal district court action will receive from the assigned magistrate judge an Initial Order Regarding Planning and Scheduling.35 This initial order establishes the process by which the parties comply with the conference and planning requirements of Fed. R. Civ. P. 26(f).36 Following the Rule 26(f) meeting, plaintiff's counsel submits to the court37 a written Report of Parties' Planning Conference.38

Through this report, the parties provide to the court a case summary, a plan for alternative dispute resolution (ADR) and discovery, and a proposed schedule for the case. The report serves to guide discussions at the Rule 16(b) scheduling conference (the federal equivalent of a state court case management conference conducted pursuant to K.S.A. 60-216(b)). Following this conference, the court issues a Scheduling Order.39

The court's form for the planning conference report is full of helpful suggestions and guidance for the parties (e.g., how to craft the case summary, the expected timing of ADR, the timing of Rule 26(a)(1) initial disclosures, the general length of time for discovery, limits on written discovery and

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discoverable information, identification

This information includes names and conference, without a discovery request. Days of the parties' Rule 26(f) planning change certain information within 14

P. 26(a)(1) requires that the parties ex-

C. Mandatory disclosures

Unlike K.S.A. 60-226, Fed. R. Civ. P. 26(a)(1) requires that the parties exchange certain information within 14 days of the parties' Rule 26(f) planning conference, without a discovery request. This information includes names and addresses of persons with knowledge of discoverable information, identification of documents, computations of damages, and insurance coverage. Failure to disclose information can result in the exclusion of evidence at trial or other sanctions. 40

In addition, the disclosure requirements of Fed. R. Civ. P. 26(a)(2) regarding expert witnesses are more detailed than those of K.S.A. 60-226(b)(6). 41

D. Timing of discovery

Fed. R. Civ. P. 26 contains a restriction on the timing of discovery not found in its state law equivalent, K.S.A. 60-226. Absent an agreement or order from the court otherwise, in federal district court litigation the parties are prohibited from seeking discovery from any source prior to the Rule 26(f) planning meeting conference. Our state court code of civil procedure contains no such general timing restriction. It allows, for example, the service of interrogatories upon a defendant at the time of service of process. 42 However, as provided in K.S.A. 60-216(b), in state court proceedings in which a case management conference will be held, the parties are prohibited from taking non-party depositions until after the conference, absent a court order or agreement of the parties.

E. Mediation

Mediation is not mandated in state court, although individual judges may require it in certain cases. Mediation is statutorily required in medical malpractice actions per K.S.A. 60-3413. Mediation is contemplated in most cases in federal court:

Consistent with Fed. R. Civ. P. 16, the judge to whom a case has been assigned or referred for case management will discuss ADR procedures at the scheduling conference. In most cases, the judge will enter an order directing counsel and the parties, at the earliest appropriate opportunity, to mediate their dispute with a private mediator. 43

Some judges may interpret the rule as mandatory, while others do not. Most judges are flexible and recognize that in many cases, mediation is pointless until certain discovery has been completed or dispositive motions have been ruled upon.

VII. Business Records Subpoenas

K.S.A. 60-245a prescribes clear and specific procedures regarding subpoenas for business records in the possession of a nonparty. Because these procedures are not applicable in federal court, issues of notice, service, and territorial scope of a business records subpoena in federal court are governed by federal law.

Thus, K.S.A. 60-245a's requirement of 10 days' advance written notice of intent to serve a subpoena does not apply to federal cases. However, this does not mean that no notice is required. Fed. R. Civ. P. 45(b)(1) requires service of "[p]rior notice of any commanded production of documents and things or inspection of premises before trial." The 10th Circuit has held that notice must be given prior to service of a subpoena. 44 Rule 45 does not say how much prior notice is required. Consistent with the provision of D. Kan. R. 30.1 that "reasonable notice" for taking a deposition is five days, the better practice in federal

41. The federal rule requires a written report signed by the expert witness, containing "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." Fed. R. Civ. P. 26(a)(2). In contrast, K.S.A 60-226(b)(6) merely requires disclosure of "the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.”
42. K.S.A. 60-233(b)(3) provides that a defendant's deadline to answer interrogatories will not expire until 45 days after service of process.
VIII. Orders for Production of Records

A. Restrictions on contents of the order

Under D. Kan. Rule 5.4.14, parties and their counsel in federal court are required to refrain from including (or to redact) certain personal data when filing pleadings and other papers with the court. Consistent with this requirement, the following restrictions apply to orders for production of records (and other filed documents): only the last four digits of a Social Security number should be disclosed, only the initials of children should be used, and only the last four digits of financial accounts should be used.

B. HIPAA and other restrictions

The privacy provisions of the Health Insurance Portability and Accountability Act, and the Alcohol, Drug Abuse, and Mental Health Administration Act, and their respective regulations are taken very seriously in federal court. Consequently, proposed orders for production of medical records may be scrutinized by a magistrate judge in order to avoid potential statutory problems. Specifically, provisions regarding records of drug and alcohol treatment may be stricken from a proposed order, and production of such records may be extremely difficult to obtain.

C. Electronic orders only

One of the shortcomings of the “paperless” ECF environment is that the court’s orders do not bear a physical, handwritten signature by a judge, nor a date and time “filed” stamp from the clerk’s office. Although D. Kan. Rule 5.4.4 provides that an electronic signature has the same effect as signing a paper order, this can sometimes cause confusion on the part of custodians of medical records and employment records who are unfamiliar with ECM/ECF and perhaps understandably reluctant to accept an “s/name” electronic signature. A certified copy of any order can be obtained from the clerk’s office, but even this will not contain a physical signature by the court.

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IX. Protective Orders

The federal court has recently promulgated guidelines regarding agreed protective orders. These are posted on the court’s Web site. The guidelines describe the procedure for submitting an agreed protective order and include cautions regarding the appropriate contents and scope of the order.

X. Motions

A. Extensions of time

With the exception of clerk’s orders under D. Kan. Rule 77.2, a motion for extension of time in federal court must state whether opposing counsel has been consulted. It must also state the position of opposing counsel, if known.

B. Submission of joint or unopposed motions

D. Kan. Rule 7.1(b) contains specific provisions that govern the form and procedure for filing joint or unopposed motions in federal court. When such a motion is filed, both the title and body of the motion must indicate that it is being filed jointly by the parties or that the opposing party has no opposition to the motion. This is an important requirement, as it serves to inform the court that it is not necessary to await the passage of the response time before addressing the motion. The party filing a joint or unopposed motion is also required to submit to the judge (or magistrate judge or clerk, as the case may be) a proposed order in an electronic WordPerfect format as an attachment to an e-mail.

XI. Pretrial

There are significant differences in the final pretrial conference orders. Pretrial conferences in state court are governed by Supreme Court Rule 140. This rule spells out the various topics that should be included in the final pretrial conference order.

In federal court, D. Kan. Rule 16.2 discusses the final pretrial conference. More importantly, the pretrial order form, located on the court’s Web site, sets forth in detail what the court expects in the order. It requires the plaintiff to list the essential elements of each of its legal theories of recovery. The defendant is likewise required to list the essential elements of any affirmative defense. The court expects in the order. It requires the plaintiff to list the essential elements of each of its legal theories of recovery. The court expects in the order. It requires the plaintiff to list the essential elements of each of its legal theories of recovery. The court expects in the order. It requires the plaintiff to list the essential elements of each of its legal theories of recovery.

The federal court has recently promulgated guidelines regarding agreed protective orders. These are posted on the court’s Web site. The guidelines describe the procedure for submitting an agreed protective order and include cautions regarding the appropriate contents and scope of the order.

The parties’ proposed pretrial order must be submitted to the judge who will conduct the pretrial conference.

XII. Trial

A. Evidentiary matters

There are some significant differences between the Federal Rules of Evidence and their Kansas counterparts.

For example, under K.S.A. 60-460(a), a prior statement made by a person who “is present at the hearing and available for cross-examination” falls within an exception to hearsay, but under Fed. R. Evid. 801(d)(1), such a statement is still hearsay unless the declarant actually testifies and the statement was (a) given under oath at a hearing, trial, or deposition, and is inconsistent with his or her testimony at the present proceeding; or (b) is consistent with his or her present testimony and is offered to rebut a charge of recent fabrication or improper influence or motive; or (c) concerns identification of a person. In other words, the mere fact that the declarant is or will be present in the courtroom is not sufficient to overcome a hearsay objection in federal court.

Kansas practitioners are well-advised to review the applicable federal rules rather than assuming they are the same as the Kansas rule.

B. Expert witnesses

State and federal courts use different standards in ruling upon the admissibility of expert opinions. Fed. R. Evid. 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The U.S. Supreme Court, in Daubert v. Merrell Dow Pharmaceutical Inc., provided a nonexclusive list of four factors to determine whether the expert testimony is relevant and reliable. The factors are (1) whether the opinion at issue is susceptible to testing and has been subjected to such testing, (2) whether the opinion has been subjected to peer review, (3) whether there is a known or potential rate of error associated with the methodology used and whether there are standards controlling the technique’s operation, and (4) whether the theory has been accepted in the scientific community.

In Kansas state courts the admissibility of expert testimony is subject to K.S.A. 60-456(b). The Daubert test was expressly

55. Id.
57. See United States v. Gabaldon, 389 F.3d 1090, 1098 (10th Cir. 2004).
rejected in Armstrong v. City of Wichita. The Kansas Supreme Court has reiterated its approval of the “generally accepted principle test” set forth in Frye v. United States. More important, in Kuhn v. Sandoz Pharmaceuticals Corp., the court held that the Frye test for scientific evidence did not even apply to “pure opinion” testimony based on an expert’s own experience, observation, or research.

C. Jury

1. Voir dire

Attorneys normally conduct all voir dire in state court. In federal court, the practice varies with each individual judge. Some judges conduct all the voir dire but allow the attorneys to submit written questions to be asked by the court. Judge J. Thomas Marten requires the attorneys to give their opening statements before they conduct voir dire.

2. Number of jurors and unanimity

Most state court cases are heard by 12 jurors, and 10 jurors must agree on the verdict. Any jury of less than 12 members must be unanimous unless the parties agree otherwise. Accordingly, one or two alternate jurors are often selected. Fed. R. Civ. P. 48 is clear and succinct. It states that the court can seat any number of jurors between six and 12 (usually eight by our Kansas federal judges), and all jurors participate in the verdict (no designated alternates). No verdict is allowed with fewer than six jurors. All verdicts must be unanimous unless the parties stipulate otherwise.

XIII. Conclusion

Despite their many similarities, there are some significant differences between rules of practice in Kansas state courts and in federal district court. Most problems can be avoided by simply remembering that each court expects lawyers to follow its rules and that lawyers are responsible for knowing the content of the rules without being told. In short, there is no substitute for reading the rules and applicable statutes.

About the Authors

David G. Seely, Wichita, received his B.A. from the University of Kansas in 1979 and his J.D. from the University of Kansas School of Law in 1982. He served two years as a law clerk to Chief Judge Earl E. O’Connor of the U.S. District Court for the District of Kansas. He is a member of Fleeson, Googin, Coulsen & Kitch LLC, where his practice focuses on civil litigation, including class action, oil and gas, and employment matters. He has served on the Bench-Bar Committee for the U.S. District Court for the District of Kansas and was co-author of the Federal Practice Handbook for the U.S. District Court for the District of Kansas.

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For more information on the nomination process, please visit the Kansas CLE Commission Web site: www.kscle.org. The nomination package must be postmarked by June 30, 2006.

E-mails and faxes will not be accepted.
Supreme Court

Attorney Discipline

IN RE DAVID R. GILMAN
ORIGINAL PROCEEDING IN DISCIPLINE
PUBLISHED CENSURE
NO. 95,133 – FEBRUARY 3, 2006

FACTS: Respondent, a practitioner from Overland Park, appeared in municipal court on two separate occasions after consuming alcohol and while apparently somewhat impaired. He admitted he had consumed alcohol prior to the scheduled court appearances on both occasions but failed to acknowledge the wrongful nature of his conduct.

The hearing panel found clear and convincing evidence of a violation of KRPC 8.4(d) (misconduct prejudicial to the administration of justice). Based on three aggravating factors, including six prior disciplinary sanctions, and two mitigating factors, the panel rejected the deputy disciplinary administrator's suggested sanction of suspension and recommended published censure.

HELD: No exceptions were filed, so the factual findings and rule violation were binding on the Supreme Court. A majority of the Court adopted the panel's recommendation, while a minority would suspend respondent’s license. All members of the Court expressed concern regarding respondent’s lack of insight into the problem. He “minimized, rationalized, and excused” his conduct and “has taken no steps to address what may be a serious problem.” The Court noted that with the sanction of published censure, they could not order respondent to seek assistance but urged him to contact the Kansas Impaired Lawyers Assistance Committee for advice and help.

IN RE BARBARA J. GIRARD
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 13,667 – FEBRUARY 15, 2006

FACTS: In a letter to the clerk of the appellate courts, respondent, a practitioner from Lawrence, voluntarily surrendered her license to practice law pursuant to SCR 217. At the time of the surrender, eight disciplinary complaints were set for formal hearing before the Kansas Board for Discipline of Attorneys. Allegations included lack of competence, lack of diligence, failure to communicate, failure to return unearned retainers and files, dishonesty, failure to comply with discovery requests, and failure to cooperate with the disciplinary process in all eight counts.

HELD: The Court examined the disciplinary administrator's files and found that the surrender should be accepted and the respondent disbarred.

IN RE PAUL D. LEADER
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 14,253 – FEBRUARY 9, 2006

FACTS: Respondent, a practitioner from Wichita, wrote to the appellate clerk voluntarily surrendering his license to practice law pursuant to SCR 217. At the time of the surrender, eight disciplinary complaints were set for formal hearing before the Kansas Board for Discipline of Attorneys. Allegations included lack of competence, lack of diligence, failure to communicate, failure to return unearned retainers and files, dishonesty, failure to comply with discovery requests, and failure to cooperate with the disciplinary process in all eight counts.

HELD: The Court examined the disciplinary administrator's files and found that the surrender should be accepted and the respondent disbarred.

IN RE NANCY L. MOORE
ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION
NO. 95,134 – FEBRUARY 3, 2006

FACTS: Respondent faced a disciplinary hearing on seven separate complaints. She failed to provide written responses to the complaints and failed to file an answer to the formal complaint. Despite proper notice of the hearing, she failed to appear. The Disciplinary Administrator’s office presented uncontested evidence, and the panel found clear and convincing evidence of six rules violations – diligence, communication, unauthorized practice of law following her administrative suspension, and failure to cooperate with the disciplinary proceedings. The hearing panel identified four aggravating factors, including a pattern of misconduct, and two mitigating factors. The deputy disciplinary administrator requested disbarment, but the panel recommended indefinite suspension with substance abuse evaluation and treatment as a condition to reinstatement.

HELD: Respondent again failed to file any response or to appear before the Court, an additional violation of KRPC 212(d). A majority of the Court agreed with the panel's recommendation, while a minority would disbar respondent.
FACTS: Respondent, who practices in Garden City, represented a couple for estate planning. He failed to provide competent legal advice to protect their assets from depletion for nursing home care and then charged the estate $4,250 for 43.5 hours of work, much of which was unnecessary due to the size of the estate. He then gave incompetent advice to the heirs regarding a Medicaid appeal, billing an additional $3,600 for his work on the appeal.

The hearing panel found violations of KRPCs 1.1 (competence) and 1.5 (fees), identified three aggravating factors and one mitigating factor, and recommended published censure.

HELD: Respondent filed no exceptions to the final hearing report. A majority of the Court adopted the sanction recommended by the disciplinary panel, while a minority would impose nonpublished censure.

Civil

MANDAMUS, PRIVACY, SUBPOENA, AND ABORTION CLINICS

FACTS: Alpha Medical Clinic and Beta Medical Clinic brought mandamus action arising out of an inquisition in which the Kansas Attorney General subpoenaed the entire, unredacted patient files of 90 women and girls who obtained abortions at Alpha and Beta clinics in 2003. The district court ordered the files produced to the court for an initial in camera review by an attorney appointed by the judge and a physician(s) appointed by the attorney general. Kansas Supreme Court stayed that order pending appeal.

ISSUES: (1) Inquisition subpoenas, (2) physician-patient privilege, and (3) contempt

HELD: Court granted a writ of mandamus. Saying three federal constitutional privacy interests are threatened by Attorney General Phill Kline’s inquisition subpoenas for patient records from the two abortion clinics, the Court unanimously ordered Shawnee County District Judge Richard Anderson to reconsider whether the subpoenas should issue and, if so, to adopt tightly drawn restrictions. The Court declined the clinics’ request to hold the attorney general in contempt of court for alleged violations of an order sealing documents and proceedings related to the inquisition. The Court stated the inquisition focused on “at least allegedly unjustified ‘late-term’ abortions and possible unreported child abuse,” and that the attorney general also had suggested crimes other than violations of the criminal abortion and child abuse reporting statutes could be uncovered.

SECURITY VIOLENT PREDATOR
IN RE CARE AND TREATMENT OF RANDY FOSTER
DOUGLAS DISTRICT COURT –
REVERSED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED
NO. 91,324 – FEBRUARY 3, 2006

FACTS: Foster appeals from a jury finding that classified him as a sexually violent predator based on his lengthy sexually contact with underage minor and young girls, his failure to complete sex offender treatment, and expert testimony on his inability to control his sexually deviant behavior. The court committed Foster to the Larned State Security Hospital. The Court of Appeals affirmed Foster’s commitment.

ISSUES: (1) Opening statements, (2) admission of polygraph test, and (3) jury instructions

HELD: Court reversed the Court of Appeals and the district court and remanded with directions. Court found the state’s openings statement was reversible error. Court stated that allowing the state to tell the jurors, before they even hear the evidence, that a multidisciplinary team of professionals, a team of prosecutors, and the judge have all previously determined that sexually violent predator commitment proceedings should proceed against Foster is extremely prejudicial and denied Foster a fair trial. These statements are prohibited by the state on retrial. Court held that direct or indirect evidence in a 25-page hospital report concerning a polygraph examination, polygraph results, and any opinions based upon those results is inadmissible in the commitment proceedings. Counsel’s direct or indirect references to same are prohibited. Court said it may be an effective evaluation tool, but is not admissible, directly or indirectly, at trial. Court held that while the jury instructions fairly and accurately stated the law of the case, upon remand, the district court should make its jury instructions read that a court or jury shall only determine whether an individual is a sexually violent predator and shall not determine the individual’s control, care, or treatment.

STATUTES: K.S.A. 2004 Supp. 59-29a01 et seq., -29a03(a), -29a05, -29a06, -29a07(a), 29a09 and K.S.A. 60-261

CRIMINAL

STATE V. ACKWARD
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 91,755 – FEBRUARY 10, 2006

FACTS: Ackward convicted of felony murder and attempted possession of marijuana with intent to sell or distribute. On appeal, he claimed trial court erred in (1) determining his statement to police was voluntary, (2) not suppressing evidence of gun found in crawl space of neighboring residence, (3) giving self-defense instruction applicable to forcible felon, (4) admitting photograph of victim, and (5) refusing to strike two prospective jurors for cause. Also claims cumulative error denied a fair trial.

ISSUES: (1) Confession, (2) suppression of gun evidence, (3) self-defense jury instruction, (4) prejudicial photograph, (5) prospective jurors, and (6) cumulative error

HELD: Totality of circumstances examined, including police use of false information, references to religion, and misrepresentations of law. No error in finding Ackward’s statement was voluntary.

Error to admit gun into evidence. Reasoning in Seventh Circuit case followed. Inevitable discovery doctrine requires the inevitable discovery be lawful. Inevitable discovery of challenged evidence by unlawful means does not render it admissible.

Defendants included possession of marijuana as inherently dangerous felony. Although not all items found on inherently dangerous felony list are included as forcible felonies, under specific facts of case, attempted possession of marijuana is forcible felony as contemplated by K.S.A. 2004 Supp. 21-3110(8). No error to deny requested self-defense instruction.

No error to admit photograph. It was relevant to prove identity of victim, display was limited, and no inflammatory personal details about victim.

Defense removed both prospective jurors with peremptory challenges. No serious claim that resulting jury was impartial.

No cumulative error where only error was admission of gun into evidence.


STATE V. BOYD
JOHNSON DISTRICT COURT – AFFIRMED
NO. 91,980 – FEBRUARY 10, 2006

FACTS: Adoptive parents and baby sitter charged with felony murder of 9-year-old boy. Adoptive mother entered plea prior to trial, which proceeded against adoptive father (Neil) and baby sitter (Boyd). Boyd convicted of felony murder and child abuse of other adopted siblings. On appeal, Boyd claims trial court should have granted motion for severance from Neil’s trial because defenses were antagonistic and evidence of closed-circuit child-victim testimony was admissible only against Neil. Also claims trial court erred in not instructing jury on endangering a child and criminal restraint as lesser-included offenses, and in admitting evidence of child abuse by adoptive mother and other caretakers.

ISSUES: (1) Severance, (2) jury instruction on lesser-included offense, and (3) evidence of other acts of binding or restraining children

HELD: Severance not required based on antagonistic defenses, but closed-circuit testimony of child victims not admissible against Boyd where no evidence that children would be traumatized by testifying against her, and trial court relied on finding that child victims would be traumatized by testifying in open court. Trial court failed to apply proper legal standard to determine whether evidence was admissible as to Neil not being competent as to Boyd, but harmless error under the facts. First Kansas case to consider U.S. Supreme Court factors to be applied in context of testimony of child witness submitted by closed-circuit television without required findings. State v. Eaton, 244 Kan. 370 (1989), is overruled regarding test or factors to be applied in making harmless error analysis when considering Confrontation Clause violation arising from application of K.S.A. 22- 3434.

Rules for instructing on lesser-included offenses of felony murder and abuse of child are stated and applied. Evidence of underlying felony of abuse of child was beyond doubt, so no instruction on lesser-included offenses of felony murder required. Endangering a child, K.S.A. 21-3608, is not a lesser degree of child abuse, K.S.A. 21-3609.

Prior actions of adoptive mother and other caretakers were not actions of Boyd, thus, K.S.A. 60-455 did not exclude this testimony.

STATUTES: K.S.A. 2004 Supp. 21-3107(2), -3107(2)(a) and K.S.A. 21-3401, -3424, -3608, -3608(a), -3609, 22-3204, -3204(3), -3434, -3434(b), -3434(c)(1) and (2), 60-455

STATE V. BROWN
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 92,910 – FEBRUARY 3, 2006

FACTS: Brown was convicted of first-degree murder in 1996 and sentenced to life in prison without the possibility for parole for 25 years. His conviction was affirmed on appeal. He filed a motion to correct illegal sentence arguing the murder statute was constitutionally vague, it shifted the burden of proof, and the jury should have been instructed regarding the element of malice. District court summarily denied Brown’s motion.
ISSUES: (1) Constitutionality of the murder statute, (2) absence of "malice," (3) shifted burden of proof, and (4) jury instructions

HELD: Court affirmed. Court held the elimination of the term "maliciously" from the first-degree murder statute does not make the statute unconstitutionally vague, nor does it shift the burden of proof to the defendant. Court found no jurisdiction to consider Brown's jury instruction claim. Court held that because a trial error does not deprive the district court of jurisdiction, trial errors cannot be raised to support a motion to correct an illegal sentence. Consequently, the Court had no jurisdiction to analyze the jury instruction issue.

STATUTES: K.S.A. 21-3401, -3504(1) and K.S.A. 1997 Supp. 21-3402

STATE V. CHRISTY EDGAR
JOHNSON DISTRICT COURT – AFFIRMED
NO. 91,833 – FEBRUARY 10, 2006

FACTS: Neil and Christy Edgar had four adopted children. Chasity Boyd often stayed with the Edgars and baby sat the children. Evidence indicated that the children were frequently bound or tied up with socks, duct tape, and plastic ties. The Edgar's 9-year-old son, Brian, died as a result of being duct taped, by Christy and Boyd, from head to toe with a sock in Brian's mouth. Neil's defense was the women of the church handled the discipline. All three defendants were going to be tried together. Christy's motion for severance was denied. On the first day of the trial, after voir dire, but before opening statements, Christy said she wanted to plead guilty to first-degree felony murder involving Brian and two counts of abuse of a child involving two of the other children. The trial court appointed another attorney to advise Christy before she made a final decision, and after opening statements, Christy, against the advice of counsel, pled guilty. After thorough examination, the trial court accepted Christy's plea. Before sentencing, Christy filed a motion to withdraw her plea, but it was denied.

ISSUE: Motion to withdraw guilty plea

HELD: Court affirmed. Court found trial court did not abuse its discretion in denying Christy's motion to withdraw her guilty plea and her claim that she had not been informed that if she entered the plea she could not appeal the trial court's ruling on the motion for severance. Court found the trial court did not err in accepting Christy's plea due to refusal to state whether she was guilty or not during an in camera hearing. Court found Christy did not assert her innocence, and Christy only noted there would be other cases tied to this one, and she entered a guilty plea at the plea hearing. Court also found the trial court adequately informed Christy of the maximum penalties she could receive.

STATUTES: K.S.A. 21-3401, -3609; K.S.A. 2004 Supp. 21-4706(c); and K.S.A. 2004 Supp. 22-3210(a), (d), -3602(a)

STATE V. NEIL EDGAR
JOHNSON DISTRICT COURT – AFFIRMED
NO. 91,861 – FEBRUARY 10, 2006

FACTS: Neil and Christy Edgar had four adopted children. Chasity Boyd often stayed with the Edgars and baby sat the children. Evidence indicated that the children were frequently bound or tied up with socks, duct tape, and plastic ties. The Edgar's 9-year-old son Brian died as a result of being duct taped, by Christy and Boyd, from head to toe with a sock in his mouth. Neil's defense was the women of the church handled the discipline. Chasity pled guilty. The jury convicted Neil and Boyd of first-degree felony murder involving Brian and two counts of abuse of a child involving two of the other children.

ISSUES: (1) Aiding and abetting instruction, (2) lesser included offense instructions for theory of defense, (3) prosecutorial misconduct on issue of intent and other prosecutorial misconduct issues, and (4) insufficient evidence

HELD: Court affirmed. Court held the evidence clearly supported giving the aiding and abetting instruction and the instructions as given were not erroneous. Court did not err in refusing to give any lesser included offense instructions because endangering a child and criminal restraint are not lesser included offenses of child abuse based on the elements and the evidence of the underlying felony was not weak or inconclusive. Court found that although the prosecutor improperly commented that the jury did not need to find Neil intended to abuse Brian in order to convict him of felony murder and the prosecutor's sarcastic and argumentative questioning was not condoned, the Court found the evidence was overwhelming and the error was harmless beyond a reasonable doubt. Court found a rational fact finder could have found Neil guilty of felony murder based on the underlying felony of child abuse.


STATE V. GREEN
SEDGWICK DISTRICT COURT – AFFIRMED AND COURT OF APPEALS – REVERSED
NO. 90,912 – FEBRUARY 3, 2006

FACTS: Green convicted of voluntary manslaughter for death of victim in bar brawl. In unpublished opinion Court of Appeals reversed, finding evidence was insufficient to support Green's conviction for voluntary manslaughter as an aider and abetter because Green was chasing someone else and not personally involved in death of victim. State appealed.

ISSUE: Sufficiency of evidence

HELD: Sufficient evidence supports Green's conviction on aiding and abetting theory where Green prevented victim's friend from coming to victim's aid. Court of Appeals erred by concluding that a bar fight is not per se inherently dangerous and that victim's death was not a reasonably foreseeable consequence of a bar fight. Decision of Court of Appeals is reversed, and district court's judgment of conviction is affirmed.

STATUTES: K.S.A. 2004 Supp. 21-3436(b)(6) and K.S.A. 21-3205, -3414(a)(1)

STATE V. MCGEE
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 92,510 – FEBRUARY 3, 2006

FACTS: McGee convicted of first-degree murder. On appeal, he claimed he was denied right to a speedy trial and claimed district court should have held hearing and granted McGee's pro se motion for new counsel.

ISSUES: (1) Statutory right to speedy trial and (2) appointment of trial counsel

HELD: No speedy trial violation. After attributing time to McGee from his notice to use mental disease or defect until Larned report filed, and from motion to dismiss on speedy trial grounds until motion was decided, 89 days charged to state.

No error to deny McGee's motion for appointment of new counsel, and no hearing was necessary. Disagreement between McGee and counsel regarding counsel's alleged failure to visit with McGee and prepare McGee's defense did not constitute a conflict of interest, and McGee's pro se motion provided adequate opportunity to state dissatisfaction with attorney.

STATE V. MOSES
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 94,113 – FEBRUARY 3, 2006
FACTS: Moses convicted in 1992 on guilty plea to first-degree murder. Twelve years later, and years after two appeals, Moses filed motion to withdraw plea. District court found Moses was sufficiently apprised of consequences to render pleas knowingly and voluntarily. Moses appealed.
ISSUE: Compliance with K.S.A. 22-3218 (Ensey 1988)
HELD: Under facts and circumstances of case, no abuse of discretion to deny motion to withdraw guilty plea. Reliance on plea petition and court’s general inquiry of defendant’s understanding of consequences did not satisfy statute in effect in 1992, but error was harmless. Trial court’s consideration of total circumstances, including defendant’s 12-year delay and failure to raise issue in previous appeals, is approved.
CONCURRING (Beier, J.): Concurs in result and majority of rationale because Moses did not demonstrate manifest injustice for withdrawal of plea, but emphasizes no reliance on laches or any “laches-like” argument. Luckert, J. and Rosen, J. joined Beier in concurrence.
STATUTES: K.S.A. 2004 Supp. 22-3210, -3210(d); K.S.A. 21-3107(2)(b), 22-3504, -3601(b)(1), 60-1507, -1507(c); K.S.A. 1992 Supp. 21-4624(5), -4625(3) and (6), 22-3717(b); and K.S.A. 22-3210, -3210(a)(2) and (3) (Ensey 1988)

STATE V. ROJAS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 93,444 – FEBRUARY 3, 2006
FACTS: In 1986, Rojas pled guilty to aggravated kidnapping and two counts of second-degree murder. He was sentenced to life for aggravated kidnapping and consecutive 15 years to life on the murder convictions. His conviction and sentence were affirmed on direct appeal. In 2004, Rojas filed a motion to correct illegal sentence claiming the sentence on his aggravated kidnapping conviction was illegal by virtue of the district court’s imposition of the sentence without consideration of the statutory factors in K.S.A. 21-4606(b). The district court denied the motion finding the statutory sentence for aggravated kidnapping was life, and therefore the K.S.A. 21-4606(b) sentencing factors were inapplicable.
ISSUES: (1) Illegal sentence and (2) pre-Kansas Sentencing Guidelines Act sentence factors
HELD: Court affirmed. Court held a sentencing court’s failure to make findings pursuant to K.S.A. 21-4606(b) does not render such sentence an illegal sentence under K.S.A. 22-3504.
STATUTES: K.S.A. 21-4601, -4606(b) and K.S.A. 22-3504

STATE V. ROSS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 92,478 – FEBRUARY 3, 2006
FACTS: Ross convicted of charges, including first-degree murder. On appeal, he claimed trial court erred in admitting evidence that Ross fled to another state after the murder and evidence that Ross was member of gang. Ross also claimed cumulative trial error and argued criminal history score should have been proven to jury beyond reasonable doubt.
ISSUES: (1) Evidence of flight, (2) evidence of gang membership, (3) cumulative error, and (4) criminal history
Evidence of gang membership is admissible if relevant to establish motive for otherwise inexplicable act or to show witness bias. Although evidence in this case was prejudicial, it was highly probative for evaluating credibility of key defense witness.
No error for cumulative error claim.

STATE V. SWINNEY
PRATT DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED
NO. 91,043 – FEBRUARY 3, 2006
FACTS: Swinney and Rich convicted on charges related to methamphetamine production discovered in dilapidated shed next to old chicken house and abandoned cars. Appeals consolidated by Court of Appeals. Finding search of property was legal pursuant to open fields doctrine, convictions affirmed in unpublished opinion. Sentences for manufacturing methamphetamine vacated and remanded for resentencing on those counts under State v. McAdams, 277 Kan. 136 (2004). On petition for review, defendants claimed (1) error to deny motions to suppress, (2) insufficient evidence supports the convictions, and (3) prosecutorial misconduct during questioning of witnesses and closing argument.
ISSUES: (1) Motion to suppress, (2) sufficiency of evidence, and (3) prosecutorial misconduct
HELD: Open fields doctrine is discussed. Here, site of meth lab was not within curtilage of any home, but officers went beyond surveillance and eventual arrest by entering and searching shed. Close question whether this violated constitutional rights is not decided. Even if violation is assumed, any error resulting from entering and searching shed would not have changed jury’s verdict.
Evidence clearly supports the convictions.
No misconduct in prosecutor’s questions. Where drug defendants maintain ignorance of illegal nature of meth lab at which they were arrested or its accouterments found in their possession, prosecutor may under certain circumstances introduce evidence of defendants’ prior involvement with drugs. Prosecutor did not shift burden of proof or improperly comment on a defendant’s failure to testify.
STATUTE: K.S.A. 21-3205, 60-455

STATE V. SYNORACKI
MCPherson DISTRICT COURT – AFFIRMED
NO. 93,445 – FEBRUARY 3, 2006
FACTS: In 1992, Synoracki was convicted of attempted first-degree murder and sentenced to 10 years to life. The trial court imposed a greater than the minimum sentence. In 2004, Synoracki filed a pro se motion to correct an illegal sentence, asserting that the enhanced sentence violated due process and was illegal under Apprendi. The district court summarily denied the motion.
ISSUE: Was Synoracki’s sentence illegal under Apprendi?
HELD: Court affirmed. Court reaffirmed the rule that new substantive rules are applied retroactively and new rules of procedure usually are applied prospectively. Court held that because only one of the two components of the rule stated in Apprendi is implicated by a sentencing statute, that is not a reason for the Court to divide its analysis in Whisler v. State, 272 Kan. 864, and to apply a Sixth Amendment right to a jury trial to the due process component.

STATE V. TROTTER
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 91,251 – FEBRUARY 3, 2006
FACTS: Trotter convicted of first-degree premeditated murder, capital murder, aggravated robbery, and conspiracy to commit aggravated robbery. On appeal, Trotter claimed (1) eyewitness iden-
tification instruction should have been given, (2) error to admit evidence that a victim was pregnant, (3) state's strike of nine of 10 African-Americans from jury denied Trotter a fair trial, and (4) evidence insufficient to support the convictions.

ISSUES: (1) Eyewitness instruction, (2) evidence of pregnancy, (3) Batson challenge, and (4) sufficiency of evidence.

HELD: No error to not give unrequested eyewitness instruction. Eyewitness was familiar with Trotter, and identification was thoroughly challenged during trial. No possibility that jury would have returned a different verdict if eyewitness identification had been given.

No abuse of discretion to admit evidence of victim's pregnancy. Under facts, this evidence was relevant to credibility of testimony of other witnesses, and Trotter failed to demonstrate prejudice.

Kansas law requires courts to objectively compare numbers or other facts and subjectively evaluate prosecutor's credibility in making strikes from jury panel. This approach complies with Miller-El v. Dretke, 125 S.Ct. 2317 (2005). Statistics alone are not legally conclusive. Reasons for striking each venireperson examined and found to be race-neutral.

No merit to Trotter's challenge to sufficiency of evidence.

STATUTE: K.S.A. 22-3601(b)(1), 60-401(b), -407(f), -455

STATE V. VANN
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART; REVERSED IN PART
COURT OF APPEALS – AFFIRMED IN PART; REVERSED IN PART
NO 91,214 – FEBRUARY 3, 2006

FACTS: Vann convicted on charges including attempted murder. On appeal he claimed district court erred in failing to consider Van's motion to discharge counsel and to proceed pro se, and in failing to give unanimity jury instruction. Court of Appeals affirmed in unpublished decision, finding in part that Vann had waived right of self-representation.

ISSUES: (1) Motions to discharge counsel and proceed pro se and (2) multiple acts jury instruction.

HELD: District court's knowledge of defendant's pro se motion to discharge attorney alleging conflict of interest, followed by defendant's corresponding letter referring to that motion, defendant's subsequent motion seeking to proceed pro se, and defendant's post-trial assertions of conflict of interest, coupled with court's failure to conduct any inquiry whatsoever, constituted an abuse of discretion. No waiver of right to self-representation. Conviction is reversed and case remanded for new trial.

Multiple acts analysis is discussed. Here, shooting gun and then pumping shotgun to reload does not involve separate factual incidents. This is not a multiple acts case. No unanimity instruction was required.

STATUTES: None

STATE V. WENDLER
RENO DISTRICT COURT – AFFIRMED COURT OF APPEALS – AFFIRMED REMANDED FOR RESENTENCING IN LINE WITH McADAM
NO. 89,568 – FEBRUARY 3, 2006

FACTS: Wendler pled no contest to several drug-related offenses, including manufacturing methamphetamine, attempted manufacture of methamphetamine, and two counts of possession of ephedrine or pseudoephedrine. He was sentenced to 158 months for manufacture, 140 months for attempted manufacture, and 146 months on each possession count. Based on Frazier, 30 Kan. App. 2d 398, the district court resentenced Wendler to 11 months on each possession count. The state's appeal was pending when McAdam, 277 Kan. 136, was decided. Wendler filed a motion to correct illegal sentence based on McAdam seeking a downward adjustment of his manufacturing and attempted manufacturing sentences. The Court of Appeals rejected the state's appeal and affirmed Wendler's resentencing under Frazier, but did not address the McAdam issue.

ISSUE: In a McAdam appeal, does it make any difference that the appeal was taken originally by the state rather than the defendant?

HELD: Court affirmed Court of Appeals and district court decisions. Court held the Court of Appeals had jurisdiction to consider the state's Frazier claim and also Wendler's motion to correct an illegal sentence. Court stated there was no reason why Wendler should not be resentenced on the manufacture and attempted manufacture counts under McAdam. When any party takes an appeal in any case, that party implicitly accepts the known risk that the law could change or evolve in a manner advantageous to the opponent before the appeal is finally adjudicated. Court remanded for resentencing in line with McAdam.


(continued on next page)
Civil

APPEALS AND MUNICIPAL CORPORATIONS

HAUSCHULZ V. Gobble

RENO DISTRICT COURT – APPEAL DISMISSED

NO. 94,402 – FEBRUARY 17, 2006

FACTS: Prisoner filed petition in small claims court seeking damages for officer’s alleged confiscation and destruction of photographs from prisoner’s locker during a shakedown search of prisoner’s cell. Small claims court granted officer’s motion to dismiss, finding officer’s conduct fell within Kansas Tort Claims Act (KTCA). Prisoner’s appeal to district court was dismissed for lack of jurisdiction. Prisoner appealed.

ISSUE: KTCA

HELD: Officer was clearly a state employee acting within scope of his employment. Any damage action against him falls within KTCA. Pursuant to K.S.A. 2005 Supp. 75-6103(b)(2), jurisdiction did not exist in small claims court. Both courts below had no jurisdiction over the action and no jurisdiction for this appeal. Case and appeal are dismissed.

STATUTES: K.S.A. 2005 Supp. 75-6102(a), (c) and (d), -6103(a) and (b)(2) and K.S.A. 61-2701 et seq., 75-6101 et seq.

CHILD CUSTODY

DAVIS V. HEATH

SEDGWICK DISTRICT COURT – AFFIRMED

NO. 94,362 – FEBRUARY 17, 2006

FACTS: Heath’s broke off contact between their children (B.H. and C.H.) and their paternal grandmother (Davis) after she incorrectly advised social services that B.H. might have been sexually abused. Davis filed petition, requesting visitation with both grandchildren. District court awarded grandparent visitation, finding a substantial relationship existed between Davis and B.H., and a developing relationship with much younger C.H., before Heaths terminated all further contact. Heath’s appealed, arguing their decision to cut off visitation with Davis should be given absolute deference since they are two fit parents in a nuclear family. Heath’s also claimed that district court abused its discretion to award Davis visitation because their reasoning for terminating visitation was not unreasonable, and insufficient evidence that Davis had a substantial relationship with C.H. or that it would be in C.H.’s best interest to continue relationship with Davis.

ISSUES: (1) Absolute parental preference and (2) grandparent visitation

HELD: Journal of the Kansas Bar Association article is discussed. Courts need not give absolute deference to decision of two parents in a nuclear family to prohibit grandparent visitation. While absolute deference was not given, court gave greater deference to their decision due to nature of the family.

Substantial evidence supports district court’s finding that the parents’ reasons for cutting off visitation with Davis were unreasonable. Sufficient evidence supports district court’s finding of a substantial relationship between Davis and both grandchildren. It is in best interests of both children for siblings to be treated the same, and for relationship with Davis to continue.

STATUTE: K.S.A. 38-129, -129(a), 60-1610(a)(5)(B)

CHILD CUSTODY AND CONSTITUTIONAL LAW

IN REMARRIAGE OF HEM

JOHNSON DISTRICT COURT – AFFIRMED

NO. 93,734 – FEBRUARY 17, 2006

FACTS: Mother (Julie) and second husband (Charlie) raised infant (B.) fathered by first husband (Lars). Six years later, Julie divorced Charlie, told B. that Charlie was not her father as B. had believed, and married Lars. District court ordered stepparent visitation for Charlie, finding K.S.A. 60-1610(b) was constitutional as applied pursuant to rationale in Skov v. Wicker, 272 Kan. 240 (2001) (grandparent visitation). Julie and Lars appealed.

ISSUES: (1) Constitutionality of K.S.A. 60-1610(b) and (2) stepparent visitation

HELD: K.S.A. 60-1610(b) is constitutional with regard to stepparent visitation when requirements and limitations in Troxel v. Granville, 530 U.S. 57 (2000), Skov, and K.S.A. 38-129(a) are engrafted onto it.

Trial court exercised proper deference to position of natural parents, but properly found their proposal for visitation was unreasonable. No error to grant stepparent visitation where there was substantial evidence that (1) it was in best interest of stepchild that she have visitation with her stepfather, (2) there was a substantial relationship between stepfather and stepchild, and (3) natural parents acted unreasonably and not in the best interest of their child in opposing all visitation between stepfather and stepchild.

STATUTE: K.S.A. 38-129, -129(a), 59-212, 60-1610(b) and (c)

CONVERSION AND NEGLIGENCE

RONALD V. ODETTE FAMILY LIMITED PARTNERSHIP V. AGCO FINANCE LLC ET AL.

CHAUTAUQUA DISTRICT COURT – AFFIRMED

NO. 93,019 – MOTION TO PUBLISH, OPINION ORIGINALLY FILED ON DECEMBER 2, 2005

FACTS: Ronald V. Odette purchased a Massey Ferguson tractor and loader from Jack Shield Sales and Service by signing a retail installment sales contract and security agreement. Shields later assigned the contract to AGCO Finance doing business as Agricredit Acceptance Company. Despite a prohibitive contract condition, Odette transferred both vehicles to the Ronald V. Odette Family Limited Partnership. Agricredit obtained a default judgment against Odette and seized the vehicles. The partnership sued Agricredit for conversion and negligence for seizing the vehicles. The district court granted summary judgment to Agricredit.

ISSUE: Was Agricredit liable for conversion and negligence?

HELD: Court affirmed. Court held the district court did not err in granting summary judgment to Agricredit and its repossession finding that a valid security interest in the vehicles was violated when Odette made the transfer, the security interest continued in the equipment when it passed into the hands of the partnership, and that the repossession was acting as the sheriff’s agent when it made the seizure and could not be held liable for negligence.

STATUTES: K.S.A. 60-212(b) and K.S.A. 2004 Supp. 84-2-312(b), -9-320, -9-601(a)(1), -9-603, 9-609(a)(2)
FACTS: Frontier is a nonprofit cooperative association composed of patrons engaged in the production of agricultural products. Frontier operates co-ops in Goodland, Brewster, Rulon, and Bird City. Shares of Frontier's common stock may only be held or owned by producers of agricultural products and other cooperative associations and shareholders receive voting rights and accumulate permanent capital or equity within the co-op. Three Ihrig shareholders from Goodland demanded access to Frontier's records to determine if the salaries and benefits of all Frontier employees were out of line with the corporation's profits. Frontier provided information, but the Ihrigs were unsatisfied with the response and sought relief in district court. Frontier provided additional documents requested by the Ihrigs, but the case eventually went to trial and the district court held the Ihrigs were not entitled to inspect any records other than Frontier's stock ledger or list of stockholders and denied their request for additional inspections.

ISSUE: Inspection of corporate records by shareholders.

HELD: Court affirmed in part, reversed in part, and remanded. Court affirmed the district court's findings that the Ihrigs failed to sustain their burden because the preponderance of the evidence established that Frontier's borrowing, salaries, fixed expenses, and financial performance were not "out of line in comparison with other co-ops." However, the court reversed the district court's refusal to permit an inspection for investigation of the Ihrigs' allegation of discounting and unequal treatment of all patrons. Court remanded and cautioned that the district court had discretion to determine a proper scope of inspection regarding discounting.


FORFEITURES

STATE V. $6,618.00 U.S. CURRENCY

RUSSELL DISTRICT COURT – AFFIRMED IN PART,
REVERSED IN PART, REMANDED WITH DIRECTIONS
NO. 93-650 – FEBRUARY 17, 2006

FACTS: Plaintiff appealed district court's order denying plaintiff's claim to pickup and money, which were then ordered forfeited. Plaintiff appealed, arguing his claim was not deficient because requirements of K.S.A. 60-4111(b) are directory rather than mandatory. He also claimed that district court failed to first find the property was subject to forfeiture.

ISSUE: Forfeiture

HELD: Provisions of K.S.A. 60-4111(b) are mandatory not directory. Plaintiff failed to file a proper claim. District court order striking plaintiff's claim is affirmed. K.S.A. 60-4116 requires that probable cause determination be made in all forfeiture proceedings. That was not done in this case. District court's order of forfeiture is vacated for probable cause determination to support forfeiture. If there is a finding of no probable cause, and there is no owner of interest holder who has filed a proper claim, disposition of the property shall be in compliance with Uniform Unclaimed Property Act, K.S.A. 58-3934 et seq.

STATUTES: K.S.A. 2005 Supp. 12-105b and K.S.A. 58-3934 et seq., 60-4101 et seq., -4102(g), - 4109, -4111, -4111(b), -4111(b)(4), -4113, -4113(c), -4113(g), -4116, -4116(a)

HABEAS CORPUS

CARTER V. WARDEN

BUTLER DISTRICT COURT
REVERSED AND REMANDED
NO. 94,531 – FEBRUARY 10, 2006

FACTS: Consolidated appeals by Kansas Department of Corrections from district court's finding that parole eligibility date of petitioners with B or C felonies should be 15 years, without regard to Habitual Criminal Act (HCA), pursuant to Cooper v. Werholtz, 277 Kan. 250 (2004).

ISSUE: Parole eligibility under K.S.A. 22-3717

HELD: District court is reversed. Supreme Court in Cooper simply stated that precise number of years specified in K.S.A. 22-3717 for parole eligibility for class A felons cannot be altered by a longer minimum sentence imposed under HCA. No basis to expand this narrow ruling to crimes other than class A felonies.


LIMITATIONS OF ACTIONS

HOUSH V. HAY

MITCHELL DISTRICT COURT – AFFIRMED
NO. 94,425 – FEBRUARY 17, 2006

FACTS: Hay filed tort action but delayed service pending settlement with defendants' insurance carrier. After statute of limitations expired, Hay filed amended petition to add new claim against same defendants. Amended petition served on defendants after settlement negotiations terminated. Defendants filed motion for summary judgment based on statute of limitations. District court denied the motion, finding amended petition related back to timely filed petition. Defendants filed interlocutory appeal, claiming amended petition could not relate back to a complaint never served, and action not properly commenced until amended petition was filed beyond statute of limitations.

ISSUE: Statute of limitations

HELD: No reported Kansas case with identical facts. District court's decision is affirmed. Under facts of case, where original petition was filed within applicable statute of limitations, and amended petition was filed beyond state of limitations but was served on defendants within 90 days of filing the original petition, lawsuit was not barred by statute of limitations.

STATUTE: K.S.A. 60-203 sections (a) and (b), -204, -215 sections (a) and (c)(1), -303(d)(1), -513(a)(4)

MARRIAGE, ANTENUPTIAL AGREEMENTS, AND TRUSTEE

RODRIGUEZ-TOCKER V. ESTATE OF TOCKER ET AL.

SEDGWICK DISTRICT COURT – AFFIRMED IN PART
AND DISMISSED IN PART
NO. 92,912 – FEBRUARY 10, 2006

FACTS: Lilia Rodriguez and Alfred Tocker married in 1961. They entered antenuptial agreements in 1961 and amended in 1977. In 2000, unbeknown to Lilia, Alfred created a living trust, naming his nephew Darryl Tocker as successor trustee and Robert, his brother, as additional successor trustee. The trust left all assets to Alfred's nephews and nieces, and Lilia was not named as a beneficiary. Lilia and Alfred remained husband and wife until Alfred's death in 2001. The trust had a value of approximately $8 million. Darryl admitted Alfred's will for probate and identified the value of probate assets as approximately $277,000. Lilia filed defenses and for her right to receive her spousal elective share of Alfred's augmented estate. The district court granted partial summary judgment finding no ambiguity in the antenuptial and postnuptial agreements, but found Lilia and Alfred were tenants in common concerning income from,
or growth of, the separate property during the marriage. District court granted request for the estate to petition for interlocutory appeal. The district court also filed orders enjoining the estate from distributing trust assets and also disqualifying Darryl as trustee and appointing Robert.

ISSUES: (1) Jurisdiction, (2) antenuptial agreements, (3) post-nuptial agreements, and (4) trustees

HELD: Court affirmed in part and dismissed in part. Court dismissed the estate’s challenge to the district court’s order granting partial summary judgment based upon the court finding that it lacked jurisdiction over that nonfinal decision. Court affirmed other issues. Court held the district court did not abuse its discretion in issuing an injunction prohibiting the estate from distributing or transferring any assets of the trust or estate pending final adjudication of Lilias’s claims. Court also found the district court did not abuse its discretion in disqualifying Darryl Tocker to serve as trustee and executor, and peremptorily disqualifying Robert Tocker to serve as successor trustee and executor, pending resolution of this litigation.


TORTS AND MUNICIPAL CORPORATIONS
DUNCAN V. CITY OF ARKANSAS CITY
COWLEY DISTRICT COURT – AFFIRMED
NO. 90,878 – FEBRUARY 17, 2006

FACTS: Landowners filed negligence/misuse action against city and Kansas Department of Transportation for damage to their property by 1998 flood. Plaintiffs claim the approved highway and levee plan failed to incorporate a contingency plan to protect landowners’ property during delay in constructing second of two levees. District court granted summary judgment to defendants, finding no proximate cause for liability.

ISSUE: Governmental liability

HELD: District court affirmed. Expert’s affidavit that a contingency plan was customary and a practice of industry, which was contrary to his deposition testimony, did not create genuine issue of material fact. Absent evidence that any acts or omissions of defendants caused flood damage in excess of that which would have been sustained in any event, there was no proximate cause established under facts of case.

STATUTES: K.S.A. 2005 Supp. 75-6104, -6104(m) and K.S.A. 75-6101 et seq.

TRIAL
ERIXSON V. OJELEYE
FRANKLIN DISTRICT COURT – AFFIRMED
NO. 93,901 – FEBRUARY 17, 2006

FACTS: Erixson sued Ojeleye for medical negligence in diagnosis and treatment of fast-paced systemic infection that required leg amputation and loss of most fingers and toes. Jury found for the defendant. Erixson filed motions for new trial and to recall jury, based on affidavits by plaintiff’s counsel and legal assistant of jury misconduct by healthcare professionals serving as jurors.

ISSUE: Juror misconduct

HELD: Under facts of case, no abuse of discretion to deny plaintiff’s motions. Absent extraordinary circumstances, an affidavit from trial counsel regarding a conversation with jurors is insufficient to establish trial error for refusing to recall a jury. Same reasoning applies to motion for new trial. Jury’s short deliberation is insufficient to presume misconduct, and affidavits failed to establish a sufficient basis to recall the jury.

STATUTE: K.S.A. 60-259(g)

WORKERS’ COMPENSATION
LOGSDON V. BOEING CO.
WORKERS’ COMPENSATION BOARD – AFFIRMED
NO. 94,206 – FEBRUARY 17, 2006

FACTS: Logsdon underwent surgery and received workers’ compensation benefits for 1993 shoulder injury as Boeing employee. Following 2004 accident at home, he filed application for post-award medical benefits. Special administrative law judge ordered independent medical evaluation, and awarded benefits. In Boeing’s and Aetna’s appeal, Workers’ Compensation Board found the award was supported by uncontroverted medical evidence that Logsdon’s injuries were a direct and natural result of the original compensable injury. Boeing and Aetna appealed.

ISSUE: Post-award medical benefits

HELD: Difficulty and frustration in application of “direct and natural consequence rule” in Jackson v. Stevens Well Service, 208 Kan. 637 (1972), is discussed. Here, there was substantial competent evidence that subsequent injury was natural and probable consequence of prior injury, and that there was no new injury. Because Logsdon’s prior injury had never fully healed, aggravation of that same injury by a subsequent nonwork-related accident was natural consequence of his original injury, and post-award injury was compensable.

STATUTES: None

WORKERS’ COMPENSATION
SPEER V. SAMMONS TRUCKING ET AL.
WORKERS’ COMPENSATION BOARD – AFFIRMED
NO. 94,588 – FEBRUARY 24, 2006

FACTS: Speer began driving a truck for Bob Wilbur in 1995. Wilbur owned and operated a semi-truck, which was leased to Sammons Trucking to haul goods and materials. Sammons has no offices in Kansas and its main office is located in Missoula, Mont. Wilbur paid Speer directly for his services. Speer became authorized to haul goods for Sammons. Speer’s home is in Wichita. Speer completed training for Sammons in Houston. After Wilbur died, Speer became employed by Sammons and drove a truck for the next several years. Speer filed a workers’ compensation claim against Sammons alleging injuries to his back, left arm, and left shoulder when he was tying down a load in San Francisco, and he also filed another claim for similar injuries in Texas, Arizona, and Colorado. The administrative law judge (ALJ) determined the parties were subject to the Kansas Workers’ Compensation Act because Speer’s contract of employment with Sammons occurred while Speer was in Wichita. The board reversed the ALJ and found that Speer’s employment contract was not made within Kansas, because the last act necessary for the contract’s formation was the acceptance by Sammons’ representative in Montana and that Speer failed to prove that his principal place of employment was within Kansas.

ISSUE: Is there jurisdiction under the Kansas Workers’ Compensation Act to consider Speer’s claim?

HELD: Court affirmed. Court held that Speer failed to establish that the board disregarded undisputed evidence or was motivated by bias, passion, or prejudice when it found that he had failed to show that his principal place of employment was within Kansas. Court also found there was substantial competent evidence in the record to support the board’s finding that Speer’s contract of employment was not made in Kansas.

STATUTE: K.S.A. 44-501 et seq., -501(g), -506

44 – APRIL 2006

THE JOURNAL OF THE KANSAS BAR ASSOCIATION
Criminal

STATE V. PALMA
PRATT DISTRICT COURT – APPEAL SUSTAINED
NO. 93,790 – FEBRUARY 24, 2006

FACTS: Palma arrested in traffic stop and bound over on probable cause determination of possession of marijuana with intent to distribute. State filed additional drug charges the same day. After guilty plea, district court set sentencing date and released Palma on own recognizance bond because no warrant had been issued or served. State appealed on question reserved, arguing no post-arrest warrant was required. Palma asked for dismissal of appeal as moot because he is now in prison and as not being an issue of statewide importance.

ISSUES: (1) Appeal on question reserved and (2) post-arrest warrant and probable cause determination

HELD: Resolution of issue provides helpful precedent and answers question of statewide interest concerning post-arrest warrants. Issue not moot because other district courts in Kansas may have to answer this dilemma. Correct and uniform administration of criminal law requires consideration of this issue.

District court erred in releasing Palma because warrant had not been issued or executed. Issuance of warrant or summons for arrest of a defendant is not required by Kansas criminal statutes when the defendant has already been arrested on probable cause and remains in custody after a probable cause determination by the court.

STATUTES:  K.S.A. 2005 Supp. 22-2401(c)(1), -3602(b)(3) and K.S.A. 22-2202 sections (8) and (20), -2301(1), -2302(1), -2304

STATE V. YOUNG
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
NO. 93,686 – FEBRUARY 24, 2006

FACTS: Young appeared pro se in May 2004 on probation violation arrest warrant. In subsequent hearings, he asserted attempts to retain counsel. At October 2004 hearing, Young still pro se because retained counsel had scheduling conflict. Trial court denied further continuance and proceeded on state’s motion to revoke probation. Young appealed revocation of probation, claiming violation of his federal and state constitutional rights.

ISSUE: Right to counsel in probation revocation hearing

HELD: No U.S. constitutional requirement for counsel in all probation revocation cases, but Kansas statutory law requires counsel. Based on State v. Wiegand, 204 Kan. 666 (1970), when Young appeared at the probation violation hearing without retained counsel, trial court should have appointed counsel and continued the hearing to a date that would have allowed counsel sufficient time to prepare for the case. Under facts, it was reversible error to force Young to proceed pro se at the hearing. Delay tactic in State v. Bentley, 218 Kan. 694 (1976), is distinguished.

STATUTES: K.S.A. 2005 Supp. 22-3716(b) and K.S.A. 21-3808

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Multiparty Motions for Time

In appeals with multiple parties on a side who wish to join in filing one brief, the best practice is to motion the appropriate appellate court for permission to file a joint brief. Once permission is granted, a single attorney should be designated as the attorney responsible for filing the joint brief. This must be done before any joint motions for extension of time can be filed.

The name of one attorney representing each party should appear on the cover of the brief. The name of additional attorneys representing the parties should appear at the conclusion of the brief. See Rule 6.07(b).

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