The Fairness in Private Construction Act: Legislative Fairness or Oxymoron?
2006 ANNUAL MEETING AT-A-GLANCE
June 8 – 10 at the Overland Park Marriott

Thursday, June 8

<table>
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<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>10:30 a.m.</td>
<td>YLS/Justice Gernon Scholarship Golf Tournament @ Falcon Lakes Golf Course</td>
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<tr>
<td>1 p.m.</td>
<td>Sporting Clays Presented by Whitney B. Damron P.A. @ Powder Creek Shooting Park</td>
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<tr>
<td>6 – 9 p.m.</td>
<td>KBF Fellows Dinner @ Lake Quivira Country Club</td>
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<tr>
<td>7 – 8 p.m.</td>
<td>&quot;Blues, Brews, &amp; BAR-B-Q&quot; Welcome Reception @ The Marriott</td>
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<tr>
<td>8 p.m.</td>
<td>Young Lawyers' Soiree @ Dave and Buster's</td>
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Friday, June 9

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<tr>
<th>Time</th>
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<tbody>
<tr>
<td>7 a.m.</td>
<td>Sunrise CLE</td>
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<tr>
<td>8:45 a.m.</td>
<td>President’s Welcome</td>
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<tr>
<td>9 a.m.</td>
<td>Keynote Address CLE – Preserving Fair &amp; Impartial Courts Speaker Panel:</td>
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<tr>
<td></td>
<td>Hon. Marla J. Luckert, Kansas Supreme Court, Topeka</td>
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<td>Hon. Stephen D. Hill, Kansas Court of Appeals, Topeka</td>
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<td>Hon. Patrick D. McAnany, Kansas Court of Appeals, Topeka</td>
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<td>Hon. Janice D. Russell, Johnson County District Court, Olathe</td>
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<tr>
<td>10:15 a.m. – 4:25 p.m.</td>
<td>CLE Presentations</td>
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<tr>
<td>12:05 p.m.</td>
<td>Brown Bag &amp; Bull Section Roundtables &amp; Lunch (all attendees welcome)</td>
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<tr>
<td>7:30 p.m.</td>
<td>The Johnson County &amp; Wyandotte County Bar Show</td>
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Saturday, June 10

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<th>Time</th>
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<tr>
<td>6:45 a.m.</td>
<td>5k Legal Runaround @ Corporate Woods Trail</td>
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<tr>
<td>7 – 8:30 a.m.</td>
<td>Eggs &amp; Issues Member Forum Breakfast: &quot;How to get the Most from Your</td>
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<td>KBA Membership&quot;</td>
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<tr>
<td>8:30 – 10 a.m.</td>
<td>Political Forum: Kansas Gubernatorial and Attorney General Candidates</td>
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<tr>
<td>9 – 10:30 a.m.</td>
<td>KBF Board of Trustees Meeting</td>
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<tr>
<td>9:30 a.m. – 4:40 p.m.</td>
<td>CLE Presentations</td>
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<tr>
<td>12:30 p.m.</td>
<td>Law School Luncheons</td>
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<tr>
<td>2 – 5 p.m.</td>
<td>KBA Board of Governors Meeting</td>
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<tr>
<td>6 p.m.</td>
<td>President’s Reception</td>
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<tr>
<td>7 – 10 p.m.</td>
<td>Awards Banquet and Changing of the Guard Ceremony</td>
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Price of rooms (if reserved by May 17, 2006): $94 single/double occupancy
Room reservations: Call (800) 228-9290 or (913) 451-8000
or reserve your room online at http://www.ksbar.org/am2006/
### Our Mission:
The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.

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

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The Kansas Bar Association and the members of the Board of Editors assume no responsibility for any opinion or statement of fact in the substantive legal articles published in The Journal of the Kansas Bar Association.

For advertising information contact Suzanne Green at (800) 211-1344 or e-mail sgreen@ksbar.org. Publication of advertisements is not to be deemed an endorsement of any product or service advertised unless otherwise indicated.

**Correction:** The “2006 Outstanding Speakers Recognition” in the April issue of the Journal incorrectly listed the rank of John Randolph “Randy” Mettner Jr. as lieutenant general. His correct rank is lieutenant colonel.

**Cover photo by Susan McKaskle, managing editor.**

**Capitol One building, Southcreek Office Park, Overland Park.**

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### ITEMS OF INTEREST

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**See you in Overland Park!**

**Annual Meeting**

**June 8-10**

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**The Journal Board of Editors**

**Assistant Executive Director:** René Eichem

**Managing Editor:** Susan McKaskle

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<tr>
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<td>Terri Savel Bezek, Chair</td>
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<td>Gregory L. Ash</td>
<td>Lawrence</td>
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<td>Anne L. Baker</td>
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<td>Hon. Monti L. Belot</td>
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<td>Tamara Lee Davis</td>
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<td>Hon. Jerry Elliott</td>
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<td>Connie Hamilton</td>
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<td>Mark D. Hinderks</td>
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<td>Michael T. Jilka</td>
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<td>Marta F. Linenberger</td>
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<td>Michelle Reinert Mahieu</td>
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<td>Hon. Tom Malone</td>
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<td>Michelle Masoner</td>
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<td>Julene Miller</td>
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<td>Brian J. Moline</td>
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<td>Hon. Lawton R. Nuss</td>
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<td>Hon. James P. O’Hara</td>
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<td>Prof. John Peck</td>
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<td>Mary D. Prewitt</td>
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<td>Richard D. Ralls</td>
<td>Manhattan</td>
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<td>Hon. Richard H. Seaton</td>
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<td>Marty M. Snyder</td>
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<td>Jeffrey A. Wiharn</td>
<td>Wichita</td>
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<td>Diane S. Worth</td>
<td>Topeka</td>
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**The Kansas Bar Association, Topeka, Kan.**
From the President
Richard F. Hayse

What Then Must We Do?

One of my favorite movies is “The Year of Living Dangerously” which follows a young Mel Gibson and Sigourney Weaver as they fall in love in the dangerous prerevolutionary Indonesia of the ‘60s. They are brought together by Linda Hunt, who portrays Billy Kwan, a scheming Anglo-Chinese news cameraman who aspires to be a puppet master in control of the lives of those around him. (Hunt, playing a man, got the Academy Award.)

From his multicultural background Billy puts up a blasé front to the Westerners about the squalid conditions which eventually lead to the ouster of Sukarno. But Billy is secretly idealistic, financially supporting a single mother and her child who struggle for survival in the slums of Jakarta. Surrounded with overwhelming poverty and misery, Billy quotes Tolstoy’s question: “What then must we do?” His answer is to do something within his power, even if it isn’t much in the big picture.

Probably every one of us graduated from law school with our idealism pretty much intact: Worlds to conquer and plenty of time to do it. As the years go by, the idealism gives way to much more prosaic pragmatism. There are mouths to feed, taxes to pay and laundry to do. Billy Kwan’s downfall comes when he sees his idealism tragically crushed by the death of his adoptive child to untreated disease. For most of us the erosion of idealism doesn’t come in a dramatic, mind-changing event such as Billy experiences. Rather, it just gets gradually displaced by more pressing concerns.

ABA President Mike Greco has undertaken to push against that tide by trying to attract lawyers to his signature project, the Renaissance of Idealism. President Greco’s challenge is to rekindle the enormous power of the legal profession to make things better. He wants us to contribute to the public good through more community service, in addition to exercising our professional responsibility to deliver pro bono legal service. He wants legal providers and those who employ lawyers to adopt policies and practices that afford lawyers the time and opportunity to engage in such service. The ABA House of Delegates has backed his initiative with a supportive policy which also calls on law schools and bar associations to encourage lawyers to undertake this service.

My guess is that everyone who reads these words is already doing a great deal — that we coach the soccer teams, teach Sunday School, volunteer for community boards and give away a lot of free legal help. But there are 10,000 lawyers admitted to practice law in Kansas, and the power of Greco’s idea is in the multiplier. If each of us follows Billy Kwan’s example and does just one more thing within our power, however limited, we’ve just taken 10,000 steps to making things better. I can’t prevent church burnings but I can help a child learn to read. I can’t stop famine in the desert but I can deliver meals on wheels. I can’t alter the economics of oil but I can teach personal finance to the disadvantaged.

The KBA has done much to facilitate public service by lawyers and will be doing more. The Lawyer Referral Service provides a vehicle to connect willing lawyers with clients who qualify for pro bono or reduced fee services. We are preparing a comprehensive guide to the continuum of legal services available to those who are unable to afford full rates. We are creating a system to establish contact between volunteer lawyers and local nonprofit organizations which are seeking a lawyer to serve on their boards. We annually recognize lawyers who perform outstanding pro bono service, or who demonstrate courage through professional achievement.

I challenge you to identify any other occupation or profession which collectively volunteers as much as lawyers to making things better. Despite the never-ending supply of lawyer jokes, the reality is that we provide leadership and personal service across all phases of society and have done so throughout this nation’s history. Through that service we ensure that our individual idealism never disappears and we serve as a model for others who need a little encouragement.

You and I can make President Greco’s Renaissance a reality in our own lives by taking on just one more task for the benefit of those around us. Opportunities are everywhere and virtually nothing else gives you more satisfaction or demonstrates better your pride in being a member of this honorable profession.

Richard F. Hayse can be reached by e-mail at rhayse@morrislaing.com or by phone at (785) 232-2662.
Being a Kansas lawyer is a privilege and a responsibility. As licensed professionals, we represent the interests of our clients in very important matters. We are able to exert substantial influence in social and public policy concerns in our local communities. Honestly speaking, most lawyers seek and enjoy the rewards of success, the notoriety of battles won, and the personal satisfaction of a career choice. We enjoy the privilege of being called lawyer, counselor, attorney-at-law, your honor, and, especially, esquire.

Lawyers are trained to aggressively pursue the goals of clients and advocate their cause. This role does not always enhance our public image. As I drank my coffee and read the newspaper one morning recently, a discussion on one of those early morning television shows caught my attention. Some political guru asserted that the problem with Congress was that most of its members were lawyers. The premise was that lawyers only know how to take sides and argue with each other. Lawyers do not know how to engage in thoughtful debate and then work together in the public interest to resolve the nation’s issues. I do not agree, but it is a public perception.

As lawyers, we should not become too intoxicated with the privilege of practicing law. To be a lawyer also means we have a responsibility to advance justice and establish civility in our country. “Equal Justice Under the Law” is not a worn-out slogan etched on some courthouse wall. It is part of our responsibility as Kansas lawyers to help people understand it and achieve it. The preamble to the Kansas Rules of Professional Conduct says:

As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives ...

Most lawyers give time and donate resources to local community projects and activities. That local demand is always present and, as a practical matter, impossible to ignore. But are we advancing access to justice, enhancing the public perception of our profession, and cultivating civility if we only support local projects?

The Kansas Bar Foundation provides funds each year to assist with the delivery of legal services to those who cannot obtain them and to promote and support educational programs, which seek to increase the knowledge and understanding of our legal system. At the February meeting of the Board of Trustees, IOLTA grants in the amount of $128,000 were approved. These grants, as with all distributions from the Foundation, are made in the name of and on behalf of all Kansas lawyers. This is a way we can collectively, at least partially, satisfy our professional responsibility. The Foundation’s work enhances and promotes the image of the legal profession. I urge you to support the Kansas Bar Foundation as you are able.

H. David Starkey can be reached by e-mail at starkey@st-tel.net or by phone at (785) 460-3383.

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@klinc.org with your name and the geographic region in which you will be able to serve. You’ll be glad you did!

Kansas Department of Revenue to Audit Lawyers

The KBA has been notified that the Kansas Department of Revenue is planning to send self-audit notices to lawyers located in Kansas. During the next few months selected law practices will be asked to review their records to determine if all sales and use taxes, i.e. out of state purchases, have been properly remitted to the state. For more information, please visit http://www.ksrevenue.org/voluntary.htm or call (785) 296-4330.
In the most recent issue of *Cornerstone*, we publicly introduced the *Raising the Bar Campaign* (RTB), which is a collaborative effort between the Kansas Bar Foundation and the Kansas Bar Association. The goal of the campaign is to raise $1.2 million.

This ambitious fundraising initiative has two laudable objectives. The first is a modest expansion of the Kansas Law Center in Topeka to add larger and up-to-date meeting facilities as well as make much-needed technology enhancements and modernize the existing building. The second aspect of the campaign is to strengthen our ability to fund projects fostering the welfare, honor, and integrity of the legal system by augmenting our endowment to help increase funding for civil legal aid to the poor and improve the accessibility of the legal system in Kansas.

During the last year, many dedicated volunteers who serve on the RTB Committee have been hard at work soliciting donations from prominent law firms across the state. We are pleased to announce that nearly 40 firms, along with the Attorneys Liability Protection Society Inc. (ALPS), have stepped forward to pledge almost $875,000. We are so grateful to these firms and ALPS for their very generous support and recognize them below:

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<thead>
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<th>Firm Name</th>
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<tr>
<td>ALPS Corporation</td>
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<td>Foulston Siefkin LLP</td>
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<td>Hinkle Elkouri Law Firm LLC</td>
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<td>Hite, Fanning &amp; Honeyman LLP</td>
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<td>Polsinelli Shalton Welte &amp; Suelthaus P.C.</td>
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<td>Depew Gillen Rathbun &amp; McInteer L.C.</td>
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<td>Bremyer &amp; Wise LLC</td>
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<td>Ralston, Pope &amp; Diehl LLC</td>
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If you would like to know how your firm could join in this exciting effort to “Raise the Bar” as well as learn the many benefits of contributing to the campaign, please contact KBF Executive Director Jeffrey Alderman at (785) 234-5696.
Rebein Participates in ABA Bar Leadership Institute

CHICAGO (ABA) — Joining nearly 300 leaders of lawyer organizations from across the country at the American Bar Association’s Bar Leadership Institute (BLI), March 9-11, was David J. Rebein of Dodge City, president-elect of the Kansas Bar Association. The BLI is held annually in Chicago for incoming officials of local and state bars, special focus lawyer associations, and bar foundations. The seminar provides the opportunity to confer with ABA officials, bar leader colleagues, executive staff, and other experts on the operation of such organizations.

Rebein joined ABA President Michael S. Greco of Boston and ABA President-elect Karen J. Mathis of Denver in sessions on bar governance, finance, communications, and planning.

Various ABA entities briefed the participants on resources available from the ABA for local, state, national, and specialty bar associations and foundations.

The BLI is sponsored by the ABA Standing Committee on Bar Activities and Services and the ABA Division for Bar Services as part of the association’s long-standing goal of fostering partnerships with bars and related organizations nationwide. Cooperating ABA staff entities included the Division for Media Relations and Communication Services.

The American Bar Association is the largest voluntary professional membership organization in the world. With more than 400,000 members, the ABA provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public.

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THE JOURNAL OF THE KANSAS BAR ASSOCIATION
MAY 2006 – 7
A Special Invitation from Your President …

“On behalf of the Board of Governors and staff, I want to personally invite you to attend the 2006 Annual Meeting. We’ve planned a schedule packed with fun and business for every member.

Thursday will kick off with a golf tournament or sporting clays shoot, after which you can meet old friends and make new ones at the ‘Blues, Brews, and Bar-B-Q’ welcome reception. On Friday, we get down to some serious business with a keynote panel of Kansas judges to update us on the latest rounds in the efforts to protect the impartiality of our judiciary. A total of 14 hours of CLE will be available Friday and Saturday, including five hours of ethics, presented by members from most of our sections.

For the first time, we will have section meetings at our ‘Brown Bag and Bull’ roundtables and lunch on Friday. That evening our talented colleagues from the Johnson and Wyandotte County bar associations will try to top their last performance of the Bar Show with fun and entertainment for everyone.

On Saturday at the Eggs and Issues breakfast, you have the opportunity to tell the KBA officers and board what’s important to you. The law school luncheons for KU, Washburn, and other schools will also be on Saturday. That evening we cap the meeting with a combined president’s reception, awards banquet, and changing of the guard ceremony and party.

This year we’ve set à la carte pricing for all of the events, allowing you to pay for only those events in which you want to participate. Whether you come for one session or the entire convention, you won’t find a better way to renew acquaintance with your friends from around the state, receive up-to-date CLE instruction, and just enjoy yourself at the many fun events.

Block out June 8-10 on your calendar, and we’ll see you in Overland Park!”

KBA President Rich Hayse
Morris, Laing, Evans, Brock & Kennedy Chtd.

124TH ANNUAL MEETING
of the
KANSAS BAR ASSOCIATION
JUNE 8-10, 2006
OVERLAND PARK MARRIOTT

Visit www.ksbar.org for more information
A NOSTALGIC TOUCH OF HUMOR

We Knew the Real Killer Before the First Commercial Break

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

I n case you haven’t noticed, lawyer shows are the rage these days. “Law & Order” and “Boston Legal” are just two of them. I suspect most lawyers have little interest in fictional accounts of our profession. But many of my nonlawyer friends watch these shows. So I watched one. It was “Boston Legal” — whose senior partner is William Shatner, who went from Captain Kirk to the lead partner in a Boston law firm. The episode was the most preposterous thing I have ever seen. It was fiction beyond a screenwriter’s wildest dreams. Shatner was more believable when he wore a polyester jump suit and barked out commands to Sulu.

You see, I’m an expert on Hollywood and the law. I grew up watching “Perry Mason.” In 1972 in Barton County, our home got two television channels, both beamed in from Wichita. Based on the signal strength, Mars seemed closer. And on channel 12, the afternoon show was “Perry Mason.” In one hour you had a murder, an arrest, Mason retained, witnesses interviewed, alibis developed, and then the courtroom scene. Perry Mason was our star. It was real TV, real lawyering. For some reason the programming guy at KAKE 12 thought that 10-year-old kids would watch this stuff over cartoons. And we did. In spades.

Back then the practice of law was simple. Perry had no use for the billable hour. No retainer. Justice was in demand and Mason was happy to deliver. My two brothers and I sat and watched every episode. The stock in trade for most episodes was blackmail schemes with embarrassing photos. Like a man caught with his shirt off or something else incredibly benign by today’s standards. The shows had great titles, which Google helped me find: “The Case of the Lazy Lover,” “The Case of the Screaming Woman,” “The Case of the Fatal Fortune,” and “The Case of the Runaway Corpse.” In contrast, “Boston Legal” has shows titled “Breast in Show” (aired in February).

Perry’s success was due to his crack team, Della Street and Paul Drake. Della was so much more than just a secretary. She was a know-it-all without being a know-it-all. Paul Drake was like her male clone. He was part detective, part paralegal, and all dedication. He knew everyone and everything. In almost every plot Perry would hit some dead end, and things would look bleak. That’s when Paul would say something like “I have a bartender friend downtown who knows something about handgun ballistics. I’ll go pay him a visit.” Five minutes later, he would return with a gleam in his eye. He broke the case but couldn’t say anything until after the commercial break.

The confession was dramatic. It often involved some jealous love interest. They not only confessed, they went into detail with motive and everything. It was like a “confession in a box.” The show would be 45 seconds from concluding. I would sit there and say, “How are they going to wrap this up?” And then it would happen. The camera would go into the assembled courtroom galley. Some woman would start to cry. “He lied to me. He said we would get married, but he lied. He had photos, too. I had no choice. I did it. I shot him in the back. I’m sorry.” She would fall to the ground and faint. The confession was often added to the Constitution.

District Attorney Burger was the embodiment of the team that plays the Harlem Globe Trotters and has never won a basketball game. He deserved an Emmy. When he looked shocked, amazed, and stunned you actually believed him. There were other bit players, like detectives and policemen, but they didn’t matter. At the end of the show, there was always a scene where they tied up loose ends and made certain viewers were able to connect all the dots and understand the various plot lines. That was one part of the show we never watched. Such spoon feeding was best left to grade-school kids in places like Derby. We knew the real killer before the first commercial break.

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. He may be reached at mkeenan@shb.com
The Journal of the Kansas Bar Association

There is loud and there is off; that is the volume control of a bagpipe, according to Jeffrey S. Kruske of Overland Park. He was first exposed to the bagpipes while a student at William Jewell College in Liberty, Mo.

“If there was a special event, there were bagpipes,” Kruske said. “It wasn’t uncommon to hear them, and bagpipes aren’t something you are exposed to on a regular basis.”

Kruske fell in love with them: they looked and sounded cool. One day he contacted the school and got connected to a pipe band. He began taking lessons and participating.

Eight years later, he plays with the Kansas City St. Andrew Pipes & Drums. His interest has become much more than a hobby, it has become a lifestyle choice.

The need to stay good requires you to play often. There are physical and mental demands required to play the bagpipes well, without disastrous results.

“At this stage of playing, it’s a set of motor skills,” he said. “Your body is not used to it. There is air-lung control, finger control, and the music has to be memorized. You will never see sheet music in front of a bagpiper.”

According to Kruske, to play the bagpipes your fingers need to be taught to move individually, almost rewiring the muscles in your hands.

Bagpipes work when the piper breathes air into the blow pipe to fill the bag. As pipers play, they squeeze the bag under their left arm to force the air into three drones (the pipes that lay against the shoulder) and the pipe chanter (a long pipe held by the piper) to keep the instrument playing. Holding the chanter, the piper plays the melody by covering and uncovering eight holes in the pipe.

As the air goes through the drones, the bagpipe’s distinctive humming sound is produced. The drones’ sound remains at a constant pitch, unlike the melody that comes from the chanter. The constant airflow causes the music to be constant as well.

“It takes a lot of air to maintain a steady tone,” he said. “Plus, it’s unique in that you are creating harmonies and harmonics against itself.”

The classical uniform worn includes a kilt, the traditional Scottish Highland knee-length skirt that comes in hundreds of tartan patterns. Kruske’s kilt is made out of 16-ounce wool and weighs about 8 pounds.

The uniform also includes the kilt jacket; sporran, the leather pouch worn around the waste, as kilts have no pockets; kilt hose, traditional knee socks worn with a kilt; flashes, a garter-like ribbon that holds the socks up; and Ghillie brogues, traditional lace-up Scottish footwear.

In the world of bagpiping, there are a lot of bad bagpipers out there, according to Kruske, so there is a misunderstanding of what they sound like.

In 2001, Kruske co-founded the Midwest Highland Arts Fund to help promote the Scottish Highland performing arts through workshops, concerts, and competitions.

The Fund evolved into the creation of Winter Storm, which is held over a weekend in January. World-class musicians come and instruct at workshops for students. This year Winter Storm had 250 students from across the United States, Canada, South Africa, and even Scotland.

“We created something fairly unique,” Kruske said. “It includes both amateur and professional competitions and a faculty concert, which sells out. We met our goal of showcasing our art to the community and to get away from the image of poor musicianship.”

When people leave the concert they have been heard to say, “Wow, I had no idea that’s what it sounded like.”

Kruske himself competes in eight to nine competitions a year from Labor Day to Memorial Day. They occur mostly over the weekends and are commonly referred to as Highland Games. The games include dancing and athletics in addition to the piping and drumming competitions.

Kruske may spend leisure time piping, but his true passion is the practice of law.

“Law allows me the freedom to do my best and help the underdogs fight the giant companies,” he said. “I’m supplying a need to those individuals. These are the stories that present a real challenge to right a wrong.”

Kruske is a securities attorney in Overland Park who opened his solo firm four years ago. He earned his B.S. from William Jewell College in 1997 and his J.D. from Washburn University School of Law in 2000.

KBA Member Profile

Just a bag of Wind or Very Special Music?

By Beth Warrington, publications coordinator

Richard L. Ruth, Ph.D.
Forensic Economist

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• Wrongful Death
• Wrongful Employment Termination
• Present Value of Life Care Plan

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Jeffrey S. Kruske

10 – MAY 2006
THE JOURNAL OF THE KANSAS BAR ASSOCIATION
The Annual Meeting is a great time to take a break from that daily practice and be reminded of the broader profession of which we are a part.

9. Social Events. Hey! Lawyers might not be the most fun crowd with which you could choose to spend your Thursday, Friday, and/or Saturday nights; but guess what … you’re a lawyer too, so what does that say about you? For the most part, however, young lawyers know how to have a good time (no offense being meant to the more senior members of the Bar). This year, we think we have a pretty good plan. Immediately following the Welcome Reception on Thursday night, all young lawyers in attendance will be able to get on a bus bound for Dave & Buster’s. The YLS will provide a preloaded game card and may even buy you a drink or two. How can you miss it?

8. Awards Banquet and Changing of the Guard. At this formal dinner, we will honor those members of the KBA, and maybe even some nonlawyers, who have provided outstanding service to their communities and the profession. We will also recognize the contributions of the KBA’s outgoing officers and welcome the incoming officers. You will even get a pretty decent meal.

7. Section Roundtables. New this year, the “Brown Bag & Bull” lunch on Friday will be an informal setting in which members of the YLS will have the opportunity to learn more about what is going on at the KBA — particularly with other sections covering specific areas of substantive law.

6. Law School Luncheons. The law school luncheons on Saturday give you the opportunity to renew prior acquaintances from your law school. There is even an out-of-state lunch for those of us who did not attend one of the fine institutions of the Sunflower State.

5. The Bar Show. I have always been amazed at the talent possessed by many members of the Bar that goes well beyond the practice of law. These lawyers spend countless hours preparing and rehearsing a stage show to entertain the rest of us on Friday night. Though I don’t know what the Johnson and Wyandotte County bar associations have planned for the 2006 Bar Show, I’m sure it will be worth the price of admission (never mind that two tickets are free to those attending the Annual Meeting).

4. Golf Tournament. On Thursday, the KBA will sponsor a golf tournament at Falcon Lakes Golf Course. Although the tournament will almost certainly be won by whatever team includes incoming YLS President Paul Davis, you can still enjoy a great day of golf on a great course — you may even come in second. Most importantly, $20 from each registration, and all proceeds from skills games and games of chance, will go directly to the YLS’s Justice Gernon Scholarship Fund.

3. Networking. One of the biggest challenges for a young lawyer is developing professional relationships with other lawyers from around the state. Although we are generally in contact with other lawyers on a daily basis, the often adversarial nature of practicing law is not always conducive to developing such relationships. If you attended law school in the state, you will know lawyers with whom you went to school. You may also have developed relationships with lawyers in your area through your local bar association. The Annual Meeting is, however, the only annual event that draws lawyers from all over the state to one location. It is a tremendous opportunity to meet people you would never otherwise come across.

2. CLE Seminars. Most of us do not suffer from a lack of alternatives for meeting our annual CLE requirements. CLE seminars have become big business. Chances are your mailbox contains one or two brochures advertising a “can’t miss” CLE opportunity each day. The Annual Meeting, however, offers you the opportunity to obtain all of your required CLE in one place. In fact, the CLE Commission has approved the Annual Meeting for 14 hours of CLE credit, including five hours of ethics. Furthermore, in response to desires expressed by young lawyers, the YLS is offering two “Nuts and Bolts” seminars designed to provide newer lawyers with basic, practical information on certain substantive areas of practice — real estate and divorce.

1. You might get to see me. What more needs to be said? I’ll see you there.

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

Footnote
1. Dave & Buster’s is like a playground for grownups. There are several locations around the country, and one recently opened near the Kansas Speedway in Kansas City, Kan. With their “Million Dollar Midway,” multiple bars, pool tables, and shuffleboard, they bill themselves as “the ultimate destination to hang out, unwind, and let loose.” You can check them out at www.daveandbusters.com.
The Kansas Bar Association is offering a three-day excursion to Washington, D.C., for KBA members who desire to be sworn in before the Supreme Court of the United States. Members can enjoy the excitement of our nation’s capital Oct. 15-17, 2006, with the swearing-in scheduled for Oct. 16 and a tour of the White House on Oct. 17.

If you would like to sign up, complete the request form below and return it to the KBA with your payment. For questions, please contact Cindy Diederich, manager of member services, at (785) 234-5696 or at cdiederich@ksbar.org.

The swearing-in ceremony will be conducted before the justices of the U.S. Supreme Court in the U.S. Supreme Court building at 10 a.m., Monday, Oct. 16. Seating capacity in the courtroom is strictly limited to one guest per admittee. Others may have the opportunity to view the ceremony from the public viewing area.

Total price of $275 includes application fee, group photo, swearing-in reception, and tour of the White House. Hotel and travel accommodations are not included.*

Features of the trip include:
- A block of discounted sleeping rooms reserved at the prestigious Hotel Washington,* which is located near the White House and Smithsonian Institution.
- Maps for leisure activities in the nation’s capital.
- Group photos taken in front of the U.S. Supreme Court building.
- Swearing-in reception for all attendees and their guests, with invitations extended to the justices of the U.S. Supreme Court.
- Tour of the White House.

*Hotel and travel accommodations: Attendees will be responsible for making their own hotel, airfare, and transportation arrangements. Please contact the Hotel Washington at 1-800-424-9540 and indicate you are registering under the group Kansas Bar Association in order to receive the discounted room rate of $220.

In order to receive the discounted room rate and ensure room availability, the deadline for making your hotel reservation is Sept. 12. A limited number of rooms have been reserved for Oct. 15 and 16.

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Name: ____________________________
Firm Name: ____________________________
Address: ____________________________
City: ____________________________ State: __________ ZIP: __________
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Please send__ application(s) for the U.S. Supreme Court swearing-in ceremony and reception sponsored by the Kansas Bar Association.

Please mail or fax this form with payment to:
Kansas Bar Association
Attn: Cindy Diederich, manager of member services
P.O. Box 1037
Topeka, KS 66601-1037
Fax: (785) 234-3813

Deadline to return application request form to the KBA office is Friday, July 7.
We came to law school for reasons similar to those of our peers: to get a good job, to make money, and, in some circumstances, to further our education. What we did not recognize was that the field of law is one of the least integrated professions in the United States. In fact, according to the American Bar Association, only two professions feature less diversity than law: the natural sciences and dentistry. This paradigm is lost to us since we have learned about the 14th Amendment, the civil rights acts, and the Employment Discrimination Act in our legal studies.

In view of the fact that we are training to be lawyers, we question what drives this disparity in the legal profession. After all, analyzing situations is within our nature as law students. We have seen lawyers push for uniform guidelines and predictability in the law. With that drive, have we also established a “precedent” of uniformity within our legal profession? By training ourselves to classify and analogize individual cases to the collective body of law, it appears that we have also trained our legal minds to view individual persons the same way.

As lawyers, however, we are capable of changing “precedent.” Francis Bacon Sr. stated, “It’s ... not what we profess but what we practice that gives us integrity.” As future attorneys, we understand that hard work, diligence, and dedication are what it takes to be an attorney. In practice, we hope to put these same tools to work because professing to promote diversity within the legal field is not enough. As attorneys and future attorneys, we must continually find ways to develop a profession that is responsive to the needs of all races. By furthering diversity and reversing the negative “precedent” of uniformity, we as law students and attorneys are capable of creating new case law and setting new standards for our profession.

Washburn University School of Law proudly fosters diversity in the legal profession. It is engaged in a variety of diversity-building initiatives. Two recent student-sponsored events exemplify our personal desires to practice in an integrated legal profession.

Washburn Law Diversity Week, April 10-13, was established to champion the goals of educating and empowering students to actively support diversity in the legal community. Additional goals include alerting the legal community that diversity requires proactive efforts by all members of the profession. By targeting the negative precedent of uniformity in our profession, this event offers a forum for individual viewpoints, workshops, and panel discussions to retrain our thinking. The event’s theme, I Support a Diverse Legal Community, embodies...
Mission Diversity
(continued from Page 13)

the belief that every attorney and future attorney is capable of compelling our legal profession to reflect the principles that our laws were designed to protect.2

Moreover, the Washburn Black Law Students Association has continually engaged in diversity initiatives, culminating with a banquet on April 8 dedicated to fostering diversity and bringing attorneys and students together. The event, titled Bridging the Gap: Building a Community of One, is geared toward promoting awareness and diversity within the profession that we seek to join. Recognizing the importance of such events, the Washburn Student Bar Association has committed a substantial amount of money to make certain that this event and others like it will be successful.

In the end, diversity should be a core component and a shared goal of the legal profession. In light of the importance of diversity and the value it places on human assets, the striking lack of diversity in the legal community must not only be acknowledged, but remedied. There must be a collective commitment to diversity, and it must start with those who are already members of the legal profession. The mission for us as law students is to persuade the legal profession to practice the principles of equality that we have learned in our legal studies. This undertaking will require a shift in focus from mere compliance to a genuine commitment.

Commitment to valuing differences and treating all members of the legal profession with respect, while discovering the talents in the labor pool, is what diversity is all about. If our mission is successful, the legal profession, instead of lagging behind, will soon be leading all professions in diversity.  ■

2. We thank the Kansas Bar Association and other organizations for supporting this event.

About the Authors

Linda Eng, a second-year law student at Washburn University School of Law, was born in Canton, China. She completed her undergraduate work at the University of Iowa with a double major in management information systems and marketing and a minor in psychology. She is a co-founder and co-chairperson of Washburn Law Diversity Week. She is currently a legal intern with the Shawnee County District Attorney’s Office and serves as a legislative aide to Kansas Sen. Chris Steininger, D-Kansas City, Kan.

Keron A. Wright is a second-year law student from Houston. He graduated from the University of Houston with a major in corporate communications and a minor in economics. He previously served as a legislative aide to former Rep. Joe E. Moreno of the Texas House of Representatives. A member of the Washburn Law Journal, he has been appointed to serve as Comments Editor for the 2006-2007 academic year.

Eunice Chwenyen Peters, a third-year law student, is from Chicago. She completed her undergraduate work at the University of Illinois in Urbana. She is a co-founder and co-chairperson of Washburn Law Diversity Week. She recently authored an article on achieving diversity in the legal profession, which has been selected for publication in the spring 2006 issue of the Washburn Law Journal. After graduating in May 2006, she plans to join the Kansas Court of Appeals Central Staff in Topeka.

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Tiffany Elizabeth Finke
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Diana Lynn Hickey
Kelley Lynn Hickman
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Eric John Howe
Michael James Hundley
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Amy Elizabeth Jackson
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Christina Marie Waugh
Victoria Lea Wert
Jessica Anne Bankston White
Jennifer Bowen Wieland
Marc Stephen Wilson
Megan Christena Winter
Kent David Wittrock
Kevin Joseph Zolotor
CHANGING POSITIONS

Garth L. Adams and Michael L. Goodrich have joined the Cherokee County Attorney’s Office.

Joan K. Archer has joined Lathrop & Gage L.C., Kansas City, Mo.

Lynette R. Bakker has joined the Kansas Attorney General’s Office, Topeka.

Jason R. Ballard has joined Schaffer Lombardo Shurin, Kansas City, Mo.

Shenna M. Bradshaw has joined Greensfelder, Hemker & Gale P.C., St. Louis.

Randall W. Brown has joined Thornberry, Eischens & Brown LLC, Kansas City, Mo.

Jason L. Buchanan has been elected shareholder of McDowell, Rice, Smith & Buchanan and Louis J. Wade was elected as equity shareholder in the firm.

Brian S. Burris has joined ICM Inc., Colwich.

Julia M. Butler and LaRonna Lasister Saunders have joined Riling, Burkhead & Nitcher Chtd., Lawrence, as associates.

Tye G. Darland has joined Georgia-Pacific Corp., Atlanta.

Robin R. Fabricius has become a shareholder with Watkins Calcara Chtd., Great Bend.

Gail A. Goek has joined the McCrummen Immigration Law Group LLC, Kansas City, Mo.

Dianne M. Hansen has joined Zerter Elder Law Office LLC, Springfield, Mo.

Terry A. Iles has become a partner with Frieden Haynes & Forbes, Topeka.

Richard W. James has been named director of McDonald, Tinker, Skaer, Quinn & Herrington P.A., Wichita.

Jennifer M. Hill has joined the firm as an associate.

Monika D. Jenkins has joined Franke Schultz & Mullen P.C., Kansas City, Mo.

Erin Bond Knoska has joined BAR/BRI Group, Chicago.

Zachary A. Kolich has joined Rathmel & Belden LLC, Merriam.

Paula D. Langworthy has joined Tripplett, Woolf & Garretson LLC, Wichita.

Joseph G. Lauber has joined the Kansas City, Mo., office of Gilmore & Bell P.C. as an associate.

Carolyn L. Matthews, Andrew J. Nolan, and Forrest T. Rhodes Jr. have become partners with Foulston Siefkin LLP, Wichita.

Timothy P. McCarthy has joined Gilliland & Hayes P.C., Kansas City, Mo.

Jeffrey A. Moots has joined the Guam Attorney General’s Office, Hagatna, Guam.

J. Matthew Oleen has joined the Kansas Army National Guard Office of the Staff Judge Advocate, Topeka.

Aaron M. Popelka has joined U.S. Rep. Jerry Moran’s staff as a legislative assistant, Washington, D.C.

Denise D. Riemann has joined Fisher Scientific International Inc., Hampton, N.H.

Richard S. Schoenfeld has joined Stinson Morrison Hecker LLP, Kansas City, Mo.

Lori R. Schultz has joined Shook, Hardy & Bacon L.L.P., Kansas City, Mo., as partner.

Jonathan H. Gregor has also joined the firm.

Dana M. Shannon has joined Shank & Hamilton P.C., Kansas City, Mo.

Eric B. Smith has joined Fisher, Patterson, Sayler & Smith LLP, Topeka.

Curtis R. Summers has joined Blackwell Sanders Peper Martin LLP, Kansas City, Mo.

Diane L. Waters has joined Bennett, Bodine & Waters P.A., Shawnee.

Anthony J. Works has been named Kincaid City Attorney.

Rene S. Young has been appointed district judge for the 28th Judicial District by Gov. Kathleen Sebelius.

CHANGING PLACES

Bratcher Gockel & Kingston L.C. has moved to 1935 City Center Square, 1100 Main St., P.O. Box 26156, Kansas City, MO 64196-6156.

Cordell & Cordell P.C. has moved to 11225 College Blvd., Suite 130, Overland Park, KS 66210.

Tom T. Inkelaar II has a new business address, 5002 S. 24th St., Suite 101, Omaha, NE 68107.

Law Offices of David R. Hills has a new business address, 12760 W. 87th St. Parkway, Suite 100, Lenexa, KS 66215.

Law Offices of Despacho Legal De Thomas R. Fields P.A. has a new business address, 3111 Strong Ave., Kansas City, KS 66106.

Mark E. Lindstrom P.A. has a new business address, 11256 Strangline Road, Lenexa, KS 66215.

Mark R. Logan has started the Law Office of Mark Logan LLC, 11005 W. 60th St., Suite 320, Shawnee, KS 66203.

Scanlan Law Firm LLC has moved to 14213 Goodman St., Overland Park, KS 66223.

MISCELLANEOUS

Tamara L. Davis, Law Office of Tamara L. Davis P.A., Dodge City, has become a member of the National Academy of Elder Law Attorneys Inc.

John W. Gillford Jr., Gillford Law Firm, Shawnee Mission, was a guest speaker on “Unlocking the Secrets of Your Small Business” on Hot Talk 1510 in March.

James W. Morrison, Morrison Frost Olsen & Irvine LLP, Manhattan, is the 2006 recipient of the Manhattan Legacy Award, presented by the Meadowlark Hills Foundation Legacy Society.

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.

“Of Course I Sliced Him Up. He Was A Couch Potato!”

Dan’s Cartoon by Dan Rosandich
Jeffrey S. Henry

Jeffrey S. Henry, Overland Park, 54, died Feb. 20, after a long battle with cancer. Henry was born Nov. 6, 1951, in Bay City, Mich.

He attended the University of Kansas, receiving his bachelor's degree in business in 1973 and his juris doctorate in 1976. That same year, Henry became a member of the Kansas Bar Association.

Survivors include his wife, Nancy; daughters, Renee and Rebecca; sons, Russell and Ryan; and two grandchildren, all of whom reside in the greater Kansas City area. He is also survived by his father, Spencer, Leawood; and brother, Richard, Norman, Okla. His mother, Lola, preceded him in death.

Robert Stone Johnson

Robert Stone Johnson, Lawrence, 86, died Feb. 13. He was born May 20, 1919, in Topeka, the son of Beryl R. and Lilian (Stone) Johnson.

After graduating from Washburn University in 1941, Johnson entered Washburn's law school, but did not complete his degree until after World War II. He graduated with his juris doctorate in 1948 and joined the Kansas Bar Association that same year. In 1998, he became a lifetime member of the KBA.

Johnson was drafted into the U.S. Army in 1941 as a private. After his discharge as a major in 1946, he remained in the reserves in the Judge Advocate General's Corps, retiring as a lieutenant colonel.

He practiced law in Topeka for 51 years before moving to Lawrence in 2000. During the first 35 years of his practice, Johnson represented the Prairie Band Potawatomi Nation in its treaty claims against the United States.

He served as president of the Shawnee County Historical Society, Mulvane Art Center, Family Service and Guidance Center, the Community Resources Council, the Thomas Jefferson and Charles Robinson chapters of the Sons of the American Revolution, and the Downtown Topeka and Lawrence Rotary clubs. He was named a Paul Harris Fellow of the Rotary Foundation and was also a member of the Board Emeriti of the Kansas State Historical Society, the board of Historic Topeka Inc., and the Mayflower Society.

Johnson is survived by his wife, Simone Amaerdeil, of the home; two daughters, Sylvie Rueff and Nicole Schneider, both of Lawrence; and four grandchildren. His parents and his sister, Sarah Johnson Curry, preceded him in death.

H.E. “Gene” Jones


He attended Wichita State University and graduated from the University of Kansas School of Law in 1949.

Jones joined the Kansas Bar Association in 1949, becoming a lifetime member in 1999. He was a member and past trustee of the Kansas Bar Foundation, member and past president of the Wichita Bar Association and the Downtown Wichita Rotary Club, a former Rotary District 5690 governor, and a member of the American College of Trial Lawyers and the Wichita Country Club.
'Baffled?' or Just ‘Board?’ Try Claim Construction After Phillips

By Lana Knedlik, KBA Intellectual Property Section president

On July 12, 2005, the Federal Circuit handed down its long-awaited en banc decision in Phillips v. AWH Corporation, 75 U.S.P.Q.2d 1321 (Fed. Cir. 2005). After reviewing more than 30 amicus and party briefs, the court clarified the proper role of dictionaries and other types of extrinsic evidence in the role of patent claim construction. The court rejected the approach that had been applied by some panels, such as the one in Texas Digital Sys. Inc. v. Telegenix Inc., 308 F.3d 1193 (Fed. Cir. 2002), which had relied heavily on dictionaries and similar types of extrinsic evidence as a means of determining the ordinary and customary meaning of the claims. Instead, the Phillips court emphasized the importance of intrinsic evidence, i.e. the claims, the specification, and the prosecution history.

The Phillips dispute arose over how to interpret the word “baffle” in a patent covering modular panels that are welded together to form vandalism-resistant walls. In its original decision, a three-judge panel of the Federal Circuit ruled that the patent was limited to structures having baffles that were configured at certain angles, such that they would deflect bullets. The ruling was based on the fact that the patent described bullet deflection as one of the advantages of the invention, even though the advantages were not required by the claims of the patent. This narrow interpretation allowed the defendant to escape infringement since its baffles were different.

On appeal to the full court, the Phillips court stated that an inquiry into how a person of ordinary skill in the art understands a claim term is the “objective baseline” from which to begin claim interpretation. See id. at 1326. Such a person reads the claim term not only in the context of the particular claim, but also in the context of the entire patent specification. Id. The court emphasized that the specification “is always highly relevant to the claim construction analysis. Usually it is dispositive; it is the single best guide to the meaning of a disputed term.” Id. at 1327. The court also recognized that “the specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such case, the inventor’s lexicography governs.” Id. at 1329.

The court also commented on the role of the prosecution history, which contains the complete record of all the proceedings before the Patent and Trademark Office (PTO). The court found that “because the prosecution history represents an ongoing negotiation between the PTO and the applicant, rather than the final product of that negotiation, it often lacks the clarity of the specification and thus, is less useful for claim construction purposes.” See id. at 1329. Thus, the court stated that the prosecution history may inform one as to whether the inventor “[made] the claim scope narrower than it would otherwise be.” Id.

The court recognized that dictionaries and other extrinsic evidence are also tools to assist the court in claim construction. However, the court viewed extrinsic evidence “as less reliable” than the patent itself and its prosecution history. Thus, extrinsic evidence may also be considered, but only in the context of the intrinsic evidence as well. Id. at 1330.

Applying these claim construction principles, the en banc court concluded that nothing in the patent description limited the patent to baffles that were formed at a bullet-deflecting angle. Although the patent mentioned several advantages that could be obtained with the invention, including the bullet-deflecting properties of the “baffles,” those advantages were not affirmatively identified in the broadest patent claims. Therefore, the full court concluded that the lower court had erroneously limited the patent to incorporating those advantages.

In light of Phillips, both the Federal Circuit and the district courts are revisiting many of their claim construction decisions. See CollegeNet Inc. v. ApplyYourself (Fed. Cir. Aug. 2, 2005) (reversing district court construction of “a format specified by the institution” because the court had improperly given the term an overly broad customary meaning); Terlep v. Brinkman (Fed. Cir. Aug. 16, 2005) (construing the term “clear” as excluding “translucent”). In one recent case, Nystrom v. Trex (Fed. Cir. Sept. 14, 2005), a Federal Circuit panel (Mayer, Gajarsa, and Linn) withdrew its earlier opinion and substituted a new unanimous opinion that reaches a different claim construction in light of Phillips. The patent at issue in Nystrom involved a design for deck boards that are shaped to shed water. The parties disagreed as to whether the claim term “board” was limited to boards made of “wood cut from a log” or a broader dictionary definition such as “a flat piece of wood or similarly rigid material adapted for special use.” The panel had earlier concluded that the term “board” was broad, relying on the dictionary definition and claim differentiation. The court had noted that a dependent claim specifically called for “wood cut from a log.”

Relying on the new Phillips decision, the panel emphasized that the patent specification and the prosecution history consistently described “boards” as “wood cut from a log.” Further, the panel now refused to rely upon claim differentiation as a basis for its previous broad construction. The court
emphasized that “[d]ifferent terms or phrases in separate claims may be construed to cover the same subject matter where the written description and prosecution history indicate that such a reading of the terms or phrases is proper.” The court concluded:

What Phillips now counsels is that in the absence of something in the written description and/or prosecution history to provide explicit or implicit notice to the public, i.e. those of ordinary skill in the art, that the inventor intended a disputed term to cover more than the ordinary and customary meaning revealed by the context of the intrinsic record, it is improper to read the term to encompass a broader definition simply because it may be found in a dictionary, treatise, or other extrinsic source. Id. at 14.

Nystrom shows that one practical effect of the Phillips decision may be that courts will now construe claims more narrowly than they would have under the Texas Digital approach.

About the Author

Lana Knedlik is a partner with Stinson Morrison Hecker LLP, Kansas City, Mo. She practices in all areas of intellectual property, including patents, trademarks, copyrights and trade secrets, and IP and technology litigation.

She received her J.D. from the University of Kansas School of Law, Order of the Coif, in 1996; a B.S. in biology, with distinction, from the University of Missouri-Kansas City; and a B.S. in chemical engineering, summa cum laude, from Kansas State University.

She may be reached via e-mail at lknedlik@stinsonmobeck.com.

Editor’s note: “Baffled?” or ‘Just Bored?” was first published in the Fall 2005 edition of the IP News, which is published by the KBA Intellectual Property Law Section.

The purpose of the IP Section is to plan and promote education programs; support and recommend legislation; distribute information through newsletters, bulletin boards, or other means of communication; and provide networking opportunities for practitioners with attorneys or law firms that specialize in the intellectual property area of law.

If you are interested in joining this or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
2006 Legislature Nears end of Session

By James W. Clark, KBA legislative counsel

As this is being written, the Kansas Legislature has just observed First Adjournment and gone home, due back for the Veto Session on April 26. By the time you read this, the Legislature will have (1) reconvened for the Veto Session, (2) solved the school finance crisis, and (3) gone home. The previous sentence was the most optimistic statement about the 2006 Kansas Legislature that your legislative counsel could think of, and he may have gotten carried away with listing Number 2. This bit of legislative speculation seems necessary because school finance has dominated the legislative landscape in three ways. First, and most obvious, is the effect that school financing will have on the education of Kansas children. Second is the effect rancor, created by the Montoy decision, will have on other state entities, especially the Kansas courts. And third is the effect the decision will have on the composition of future legislatures.

While the specific school finance issue has not been part of the legislative agenda of the Kansas Bar Association, it is part of a collateral legislative issue that KBA has long been a part of: judicial independence. Since the Montoy decision, the Legislature has struggled to reach consensus on the level of school funding and, more contentiously, how to reach that level.

In addition to the financial struggle, or often in lieu of, the Legislature has sought to restrict the independence of the judiciary through funding, or more correctly, under-funding, and by proposing to amend the Kansas Constitution to restrict the power of the Supreme Court. Examples of the former were the House voting to abolish the $5 surcharge docket fee imposed by the Supreme Court, while making no simultaneous provision to replace the loss of operating funds from another source, and the passage of SB 337, giving substantial and long overdue raises to district and magistrate judges, significantly smaller raises to Court of Appeals judges, and no raises to Supreme Court justices.

Examples of the latter are the introduction of 14 separate resolutions proposing to amend the Kansas Constitution, five alone from the Special Session of 2005, that would have restricted judicial independence. These proposals range from direct election of justices, to prohibition of closing schools, to direct appointment of justices by the governor with confirmation by the Senate.

So far this session, these proposed amendments have generally failed to gain the constitutional two-thirds majority in the original house. Most recently the Senate failed to reach the required two-thirds vote on SCR 1606, requiring Senate confirmation of Supreme Court justices, and the House failed on HCR 5032, restricting the Supreme Court’s power to order or reallocate appropriations.

However, during the Special Session, two resolutions actually passed the Senate, but were stopped in the House.

The votes cast in the House during the Special Session also show what seems to be a strong correlation in the House between those voting against proposed constitutional amendments restricting judicial independence and those voting for a school finance bill that meets the constitutional mandate of suitable financing for public schools. This correlation raises the third point, change in composition of the Legislature. You may recall the election of 2004, when several House members were targeted by independent, issue-oriented campaigns because of their positions on school finance, among others. Some incumbent moderate members of the majority party were actually defeated in their own party primary. Such special issue targeting can be expected again in the 2006 election, especially in House races.

It is time for KBA members to think about the consequences of even a small change in the House of Representatives, especially on the issue of judicial independence. It is also time to act. It is up to us to find, and support, legislative candidates who believe in properly funding public schools and who also believe in an independent judiciary.

Muret Nominated to Represent District Four on Board of Governors

William E. Muret, Winfield, has been nominated by the KBA Nominating Committee to fill the District Four seat on the Board of Governors.

Muret has been in solo practice since 2000 and is counsel for the cities of Winfield and Udall and USD 465. He was in general practice with the firm of McSpadden & Andreas, Winfield, from 1984 until opening his own firm.

He graduated from Kansas State University in 1974 with a Bachelor of Arts and in 1976 with a Master of Science. He then worked for Drake University, Des Moines, Iowa, and K-State for five years before beginning law school at Washburn University. He graduated from Washburn in 1984.

Muret joined the KBA in 1984 and is a member of the Criminal Law; Family Law; Government Lawyer; and Real Estate, Probate and Trust Law sections. He is a Fellow of the Kansas Bar Foundation.

He has served as president, vice president, and secretary/treasurer of the Cowley County Bar Association; as president and vice president of the Winfield area United Way; and as a member of the USD 465 School Board.
A Message from Secretary of State Ron Thornburgh on Revised Article Nine of the UCC

Revised Article Nine of the Uniform Commercial Code (RA9), which became effective in Kansas on July 1, 2001, contains transition rules governing the conversion from old Article Nine to new Article Nine. One such rule, 9-705, creates a five-year transition period in which financing statements filed under old law can become compliant with new law. From July 1, 2001, to June 30, 2006, filers can correct their financing statements (and, thus, preserve their security interest) by filing amendments to comply with the new requirements of RA9. The five-year transition period closes this summer and brings with it some questions on the interpretation of this transition rule.

K.S.A. 84-9-705(c) says that financing statements effective under the old law remain effective under RA9 until the earlier of: (i) the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it was filed or (ii) June 30, 2006. The first provision of this rule references the financing statement’s lapse date, which is generally five years from its filing date. Thus, a pre-RA9 financing statement expires on the earlier of its lapse date or June 30, 2006.

This rule causes a strange and unintended problem for a small number of filings — those filings that do not require an amendment in order to comply with the new law and that were continued in the first half of 2001 with a lapse date in the second half of 2001. This problem is best illustrated by example:

- A financing statement is filed under old law on Nov. 1, 1996. The financing statement is good for five years — until Nov. 1, 2001.
- The financing statement may be continued by filing a continuation statement within six months of Nov. 1, 2001; thus, it may be filed from May 1, 2001, to Nov. 1, 2001.
- The filer files the continuation early within the window — before RA9 takes effect on July 1, 2001. Thus, the filing is under the old law.
- Another five years passes and another continuation is necessary in 2006. RA9 is now in effect, and the transition rule given in 9-705 applies. The rule says any pre-RA9 financing statement lapses on the earlier of: (1) its lapse date (which would be Nov. 1, 2006) or (2) June 30, 2006. Thus, the financing statement will lapse on June 30, 2006.

This scenario raises the question “When should the continuation be filed?” Does the window to file a continuation remain six months dating back from the lapse date — from May 1, 2006, to Nov. 1, 2006 — or is it shortened to May 1, 2006, to June 30, 2006? Filing the continuation correctly is key to preserving the financing statement and its security interest.

The National Conference of Commissioners on Uniform State Laws (NCCUSL), which drafted RA9, has not taken an official position on the problem nor has it crafted remedial legislation. The NCCUSL Permanent Editorial Board has issued a report outlining the problem and possible solutions, and several members of the RA9 drafting committee have offered opinions on the proper meaning of 9-705. Although there is disagreement on the proper interpretation of 9-705, there is general agreement that a safe window does exist for filing a continuation. The safe window runs from the date the six-month continuation window opens (in our example, May 1, 2006) until June 30, 2006. A financing statement with a filing date of Dec. 30 would have one day in its continuation window — June 30, 2006! Filers are cautioned to note that this interpretation shortens both the continuation window and the effective period of the financing statement.

In an effort to clarify 9-705’s meaning, the Kansas Secretary of State and the Kansas Bankers Association drafted a legislative fix. SB 352 was introduced during the 2006 session and is expected to become law before June 30 by publication in the Kansas Register. The bill amends 9-705(c) to clarify that the customary six-month continuation window and five-year effective period remain in effect for those pre-RA9 financing statements that are correct under RA9. Thus, only pre-RA9 filings that need amendments to comply with the new law are expected to meet the June 30, 2006, deadline. The original intent of 9-705 was to require compliance with RA9 by the end of the transition period; therefore, those financing statements that are correct under the old law and the new law should be excluded from the rule. If SB 352 is enacted into law, the financing statements that fall in this category will retain their full five-year effective period and six-month continuation window. If SB 352 does not pass, filers should carefully review the law and consider filing any continuations before June 30, 2006.

Melissa A. Wangemann, legal counsel
Deputy Assistant Secretary of State
I. Introduction

Construction is behind schedule, payments to subcontractors are untimely, and there is a threat of work stoppage. The owner needs the job done now, and the subcontractors need payment. The owner, design professional, contractor, and subcontractors prepare to meet to discuss how to get this done, and each party seeks advice as to its rights and responsibilities. In rendering advice, if you limit your analysis to the contract itself — and applicable common law — then you may overlook changes to the parties’ respective rights through new legislation that redefines many of these relationships.

A new law titled the Kansas Fairness in Private Construction Contract Act¹ (Act) came into effect on July 1, 2005, and can be found in the 2005 Supplement at K.S.A. § 16-1801 et. seq. It is neither a standardized model act nor a duplication of the efforts of another state. Instead, it is an original piece of legislation having its genesis in the efforts of several Kansas subcontractors who sought to provide more tools of ensuring the payment of amounts due.

The Act is the second piece of legislation in Kansas concerning construction in the past few years² and represents a pioneering effort by Kansas to standardize payment in nonresidential, private construction projects. The Act is broad and controlling and seeks to give each party equal bargaining power by voiding, as a matter of law, a host of otherwise “typical” construction provisions. Specifically, the Act requires certain language to be included in each contract for nonresidential, private construction; renders certain contract language void and unenforceable; and creates a form of statutory breach of contract. This article describes the Act and raises several questions about its implementation.

II. Payment

The Act’s primary intention concerns payment. Depending upon its application to the subject project and party,³ the Act defines the obligations concerning payment and the rights that can arise due to nonpayment.

FOOTNOTES
3. See Section III infra.
A. Payments must be prompt

The Act requires that contracts provide for the prompt payment of each “timely, properly completed, undisputed” request for payment and establishes remedies for nonpayment.4 An owner must pay its contractors and its designers’ all “undisputed” amounts due less retainage under each timely, properly completed request for payment, even if the owner disputes some of the amounts due under the application for payment.6 Payment of all undisputed amounts must be made within 30 days of the owner’s receipt of the application.7 If the owner fails to pay these sums within the 30-day window, interest at 18 percent per annum begins to accrue on the undisputed amount on the 31st day.8 Interest also accrues on any unpaid retainage at 18 percent per annum upon the first business day after the retainage payment becomes due.9 If the owner does not pay the interest to the contractor, the Act authorizes the contractor to stop work.10

Equally, each contractor (including subcontractors in that definition) having a contract with a subcontractor of whatever tier must pay that subcontractor all undisputed amounts due it (including retainage, but only once it is released by the owner)11 within seven “business days” of its receipt of payment by the preceding tier of contractor so long as there exists a timely, properly completed request for payment.12 Again, the mere fact that a party disputes some of the amounts outlined in a payment application does not authorize the withholding of the entire amount. If the contractor does not pay these sums to its subcontractor within the seven-business-day window, interest at 18 percent per annum begins to accrue on the undisputed amount on the eighth business day.13 Each tier of subcontractor has a separate seven-day window in which to expect payment.14 If the contractor does not pay the interest to its subcontractor, the Act authorizes that subcontractor to stop work.15

The Act, however, is not a panacea for payment. Owners and contractors will likely begin to pay more attention to payment applications, which will give rise to issues about whether payment applications are “timely” and “properly completed,” and whether the sums being sought are “undisputed” or otherwise are “amounts due.” The Act gives no guidance on the elements for a legitimate “dispute” of a payment application. “Disputes,” therefore, could be simple arithmetic differences as well as offsets for claims being made or threatened to be made concerning the quality of the underlying work.16 These parties must clarify these terms in the contract so that the various tiers will know if something is genuinely disputed.

Not only can the parties lay out objective requirements and notice provisions, but also they can better define the more subjective terms. For example, the contract can define grounds for “disputes,” and may even put in place a mechanism for “disputing” such as outlining notice responsibilities of an “unapproved” item in pay applications.

B. Work stoppages are allowed without repercussion

The Act authorizes contractors and subcontractors, regardless of their tiers, to stop work if they are not paid all undisputed amounts due to them within seven business days of the payment’s due date.17 In order to stop work under the Act, the unpaid party must give

The Act requires that contracts provide for the prompt payment of each “timely, properly completed, undisputed” request for payment and establishes remedies for nonpayment.

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5. See Section III(B) concerning application to design professionals.
6. K.S.A. § 16-1803(d)-(h).
7. Id.
8. K.S.A. § 16-1803(c). An interesting note is that the Kansas House deleted the provision, which limited interest to the “undisputed amount.” While the reinstatement of that condition appears to this author as a retrogressive gesture, the House may have had a different intention. House Comm. of Com., Substitute for S. 33, 3-10 (2005).
10. K.S.A. §§ 16-1803(e), 1805 (Supp. 2005). See also Section II(B) infra.
11. K.S.A. § 16-1803(f), (h). The House had inserted a provision, which read that “but in any case retainage shall be paid to a subcontractor not more than 60 days after the subcontractor has satisfactorily completed all the work of the subcontractor under the contract.” House Comm. of Com., Substitute for S. 33, 3-10 (2005). This language was struck before passage.
13. K.S.A. §§ 16-1803(g), (h), 1804(b).
14. K.S.A. § 16-1803(h).
15. K.S.A. §§ 16-1803(g), (h), 1805. See also Section II(B) infra.
16. The House had replaced “undisputed” with the term “uncontested” in K.S.A. § 16-1804(a), concerning the maximum amount of retainage that could be held, before it was changed back prior to passage. House Comm. of Com., Substitute for S. 33, 3-10 (2005). The House made no effort to change the word “undisputed” in §§ 16-1803(d), (e), (f), or (g) or 16-1805.
17. K.S.A. § 16-1805.
18. Id.
19. Id. (emphasis added).
As written, the Act grants every contract affected by the suspension not only more time, but also more money to the same extent as the suspending party’s reasonable costs. The Act, however, does not specify who pays for the additional contract sums or who bears the burden of the increase in time when the suspension affects an innocent owner who may be unable to grant an extension. This provision could have a damaging impact on innocent owners who find their projects suddenly and hopelessly behind schedule, despite efforts to ensure that “time is of the essence.” It may also result in owners making more claims against their lenders if the lender fails to release funds or otherwise make payments in a timely fashion. The Act is also silent as to whether the relief of time extensions and additional contract sums are the exclusive remedy for all affected parties. These are issues that should be addressed contractually along with the issue of how the parties construe the Act with regard to any “time is of the essence” provisions.

C. Contingent payment provisions are no defense to a lien or bond claim

Another provision of the Act concerns lien or bond claims. Under the Act, contract provisions making payment to a subcontractor “contingent or conditioned” upon receipt of a payment from any other private party are not a defense to a claim to enforce a mechanic’s lien or a bond to secure payment of claims. Such provisions, however, remain enforceable on breach of contract claims. Accordingly, lien and bond claims have heightened importance since their pursuit can render contingent payment provisions effectively unenforceable.

D. Mechanic’s liens are inviolate

The mechanic’s lien rights under article 11 of chapter 60 of Kansas Statutes Annotated remain fully enforceable despite any language to the contrary in a contract, except to the extent of a payment received. Except as may be conditioned to receive a payment (only to the amount of the payment received), the contract cannot serve to waive, release, or extinguish such a right, and a party remains free to file liens or exercise any other right under article 11.

E. Retainage cannot exceed 10 percent

Under the Act, no party can withhold more than 10 percent in retainage from the amount of any undisputed payment due. This provision has two applications. First, the contract cannot allow for the retention of any more than 10 percent. Attempts to withhold more than 10 percent are unenforceable. Second, the 10 percent is a factor of the “undisputed payment due” rather than the entire amount of an application. In other words, according to the Act, if an application is for $1,000, of which $800 is undisputed, the retainage would be no more than 10 percent of the $800 with the remainder allowed to be wholly retained as a “disputed” sum.

III. Projects Covered

A. The Act does not affect every construction project

The Act applies to all private, nonresidential “contracts or agreements” concerning the construction of a “building, structure, road, bridge, water line, sewer line, oil line, gas line, appurtenance, or other improvement to real property.” There is no limitation as to the tier to which the Act applies in subcontractor relations.

As stated above, the Act does not apply to:

• single family housing,
• multifamily residential housing of four units or less,
• public works projects,
• any contract entered into prior to the date the Act is published in the statute books.

No statutory explanation is given about why these exceptions are made, even with regard to the “single family housing” exception, which is an arena in which contractual abuses are prevalent between owners and contractors.

21. Id.
22. K.S.A. § 16-1803 (c) (Supp. 2005). An interesting note is that the statute originally was limited to liens, and that the bond provision was later added by the House. House Comm. of Com., Substitute for S. 33, 3-10 (2005).
24. Id.
25. K.S.A. § 16-1804(a).
26. K.S.A. § 16-1802(b) (Supp. 2005). The reason for this seemingly irrelevant distinction is unclear.
27. K.S.A. §§ 16-1802(a), 1803(a) (Supp. 2005).
28. See K.S.A. §§ 16-1802(b), 1802(g), 1803(b) (Supp. 2005) (limiting relations only between classes of party rather than tier).
30. Id.
31. Id. If the Act is inapplicable to a public works contract, payment is dictated under the Kansas Prompt Payment Act, K.S.A. § 75-6401 et. seq.
32. K.S.A. § 16-1807, 1803(a).
33. Ironically, it is generally believed that a subcontractor in the residential setting has greater negotiating power than its “more sophisticated” cousins on commercial projects. While this may be true, the exclusion of the Act to the residential setting ignores the multitude of contract disputes that arise between owner and contractor in the residential setting, which often hinge around contract terms that would be impermissible under the Act. Perhaps the inequities that arise under residential contracts (usually in favor of whomever drafted the agreement) are the fault of the responding party who failed to have the contracts properly reviewed prior to entering into them. However, (not to condone legislative intervention into contractual relations) the sheer number of instances of such situations and the relative lack of sophistication of the residential contract parties should have piqued the interest of the Legislature rather than resulted in its exclusion from the Act.
One notable omission from the definitions of “contractor,” “contract,” or “construction” to which the Act applies is the surety or similar persons who serve a quasi-guarantor role with regard to either payment or performance. Despite omitting sureties from the definitions, the Act expressly prohibits contingent payment provisions to serve as a defense to payment bond claims under article 11 of chapter 60 of Kansas Statutes Annotated. The Act is silent, however, in regard to performance bonds and as to whether the Act affects surety agreements with contractors. Because bond agreements typically incorporate the contractor’s contract provisions, which will include the terms of the Act, the author expects that the surety will be similarly affected by the Act as the contractor.

Additionally, the Act’s broad language may interject itself into unexpected situations. For example, the Act may apply to construction settlement agreements because they are also “agreements concerning construction.” This could prove an important application because settlement agreements often alter parties substantive and procedural rights, even though the Act would prohibit such alteration. There is also an interesting transition issue concerning whether a change order issued on construction contracts that pre-exist the Act is a separate contract governed by the Act. Although the majority position appears to be that change orders are a continuation of the original contract, changes orders require the same formalities of execution as do “original contracts,” and some authorities exist to allow for issues to arise about their separateness and, thus, the application of the Act to each change order.

### B. The Act applies to design professionals

The definitions in the Act do not limit the Act’s application to physical construction agreements, but rather extend the Act to all “design” agreements. This extension would apparently include not only design-build agreements but also agreements for pure design because of the definition of a “contract” under the Act. The Act defines a “contract” as a “contract or agreement concerning construction made and entered into by and between an owner and a contractor.” A “contractor” is a “person performing construction.” The Act defines “construction” to include the furnishing of “labor ... used or consumed for the design ... of a building, structure ... or other improvement to real property.” Thus these definitions do not appear to limit the Act to the design-build arena. Instead, the definitions seem to extend the Act to every contract between an owner and a design professional on private, nonresidential construction projects entered into on or after July 1, 2005. Accordingly, design professionals and their consultants should consider the Act to affect their rights.

### IV. Miscellaneous Provisions

The Act addresses more than just payment. It also addresses such issues as attempts to undermine “substantive” and “procedural” rights, subrogation, the recovery of attorneys’ fees, and venue provisions. Although these provisions are not necessarily tied to the underlying purpose of the Act, they constitute an equally important alteration to contract rights.

#### A. Contracts cannot waive rights concerning litigation

Except as discussed below concerning alternative dispute resolution (ADR), the Act does not allow a contract to “waive, release, or extinguish the rights to resolve disputes through litigation in court or substantive or procedural rights in connection with such litigation.” The second part of this simple clause may prove to be the most important part of the Act. The Act requires the preservation of all substantive rights, which, in another context the Kansas Court of Appeals has defined as “the law, which gives or defines the right”; the “law, which gives the right or denounces the wrong”; and “the law creating any liability against the defendant for his tort committed.” Examples of substantive rights include the measure of damages, the rate of interest, prejudgment interest, negligence causes of action, breach of fiduciary duty, mechanic’s lien, the statute of repose, escheats.

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34. K.S.A. § 16-1803(b)(3) (Supp. 2005).
35. K.S.A. § 16-1802(a), (b).
36. See, e.g., Section IV (A) infra.
37. See, e.g., In re Sando Corp., Bankruptcy No. 91 B 09826, Adv. No. 95 A 01620, 1996 WL 362756, at *6 (Bankr. N.D. Ill.) (finding that the evidence before the court created genuine issues of material facts that precluded granting the motion as to whether the change order created a separate contract).
38. K.S.A. § 16-1802(a).
39. K.S.A. § 16-1802(b) (emphasis added).
40. K.S.A. § 16-1802(c) (Supp. 2005) (emphasis added).
42. K.S.A. § 16-1803(b)(1) (Supp. 2005).
45. Id.
46. Id.
48. Id.
and the other “definition[s] of the rights and wrongs out of which differences grow”52 that may include such things as no-damages-for-delay clauses, waivers of consequential or incidental damages, and pay-if-paid clauses.

The Act also requires the preservation of all procedural rights, which have been defined as “the machinery for carrying on a suit, including pleading, process, evidence, and practice.”53 Procedural rights have included dormancy and reviver,24 the statute of limitations,55 arbitration acts,56 sanctions,57 venue (including choice of forum),58 discovery,59 evidence (including stipulations),60 and the provisions in the Bill of Rights.61 Nonetheless, the Act permits the parties to require nonbinding ADR as a prerequisite for litigation, and it authorizes requiring the use of binding arbitration as a substitute for litigation.62 However, it is unclear whether arbitration would be in the form as it is presently known, i.e., with limited discovery. Because the Act does not allow substantive or procedural rights to be waived, one of which is the right to discovery, the Act may be read to authorize, if not require, the use of discovery in the arbitration setting. Such a requirement could undermine the efficiencies often enjoyed with ADR.

The Act, therefore, is reaching deep into the rights of the parties to define and allocate their risks. Such an impact will not only affect the parties’ immediate rights and responsibilities, but will also undermine the rationale for the economic loss doctrine, which is “based on the premise that ‘contract law and the law of warranty, in particular, is better suited than tort law for dealing with purely economic losses in the commercial arena.’”63 By undermining the ability of parties to allocate their economic risks by contract, the Act may be making the economic loss doctrine vulnerable to attack, despite the Kansas Court of Appeals’ recent affirmation of it in the construction setting.64

B. Subrogation remains effective

Except in limited circumstances, the Act voids agreements that purport to waive, release, or extinguish subrogation rights arising from losses or claims covered or paid by liability or workers’ compensation insurance.65 Specifically, the parties cannot waive, release, or extinguish losses and claims unless the losses or claims are paid by:

- a consolidated or wrap-up insurance program,66
- owners and contractors protective liability insurance,67 or
- project management protective liability insurance.68

Depending upon the party’s perspective, the party may desire to redefine the insurance required on a project, and in any case the parties’ attorneys will have to take care in preparing settlement documents discussing subrogation.

C. The Act mandates attorney fees and venue

The Act mandates that the court or arbitrator shall award costs and reasonable attorney fees to the prevailing party in any action to enforce the rights outlined in the Act.69 The Act, therefore, removes a substantial hurdle for an award of costs and fees, but does not necessarily resolve all issues involved in an award. For example, the court or arbitrator must also determine who has “prevailed” and what fees are “reasonable.”

Although who is the “prevailing party” is often apparent, that is not always the case. The parties occasionally argue over who has prevailed in an action, and they can appeal to different standards. For example, it can be the party that prevails on the main issue of the litigation70 or simply the one that recovers more than the amount tendered by the adverse party prior to litigation.71 The Kansas Supreme Court has stated:

The term “successful party” has been held to be synonymous with “prevailing party.” Beneficial

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54. Id.
56. Dobson, 513 U.S. at 286-287.
62. K.S.A. § 16-1803(b)(1).
65. K.S.A. § 16-1803(b)(3).
66. Id.
67. Id.
68. Id.
69. K.S.A. § 16-1806 (Supp. 2005) (emphasis added). The House had deleted attorney fees from any award to a prevailing party before the provision was reincorporated before passage. The Act now joins approximately 16 other statutes, which mandate the award of attorney fees.
The term “prevailing party” is defined in Black’s Law Dictionary 1069 (5th ed. 1979) as:

The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered (citations omitted). The party ultimately prevailing when the matter is finally set at rest.

Further, the amount of attorney fees to be awarded in a matter is largely within the trial court’s discretion. The factors a trial court should consider in determining the amount of a reasonable attorney fee are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Accordingly, while one party will be glad for the mandatory nature of the attorney fee award because it resolves a substantial issue, the actual award is neither automatic nor guaranteed. Instead further proceedings may be required to determine who has “prevailed” and the “reasonableness” of any requested fees.

The Act also establishes venue for any action (including arbitration) to enforce the rights outlined in the Act. Venue is simply in the county where the real property is located. It is unclear whether a counterclaim seeking relief under the Act would supersede other venue provisions.

(continued on next page)
V. Observations and Conclusion

The Act dramatically redefines the contractual provisions used to allocate risks between parties. The Act’s good intentions on prompt payment may prove to be outweighed by other provisions that radically alter the parties’ freedom to contract. These good intentions might simultaneously be rendered impotent by the easily-circumvented condition that payment applications must be “undisputed” before full payment is necessary.

The higher in the privity chain your client lies the more the need may exist to define — and perhaps thus limit — key terms from the Act contractually — terms such as “undisputed” and “properly completed.” Your client’s position may even justify attempting to circumvent the Act’s application by contracting that non-Kansas law applies to your client’s construction contract. Whether such a tactic would be effective is unclear. The Act states that “all persons who enter into a contract for private construction after the effective date of this act, shall make all payments pursuant to the terms of the contract.” It also states that “the rights and duties prescribed by this act shall not be waivable or varied under the terms of a [construction] contract” and that any term in a construction contract that purports to do so is void and unenforceable. That appears to be a strong statement of public policy, applicable regardless of attempts to circumvent through a choice of law provision. However, the Act does not expressly claim that it applies to all construction contracts simply because they are entered into in the state of Kansas, but rather may only apply to construction contracts to which Kansas law applies.

Accordingly, there is an unresolved conflict between the Act’s expression of public policy regarding the content of contracts and its failure to prohibit contractual choice of law provisions that would make the Act — and possibly the incumbent public policy — inapplicable.

The Act is a good effort in seeking to ensure prompt payment to lower-tiered subcontractors, but it contains language that could have a much greater and different impact on construction contracts in Kansas than what its proponents probably envisioned at the time of passage. In any event, it will change the landscape of construction contracting in Kansas and require the attention of lawyers interpreting and drafting contract language.

About the Author

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Supreme Court

Civil

ADMINISTRATION LAW AND PROCEDURE – LICENSES
FOSTER V. KANSAS DEPARTMENT OF REVENUE
SEDGWICK DISTRICT COURT
REVERSED AND REMANDED
NO. 92,250 – MARCH 24, 2006

FACTS: Kansas Department of Revenue (KDR) suspended driving privileges of Foster and Griggs for refusing to submit to breath alcohol tests. Each sought judicial review. District court vacated suspensions because KDR had not “forthwith set” the matters for hearing as required by K.S.A. 8-1020(d). KDR’s appeals consolidated and transferred to Supreme Court. Issues on appeal were whether district court had jurisdiction to consider if administrative hearing were “forthwith set,” whether hearings were timely held, and whether dismissal of suspended driving privilege is an authorized remedy.

ISSUES: (1) Jurisdiction, (2) “forthwith set” in K.S.A. 8-1020(d), and (3) dismissal of suspension order

HELD: K.S.A. 8-1020 does not alter judicial review to interpret statute. KDR can raise issue of timeliness and court has jurisdiction to consider it.

The term “forthwith” as used in K.S.A. 8-1020(d) does not mean immediately and is not susceptible to a fixed time definition; rather, it means without unnecessary delay and requires reasonable exertion and due diligence consistent with facts and circumstances of the case in order to carry out legislative intent of removing dangerous drivers from public highways. Case is remanded to trial court to properly apply this definition in determining if hearings were “forthwith set.”

A showing of prejudice is required to justify setting aside a suspension and dismissing the case. Upon remand in each case, if trial court finds a hearing was not set forthwith, it must make a factual finding as to prejudice. If prejudice is found, the suspension may be vacated and case dismissed. If not, order of suspension must be affirmed.

STATUTES: K.S.A. 2005 Supp. 22-3402; K.S.A. 8-1001 sections (a) and (q), -1002 sections (e) and (k), -1020 sections (b), (d), and (b)(1), 20-3018(c), 38-1683(a), 60-252a, 77-621(a)(1), -622(b); K.S.A. 2000 Supp. 8-1002(k); K.S.A. 1997 Supp. 8-1002(a); and K.S.A. 8-286 (Ensley 1982)

BOARDS OF HEALING ARTS, NEGLIGENCE, AND PROXIMATE CAUSE
FIESER V. KANSAS STATE BOARD OF HEALING ARTS
BARTON DISTRICT COURT – REVERSED
NO. 94,203 – MARCH 17, 2006

FACTS: Dr. Fieser failed to adhere to the applicable standard of care in eight out of 10 instances cited in the petition. The Kansas State Board of Healing Arts concluded that Fieser was professionally incompetent without requiring proof that her deviations from the applicable standard of care proximately caused the patient injury. The district court exercised a de novo review and accepted Fieser’s argument that the reference in K.S.A. 65-2837(a)(2) to “ordinary negligence” meant “actionable negligence,” i.e., a deviation from the applicable standard of care plus proximate cause of injury to the patient.

ISSUE: Did the board correctly interpret K.S.A. 65-2837(a)(2) in concluding that Fieser was professionally incompetent without requiring proof that her deviations from the applicable standard of care proximately caused the patient injury?

HELD: Court reversed the district court. Court stated that a Kansas doctor’s license may be revoked if the licensee has committed an act of unprofessional or dishonorable conduct or professional incompetency. K.S.A. 65-2837(a)(2) defines “professional incompetency” as, among other things, “repeated instances involving failure to adhere to the applicable standard of care to a degree which constitutes ordinary negligence,” as determined by the Board of Healing Arts. Court held this statute does not require the board to prove patient injury caused by the licensee’s deviation from the applicable standard of care.

STATUTES: K.S.A. 20-3018(c); K.S.A. 65-2801 et seq., -2836, -2837(a)(2), (b), -4921 et seq.; and K.S.A. 77-621(c)(4)

GUARANTY, STATUTE OF FRAUDS, WAIVER, AND PUBLIC POLICY
BOTKIN V. SECURITY STATE BANK
SUMNER DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 92,380 – MARCH 17, 2006

FACTS: Security State Bank loaned money to Botkin. In return, 34 individuals and entities executed separate three-page guaranty agreements securing the loan. After Botkin defaulted on the loan, Botkin and the other guarantors filed a declaratory judgment action to determine whether their signed guaranty agreements were
enforceable under the statute of frauds. The district court granted summary judgment to the guarantors finding the guaranties were incomplete and therefore unenforceable under the statute of frauds. The Court of Appeals reversed finding the guaranties satisfied the statute of frauds and that any escape of the guarantors from liability would not be consistent with the statute of frauds to prevent fraud and injustice.

ISSUE: (1) Guaranty, (2) statute of frauds, (3) waiver, and (4) public policy

HELD: Court affirmed the Court of Appeals reversal. As a matter of law, Court held that some tension existed in the guaranty between liability to “my proportional ownership share” and “if no amount is stated, the Undersigned shall be liable for all indebtedness without any limitation to amount.” Court held that because the parties did not leave blank the amount of the limitation on liability, but instead agreed that liability would be based upon the phrase the bank typed there — “my proportional ownership share” — the parties' intent to limit liability is evident. Court strictly resolved any tension against the bank as drafter of the guaranty. Court clarified that its remand was only to determine what was meant by “my proportional ownership share.” Court found the rest of the issues raised in the case were moot.

STATUTE: K.S.A. 33-106

SECURITIES AND CLEARING BROKER
ROGER KLEIN V. OPPENHEIMER & CO. INC.
JOHNSON DISTRICT COURT –
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 91,778 – MARCH 24, 2006

FACTS: Roger Klein had a brokerage account with L.T. Lawrence, L.T. Lawrence, functioning as an originating or introducing broker, sold Klein unregistered securities through Oppenheimer & Co. Inc., a clearing broker. Klein sued Oppenheimer under the Kansas Securities Act seeking damages, interest, costs, and attorney fees. The district court granted summary judgment in favor of Oppenheimer. The district court concluded that Oppenheimer could not be liable for the sale of unregistered securities as an aider and abettor and that even if secondary liability was existent, the facts did not support a finding that Oppenheimer was liable as an aider or abettor. The district court also concluded that Oppenheimer was not jointly and severally liable because it did not “materially aid” in the sale of the unregistered securities, that the securities were exempt from registration, and that the National Securities Markets Improvement Act of 1996 did not pre-empt the transaction.

ISSUES: (1) Is Oppenheimer liable for aiding and abetting or for “materially aiding” L.T. Lawrence in the sale of unregistered securities? (2) Were the securities at issue exempt from registration? (3) Were the transactions that occurred on and after Oct. 11, 1996, pre-empted by the National Securities Markets Improvement Act of 1996?

HELD: The Court held the district court correctly concluded that the aiding and abetting theory of liability for public causes of action filed by the Kansas Securities Commissioner should not be extended to K.S.A. 17-1268(a) to impose secondary liability to persons expressly listed in K.S.A. 17-1268(b). Consequently, the Court stated that it did not need to determine if the stipulated facts would support a finding that Oppenheimer was liable as an aider and abettor. Court reversed the district court’s finding that Oppenheimer did not materially aid in an unlawful sale. Court found the facts demonstrated that Oppenheimer’s services as clearing broker included activities that required the exercise of professional expertise and judgment and were not accurately considered clerical or ministerial. Court held that Oppenheimer materially aided in the unlawful sale. Consequently, the Court addressed the issue of whether Oppenheimer knew, or by the exercise of reasonable care could have known, of the existence of the facts by reason of which the liability is alleged to exist. The Court concluded it had insufficient information to resolve this question and remanded to the district court for consideration. Court held that all the securities purchased by Klein, with the exception of one, were exempt under K.S.A. 17-1262(b) from registration requirements. Last, the Court also remanded to the district court for its consideration of whether the transactions that occurred on and after Oct. 11, 1996, were pre-empted by the National Securities Market Improvement Act of 1996.


SECURITY INTEREST AND INCORRECT DEBTOR’S NAME
PANKRATZ IMPLEMENT CO. V.
CITIZENS NATIONAL BANK
RENO DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED
NO. 91,721 – MARCH 17, 2006

FACTS: Pankratz Implement Co. attempted to perfect its security interest in equipment sold to Rodger House. In filing with the secretary of state, Pankratz spelled the debtor's name as Roger House. Citizens National Bank later attempted to secure the same property using the debtor's correct name, Rodger House. Rodger House filed for bankruptcy; Pankratz obtained relief from the bankruptcy stay order and filed suit against Citizens in order to realize its security interest. The district court determined in accordance with recently enacted amendments to the Kansas Commercial Code that Pankratz was entitled to summary judgment because use of the debtor's incorrect name was a minor error and not seriously misleading. The Court of Appeals reversed, concluding that the use of the debtor's incorrect name was seriously misleading.

ISSUE: Whether the filing of a financing statement, which mis-spells the debtor's name, is insufficient to render a filed financing statement seriously misleading under the Uniform Commercial Code (UCC).

HELD: Court affirmed the Court of Appeal's reversal of the district court. Court held that Pankratz failed to satisfy the requirement of using the correct name of the debtor and that this did not satisfy the name requirements of the UCC. Nevertheless, minor errors will not destroy the effectiveness of that statement unless the errors make the statement seriously misleading. Court held that Pankratz's failing to meet the naming requirements is seriously misleading except in the case where a search using the debtor's correct name discloses the defective financing statement. In this case, it did not and, therefore, remains seriously misleading. The Court that found Pankratz failed to raise the issues in the trial court concerning the new revisions to the UCC and is precluded from raising them on appeal.


WORKERS' COMPENSATION AND WORKPLACE HORSEPLAY
COLEMAN V. ARMOUR SWIFT-ECKRICH
WORKERS' COMPENSATION BOARD – REVERSED AND REMANDED WITH DIRECTIONS
NO. 94,324 – MARCH 24, 2006

FACTS: While waiting for the start of a meeting required by her employer, Armour Swift-Eckrich, Coleman sat on a chair with rollers, with her feet propped up on another chair. A co-worker came up behind Coleman, took hold of the back of her chair, and dumped her out of it onto the floor. The fall injured Coleman's back. There
was no ill will between Coleman and the co-worker, nor had Coleman
done anything to provoke or encourage him. There was no
evidence that such horseplay was common at Armour or that the
company had in some way conformed the co-worker's actions. The
administrative law judge ruled under long-standing Kansas pre-
edent that the horseplay did not arise out of and in the course of
Coleman's employment, and Coleman was denied compensation.
The Workers' Compensation Board affirmed.

ISSUE: Should an innocent victim of workplace horseplay be
compensated for injuries?

HELD: Court reversed and held the old rule of no liability for
injuries resulting from workplace horseplay should be abandoned.
Court concluded that an injury to a nonparticipating employee
from workplace horseplay arises out of employment and is compen-
sable under the Kansas Workers' Compensation Act. Court clarified
that in contrast, a participating worker makes a choice to step away
from his or her status and responsibilities as an employee to engage
in playful but hazardous conduct, and injuries therein do not arise
out of employment.

STATUTE: K.S.A. 2005 Supp. 44-501, -556(a) and K.S.A. 77-
601 et seq.

Criminal

STATE V. BEAUCLAIR
SHAWNEE DISTRICT COURT – JUDGMENT OF THE COURT OF APPEALS REVERSING THE DISTRICT COURT IS REVERSED, AND CASE IS REMANDED TO THE COURT OF APPEALS FOR FURTHER DETERMINATION. JUDGMENT OF THE DISTRICT COURT IS AFFIRMED IN PART. NO. 91,999 – MARCH 17, 2006

FACTS: Two years after Beauclair pled no contest to one count
of rape of a child under 14 years of age and one count of aggravated
criminal sodomy of a child under 14 years of age, he filed a mo-
tion to withdraw his pleas. Among other things, he alleged that the
district court had under informed him of the possible minimum
and maximum sentences at his plea hearing and that as a result, his
pleas were not knowing and voluntary. After the district court de-
nied Beauclair's motion, he appealed. The Court of Appeals reversed
the district court and found that Beauclair did not knowingly and
voluntarily enter his plea due to the district court's error in advising
Beauclair of the maximum sentences.

ISSUE: Whether the district court abused its discretion when it
denied Beauclair's motion to withdraw his plea.

HELD: Court held that under the facts of the case, although the
district court under informed Beauclair at his plea hearing of the
maximum and minimum penalties provided by law for his crimes,
the district court did not abuse its discretion in denying Beauclair's
later motion to withdraw his no-contest plea under K.S.A. 2005 Supp.
22-3210. Court remanded to the Court of Appeals for consid-
eration of the issues raised by Beauclair concerning his mental health,
the district court's alleged failure to determine a factual basis for the
plea, and that the victim's sworn statement exonerated Beauclair.

STATUTES: K.S.A. 20-3018(b) and K.S.A. 2005 Supp. 22-3210

STATE V. BISCHOFF
SALINE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 91,179 – MARCH 17, 2006

FACTS: Bischoff's interstate driving resulted in convictions for
aggravated assault and criminal threat. In unpublished opinion,
Court of Appeals affirmed criminal threat conviction, but reversed
and remanded aggravated threat conviction on several grounds, in-
cluding a finding that multiple acts supported that charge. State's
petition for review was granted. Issues on appeal were whether dis-
trict court erred in not giving unanimity jury instruction on aggra-
ivated assault charge and whether district court violated due process
rights by granting state's motion to amend the complaint to include
aggravated assault charge after preliminary hearing without requir-
ing a bill of particulars.

ISSUES: (1) Unanimity jury instruction and (2) amendment and
bill of particulars

HELD: Multiplicity cases examined. Under facts, this was not a
multiple acts case requiring jury unanimity. Incidents on interstate
and exit ramp prior to Bischoff leaving his semi trailer were a con-
tinuous incident; as road rage, Bischoff's exit ramp conduct in his
semi trailer was not motivated by a fresh impulse.

Under facts, evidence presented at preliminary hearing provided
same information that would have been given in bill of particulars;
thus, Bischoff can show no prejudice to his substantial rights. No
abuse of discretion to allow amendment of the complaint and to
reject request for bill of particulars.

22-3201, -3201(f); K.S.A. 8-1523, -1566, 21-3410(a), -3419, 60-
2101(b); and K.S.A. 22-2902 (Enslow 1988)

STATE V. BRYAN
GREENWOOD DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 90,881 – MARCH 17, 2006

FACTS: Bryan convicted of lewd and lascivious behavior for
exposure and sexual conduct involving sleeping victim. Court of
Appeals affirmed, 33 Kan. App. 2d 382 (2004), finding no require-
ment for sensory perception or awareness of victim. Bryan's petition
for review granted on limited issue of whether K.S.A. 2004 Supp.
21-3508(a)(2) requires an awareness of the victim.

ISSUE: Lewd and lascivious behavior statute

HELD: Issue of first impression whether K.S.A. 2004 Supp. 21-
3508(A)(2) requires a victim to be aware of offender's exposed sex
organ. Split in other jurisdictions discussed. Legislature's combina-
tion of words "exposing" and "presence" with a specific intent ele-
ment indicates Legislature's intent to criminalize lewd and lascivious
behavior whether the victim has actually seen or perceived the of-
fending act or acts. Applied to facts in this case, evidence supports
the jury's verdict.

STATUTES: K.S.A. 2004 Supp. 21-3508(a)(2) and K.S.A. 21-
3408, -3503

STATE V. CORBETT
RENO DISTRICT COURT – AFFIRMED
NO. 91,518 – MARCH 24, 2006

FACTS: Corbett convicted of first-degree premeditated murder.
On appeal he claimed trial court (1) erred in admitting transcripts
of witness depositions, (2) erred in admitting eyewitness testimony
initially found to be unreliable, (3) violated right of confrontation
by limiting cross exam of eyewitness, and (4) improperly admitted
hearsay evidence from victim's diary. Corbett also claimed (5) no
direct evidence supported the conviction, (6) prosecutorial mis-
conduct in closing argument, including use of demonstrative silence,
and (7) erroneous admission of other evidence.
ISSUES: (1) Deposition testimony, (2) eyewitness testimony, (3) cross-examination, (4) decedent’s hearsay testimony, (5) sufficiency of evidence, (6) prosecutorial misconduct, and (7) admission of evidence.

HELD: Transcript from a witness’s prior testimony may be admitted as evidence pursuant to K.S.A. 60-460(a) if witness is testifying at trial. Under facts, deposition transcripts were unnecessary and cumulative but were properly admitted under 60-460(a), regardless of Corbett’s opportunity to cross-examine witnesses during deposition or whether depositions were used to impeach their testimony. Procedure and factors in State v. Hunt, 275 Kan. 811 (2003), stated and applied. No error in allowing witnesses to testify regarding their eyewitness testimony. No abuse of discretion in limiting cross-examination where no support in record for inference of bias based on alleged deal with prosecutor for testimony. Victim’s statements in diary were not testimonial. Also, Corbett failed to object and preserve issue for appeal. No merit to Corbett’s assertion that direct evidence was required. Sufficient circumstantial evidence supports the conviction. No Kansas case addresses use of demonstrative silence during closing argument. No merit to general claim that a prosecutor may not use demonstrative silence. Under facts in this case, prosecutor did not place jurors in victim’s position and did not appeal to their biases, passions, or prejudices. Prosecutor’s statement of opinion regarding strength of his case, and his comment outside facts in evidence, were improper but not plain error. No error in allowing opinion evidence regarding length of time force must be applied for death by manual strangulation. No merit to claim that question or answer regarding cause of death must include magic words of “to a reasonable medical probability.” Error to find prisoner’s remark of being warned against testifying was admissible as spontaneous remark exception, but error was harmless where same evidence admitted without objection in other testimony. STATUTES: K.S.A. 2203211, -3601(b)(1) and K.S.A. 60-230(e), -232(a), -401(b), -404, -407(f), -456, -456(b), -458, -459, -460, -460(a), -460(b), -460(c)(2)(B)

STATE V. DAVIS
PAWNEE DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED
NO. 90,982 – MARCH 17, 2006

FACTS: Davis charged with rape, aggravated kidnapping, and battery. His attorney filed motion to determine competency, and magistrate judge ordered competency determination. Order was returned without service on hospital; Davis’ preliminary hearing, arraignment, and trial proceeded without competency determination. After direct appeal, Davis filed motion alleging trial court lacked jurisdiction to convict because it failed to suspend proceedings to determine competency. A different district court judge conducted hearing and denied the motion, finding Davis waived this issue by failing to raise it in the direct appeal. The judge also made retroactive determination that Davis had been competent at trial three years earlier. Davis appealed.

ISSUES: (1) Waiver and (2) competency determination

HELD: Alleged error is lack of jurisdiction. Second district court judge erred in finding Davis waived the illegal sentence issue by failing to raise it in his direct appeal. Once Davis’ competency determination had been ordered, first district court erred in proceeding through trial. Failing to hold competency hearing under K.S.A. 22-3902(1) when one is warranted is not subject to harmless error review. A retrospective competency hearing may cure the due process violation in limited circumstances, but under facts, Davis’ rights were not adequately protected in the 2003 retrospective competency hearing, nor can they be adequately protected by remand for a second retrospective determination of competency at time of 2000 trial. Convictions and sentence are reversed. If state wishes to retry Davis, it must pursue a determination of competency at time of retrial.

DISSENT (McFarland, C.J.): Under facts, no violation of K.S.A. 22-3302(1) or denial of due process where there is a complete absence of evidence raising a bona fide doubt as to Davis’ competency. Disagrees with majority’s analysis of four factors in McGregor v. Gibson, 248 F.3d 946 (10th Cir. 2001), and with majority’s strict application of K.S.A. 22-3302 to a noncompliant court order. Would affirm the Court of Appeals’ decision, but alternatively, any relief should be limited to remand for another retrospective competency hearing.

STATUTE: K.S.A. 22-3301 et seq., -3302 sections (1) and (3)-(5), -3402(1), -3404(1), 60-261, -1507

STATE V. GAYDEN
LYON DISTRICT COURT – AFFIRMED
NO. 94,651 – MARCH 17, 2006

FACTS: During a bar fight, Gayden pulled a gun and opened fire. He was convicted of first-degree murder, attempted voluntary manslaughter, four counts of reckless aggravated battery, firearms violations, and possession of cocaine. He was sentenced to consecutive sentences totaling life plus 68 months in prison and one year in jail. The district court denied Gayden’s motion that he was serving an illegal sentence because his six felony convictions involved personal injury arising from a single wrongful act and the cumulative punishments were barred by the Double Jeopardy Clause.

ISSUE: Does the definition of an illegal sentence under K.S.A. 22-3504(1) include a claim that the punishment term violates a constitutional provision?

HELD: Court affirmed. Court held that a claim that a sentence fails to conform to constitutional requirements is not a claim the sentence fails to conform to statutory requirements as is necessary to come within the narrow definition of “illegal sentence” under K.S.A. 22-3504(1). Court concluded the district court properly denied the motion to correct an illegal sentence, but did so based on the wrong reason. Relief should have been denied because the claim does not fit within the definition of “illegal sentence.” While the issue was not raised, a jurisdictional issue may be raised at any time.

STATUTE: K.S.A. 22-3504

STATE V. HAYDEN
FRANKLIN DISTRICT COURT – REVERSED AND REMANDED
NO. 88,650 – MARCH 17, 2006

FACTS: Hayden was convicted of second-degree murder, attempted second-degree murder, and aggravated burglary in the death of Vivian Johnson and serious injury to Howard Johnson. The Johnsons were in their mid-80s and were beaten with a shovel. Hayden and Raymond Fuller were suspects in the beating, and each pointed the finger at the other. Fuller was tried first and convicted of attempted second-degree murder for each of the Johnsons and aggravated burglary. Fuller testified at Hayden’s trial. Throughout the entire trial, the district court judge demonstrated a careless, angry, and unprofessional attitude toward almost every person involved in the case.

ISSUES: (1) District judge’s misconduct, (2) speedy trial violation, (3) individual voir dire, (4) amendment of complaint, (5) instruction on mere presence, and (6) sufficiency of the evidence

HELD: Court reversed and remanded based on the extreme misconduct of the district court judge in the case. Court stated the record clearly reflected that the district judge was hostile, outlandish, impatient, rude, inappropriately loud, and failed to pay atten-
Court stated the district judge's behavior thoroughly polluted the trial and affected the performance of all concerned. Court reversed for a new trial before a different district judge. The Court addressed the remaining issues insofar as they may recur on or arise in retrial. Court found the 13-month delay between the crime and the trial was not presumptively prejudicial and constituted tolerable delays in a difficult murder case. Court held there was no violation of Hayden's constitutional speedy trial rights. Court held there was no abuse of discretion by the trial court in denying Hayden's motion for individual voir dire. Court held there was no prejudice to Hayden's rights by allowing the state to amend the complaint. Court found the amendment to the complaint actually reduced the number of felonies. Court held there was no abuse of discretion by the trial court in failing to give the jury an instruction that mere presence at a crime scene is insufficient to convict because his sole defense was that he stayed in the truck and did not participate in the crime. Court found that Hayden was not prevented from making this argument to the jury. Court held there was sufficient evidence, when taken in the light most favorable to the prosecution, to convict Hayden of the crimes charged.

CONCURRENCE: Chief Justice McFarland concurred in part and dissented in part. Justice McFarland strongly disapproved of the trial judge's conduct, but opined that reversal of the convictions and remand for a new trial was not legally justified. Justice McFarland indicated that Kansas has a procedure for determining whether judicial misconduct has occurred and imposing sanctions, including removal where appropriate.

STATUTES: K.S.A. 21-3436(10) and K.S.A. 2004 Supp. 22-3201

STATE V. HILL
SALINE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 89,572 – MARCH 17, 2006

FACTS: Hill convicted of conspiracy to manufacture methamphetamine, manufacturing methamphetamine, and possession of ephedrine. Hill appealed, claiming in part the trial court should have granted motion to suppress evidence obtained after police arrested him without probable cause. State conceded arrest was unconstitutional, but argued error was harmless under the circumstances. In unpublished opinion, Court of Appeals affirmed, finding the police officer had reasonable suspicion to support an investigatory detention, which provided probable cause for Hill's later arrest. Hill's petition for review granted on this issue.

ISSUE: Arrest

HELD: Court of Appeals' decision is affirmed on other grounds. Hill was arrested without probable cause during initial encounter with officer when Hill was ordered out of truck at gunpoint and handcuffed. Trial court erroneously denied Hill's motion to suppress evidence from that encounter, and Court of Appeals erred in affirming trial court's decision. Hill's conviction affirmed nonetheless because error was harmless in light of other direct evidence of Hill's involvement in manufacturing methamphetamine. Convictions affirmed.

STATUTES: K.S.A. 2004 Supp. 22-2401 and K.S.A. 22-2202(4), -2402 sections (1) and (2), -2405(1), -2509

STATE V. MATHIS
WYANDOTTE DISTRICT COURT – APPEAL ON QUESTION RESERVED DISMISSED
CONVICTION ON CROSS-APPEAL AFFIRMED
NO. 87,763 – MARCH 17, 2006

FACTS: Mathis charged with two counts of abuse of child and one count of felony murder for death of the child. At conclusion of state's evidence, trial court dismissed one abuse count, finding it had merged with felony-murder charge. State appealed on question reserved. Mathis found guilty of felony murder, and not guilty on remaining abuse count. Mathis appealed, claiming juror misconduct, insufficient evidence, abuse of discretion in admitting certain evidence, ineffective assistance of counsel, and cumulative error. Mathis' appeal transferred to Kansas Supreme Court and consolidated as cross-appeal with state's appeal.

ISSUES: (1) Question reserved, (2) juror misconduct, (3) sufficiency of evidence, (4) admission of evidence, (5) ineffective assistance of counsel, and (6) cumulative error

HELD: Question presented hinges on peculiar factual circumstances in case and is not of statewide importance. Answer to question reserved is declined. State's appeal dismissed.

No abuse of discretion in denying motion for new trial based on juror misconduct.

Sufficient evidence for rational factfinder to find Mathis guilty beyond a reasonable doubt.

Admission of letter Mathis wrote to child's mother, testimony of child's mother and grandmother, child's medical history, and Mathis' prior crimes and wrongdoings are examined. No abuse of discretion in admitting this evidence.

Issue examined in evidentiary hearing on remand. No error in trial court's finding that defense counsel was not deficient.

No merit to cumulative error claim.

STATUTES: K.S.A. 2005 Supp. 22-3602(b)(3) and K.S.A. 20-3018(c), 60-404, 460(g), -1507

STATE V. MCELROY
SEDGWICK DISTRICT COURT – REVERSED
NO. 92,968 – MARCH 17, 2006

FACTS: McElroy convicted of attempted rape and paroled to a halfway house in Sedgwick County. After registering Wichita address for Kansas Offender Registration Act (KORA), he absconded and was apprehended in California. Jury convicted him on Sedgwick County charge of offender registration violation for failing to inform Sedgwick County Sheriff's Department of his change of address. McElroy appealed, claiming jury not properly instructed on essential elements of crime because statute requires registration with Kansas Bureau of Investigation. Also claimed for first time on appeal that venue in Sedgwick County was not proper. Appeal transferred to Supreme Court.

ISSUES: (1) KORA notification and (2) venue

HELD: Conviction is reversed. Examination of statutory amendments to K.S.A. 2004 Supp. 29-4904(b)(1), plain language of statute, and policy behind KORA reveals that Legislature did not intend to make failure to notify law enforcement agency in county offender was moving from a registration violation. Complaint in this case failed to charge McElroy with a registration of offender offense even under liberal standard of review after State v. Hall, 246 Kan. 728 (1990).

Venue of trial charging a violation of K.S.A. 2003 Supp. 29-4904(b)(1) lies in county where change of address notification must be filed and in jurisdiction of new residence where offender has failed to register rather than in county where offender had previously registered but is no longer residing. Under facts, Sedgwick County not an appropriate venue for case, and no jurisdiction to try McElroy in Sedgwick County.

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Civil

ARBITRATION AND MOTION FOR JUDGMENT
ON THE PLEADINGS
MISSOURI BANK & TRUST CO. V.
GAS-MART DEVELOPMENT CO. ET AL.
JOHNSON DISTRICT COURT – AFFIRMED
NO. 93,662 – MARCH 10, 2006

FACTS: Gas-Mart contracted with Cherry & Associates to construct a “Conoco Breakplace” in Leavenworth. Cherry filed for arbitration alleging payments due under the contract in the amount of $192,808.75. Gas-Mart responded with claims totaling $270,000, based on allegations that construction costs had either not been properly documented or were inflated. Cherry assigned its right, title, and interest in the arbitration to Missouri Bank & Trust. The district court found a valid assignment and denied a stay of the arbitration. The arbitrator awarded Cherry $122,569.97 after setting off some of Gas-Mart’s claims. Missouri Bank filed a motion for judgment on the pleadings or alternatively for summary judgment. The arbitrator awarded Cherry $122,569.97 after setting off some of Gas-Mart’s claims. Missouri Bank filed a motion for judgment on the pleadings or alternatively for summary judgment. The district court found a valid assignment and denied a stay of the arbitration. The district court did not err in refusing to stay the arbitration.

HELD: Court affirmed. Court disagreed with the district court’s characterization of Missouri Bank’s motion as one for summary judgment. Rather, court found Missouri Bank’s motion was properly considered as a motion for judgment on the pleadings. Court held the district court committed no procedural error in granting the motion for judgment on the pleadings and declined Gas-Mart’s request to remand for discovery and rehearing. Court also held prior decisions of a different district judge concerning the construction contract’s express prohibition on assignment were res judicata or law of the case. Last, the court held Cherry’s assignment of its right, title, and interest in its arbitration claims was not prohibited by the contract provisions and was valid. The arbitration claims were fully assignable, and the district court did not err in refusing to stay the arbitration.

ISSUES: (1) Procedural error in motion for judgment and (2) assignment of arbitration rights

STATUTES: K.S.A. 5-412, -413 and K.S.A. 60-212(c), -256

CONTRACTS AND RIGHT OF FIRST REFUSAL
BERGMAN V. COMMERCE TRUST CO. ET AL.
JOHNSON DISTRICT COURT – AFFIRMED
NO. 93,936 – MARCH 10, 2006

FACTS: In June 1995, Crispan Richardson and Bradley and Elizabeth Bergman executed Declarations of Restrictions and Reservations, which granted both parties the right of first refusal on specified adjacent properties owned by each of the parties. Richardson executed a will and trust leaving all his personal and real property, including the 10 acres in question, to Christa Park. Richardson executed a deed conveying the property to the trust. After Richardson’s death, Richardson’s sister contested the will and trust. Park settled with the estate and (2) Richardson or Commerce would have had to receive a bona fide written offer for the purchase of the 10-acre tract that Richardson and Commerce would have accepted. Court held the Bergman’s failed to show that these conditions precedent were satisfied and the Bergman’s right of first refusal never ripened into an enforceable right to purchase the property.

CONCURRING: Judge McAnany concurred in the ultimate decision, but used a different rationale to affirm the district court.

STATUTES: None

GARNISHMENT
LSF FRANCHISE REO I LLC V.
EMPIRE RESTAURANTS INC. ET AL.
LYON COUNTY COURT – AFFIRMED
NO. 93,622 – MARCH 3, 2006

FACTS: Emporia Restaurants Inc., Polaris Restaurants Inc., and North Star Holdings of Missouri LLC signed two promissory notes for $2.6 million secured by a mortgage, assignment of leases and rents, and fixture financing statement. LSF is the holder of the notes. LSF filed a petition to foreclose the mortgage, and the trial court granted the foreclosure. On July 23, 2004, the trial court issued a garnishment order to Commerce Bank for funds, credits, or indebtedness held by Commerce for Polaris not to exceed the $2.6 million. Commerce answered the order stating it held $33,686.73 in accounts for Polaris. Commerce later amended its answer stating it had $24,069.66 in one account and $9,617.07 in another account. The deposits made to the accounts prior to receipt of the garnishment order, which were part of the $33,686.73 reported to the trial court, were returned to Commerce as unpaid by the paying bank.

ISSUE: Should trial court quash the garnishment?

HELD: Court affirmed. Court found that in joint tenancy cases, the financial institution is required to inform the creditor that the debtor’s account is held in joint tenancy. Court recognized that Commerce was unaware that the funds were intended to pay the IRS for payroll taxes and did not obtain LSF that the funds belonged to someone else. Court held that if the money truly did not belong to Polaris, LSF was not entitled to garnish the funds. Court found Polaris had arranged for the electronic transfer prior to the garnishment. Court held the trial court’s findings were supported by substantial competent evidence and the trial court did not err in quashing the garnishment order.

STATUTE: K.S.A. 60-729, -733(a), (b), (c), (d), (f)
FACTS: Starr challenged prison discipline on contraband and telephone charges. District court summarily dismissed the petition. Starr appealed claiming noncompliance with procedural regulations, use of hearsay information by confidential informant, and sufficiency of evidence. 

ISSUE: Due process 

HELD: Summary dismissal justified. No cognizable due process claim stated, and disciplinary convictions were supported by sufficient evidence. 

STATUTE: K.S.A. 2004 Supp. 60-1501

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FACTS: In Tomlin's trial on rape and aggravated indecency liberties and charges, jury agreed he was not guilty of rape but where at imparie on other charges. Mistrial declared and jury discharged. In retrial, Tomlin was convicted on all counts. No relief granted in his appeal from district court's grant of mistrial and denial of motion for acquittal on rape charge. Tomlin then filed post-conviction motion alleging ineffective assistance of trial and appellate counsel for failing to file motion for partial verdict in first trial and failing to pursue that claim in the direct appeal. 

ISSUE: Ineffective assistance of trial and appellate counsel 

HELD: Kansas does not recognize partial verdicts. Absent a verdict on all charges in conformity with K.S.A. 22-3421, a defendant can be retried following mistrial due to a hung jury. Under facts, trial and appellate counsel were not ineffective for failing to secure or advance appellate argument for partial verdict when existing Kansas law does not permit such a procedure. 

STATUTE: K.S.A. 21-3108, 22-3421, 60-455, -1507, -1507(b)

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MECHANIC'S LIEN, BOND CLAIMANT, AND ATTORNEYS FEES

TRADESMEN INTERNATIONAL INC. V. WAL-MART REAL ESTATE BUSINESS TRUST ET AL. 

JOHNSON DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART NO. 93,410 – MARCH 3, 2006

FACTS: Wal-Mart contracted with Merit construction for construction of a Wal-Mart supercenter in Overland Park. Merit subcontracted with Construction Services Corp. (CSC) to complete the concrete work. Merit eventually terminated CSC from its subcontract with $168,031.04 remaining due and owing from CSC to Tradesmen International for the skilled laborers supplied to the Wal-Mart project. After Tradesmen's claims were refused by Merit and Centennial Insurance Co., Tradesmen filed a subcontractor's mechanic's lien against the Wal-Mart property. The lien statement failed to correctly name the contractor as Merit General Contractors Inc., and instead named Merit Construction Co. Inc., as the contractor. The trial court later allowed Tradesmen to amend its lien statement to reflect the correct name for Merit after the statutory period for filing a valid lien had expired. The trial court granted summary judgment in favor of Tradesmen but denied Tradesmen's request for attorneys fees. 

ISSUES: (1) Valid mechanic's lien, (2) proper bond claimant, and (3) attorney fees 

HELD: Court affirmed in part and reversed in part. Court held the trial court erred in granting summary judgment to Tradesmen. 

Court stated that a mechanic's lien statement filed by a subcontractor that fails to correctly name the contractor is vitally defective and the correct name of the contractor is an essential step for a valid lien. Court held the trial court may not exercise its authority to allow the amendment of a mechanic's lien and the trial court erred in allowing Tradesmen to amend its mechanic's lien statement. Court also held that Tradesmen was a proper bond claimant under Centennial's payment bond because Tradesmen provided skilled laborers that were used in the prosecution of work under the general contract between Wal-Mart and Merit. Court affirmed summary judgment in that regard. Court also affirmed the trial court's refusal to grant attorney fees to Tradesmen because it was unable to find that no reasonable person would take the view of the trial court that Centennial had just cause or excuse in refusing to pay Tradesmen's bond claim based the obligation of a surety to a subcontractor of a subcontractor. 

STATUTES: K.S.A. 40-201, -254(b), -256 and K.S.A. 60-1102, -1103(a)(1), -1105(b)

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MENTAL HEALTH 

IN RE CARE AND TREATMENT OF WARD 

JOHNSON DISTRICT COURT 

REVERSED AND REMANDED NO. 91,826 – MARCH 31, 2006

FACTS: Ward pled guilty to criminal threat charge. Sentencing court found crime was sexually motivated and required Ward to register as sex offender. Registration order affirmed in Ward's appeal. On day before Ward's release from prison, state filed petition under Kansas Sexually Violent Predator Act (KSVPA), and jury found Ward was sexually violent predator. Ward appealed, claiming (1) use of "likely" in definition of sexually violent predator unconstitutionally reduced burden of proof, (2) state failed to file special allegation of sexual motivation in his criminal case, (3) error to admit a prior judge's finding that Ward's underlying conviction for criminal threat was sexually motivated, (4) insufficient evidence supported jury's finding that he was a sexually violent predator, and (5) reversible error in state's closing argument. 

ISSUES: (1) Burden of proof, (2) special allegation of sexual motivation, (3) evidence of judicial determination that crime was sexually motivated, (4) sufficiency of evidence, and (5) closing argument 

HELD: Use of "likely" in KSVPA's definition of a sexually violent predator does not establish a lesser burden of proof in civil commitment cases than is required under Due Process Clause of 14th Amendment. 

Record contains too little information regarding Ward's criminal case to indicate what, if any, defenses were plausible and reasonably foreseeable at time a special allegation of sexual motivation was to be filed. Ward failed to provide record sufficient to establish this claim of error. 

Appellate review of this evidentiary issue barred because Ward failed to object to evidence that showed judge's finding of sexual motivation. 

Sufficient evidence that criminal threat in underlying conviction was sexually motivated and that Ward suffered from a mental abnormality or personality disorder that made him likely to engage in repeat acts of violence or serious difficulty in controlling his behavior. 

Under facts, reversible error for state's attorney in KSVPA commitment proceeding to appeal to jurors' personal fears for safety of their own children and community's children. This misconduct violated Ward's right to a fair trial. Reversed and remanded for new trial. 

STATUTES: K.S.A. 2005 Supp. 22-4902(c)(14); K.S.A. 21-3419, 22-4902(c)(14), 59-29a01 et seq., -29a02 sections (c), (d), and (e)(1)-(13), -29a05, -29a07 sections (a) and (e), -29a14 sections (a) and (b), 60-261; and K.S.A. 59-29a01 et seq., -29a02(a) (Furse 1994)
valid and enforceable.

and contrary to public policy. The court found the agreement was

status of Hobley and Hardy. The court also upheld the district court’s

and enjoined Hobley and Hardy for a period of two years.

injunctive relief was granted to Caring Hearts. Hobley and Hardy continued to treat patients they had treated while at Caring Hearts.

and also a 100-mile-radius restriction. Hobley and Hardy expressed

provisions barred them from treating patients they treated while at Caring Hearts for two years from treating patients they treated while at Caring Hearts and also a 100-mile-radius restriction. Hobley and Hardy expressed concerns about Caring Hearts’ referral fees and also their independent contractor status. When the issues were not resolved to their satisfaction, they terminated their contracts with Caring Hearts and began working for another home healthcare agency, where they continued to treat patients they had treated while at Caring Hearts. Caring Hearts sought an injunction based on the noncompetition clause. After a bench trial, the court found in favor of Caring Hearts and enjoined Hobley and Hardy for a period of two years.

ISSUES: (1) Personal jurisdiction and (2) noncompete agreements

Held: Court affirmed. Court held the trial court had personal jurisdiction over Hobley and Hardy, even though they were Missouri residents with Missouri nursing licenses. Court held all of Caring Hearts’ performance of this Kansas contract occurred in Kansas and the trial court did not err in finding that the Kansas long-arm statute applied and the assumption of jurisdiction by the Kansas courts would not cause any inconvenience or hardship to Hobley and Hardy. Court held the noncompetition agreements were not invalid based on alleged illegal kickbacks or the independent contractor status of Hobley and Hardy. The court also upheld the district court’s granting of an injunction despite Hobley and Hardy’s arguments that the noncompete agreement was overly broad, unreasonable, and contrary to public policy. The court found the agreement was valid and enforceable.

STATUTE: K.S.A. 60-308(b)

PARENT AND CHILD
J.N.L.M. V. MILLER
WYANDOTTE DISTRICT COURT
REVERSED AND REMANDED
NO. 94,902 – MARCH 31, 2006


ISSUE: Surname change

Held: Presumption for paternal surname is rejected as inconsistent with Kansas law. Millen is discussed and distinguished. Where child is born to a nonmarital relationship and child’s surname is contested, factors to be considered in determining whether child’s surname should be changed are best interests of child and interests of parents. Factors stated for application of that standard. Under facts, district court failed to meaningfully apply correct legal standards, erroneously interpreted K.S.A. 65-2409a(c) and associated testimony, misread and misapplied Millen, failed to make findings to facilitate meaningful appellate review, and made comments that could be interpreted as directly contrary to Kansas law. Reversed and remanded to a different district judge for further proceedings.

STATUTE: K.S.A. 38-1130, 65-2409a(c)

SALES
HAMMER V. THOMPSON
SEDGWICK DISTRICT COURT
AFFIRMED IN PART, REVISED IN PART, AND REMANDED
NO. 93,526 – MARCH 3, 2006

FACTS: Hammer and Howe (Hammer) placed cattle with Thompson for pasture grazing. Cattle transferred from Thompson to Morris, then to Hunt, then to Tyson. Hammer filed limited action alleging all were jointly and severally liable for conversion of the cattle. District court denied plaintiffs’ partial motion for summary judgment and granted summary judgment to defendants. District court found Thompson was a merchant. Morris was a buyer in ordinary course of business pursuant to entrustment doctrine, thus, Morris and all subsequent purchasers obtained and passed good title to the cattle. Hammer appealed.

ISSUE: Uniform Consumer Code (UCC) entrustment doctrine

Held: Full discussion of entrustment doctrine, K.S.A. 84-2-403. No Kansas case on whether an order buyer is considered a merchant under UCC entrustment doctrine. “Buyer in the ordinary course of business” is examined, holding Article 2 standard of good faith applies to Morris as a merchant. No Kansas case guides determination of whether a merchant has observed reasonable commercial standards. No published Kansas opinion addresses whether party’s status as a merchant under UCC is a question of law or fact. Court holds it is mixed question of law and fact.

No error by district court in finding Thompson was a merchant as matter of law. Error to find as matter of law that Morris was a buyer in ordinary course of business because no evidence that Morris observed reasonable commercial standards of fair dealing in cattle trade, an essential element of entrustment doctrine in this case. Error to absolve subsequent purchasers of liability until nature of title Morris had to transfer is determined. Denial of plaintiff’s motion for partial summary judgment is affirmed. Summary judgment granted to defendants is reversed.

STATUTES: K.S.A. 2005 Supp. 84-1-201 sections (9) and (19), -2-103(1); and K.S.A. 47-1804(c), 84-2-103, -2-104(1), -2-403(2)

TORTS – CONTRACTS
PHILLIPS V. TYLER
SEDGWICK DISTRICT COURT
REVERSED AND REMANDED
NO. 93,146 – MARCH 10, 2006

FACTS: Phillips purchased house from Tylers. Based on later found defects, Phillips sued Tylers for negligent misrepresentation, negligent failure to repair, fraud, and nuisance. District court dismissed nuisance and negligent failure to repair claims and denied summary judgment on remaining claims. Jury found no fraud, but awarded almost $1 million to Phillips for repairs and loss of use of home. Tylers appealed.

ISSUE: Negligent misrepresentation

Held: Tort of negligent misrepresentation is discussed. Contract provisions between buyers and sellers can defeat a claim of negligent misrepresentation. Here, buyers cannot sustain negligent misrepresentation claim where they, by express contract provisions, agreed that statements of sellers were not warranties, that sellers were not experts concerning building defects, and that buyers were relying upon own judgment and own inspections of property and not statements of sellers. Because buyers agreed that they did not rely upon
any representation of the sellers in making the purchase of the house, district court erred in denying summary judgment on the negligent misrepresentation claim. Judgment is reversed and case is remanded with instructions to enter judgment on behalf of Tylers.

**STATUTES:** None

**UNINSURE MOTORIST BENEFITS**

**RICHERT V. MCHONE ET AL.**

**MCPHERSON DISTRICT COURT – AFFIRMED**

**NO. 94,906 – MARCH 31, 2006**

FACTS: Richert collided with a Chevy Blazer driven by McHone. McHone did not own the Blazer; the vehicle was titled to his mother and two other people. At the time of the accident, the Blazer’s owners did not have bodily injury liability insurance in effect. However, McHone had an automobile policy listing his own vehicle and extended to cover his operation of the Blazer. McHone’s policy limits were $100,000 per person and $300,000 per occurrence. Richert had insurance with 100/300 coverage applicable to uninsured motorist (UM) and underinsurance motorists benefits. Richert sued McHone and the owners and American Family was added upon a claim that it owed benefits to Richert. The district court granted summary judgment to American Family holding that the Blazer could not be considered “uninsured” at the time of the accident because its driver, McHone, had liability insurance which covered the Blazer.

**ISSUE:** Whether the language of American Family’s uninsured motorist policy provides UM coverage when the offending vehicle was uninsured, even though the driver of the offending vehicle did not own the Blazer.

**HELD:** Court affirmed. The Kansas uninsured motorist statutes do not require an insurer to provide UM coverage for an insured’s injuries, which are sustained in an accident where either the owner or the driver of the other vehicle has a bodily injury liability insurance policy, which covers the accident and which provides liability limits required by Kansas law. An insurance policy that defines an uninsured motor vehicle as a motor vehicle that is “[n]ot insured by an insurance policy, which covers the accident and which provides liability limits required by Kansas law.” A reasonable prudent insured would understand that uninsured motorist coverage is unavailable for the same damages covered by the negligent driver’s bodily injury liability insurance policy and that the UM limits cannot be added to or stacked upon the recovery obtained by the tortfeasor. 

**STATUTE:** K.S.A. 40-284 et seq.

**Criminal**

**STATE V. BOLDEN**

**SEWARD DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

**NO. 93,823 – MARCH 3, 2006**

FACTS: Bolden rammed her car into the car containing her estranged husband and his mistress, forcing the car to the side of the road. After her husband would not get into the car with Bolden, she rammed into the car a second time as the husband and mistress drove to the police station. The mistress had previously obtained a protection order against Bolden. Bolden was convicted of two counts of intentional aggravated battery, two counts of aggravated assault, one count of criminal damage to property, one count of violation of a protection order, and one count of reckless driving.

**ISSUES:** (1) Multiplicitous convictions and (2) aggravated battery

**HELD:** Court stated that two acts of violence were used to support the convictions of two counts of aggravated battery and two counts of aggravated assault. Court held that by applying the single act of violence paradigm, Bolden can be convicted of the two counts of aggravated battery, but not the two count of aggravated assault because they merged into the more serious offenses of aggravated battery. Court reversed aggravated assault convictions. Court denied Bolden’s claim that the trial court erred by failing to instruct the jury on lesser included offenses of aggravated battery. The instructions were not requested. Court stated that all reckless battery crimes require some type of bodily harm. Bolden’s estranged husband and his mistress did not suffer bodily harm and there was little chance the jury would have returned a different verdict if the instructions had been given. Court held it was not clear error that the trial court did not give the instruction.

**STATUTES:** K.S.A. 21-3414(a)(1)(C), (2), -3412(a)(1) and K.S.A. 2005 Supp. 22-3414(3)

**STATE V. CARTER**

**JOHNSON DISTRICT COURT – AFFIRMED**

**NO. 92,988 – MARCH 17, 2006**

FACTS: Carter convicted of aggravated burglary and misdemeanor or criminal damage to property. On appeal, he claimed trial court erred in not instructing jury on attempted aggravated burglary because he only entered screened-in porch and never entered victim’s residence. He also claimed there was no evidence of the value of damaged porch screen or door.

**ISSUES:** (1) Aggravated burglary and (2) evidence of value

**HELD:** Under facts, entry onto porch was sufficient. Porch was integral part of house, sharing common foundation, roof, gutter system, and siding. Arguments that porch was not for dwelling purposes because owner did not keep anything of value on porch and it was uninhabitable, unused, and not very secure, are simply irrelevant. Also, removal of screen from kitchen window and opening screen door from porch into the kitchen door constituted an entry for purposes of burglary. Crime of aggravated burglary was thus completed, and instruction for attempted aggravated burglary not supported by the evidence.

For misdemeanor conviction of criminal damage to property, value need not be proven. Value of property damaged may be important in determining severity level of felonies under K.S.A. 21-3720(b)(1) or (2), but value is irrelevant in misdemeanor prosecution under K.S.A. 21-3720(b).

**STATUTES:** K.S.A. 2005 Supp. 22-3414; K.S.A. 21-3715, -3716, -3720(b) sections (1)-(3); and K.S.A. 21-513 (Corrick)

**STATE V. ESCALANTE**

**SHAWNEE DISTRICT COURT – AFFIRMED**

**NO. 93,256 – MARCH 31, 2006**

FACTS: Escalante’s wife, Nancy, brought some clothes to the hotel where Escalante was staying. Escalante got into the car with Nancy as she was leaving, claiming he needed a ride to the grocery store. As they approached the grocery store, Escalante told Nancy to keep driving to the country, and he flashed a small kitchen or paring knife in his hand. Nancy drove into the Kmart parking lot and tried to get out of the car. Escalante pulled her back into the car and repeatedly stabbed her. Nancy escaped and was treated for minor cuts and released. Escalante was charged with aggravated kidnapping, aggravated battery, criminal threat, and aggravated assault. A jury convicted Escalante of a lesser count of attempted aggravated kidnapping and then all the remaining charges. The trial court acquitted Escalante of the criminal threat and aggravated assault charges, finding they merged into the aggravated battery conviction.

**ISSUES:** (1) Multiplicitous convictions, (2) unanimity jury instruction, and (3) correct criminal history

**HELD:** Court affirmed. Court held that Escalante’s case did not present a situation of a single act of violence. The events clearly consisted of a continuous incident, but not multiplicitous as a single act of violence. Court found that due to the elements of aggravated...
kidnapping as charged in the case, had that crime been successfully
completed, the aggravated battery would have merged with the
aggravated kidnapping. However, here there was only an attempt,
which did not require a completed aggravated battery, so the two
crimes are not merged. Court also held that the trial court did not
err not giving a unanimity jury instruction. Court found this case
was not one of multiple acts. Court held there was no possibility
of jury confusion because it was made clear what overt acts were
charged and which supporting evidence that the state was relying
upon in establishing each charge. Last, court held all issues regard-
ing Escalante’s sentence were rendered moot because of his death.

DISSENT/CONCURRENCE: Judge Malone concurred with the
majority on all issues except for a dissent on the conclusion that
Escalante’s conviction for aggravated battery did not merge with
the conviction for attempted aggravated kidnapping. Judge Malone
found the charges were multiplicitous.

STATUTES: K.S.A. 2005 Supp. 21-3107 and K.S.A. 21-3301,
-3414(a)(1)(C), -3421

IN RE T.G.
CHASE DISTRICT COURT – AFFIRMED
NO. 93,779 – MARCH 31, 2006, MOTION TO PUBLISH
OPINION ORIGINALLY FILED OCTOBER 21, 2005

FACTS: T.G., a minor, was charged with one count of rape and
placed in juvenile detention. The Juvenile Justice Authority (JJA)
placed T.G. at the Marillac Center, where he was enrolled in a juve-
nile sexual misconduct program. T.G. pled to a lesser charge and
the district court sentenced him to 18 months’ incarceration in a
Juvenile Correctional Facility with 24 months’ aftercare. The dis-
ctrict court then stayed the incarceration and continued treatment
at Marillac to complete sexual offender treatment. T.G. made initial
progress at Marillac, but a year later the district court revoked JJA
placement at Marillac and ordered incarceration. The district court
rejected T.G.’s request for credit for time served at Marillac because
it was a treatment facility.

ISSUE: Did the district court err in denying T.G.’s request for
time served while in a residential juvenile sexual misconduct pro-
gram prior and subsequent to his sentencing?

HELD: Court affirmed the district court. Court initially held
that it had jurisdiction to consider T.G.’s motion for credit for time
served. Court held that a juvenile may voluntarily request and agree
to certain restrictions in order to be in the custody of the JJA rather
than a juvenile correctional facility. If the JJA places the respond-
ent in a treatment facility, the respondent is not in the facility pursuant
to a court order and would not be subject to an escape charge if he
or she left the facility. Such a respondent is not “incarcerated” as
that term is used in K.S.A. 38-16,133 and may not receive credit for
time spent in the treatment facility.

STATUTES: K.S.A. 2004 Supp. 21-4614; K.S.A. 21-3511,
-3809, -3810; and K.S.A. 38-16,133, -1663(a)(4), -1664(b),
-1681(c)(2)(B)

STATE V. HAMIC
PRATT DISTRICT COURT
REVERSED AND REMANDED
NO. 94,881 – MARCH 3, 2006

FACTS: Officer stopped car owned by Hamic-Deutsch who had
twice operated vehicle without proof of insurance and had outstand-
ing probation violation warrant. Hamic (mother of Hamic-Deutsch)
driving was and was arrested on charges of possession of mariju-
a and drug paraphernalia, obstruction of legal process, and no proof
of insurance. District court granted Hamic’s motion to suppress, find-
ing officer’s knowledge of no insurance in November and December
2004 did not amount to reasonable suspicion that vehicle had no

ISSUE: Vehicle stop
HELD: No published Kansas case deals directly with question of
whether law enforcement officer is justified in suspecting that regis-
tered owner of a vehicle is driver of that vehicle. Outstanding warrant
is evaluated as part of totality of circumstances. All information officer
possessed when he stopped the vehicle rationally supported inference
that Hamic-Deutsch was driver or occupant of vehicle. Knowledge
that divorcing husband was co-owner of vehicle did not contradict,
destroy, or mitigate that inference. Under totality of circumstances,
person of reasonable caution could believe a crime was or had been
committed by driver or occupant. Initial vehicle stop was valid inves-
tigatory detention. District court’s ruling to contrary is reversed.

STATUTE: K.S.A. 22-2402(1)

STATE V. HENDERSON
SEDGWICK DISTRICT COURT – CONVICTION
REVERSED, SENTENCE VACATED, AND REMANDED
NO. 92,251 – MARCH 10, 2006

FACTS: Henderson convicted of aggravated indecent liberties
involving a 3-year-old child. District court found victim’s failure to
understand proceedings or duty to be truthful rendered her an un-
available witness. On appeal, Henderson claimed trial court erred
in denying pretrial motion to suppress statements by victim during
videotaped questioning by Social and Rehabilitation Services and
after Henderson was sentenced.

ISSUE: Right of confrontation
HELD: Under facts, an objective reasonable person standard is ad-
opted for determining when a child witness’s out-of-court statements
are testimonial under Crawford. Interview of a child abuse victim con-
ducted by child protective agencies in conjunction with law enforce-
ment officials is testimonial under Crawford and is protected by Con-
frontation Clause. Under Crawford, it was error to admit this evidence
without Henderson being able to cross-examine victim. Doctrine of
forfeiture of right of confrontation is discussed and found not ap-
licable. No case identified in which doctrine was applied solely due
to declarant’s age. Henderson’s conviction is reversed and sentence
is vacated. Sufficient competent evidence exists apart from videotaped
interview to allow state to retry Henderson.


STATE V. MILES
RENO DISTRICT COURT – AFFIRMED
NO. 93,260 – MOTION TO PUBLISH
OPINION ORIGINALLY FILED OCTOBER 7, 2005

FACTS: Miles appealed the sentence imposed after he pled guilty
to conspiracy to manufacture methamphetamine. He argued that
under State v. McAdam, he should have been sentenced to the lesser
crime severity level of possession of drug manufacturing paraph-
ernalia. Miles did not raise the issue to the district court.

ISSUE: Sentence
HELD: Court affirmed Miles’ sentence. Court held that for pur-
poses of identifying identical proscribed conduct under difference
sentences, the test is not whether proving one offense necessarily
proves the other, but whether the same conduct, as defined by the
elements contained within each statute, is proscribed. Court held
that under K.S.A. 65-4159(a), the Legislature intended to criminal-
ize the act of producing a controlled substance; under K.S.A. 65-
4152(a)(3), the Legislature intended to criminalize the possession,
collection, or application of noncontrolled substances or products
with the intent to produce a controlled substance.

STATUTES: K.S.A. 21-3301; K.S.A. 2001 Supp. 65-7006(a);
and K.S.A. 65-4150(a), (c), -4107(d)(3), -4152(a)(3), -4159(a)
STATE V. MOORE  
JOHNSON DISTRICT COURT  
CONVICTION AFFIRMED, SENTENCE VACATED,  
AND REMANDED  
NO. 93,521 – MARCH 10, 2006

FACTS: Moore convicted of felony DUI. On appeal, he claimed (1) trial court erred in denying motion to dismiss charge for lack of jurisdiction and in holding second preliminary hearing where state presented evidence of prior DUI convictions, (2) insufficient evidence supported his conviction where police never saw him operating a vehicle while intoxicated, and (3) sentence as sixth-time DUI offender was illegal because he was charged as third-time offender.

ISSUES: (1) Preliminary hearing, (2) sufficiency of evidence, and (3) sentencing

HELD: Challenge to first preliminary hearing is not a jurisdictional issue. Under facts, Moore waived his challenge to sufficiency of preliminary hearing when he filed motion to dismiss more than 20 days after entering plea. Also, defense counsel entered a qualified stipulation to evidence, which Moore now claims was absent in the first preliminary hearing.

Sufficient evidence supports the conviction.

DUI charged as nonperson felony contains disparate penalties based on whether person charged is a third-time DUI offender, K.S.A. 2005 Supp. 8-1567(f), or a fourth or subsequent DUI offender, K.S.A. 2005 Supp. 8-1567(g). Due process thus requires notice of the particular subsection being charged. Failure to do so results in the defendant being sentenced as a third-time offender. Because Moore charged as third-time DUI offender, his sentence as a sixth-time offender is vacated. Case remanded for resentencing as third-time offender. State v. Moody, 34 Kan. App. 2d 526 (2005), is distinguished.

STATUTES: K.S.A. 2005 Supp. 8-1567 sections (f) and (g); K.S.A. 22-3201(c), -3208 sections (3) and (4); and K.S.A. 1995 Supp. 8-1567, -1567(d)
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