Title VII is Color Blind: The Law of Reverse Discrimination
Supreme Court of the United States
Swearing-In Ceremony for
Kansas Bar Association Members

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.

Application Request Form
U.S. Supreme Court Swearing-In Ceremony
Oct. 16, 2006

Name: ____________________________
Firm Name: ____________________________
Address: ____________________________
City: ____________________________
State: ___________ ZIP: ____________
Phone: ____________________________
KBA #: ____________________________

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.
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Cover: Justice in Kansas is depicted as the compassion and sensitivity of a woman holding the powers of unrivaled vision and swift and accurate action, as evidenced by the sculpture “Justice” in the atrium of the Judicial Center in Topeka. The gentle, kneeling posture of a woman is holding aloft a native Prairie Falcon, one of the swifts birds known, whose vision is thought to be eight times more powerful than man’s.

Photo by David Gilham, KBA desktop publisher.

Look for Your July/August KBA Journal to arrive in Mid-July

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

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Photo by David Gilham, KBA desktop publisher.

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From the President
Richard F. Hayse

Quacks From a Lame Duck

Bar leadership comes and goes, but some issues endure, unresolved. The unauthorized practice of law, or UPL, is such an issue in Kansas. Successive KBA administrations have attempted to confine the practice of law more strictly to those who are educated, tested, licensed and regulated. So far we have had limited success because of the lack of a bright-line definition and a workable enforcement mechanism.

Defining what constitutes the practice of law is currently dependent on common law principles gleaned from decided cases. Because each case arises out of unique circumstances, there is no overriding structure to guide us when we question whether a particular practice is within or without the regulated parameter. Once we go beyond representation of a client in a courtroom there is precious little guidance as to whether there has been a UPL violation.

Enforcement is even more abstract. The Attorney General has theoretical power to enjoin or prosecute those who would practice law in Kansas without a license, but actual activity has been scattered. Consumer protection laws could offer a vehicle for enforcement in individual cases, but the lack of a class action tool inhibits effective pressure on mass marketers of substitutes for legal services.

In 2001 the KBA Board of Governors approved and the president appointed an Unauthorized Practice of Law Committee charged with crafting a definition and a recommendation for enforcement. After an exhaustive review of the experience of all states which purport to regulate the practice of law, the committee prepared an excellent report and recommendation which was submitted to the Board of Governors in June 2004. The approach endorsed by the committee depended on adoption of a Supreme Court rule defining what it means to practice law, backed by enforcement through a standing committee organized as an adjunct of the Supreme Court.

The UPL Committee’s thoughtful, complete report was thoroughly reviewed by the Board of Governors and approved in September 2004 for submission to the Supreme Court. The structure of the committee’s work product would preserve the inherent power of the Supreme Court to regulate the practice of law while providing strong protection for consumers. Upon receipt of the report, the Court began its own study with input from the Kansas Disciplinary Administrator.

Meanwhile, back within the Beltway, the Federal Trade Commission got wind of the KBA report and fired off a 12-page letter in February 2005, hinting at legal action if the proposed definition was not watered down, ostensibly to allow more competition in providing services to consumers. The letter did not explain how an agency of the federal government would obtain authority to supplant the inherent jurisdiction of the state Supreme Court. Nevertheless, the KBA UPL Committee, chaired by the indefatigable Ed Bideau of Chanute, crafted a detailed response to the FTC letter and submitted the proposed response to the Board of Governors, which referred the draft to antitrust counsel for review.

Before that study could be completed the KBA received word that the Supreme Court would decline to adopt the KBA’s definitional rule and would continue to rely on the common law principles from decided cases. That decision had the advantage of making the FTC concerns moot, but left us back where we started five years previously in groping for a comprehensive, bright-line definition.

As this is written the Court continues its consideration of the proposed enforcement mechanism drafted by Mr. Bideau’s task force. Without a clear definition of the practice of law, the fate of the second prong of the KBA’s proposal seems shaky, at best.

So, in June 2006, yet another KBA administration inherits the enduring saga of how best to control the unauthorized practice of law in this state. The brightest spot in this tale is shown by the untiring efforts of Ed Bideau and the members of his committee. They exemplify the dedicated service of hundreds of KBA members who place the good of the profession above personal economics. You make the job of KBA president extremely gratifying, and I thank you.

Richard F. Hayse can be reached by e-mail at rhayse@morrislaing.com or by phone at (785) 232-2662.
GROW YOUR FUTURE WISELY

As a law professional, you know that growing your future wisely isn’t just choosing the right plan for your firm—it’s also choosing the right resource. So when you’re ready for retirement planning, choose the program created by lawyers for lawyers, and run by experts.

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Call an ABA Retirement Funds Consultant at 1-877-945-2272  www.abaretirement.com

Please visit Igor Fedosenko at the ABA Retirement Funds Booth at the upcoming Kansas Bar Association Annual Meeting for a free cost comparison and plan evaluation. **June 8-10, 2006 - Overland Park Marriott - Overland Park, Kansas**

For a copy of the Prospectus with more complete information, including charges and expenses associated with the Program, or to speak to a Program consultant, call (877) 945-2272 or visit www.abaretirement.com or write ABA Retirement Funds P.O. Box 5142 • Boston, MA 02206-5142 • abaretirement@citigreentrust.com. Be sure to read the Prospectus carefully before you invest or send money. The Program is available through the Kansas Bar Association as a member benefit. However, this does not constitute, and is in no way a recommendation with respect to any security that is available through the Program. 6/2/2006.
In Memoriam
Marvin E. Thompson
KBA President 1972 - 1973

Marvin E. Thompson, 85, Russell, died April 11. He was born May 5, 1920, in Belton, Mo., to Harry and Eudora (Sapington) Thompson. As a young boy, he and his family moved to the Paola area.

Thompson graduated from Paola High School and went on to graduate from the University of Kansas in 1944. In 1946, he received his law degree from the University of Kansas School of Law.

“We’ve never known anyone more proud of being a lawyer than Marvin. The practice of law was his passion,” said Mark Arthur Jr., eulogizing his law partner.

“He felt honored that someone would come to him for advice and counsel, and he repaid that honor by representing them to the very best of his ability, which was, if you didn’t know, considerable.

“He was a father figure and confidant to many young lawyers and was never too busy to help any lawyer who called with a complex legal issue seeking Marvin’s opinion. And that happened often. He always had an opinion.”

He began his law career as a law clerk for U.S. District Court Judge Arthur J. Mellott. In 1947, Thompson opened his law practice in LaCrosse and then moved to Russell in 1950, where he practiced with the firm of Thompson, Arthur, and Davidson until his retirement in 2002. He was admitted to practice before the Kansas Supreme Court, U.S. District Court for the District of Kansas, 10th U.S. Circuit Court of Appeals, and the U.S. Tax Court.

Thompson was a member of the Kansas Bar Association, from 1946 until his death. He served as president of the KBA, 1972-1973, on the Executive Council from 1959 to 1974, and the Access to Justice Task Force. For many years he belonged to the KBA Oil, Gas, and Mineral; Real Estate, Probate, and Trust; and Tax Law sections. He was a fellow of the Kansas and American bar foundations, a fellow of the American College of Trial Lawyers, and a member of the Russell County Bar Association.

From 1969 to 2000, Thompson was a member of the Kansas Judicial Council, where he served on the Probate Code, Lien Law, Title Standards, Care and Treatment/Guardianship, Continuing Legal Education, and Governmental Immunity advisory committees. He also served on the Russell County Zoning Commission for a number of years.

“The legal profession has lost a great lawyer who has been an inspiration to me since I first became active as a member of the executive committee of the Kansas Bar Association in 1977. I had the opportunity to serve with Marvin on many bar committees,” said Gerald L. Goodell, Goodell, Stratton, Edmonds & Palmer LLP, Topeka, KBA president, 1985-1986.

“I also served many years with Marvin as a member of the Kansas Judicial Council and as a member of its Probate Advisory Committee. Marvin devoted hundreds of hours to work on Kansas Bar Association and Kansas Judicial Council work. He was a true professional in the way he approached each problem. If there has ever been a lawyer I could classify as a ‘lawyers lawyer,’ Marvin would fill that bill. The legal profession will certainly miss his contributions.”

During Thompson’s tenure as president, the Kansas Supreme Court implemented the KBA’s proposal for annual registration and licensing of lawyers and a full-time disciplinary administrator.

“It has been my privilege to gain an even greater insight into the greatness of character that makes up a lawyer. I would rather fight, fish, golf, work, or get drunk with lawyers than any other group in captivity,” he said in his final president’s message. (42 J Kan. Bar Assn. Spring, 1 (1973))

“I insist that no other single group is so diligent in preserving the essential dignity of the human specie, whether it be an individual right or a group proposal.”

Thompson was a member of the Russell Elks Lodge No. 1715, the Masonic Lodge, and the Isis Shrine.


He is also survived by his son and daughter-in-law, David and Myra Thompson of Russell; daughter, Patricia Huber of Greenfield, Mass.; stepdaughters and stepsons-in-law, Ruth and Jim Heckman of Guilford, Conn., and Mary Kay and Jim Kimmitt of Roswell, Ga.; stepdaughter, LuAnn Wasinger of Ft. Collins, Colo.; sister, Lucy Roark of Paola; seven grandchildren; five stepgrandchildren; and four stepgreat-grandchildren. He was preceded in death by his parents and brothers, Harry and Harold.

Memorials contributions may be made to the Kansas Bar Foundation, Shriner’s Burn Center, South Wind Hospice, and St. Mary’s Catholic Church Building Fund. Contributions may be sent to Pohlman-Varner-Peeler Mortuary, 610 N. Maple, Russell, KS 67665.
Stout to Receive Robert K. Weary Award

The Robert K. Weary Award will be given to Mikel (Mike) L. Stout, Wichita, at the Kansas Bar Foundation’s Annual Fellows Dinner. The dinner will be Thursday, June 8, at the Lake Quivira Country Club, Lake Quivira.

“The Robert K. Weary Award was established as an annual award by the Board of Trustees of the Kansas Bar Foundation to recognize lawyers for their exemplary service and commitment to the goals of the Kansas Bar Foundation,” said H. David Starkey, Foundation president.

“Through the years, Mike Stout has supported the Foundation with his time, service, and resources. The Board of Trustees is very pleased to present the award this year to Mike.”

Stout is a member of the Kansas Bar Foundation and served as president 1991-1992. “Mike is a wonderful example to the presidents who have come after him,” said Frank C. Norton, Salina, former Foundation president and 2002 Weary Award recipient.

Stout also served on the KBA Annual Meeting Task Force in 1998 and is a current member of the Employment Law, Litigation, and Intellectual Property Law sections. He received the KBA Professionalism Award in 1997.

He is a former chairman and current member of the Commission on Judicial Qualifications, a Fellow and current treasurer of the American College of Trial Lawyers, and former president of the Kansas Association of Defense Counsel and the Wichita Bar Association. In addition, Stout was co-chair of the Civil Justice Reform Act Advisory Group for the U.S. District Court for the District of Kansas.

Stout, a partner at Foulston Siefkin LLP, Wichita, concentrates his practice in the area of business litigation with an emphasis in environmental and employment-related cases. He has gained extensive experience over the past 30 years as lead counsel in the analysis, evaluation, and trial of civil litigation in state and federal court.

The Robert K. Weary Award was established in 2000. Despite his objection, the Board of Trustees selected Bob Weary as the initial recipient of the award in recognition of his decades of service to his community, the Kansas Bar Foundation, and the legal profession in Kansas. In 2005, the award was given posthumously to honor former Kansas Supreme Court Justice Robert L. Gernon. Weary, Norton, Gernon, and Stout are the only recipients of the Weary Award.

We Need You!

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@klslinc.org with your name and the geographic region in which you will be able to serve. You’ll be glad you did!
Telling Stories of Love, Laughter, and Hardship Through Food

By Beth Warrington, publications coordinator

On short notice, Mira Mdivani gathered friends in her Overland Park kitchen for four weekends of cooking during a hot Kansas summer in 2004. The result was a cookbook, Cooking with an Accent: An Immigration Lawyer’s Cookbook, featuring recipes from clients and friends.

“It’s telling stories through food,” Mdivani said. “We invited my clients over and ate like crazy. It’s stories from all over the world — from Singapore to Peru to Great Bend.”

Mdivani’s idea for Cooking with an Accent began when she would set the table for dinner and tell her husband, Dennis, about her day at work. The stories ranged from a client who received their green card after waiting 14 years to naturalization cases to the injustices done to her clients that are both American and foreign. Often Dennis would tell her to write a book about it, but without that amount of time in her busy schedule, Mdivani took a simpler approach, creating a cookbook.

The recipes include everything from Baked Macaroni and Cheese to Escabeche de Pollo to Fondant au Chocolat. All include a story from the recipe’s author. According to Mdivani, there are a lot of love stories, including Linh Trieu, who was from China, and George Vial, who was from Ireland, and how they met at a party. Like this story, everybody wanted to talk about how happy they are here, but nobody wanted to talk about how hard the immigration process was.

Mdivani’s favorite recipe in the cookbook is Grilled Bratwurst by Tien Bui, who came to the United States from Vietnam when he was 2. It was also her least favorite when she began working on the cookbook.

When Bui, a Boeing engineer, brought his bratwurst to Mdivani’s house to cook, her initial reaction was “you’ve got to be kidding me.” She asked him to cook something interesting as they cook and clean in Mdivani’s kitchen.

Mdivani included a few of her own recipes in the cookbook, as did her husband and her father, Archil.

A portion of the profits from Cooking with an Accent will go to two Kansas City area organizations, the Hope House, an area shelter for battered women, and El Centro Inc., a program for survivors of domestic violence.

Born in Moscow, Mdivani came to the United States in 1993 after being transferred to Kansas City by her U.S. employer. Even before coming to the United States, there was a clear understanding that law was in her future.

Her mother, Valentina, and stepfather, Boris, are professors of law, and her brother, Igor, is a lawyer in Russia.

Before becoming an attorney, Mdivani put together international business deals and worked frequently with lawyers.

“When a deal was ready to close in, let’s say, London,” she said, “and our lawyers were, let’s say, in New York sleeping instead of drafting my contract, I felt I was missing a leg while trying to run really hard.”

After graduating from the University of Missouri-Kansas City School of Law in 1999, Mdivani thought that with all of her new legal knowledge she would go back into international business, but while working at Klamann & Hubbard in Overland Park, she was receiving calls about immigration instead of business.

“When I started snowballed into it,” she said. “The more I learned about immigration law, the more I realized that immigration is complex, unfair, sometimes frustrating, and rewarding. People in general think it’s not their problem, but as long as someone is willing to listen, I will talk in boring ways, in fun ways, to those who cook and those who don’t, to give it a second thought.”

Mdivani is now using her international business background to serve businesses and families with international members at the Mdivani Law Firm LLC, based in Overland Park. She has developed a unique employer immigration compliance practice and often publishes and teaches on business immigration issues.

“Accents make you stand out,” Mdivani said. “Everyday I hear, ‘Where are you from?’ Then you have to tell your life story. It pushes me to do the best I can to help my clients, not just legally, but also to make them persevere.”

For more information about Cooking with an Accent: An Immigration Lawyer’s Cookbook, call (913) 317-6200 or visit www.uslegalimmigration.com.
This column is dedicated to the annual bar convention and playing golf. Two things that really have little in common with each other, except for the annual KBA golf tournament. For most of us, the bar convention is a great time to get together and reconnect with fellow bar members. Earn some CLE, trade war stories, relax. And then someone decides to play golf. And that’s when things start to get ugly.

See, I don’t think golf mixes well with lawyering. There are exceptions, of course. Bobby Jones was a great golfer, maybe the best ever, then he was a great lawyer, but he never excelled at both at the same time. That was no accident. Golf eats up more time than completing a Sudoku puzzle. In my opinion, golf is best left to other professions who have a lot of free time on their hands—like bankers and insurance salesmen. Golf takes about eight hours to play and when it’s over you get home to find out why some lawyers hate to mediate domestic disputes. Been there.

So anyway, back to my story. When I was young and stupid, I used to play golf with strangers. The centerpiece of this was the KBA convention. I figured playing golf with fellow attorneys from around the state was a great idea. Until I tried it.

This put into motion a disaster of titanic proportions. It was the bar convention, circa 1987. Location: Topeka. Back then my Uncle Denny from Great Bend and I paired up. But it takes four to make a team. So we were paired up with two other lawyers whose names I hope to never remember. I’m sure they remember. They can’t forget that day, try as they might.

When you play with strangers, right away you look for visual clues about their skill level. Easy things, like the quality of their shoes and shirts, for example. Do their clubs have brand names or knock off names. For instance, is the Nike swoosh forward or backward. Golf also has certain trappings that some people buy to give them the “look.” Denny and I had no use for this silliness. We resembled two yahoos who flunked the dress code at the Caddy Shack. So the next indication is the tee shot. And that tells your partners whether the next four hours will be a high-five convention or a living hell.

The first hole tee box is the one with the largest audience. Spectators stand by and watch with great anticipation. Everyone was standing there when Denny took center stage. He walked up, did all the right things—tossed some blades of grass into the wind, nodded as if to say “got it,” and then took a couple practice swings. I said to myself, “This is great. Playing with my uncle.” And he started his backswing. He then unleashed a furious swing. It had the aerodynamic fury of a 747. Except I saw no ball. Anywhere. Until I looked at his golf tee. And there it sat. It had not moved. A total and complete whiff.

When someone whiffs in golf, it’s a top-10 horrible moment. When someone whiffs in golf on the first tee, it moves to number two. And when you whiff on the first tee with total strangers on your foursome, it’s number one. It’s on par with watching someone’s pants fall down during an airport security check, someone tripping down the wedding isle; a man’s hair piece flying off in a stiff breeze, someone’s dental bridge dropping to the plate. When Denny whiffed, life went in slow motion. You could hear crickets chirping on the back nine. Bald eagles circling over the Arctic were audible. The assembled audience pretended they never saw it. They quickly averted their glance to the nearby water tower or closed their eyes completely as if to meditate. I had to watch. He was my partner.

What immediately follows is that no one dares to say a thing. You wait for the whiff-master to acknowledge his folly. Denny paused and stared forward, expecting the ball to land in the fairway. Then he understood the enormity of it all. Golf etiquette says you hit another ball as fast as humanly possible. Which he did. For all intents and purposes, however, the day was done. Our partners knew the next four hours would turn to nine hours. So we obliged. Denny and I started creating divots that would swallow most golf carts. The beverage cart became our constant companion and by the end of the last hole we didn’t care one bit about the leader board.

So at this year’s KBA convention, when you are looking for that ball in the weeds on the back nine and your day is pretty bad, think of Uncle Denny. That should brighten your day.

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
17th Edition of the Annual Survey of Law Dedicated to the Memory of Justice Robert Gernon

The Annual Survey of Law Editorial Committee has dedicated this 17th edition to the memory of Justice Robert Gernon, former chair of the committee. The latest edition will be available from the publisher in mid-June and is the first to be issued without the involvement of Justice Gernon. This edition’s forward states:

“This year’s work was marked by the notable absence of our friend and colleague, Justice Robert Gernon. Bob became the face of the Annual Survey due to his long and devoted service as Chair of the committee over the past 16 years. It is with profound sadness but as a living tribute to that service that we, your Editorial Committee, dedicate this 2006 Annual Survey of Law to his memory. We trust that Bob would be pleased that his beloved annual project lives on.”

The Annual Survey of Law is the KBA’s best-selling publication, and the associated satellite institutes are the KBA's best-attended CLE events. The 2006 publication contains 30 chapters authored by renowned Kansas practitioners and academics, and there is a full chapter devoted to virtually every subject of law. Both case law and legislative developments over the past year are surveyed for each subject, making the Survey invaluable to practitioners — both generalists and those who practice in a particular area of law.

The Survey comes together with lightning speed each spring. Authors are invited to participate in early February, with initial drafts of chapters due in mid-April. Upon submission of each chapter, a member of the committee is assigned to review and edit the chapter, with a fast turnaround time, because all edited chapters must be submitted to LexisNexis for typesetting by the end of April. Final review and approval of the proof must be completed by mid-May, and the target for release of the publication is mid-June. In the interim, our KBA coordinators work with authors and presenters to tape segments for the annual institute.

The idea for an Annual Survey was hatched in the late ‘80s, and the project was initially championed by Robert W. Wise, of Bremyer and Wise, McPherson, during Wise’s presidency of the KBA. Its genesis may have been the Colorado Annual Survey of Law published by the Colorado Bar Association. Earliest memories of the Survey indicate that the Colorado publication was reviewed for feasibility in Kansas by Brad Bradley, then of the Martindell Swearer firm, Hutchinson; Bill Seiler of Bremyer & Wise, McPherson; and Bob Gernon.

After feasibility was established, Dick Mellinger, then chair of the CLE Committee, assisted in compiling a list of proposed subjects and authors for the initial publication in 1990.

Wise persuaded Gernon that he needed an appellate judge to spearhead the new project, and Gernon accepted the mission. Upon his appointment as the first chair of the committee, Gernon became the “driving force” of the project and remained as chair for the next 16 years, until his death in 2005. Both Wise and Seiler remain faithful and contributing members of the committee, together with Kathy Webb of McDonald, Tiker, Skauer, Quinn & Herrington, Wichita; Justice Carol Beier; and federal judges John Lungstrum, Monti Belot, and J. Thomas Marten.

The first CLE program to feature the Survey and its authors was Oct. 26, 1990. During the first two or three years, these were live programs with two 75-minute segments, each featuring six authors. After the first programs, Patricia Parker, then executive director of the Kansas Continuing Legal Education Commission, noted that “the program received rave reviews, high praise in every aspect of the presentation ... and that from very rough critics.”

In February 1995, Gernon reported that the KBA’s CLE Committee voted to combine the Survey institutes with the annual Legislative Update, using video and satellite locations. The annual satellite broadcasts continue to be very favorably received and will be broadcast across the state again this year.

Gernon remained the driving force of the Survey and associated CLE events, devoting hours to the effort each year. One of the editors remembers how Bob would send personal thank you notes to each of the authors, commending their fine work and expressing gratitude for their participation. Typical of Bob, he consistently deflected personal credit for his own efforts, although his contribution was enormous. He would kiddingly refer to taking care of “Bob Wise’s baby.” Another editor remembers that Volume 3, published in 1993, accidentally printed Bob’s name as “Chairman” on the spine of the book. Bob was horrified and wrote to all the editors apologizing for this “dreadful” [but deserved] attribution of credit, stating, “This will not happen again.” Of course, it never did.

From our work on this year’s Annual Survey, it seems that this has been a particularly robust year for developments. As of this writing, we project that the Survey may break all records for volume of materials. We hope you will continue to find the Survey a helpful tool for the practitioner and will continue to attend our associated CLE event, the annual “Kansas Legislative and Case Law Institute.” Thanks to all who played key roles in this effort this year, our authors and presenters, our editors, the KBA coordinators, and our publisher, LexisNexis. ■

Thanks to Bill Seiler, Annual Survey committee member, for his assistance in reconstructing some of the historical elements contained in this story.
Protecting Judicial Independence was Major Focus During Hayse’s Term

By René Eichem, KBA assistant executive director

According to Rich Hayse, “protecting judicial independence and coordinating elements of the KBA to work better together” were his major focuses and goals during his term as 2005-2006 KBA president. When asked if he accomplished those goals, Hayse modestly replied, “That’s for history to judge.”

In the 124 years that the Kansas Bar Association has been in existence, Hayse had the distinct honor of serving as the association’s 120th president. He said he used his year at the helm to take every opportunity with bar meetings, citizen groups, and the legislature to remind anyone who’d listen about the importance of our system of government and the crucial role of a fair and impartial judiciary in protecting everyone’s rights.

Among his many duties as president, Hayse met with Kansas Supreme Court justices as well as Kansas and Missouri judges; he gave the keynote address for the “We the People” Kansas high school state finals; and he testified at the 2006 legislative session, including opposition to legislative efforts to alter the current merit selection of appellate court judges.

He has also been active in the Kansans for Simple Justice and the Justice at Stake committees, nonpartisan coalitions formed to preserve the merit selection of judges.

He was instrumental in establishing a clearinghouse of resources to assist those whose lives were affected by Hurricane Katrina. KBA members donated money, clothing, and food and many opened their own homes and offered jobs to those in need. Hayse also worked for the continued support of the KBA’s “Project Call Up” program, which was originally initiated in 1990 during Operation Desert Storm and was reactivated during the aftermath of Sept. 11. Through this project, the KBA matches Kansas National Guard and military reservists with volunteer lawyers who will draft basic wills and/or durable powers of attorney at no charge.

“I enjoy working with other people to accomplish things that are beyond the capabilities of an individual,” noted Hayse. “KBA members are always ready and willing to devote themselves to worthwhile projects on behalf of the profession.”

Hayse was born in Kansas City, Mo., and raised in Wichita, where he graduated from East High School in 1960. He received his B.A. in speech (radio and television) from Kansas State University in 1964. After college, he said he felt that a career in broadcast journalism would be a dead end, so he entered law school without knowing whether he really wanted to practice law. After an eight-week program of international law study in Europe in the summer of 1968, he applied for the U.S. Foreign Service while still a law student. In 1969 he received his J.D. from Washburn University School of Law, where he was editor in chief of the Washburn Law Journal.

He became an assistant Kansas attorney general (1969-1970), and in 1971 he accepted a job with the U.S. Information Agency and moved to Washington, D.C., for 10 months of training. He and his wife, Linda, were then posted to Brussels, London, and Dakar, Senegal, where he worked as a Foreign Service information officer in jobs such as the press attaché in the U.S. Embassy in Dakar.


Hayse has been a KBA member since 1969. He has served on the Board of Governors since 1999 and the Executive Committee since 2001; the Legislative Committee as a representative of the Corporation, Banking and Business Section; the Journal Board of Editors as board liaison; the Corporation Code revision committee; the Raising the Bar Committee; and the Annual Meeting Task Force. He is also an original chapter author for the KBA Annual Survey of Law Handbook and has authored a chapter in every edition through the 2005 edition.

His involvement with civic organizations includes serving as past president of the Topeka Lions Club, Topeka Youth Project, Topeka Symphony Society, and Cornerstone of Topeka. He is a past commodore of the Shawnee Yacht Club and past chapter advisor to Phi Delta Theta fraternity at Washburn University. He is also a member of the American and Topeka bar associations.

Hayse has been married to Linda, a retired Topeka High School teacher, for nearly 42 years. They have two children, Adrienne and Toby, and two grandchildren, Sidney and Maya, who live in Washington state.
CHANGING POSITIONS

Joan K. Archer has become of counsel with Lathrop & Gage L.C., Kansas City, Mo.

Alex B. Bachelor has been named vice president of legal for Dairy Farmers of America Inc., Kansas City, Mo.

Brian R. Barjenbruch has joined Franke Schultz & Mullen P.C., Kansas City, Mo.

Richard A. Buck has joined the Reno County Public Defender’s office.

Wendell E. Cowan Jr. has joined Foulston Siefkin LLP, Overland Park, as special counsel.

Alex B. Bachelor has been named vice president of legal for Dairy Farmers of America Inc., Kansas City, Mo.

Brian R. Barjenbruch has joined Franke Schultz & Mullen P.C., Kansas City, Mo.

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Wendell E. Cowan Jr. has joined Foulston Siefkin LLP, Overland Park, as special counsel.

Joan K. Archer has become of counsel with Lathrop & Gage L.C., Kansas City, Mo.

Jon Colby Cox has joined J.E. Construction Co., Kansas City, Mo.

Jana D. Croft has joined Embarq Corp., Overland Park.

F. William Cullins has been appointed as a 14th Judicial District Judge by Gov. Kathleen Sebelius.

Patrick M. Gavin has become of counsel with Husch & Eppenberger LLC, Kansas City, Mo., in the firm’s General Business Litigation Practice Group.

Jeffrey W. Gettler has become an associate with Scovel, Emert, Heasty & Chubb, Independence.

John R. Granger has joined State Street, Kansas City, Mo.

Jonathan H. Gregor has joined Shook, Hardy & Bacon LLP, Kansas City, Mo., as of counsel.

Bach T. Hang has joined Joseph & Hollander P.A., Wichita. Sonya L. Strickland has joined the firm’s Topeka office.

Matthew A. Hoffman has joined Rabbitt, Fitzger & Snodgrass P.C., St. Louis.

Jonathan S. James has joined Riling, Burkhead & Nitcher Chtd., Lawrence.

Ryan W. Johnson has joined the U.S. Bankruptcy Court for the Northern District of West Virginia.

Todd M. Johnson has been elected a shareholder of Baty, Holm & Numrich P.C., Kansas City, Mo.

Jason H. Klein has joined Greenberg Traurig LLP, Orlando, Fla., as an associate.

Eric T. Mikkelson has become a partner of Sonnenschein Nath & Rosenthal LLP, Kansas City, Mo.

Andrew J. Nazar has joined Shughart Thomson & Kilroy P.C., Kansas City, Mo.

Jennifer L. Peters has joined H&R Block, Kansas City, Mo.

Matthew P. Reinsmoen has joined Oppenheimer Wolff & Donnelly LLP, Minneapolis.

Mark B. Rockwell has become a member of Knox, Johnson, Rockwell & Babbit Chtd., Lawrence.

William E. Scanlan has joined Sprint Nextel Corp., Overland Park, as part of the Law Department – Real Estate Group.

Laura B. Shaneyfelt has joined Monnat & Spurrier Chtd., Wichita.

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

Adam W. Smith has joined Polsinelli Shalton Wele Suelthaus P.C., Kansas City, Mo.

Michael D. Smith has joined Sanders, Conkright & Warren LLP, Overland Park.

Nicole B. Theophilus has joined ConAgra Foods Inc., Omaha, Neb., as vice president chief employment counsel.

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

Adam L. Weitzel has joined Rothgerber Johnson & Lyons LLP, Colorado Springs, Colo.

CHANGING PLACES

Steven M. Ellis has started his own firm located at 703 N. Webster, Suite 200, P.O. Box 394, Spring Hill, KS 66083.

Foulston Siefkin LLP has moved its Overland Park office to 9200 Indian Creek Parkway, Suite 450, Overland Park, KS 66210.

Perry L. Franklin has started his own firm located at 4003 Parkway Court, Lawrence, KS 66047.

Charles F. Moser has a new business address, 113 W. Greeley, P.O. Box 429, Tribune, KS 67879.

Phillip A. Miller has moved his business to 5401 Brookside Blvd., Suite 302, Kansas City, MO 64112.

David C. Kirk has a new business address, 1038 W. 103rd St., Kansas City, MO 64114.

Bradley G. Korell has started Korell & Frohlin LLP, 301 Congress Ave., Suite 120, Austin, TX 78701.

Shaffer Lombardo Shurin P.C. has moved its offices to 911 Main St., Suite 2000, Kansas City, MO 64106.

Ina Kay Zimmerman has moved her practice to 13200 S. Lakeshore Dr., Olathe, KS 66061.

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.

“Mary, I would like you to meet my law partner, Robert A. Wilson Jr., hereinafter referred to as ‘Bob.’”
**Obituaries**

**Mary E. May**
Mary E. May, 56, died March 25 in Rochester, Minn. Born in Sabetha on March 8, 1950, May was the daughter of Forest and Virginia Francis Myers. She graduated from Avila University, Kansas City, Mo., and the University of Missouri-Kansas City School of Law.

May was the U.S. Bankruptcy Trustee for Region 20, which covers Kansas, Oklahoma, and New Mexico. Prior to that position she was a partner with the Wichita firm of Fleeson, Gooing, Coulson & Kitch LLC.

She had been a member of the Kansas Bar Association since 1983, where she was a member of the Awards Committee, serving as its chair from 2001 to 2003. She was also a member of the KBA Bankruptcy and Insolvency Law Section and was a past member of the Corporation, Banking, and Business Law Section.

In addition to her membership with the KBA, May was a member of the American and Wichita bar associations and the American Bankruptcy Institute. She served as president and as a board member of many economic, legal, and philanthropic boards, such as the YWCA and the Kansas Humane Society, and provided her legal skills in structuring the financing and development of Wichita community projects.

Survivors include her husband of 23 years, Phil; two sons, Douglas and Gardner; a brother, Forest Myers; four grandchildren; and numerous extended family and friends.

**William L. “Bill” Mitchell**

Mitchell graduated from Hutchinson High School in 1942, attended Hutchinson Community College, and graduated from the University of Kansas and the University of Michigan School of Law. He joined the Kansas Bar Association in 1951 and became a lifetime member in 2001.

He practiced law in Hutchinson and served as a member of the Kansas House of Representatives from 1957 to 1962, where he was speaker of the house from 1960 to 1962. From 1963 to 1968, he chaired the Kansas Corporation Commission. He was also a U.S. Army Air Corps veteran of World War II.

Survivors include his wife, Norma Gaulding, Hutchinson; two daughters, Derenda Mitchell Valerius, Topeka, and Molly Mitchell, Olathe; and four grandchildren.

**James O. Yates**

After serving in the Army during World War II, Yates attended college and graduated from Washburn University School of Law in 1951. That same year he joined the Kansas Bar Association, where he became a lifetime member in 2001. In 1970 he was admitted to argue before the U.S. Supreme Court.

He is survived by four daughters, Hon. Muriel Yates Harris, Piper, Martha Jo Martin, Oak Grove, Mo., Marcia Yates Roberts, Linwood, and Marilyn Arnold, Kansas City, Kan.; 11 grandchildren; and five great-grandchildren. A daughter, Mary, preceded him in death.
A ttending meetings, voting on proposals, representing others, mediating extraordinarily absurd conflicts, making complex decisions, absorbing criticism — that is the life of the president of the Student Bar Association. Was it worth it? I’ll get to that in a little bit.

A little over a year ago I had to decide whether to run for president. As any good law student would do I sought the advice of past SBA members. I was startled when they recounted their days on the board. According to these soothsayers, it was a sure-fire way to lose friends and ruin what would otherwise be the best year of law school — the last one. They urged me to live the life of leisure and luxury as a graduating nonoffice holder. After impudently ignoring this sage advice I charged forward with my relentless campaign to change the atmosphere of Green Hall.

My platform seemed rock-solid. I envisioned an extensive alumni relations program, more community outreach, more student-faculty interaction, all anchored by well-attended football tailgates. Who does not like a tailgate? I’ll get to that in a little bit.

After winning the election handedly (I ran unopposed) I began my tenure by digging through the president’s file cabinet for guidance. I was looking for the president’s guiding document, the touchstone for all leaders and lawyers: a constitution or bylaws.

For the first time in my administration I was slapped by the heavy hand of reality. There were at least four versions of the SBA Constitution. None of which were remotely helpful. Two were red-lined and two appeared to be written on parchment by Uncle Jimmy Green himself. I could not believe that the same law students who sit in the library at 11 p.m. on a Saturday night, earplugs and all, could not have drafted a better quasi-legal document. Did my predecessors not take Judge Lungstrum’s love for contracts to heart? By the way, the constitution is a contract. (“The constitution, rules and bylaws, knowingly assented to, become in effect a civil contract ...”) Cunningham v. Independent Soap & Chemical Workers, 207 Kan. 812, 818 (1971).

After doing what any politician would do, convene a committee and finally place the proposed measure on the ballot, I had my trusty constitution. Now I could get to work on my alumni relations program. Outcome? Promptly torpedoed by various higher-ups. Community outreach? Apparently law students are too busy. Student-faculty interaction? Apparently professors are too busy. Tailgates? Although extremely well-attended, they were not beyond the wrath of several students who somewhat angrily commented that SBA “should be focusing on getting jobs for students” and taking a more “holistic approach” to governing.

Now that I am a lame-duck, was it worth it? Absolutely. There truly is something more to being a lawyer than knowing how to brief a case and make an outline. I learned the intangibles that separate a good law student from a successful lawyer. I learned that not every argument will be successful. I learned that I cannot please everyone. I also honed my speaking and writing skills and learned to better manage my time.

Most importantly, I learned that being SBA president, much like being a lawyer, is an honor and a privilege. I cannot thank the student body enough for electing me. For all the boards I have served on, I have treasured this the most. I represented the most intelligent and demanding students at the University of Kansas, and I did it with pride. I am ready to enter the legal profession with a skill set not readily found among graduating law students, and I owe it to those who elected me.

Finally, as I reflect on the past I am left wondering if the Kansas Bar Association’s politics and projects are more dignified and professional than those in Green Hall? Well, I guess I will have to form an exploratory committee and see for myself.

**About the Author**

Samuel G. MacRoberts is a third-year student at the University of Kansas School of Law. A native of Leawood, he received his undergraduate degree from the University of Kansas, where he was president of his fraternity and president of the Interfraternity Council. After graduating, he will be an assistant attorney general in Topeka.
Las, it is time to write my final column as president of the Young Lawyers Section. The feeling is bittersweet. Between the demands of a busy career and a young family, I have not always been thrilled to take the time to sit down and write these columns for every issue of the Journal (my wife and co-workers, not to mention the editor, will certainly back me up on this); however, once I have taken the time to sit down and put fingers to keyboard, I have truly enjoyed the process of contemplating, reflecting, theorizing, and expounding on the issues that face young lawyers in today’s profession. Sometimes it helps to stop, take a deep breath, and think about what we are doing, and why we are doing it.

When I started my term as president, I had a very difficult time writing my first column. Despite what you may think, there is no prescribed form or substance for these things. I am, for the most part, left to my own ramblings. (“Aha!” you say, “Now it all makes perfect sense.”) As I struggled to come up with a topic for that first column, someone, who was actually very well-meaning, told me not to worry about it, nobody reads these things anyway. I have to admit the thought gave me some comfort to assuage my fears that nobody would like reading what I wrote. It is better, I reasoned, to be ignored than criticized. Throughout the past year, however, I have been gratified as several people (read technically, more than one) have mentioned that they read my columns and have enjoyed what I had to say. I thank you (both) for that.

Those of you who have read my prior columns may have guessed that I am a relationship-guy. I get value out of the relationships I build with people. I have been fortunate, in my work with the KBA YLS, to work on building professional relationships with a lot of great people. I want to extend my sincere thanks to the members of the YLS Executive Committee and the other members of the section who have committed their time to our activities; Jeff Alderman, Tonya Bell, and other members of the KBA staff who have provided outstanding support to the YLS throughout the year; Susan McKaskle, managing editor of the Journal, who has been a persistent but understanding taskmaster every time this column has been (past) due; KBA President Rich Hayse and the rest of the Executive Committee of the Board of Governors, who have welcomed me to the “inner circle” of the KBA; the rest of the Board of Governors; and all others whom I have had the opportunity to meet throughout the year.

It is only natural at the end of one’s term of service to look back and consider what has been accomplished. In the past year, the YLS has conducted a very successful Mock Trial competition, continued publication of an outstanding section newsletter, and made plans for informative seminars and entertaining social events at the Annual Meeting. We have also welcomed 326 new lawyers into the KBA. Unfortunately, intervening circumstances have prevented us from accomplishing everything we set out to do at the beginning of the year, but I did not make any campaign promises, so you can’t hold me to it.

At the Annual Meeting this month, I will step down as president and pass the gavel (at least I would if we had one) to the Hon. Paul T. Davis. Paul and I started practicing at the same time in Lawrence several years ago; though our career paths have been markedly different, we have maintained a friendship and professional relationship in large part through our involvement with the KBA. I have no doubt Paul will perform admirably as president of the YLS, but I do wonder when he will find the time to write these columns between his law practice, his service in the Kansas House of Representatives, and his work with the American Bar Association. Good luck, Paul!

Though my term as YLS president is ending, service to the profession will remain a constant for me, as I hope it will for many of you. I look forward to seeing you at the Annual Meeting and working with you in the decades to come as we become the leaders of the Kansas bar.

Christopher J. Masoner

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.

Vaya con Dios, Mis Amigos … Hasta Mañana

By Christopher J. Masoner, KBA Young Lawyers Section president
Lost in the shuffle?

Set yourself apart from the others by advertising in the Kansas Legal Directory. Among all the legal directories on the market, the Blue Book stands out, truly the most user friendly hand held device on your bookshelf.

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KBA Welcomes 140 New Attorneys to the Kansas Bar

To honor the 140 newly admitted attorneys to the Kansas Bar, the Kansas Bar Association hosted a champagne reception April 28 at the Topeka Performing Arts Center. Their families and friends joined the new attorneys at the reception.

Kansas Supreme Court Justice Marla J. Luckert (KBA president, 2000-2001), welcomed the newest members of the legal community and explained some of the benefits of being members of the KBA.

Eric G. Kraft, immediate past president of the KBA Young Lawyers Section, also took time to speak to the new admittees and to congratulate them on their achievements. He encouraged their participation with not only the YLS, but also the KBA.

Gerald L. Goodell, chair of the Kansas Board of Law Examiners, called the roll; Carol G. Green, clerk of the Kansas Supreme Court, administered the Kansas oath; and Ralph L. DeLoach, clerk of the U.S. District Court for the District of Kansas, administered the federal oath. Chief Justice Kay McFarland, Kansas Supreme Court, presided with justices Luckert, Donald L. Allegrucci, Robert E. Davis, Lawton R. Nuss, Carol A. Beier, and Eric S. Rosen and with Judge Julie A. Robinson, U.S. District Court for the District of Kansas.

Chief Justice McFarland and Judge Robinson addressed the group by offering their congratulations and advice. Following the remarks the Court stood and congratulated each new attorney individually. Goodell was the first non-new admittee to be invited to shake the hands of the Court. This was in recognition of his 14 years of service on the Kansas Board of Law Examiners.

At the KBA-sponsored reception, the newly admitted attorneys had the opportunity to visit with members of the Court and representatives of the KBA, Washburn University School of Law, and the Kansas and Wichita women attorneys associations.

A KBA Royal Affair at the ‘K’

The home of the Kansas City Royals – Kauffman Stadium – became home of the Kansas Bar Association Grand Slam CLE on April 7.

“As a die-hard sports fan,” said Jared A. Saunders, an attorney from Des Moines, Iowa, “I knew I would attend the KBA Grand Slam CLE as soon as I read about it in an e-mail from the KBA.”

More than 100 attorneys attended a tour of Kauffman Stadium, had an opportunity to pick up a few CLE hours, and finally joined friends and family as they ate barbecue and took in a game.

More than 200 KBA members, family, and friends joined thousands of baseball fans as their Royals came from behind to beat the defending World Series champion Chicago White Sox 11-7.

CLE attendees learned that while Kansas now has reciprocity, the application process is lengthy and detailed. Presentations also included the Kansas Lawyers Assistance Program, liability malpractice, and thinking outside the box. Attendees snacked on peanuts, popcorn, and Cracker Jacks while their presentations overlooked the baseball field.

Grand Slam attendees all reached a general consensus: “Great idea of having it at the ‘K.’ Do it again!”
Bench-Bar Committee Chair Grew to Understand ‘Privilege’

By Hon. Benjamin L. Burgess

“P rivilege,” as defined in Black’s Law Dictionary, means “a particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantages of other citizens.” As chair of the Bench-Bar Committee for the past three years, I grew to understand “privilege.” I enjoyed a particular benefit from interacting with many of the best justices, judges, and lawyers in the state of Kansas. Also, I had an advantage and embraced the opportunity of seeing a new rule on reciprocity implemented, in addition to following several other initiatives as they percolated through the committee.

In a previous Journal article, I observed, “It’s often said that there are two things you should not watch being made — sausage and law.” Now, I simply observe that there are exceptions to every rule.

The Bench-Bar Committee began its work to promote reciprocity admission in April 2004, when we created a subcommittee to look at the issue, develop language to permit reciprocity admission, and develop a strategy for pushing the issue through to implementation. Also, the subcommittee crafted a rule for pro hac vice admissions. To note some history on admission of out-of-state lawyers, the previous rule on admission on motion was repealed July 15, 1987. According to an article written by a former Johnson County Bar Association president, the admission on motion rule was repealed under pressure from attorneys in the Johnson County area “feeling pressure from our Missouri brethren.” By October 2004, the Bench-Bar subcommittee developed a proposed rule, which both the full committee and Board of Governors approved. In proposing the rule to the Kansas Board of Bar Examiners, we emphasized that at one time lawyers tended to maintain their law offices in a single jurisdiction over the course of their legal careers, while today geographic mobility is common. In a final step before adopting the proposed rule, the Kansas Supreme Court sought public comment. Now it is all history. The new Rule 703 became effective July 1, 2005.

The rule on pro hac vice admissions of attorneys from other states moved forward on a parallel track, although, instead of seeking public comment, Carol Green, clerk of the Appellate Courts, sought input from the judges of the district courts and the chief clerks. This modified rule, Rule 116, also went into effect July 1, 2005.

In 2004, in response to the Kansas Judicial Council, the committee considered the issue of adopting statewide Shawnee County’s case management system. After thorough review we recommended that the Kansas Judicial Branch put that case management system on its Web site, the KBA notify its members of its availability, and each local bar association adopt it if and as they saw fit.

While not a committee initiative, one of the hottest topics in today’s climate is judicial evaluations. Being on the committee allowed an inside perspective on the issue. Even before the controversial Supreme Court decisions on school finance and the death penalty, a movement was under way to evaluate judges at all levels. Court of Appeals Judge Stephen Hill gave a presentation on judicial evaluations to the Bench-Bar Committee at its meeting April 23, 2004. He provided a historical perspective, sharing his experience as an appointee to the Kansas Justice Initiative and explaining how the subject of judicial evaluations grew out of hearings that the Initiative held. Those hearings brought forth the belief that, while the electorate may know district judges, the electorate knows virtually nothing about appellate judges and justices. At the Bench-Bar Committee’s next meeting on Dec. 2, 2004, Jim Clark, KBA legislative counsel, reported that the Kansas Judicial Council appointed a committee to study a judicial evaluation system for Kansas, to be chaired by Hill. In the April 2006 Journal, KBA President Richard Hayse devoted his president’s column to the current status of that body of work.

Most recently, on a separate tract, members of the Kansas Legislature now find it necessary to evaluate and inquire about the actions of an individual Supreme Court justice after he recused himself. Regarding the upcoming judges’ election in Sedgwick County, recent information reveals that the Wichita Eagle advocates evaluating judges. While it is one thing for judges and possibly lawyers to evaluate judges, it may be impolitic for those unfamiliar with this profession to do so. Truly, the inherent job of judges is not to react to current trends or the whims of politics but to work diligently to help secure justice for all. We can only hope that the Legislature, and the populace who inform it, someday will recognize that the judiciary — whether elected or appointed — is a separate and independent branch of government, not an arm of the Legislature or a reflection of populace belief. It must operate free of influence from both in order to help protect and preserve our democratic system.

I am grateful for the privilege of serving the committee directly as its chairman for the past three years, and, in turn, serving indirectly the legal profession in Kansas and the legal system as a whole. There could be little more distinct benefit or advantage. ■
Remedying Fraud on the Court

By Professor Sheila Reynolds, Washburn University School of Law

In order to react immediately and properly when the issue arises — as it inevitably will — lawyers who litigate in any forum must have a clear understanding of their duty to remedy either false evidence they have unwittingly offered or client fraud on the tribunal. For example, a prosecutor spends two hours preparing a key prosecution witness to testify at trial. On cross-examination, when the witness is asked if he has talked to anyone about his testimony, the witness testifies he has not. The lawyer listening to the witness he has called knows that the witness has just lied to the court. Or a client in a divorce action submits to the court, through his lawyer, a domestic relations affidavit that omits rental income, then later advises his lawyer that he receives $1,500 a month from a tenant. What must the lawyer do?

When such situations arise, the obligation of lawyers to advocate for their clients conflicts with their obligations as officers of the court not to offer or assist in presenting false evidence. The Kansas Rules of Professional Conduct resolve such conflicts in favor of the duty of candor to the court, requiring lawyers to take measures to remedy the fact that the judge or jury has received false evidence. In effect, the duty of candor to the court (Rule 3.3) creates another exception to the duty of protecting client confidences (Rule 1.6) because it provides that the candor to the court duties “apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.” See 3.3(b).

A lawyer confronted with client fraud may think that the solution is to withdraw, but as the American Bar Association (ABA) noted in Ethics Opinion 87-353, once false evidence is before the trier of fact, withdrawal of counsel will seldom “remedy” the situation. Instead, a lawyer should first request a recess and privately attempt to convince the witness to correct the testimony. When the client has submitted false documents in the litigation, the lawyer may be able to assist in withdrawal of the documents. But if the client will not cooperate in remediying the falsity, the lawyer has an ethical obligation to take remedial measures, not to just withdraw.

The Restatement of Law Governing Lawyers, §120(h), suggests remedial measures could include moving to have the evidence stricken or withdrawn or recalling a witness to correct the testimony. If no other remedial measure corrects the situation, the lawyer must disclose the false evidence to the judge. The judge then assumes the responsibility of handling the situation — perhaps instructing the jury to disregard the testimony, allowing the matter to conclude without comment, or declaring a mistrial.

A lawyer who understands there is an ultimate duty to inform the judge can use that duty effectively to convince the client or witness to correct the situation. Or, if the false evidence is only anticipated and not yet given, a lawyer often can prevent the event by counseling the witness about what the lawyer must do if the evidence is presented.

The duty of candor applies in all matters, civil and criminal. There is no constitutional right for a criminal defendant to testify falsely, and a criminal defendant is not denied the effective assistance of counsel when the lawyer threatens to tell the court if the client chooses to testify falsely.1 Similarly, prosecutors who stand silent when they know their witness has testified falsely may see their criminal conviction reversed.2

The duty of candor continues to the conclusion of the proceeding, which is not defined, but probably is through an appeal or the period of time to appeal.3 Once the proceeding has concluded, a lawyer has no duty to reveal client fraud and instead must refuse to reveal client information unless another exception to the duty of confidentiality applies.

ABA Ethics Opinion 93-376 opines that the duty of candor applies in the discovery stages of a proceeding, when a client lies in response to discovery requests. When the lawyer becomes aware of such a situation, often the lawyer can convince the client to amend or supplement responses to correct the record, without necessarily having to divulge the client’s wrongdoing.

There are few disciplinary cases involving a failure to comply with the duty to remedy false evidence, likely because violations are difficult to detect; however, the likelihood of escaping detection makes the duty of candor to the court no less meaningful. Lawyers who act ethically as officers of the court, by refusing to protect clients and witnesses who seek to misuse the judicial process, are helping to preserve a fair and just system of law and serving the legal profession well, which highly values and expects honesty of counsel in such situations. ■

FOOTNOTES
2. “It has long been established that the prosecution’s deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice,” Banks v. Dretke, 540 U.S. 668, 694 (2004) (case remanded for habeas corpus relief because the prosecutor withheld exculpatory information and did not correct the false testimony of a key witness).
3. The 2002 revisions to the ABA Model Rules use this definition of conclusion of the proceeding, in comment 13.

About the Author

Professor Sheila Reynolds, Washburn University School of Law, teaches professional responsibility, legal malpractice seminar, and law clinic. She serves on the KBA Legal Ethics Advisory Committee and Ethics Commission, and the Judicial Council’s forms committee. She co-authored two chapters of the KBA’s Legal Ethics Handbook (1996 and Supp. 2001) and the chapter on “Ethical Considerations in Representing an Impaired Client” for the KBA’s Long-Term Care Handbook (1999 and Supp. 2001).
I. Introduction

Corporate America has declared diversity to be a priority in today's global marketplace. In Grutter v. Bollinger, the U.S. Supreme Court stated, "American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." 1

The diversification of America can be seen in the development of majority-minority states. The U.S. Census Bureau released a report indicating that minorities make up a majority of the population in four states — California (56 percent), Texas (50.2 percent), Hawaii (77 percent), and New Mexico (57 percent). 2 The minority population in the District of Columbia also exceeds 70 percent. 3 Other states, including New York, Georgia, Arizona, Maryland, and Mississippi, have minority populations exceeding 40 percent. 4 Therefore, in order to attract qualified minority employees, companies are promoting diversity as a competitive and recruiting advantage. 5

The benefits of a diverse workplace are infinite and should never be discouraged, but employers must take care to avoid engaging in what is known as "reverse discrimination" or discrimination against members of majority or favored groups. The number of reverse discrimination claims has risen in recent years. 6 Title VII prohibits all discrimination on the basis of race, color, religion, sex, or national origin, including reverse discrimination. 7 Favoritism on the basis of a protected trait will result in potential liability under Title VII for reverse discrimination, unless the preference is accorded pursuant to a valid affirmative action plan.

Section II of this article will discuss the legal support for reverse discrimination claims under Title VII. Section III will address the legality of voluntary affirmative action plans. Section IV considers whether disparate impact reverse discrimination claims are cognizable under Title VII. Section V discusses the proof scheme applicable to Title VII reverse discrimination claims. Finally, section VI provides a glimpse of some employer practices that amount to unlawful reverse discrimination.

FOOTNOTES
3. Id.
4. Id. For purposes of comparison, the minority population in Kansas is less than 19 percent. Id.
II. Reverse Discrimination is Prohibited by Title VII

Reverse discrimination is generally defined as discrimination against an individual on the basis of that individual’s membership in a majority group, i.e., whites and males. Most reverse discrimination claims are brought under Title VII. Title VII was primarily enacted to protect minorities from discrimination on the basis of race, but it is clear that Congress intended to eliminate all discrimination, including reverse discrimination, when it enacted Title VII.

A. Legislative history and statutory support for reverse discrimination claims under Title VII

At the time the Civil Rights Act of 1964 was enacted, the country was still struggling mightily with race discrimination. While there was strong support for Title VII, it likely would not have been enacted if it had not been clear that Title VII prohibits all discrimination, including reverse discrimination. To assuage the concerns of some of the conservative members of Congress, other members emphasized Title VII’s broad prohibitions against all discrimination. Manny Cellar, a Democratic member of the House of Representatives, declared:

The legislation before you seeks only to honor the constitutional guarantees of equality under the law for all. It bestows no preference on any one group; what it does is to place into balance the scales of justice so that the living force of our Constitution shall apply to all people, not only to those who by accident of birth were born with white skins ... Both parties joined hands.

Joseph Clark and Clifford Case, members of the Senate, introduced a memorandum into the Congressional Record, which stated, “it must be emphasized that discrimination is prohibited as to any individual.” Sen. Hubert Humphrey proclaimed:

What the bill does ... is simply make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States.

Clearly, Congress intended to prohibit reverse discrimination when it enacted Title VII.

Congress’ intent is further evidenced by the language used in Title VII, which reads in pertinent part:

It shall be an unlawful employment practice for an employer ... (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin. (Emphasis added.)

Title VII was primarily enacted to protect minorities from discrimination on the basis of race, but it is clear that Congress intended to eliminate all discrimination, including reverse discrimination, when it enacted Title VII.

The statute repeatedly indicates that “any individual” is protected. If Congress had only meant to protect individuals who were members of a historically disadvantaged group, it could have used a phrase far narrower than “any individual” or it could have defined “individual” only to include minorities.

Nowhere in the statute does it say that individuals are only protected if they are a minority.

Courts have repeatedly held that Title VII prohibits reverse discrimination.

B. Reverse discrimination as defined by the U.S. Supreme Court

In Griggs v. Duke Power Co., the U.S. Supreme Court first suggested in dicta that reverse discrimination is actionable under Title VII. The Court was not considering a reverse discrimination claim, but it nevertheless stated that Title VII:

[D]oes not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preferences for any group, minority or majority, is precisely and only what Congress has proscribed.

8. This article focuses only on reverse discrimination claims brought under Title VII. However, reverse discrimination is prohibited by other statutes and the U.S. Constitution, including the Equal Protection Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution, 42 U.S.C. § 1981(a); the Equal Pay Act, 29 U.S.C. § 206(d)(1); and the Family Medical Leave Act, 29 U.S.C. § 2615(a)(2).


12. McDonald, 427 U.S. at 280.


14. Id.

15. See generally id.

16. E.g., McDonald, 427 U.S. at 280; McGarry v. Board of County Comm’rs, 175 F.3d 1193, 1199 (10th Cir. 1999); Taken v. Oklahoma Corp. Comm’n, 125 F.3d 1366, 1368 (10th Cir. 1997).

17. 401 U.S. 424, 430-31, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971). See also Connecticut v. Teal, 457 U.S. 440, 453-54, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982) ("The principle focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."). Griggs did not involve a reverse discrimination claim. A class of black employees argued that an employer violated Title VII by requiring a high school education or passing of a general standardized intelligence test as a condition of employment, where such requirements had a disproportionate affect on minority candidates and were not reasonably related to successful job performance. The Court struck down the job requirements.


Seven years later, in *McDonald v. Santa Fe Trail Transportation Co.*, the Court finally had an opportunity to decide its first Title VII reverse discrimination case. In that case, three employees were accused of stealing customer property. Two of the employees were white and the other was black. The white employees were discharged, while the black employee was retained. The white employees sued the employer under Title VII and § 1981, but the trial court dismissed the employees’ complaint.

The Court reversed the trial court’s decision and held for the first time that “Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and [the black employee] white.” (Emphasis added.)

The Court’s holding in *McDonald* was plain and unmistakable: race could not be considered in employment decisions, even when the employer’s intentions were commendable.

The only exception to *McDonald* is that race may be considered as a “plus factor” when used in the context of a valid affirmative action plan. The *McDonald* case did not involve an affirmative action plan. The Court first indicated that affirmative action was lawful in *Bakke v. Regents of the University of California*. In *Bakke*, a deeply divided Court struck down a medical school admissions program that reserved 16 slots for minority applicants, but the Court held that race could be considered as one factor among many in the admissions process. While *Bakke* was not a Title VII case and did not involve affirmative action by an employer, it is nevertheless instructive on how the Court has historically evaluated affirmative action plans.

The Court considered a voluntary affirmative action program by an employer for the first time in *United Steelworkers of

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America v. Weber. In that case, an employer implemented an in-plant craft training program in which 50 percent of the openings in the program were reserved for minorities until the percentage of minority workers was equivalent to the percentage of minorities in the local labor market. A group of white employees sued the employer for reverse discrimination contending that the program violated Title VII, but the Court rejected their claims. The Court noted that Title VII was primarily enacted “to open employment opportunities for [blacks] in occupations ... traditionally closed to them.” It was troubled by the prospect of striking down an employer’s voluntary effort to further the primary purpose behind Title VII:

It would be ironic indeed if a law triggered by a [n]ation’s concern over centuries of racial injustice and intended to improve the lot of those who have ‘been excluded from the American dream for so long’ constituted the first legislative prohibition of all voluntary, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

The Court, therefore, held that Title VII “does not condemn all private voluntary race-conscious affirmative action plans.”

The Court reaffirmed Weber when it decided Johnson v. Transportation Agency, Santa Clara County, California. The Court extended Weber to protect affirmative action in favor of women. In Johnson, a woman was promoted to a road dispatcher position pursuant to the employer’s affirmative action plan, even though a male scored two points higher on an interview. The Court found that although the female’s sex was the determining factor in her promotion, the employer’s affirmative action plan was valid. Therefore, the male employee’s reverse discrimination claim was rejected.

The Court has consistently held that Title VII prohibits reverse discrimination. The Court has also given employers its blessing to utilize voluntary affirmative action plans, so long as those plans meet certain standards discussed below.

III. Valid Voluntary Affirmative Action Plans

Microsoft Corp.’s minority domestic workforce increased from 16.8 percent in 1997 to 25.6 percent in 2003 in large part due to a voluntary affirmative action program. The number of minority executives at IBM increased 170 percent — from 117 to 316 minority executives — between 1996 and 2001 because of its affirmative action program. These figures demonstrate the profound impact that a voluntary affirmative action plan can have on diversity.

The legality of voluntary affirmative action plans was reaffirmed with the passage of the Civil Rights Act of 1991, which provided that nothing in the act “shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are in accordance with the law.” This begs the question, when are preferences in accordance with the law?

Based on Weber and Johnson, an employer may utilize racial preferences only if done pursuant to a valid affirmative action plan. A valid affirmative action plan is one that is intended to remedy a “manifest imbalance” in “traditionally segregated job categories” and does not “unduly trammel” the interests of the majority. It is not necessary for the employer to have engaged in prior discrimination. If the plan is intended to remedy the effects of societal discrimination, that is enough to validate the plan.

A. “Manifest imbalance” in “traditionally segregated job categories”

Affirmative action plans are only valid if there is a “manifest imbalance” in a “traditionally segregated” job category. To determine if there is a “manifest imbalance,” it is appropriate to compare the percentage or number of minorities or women in the employer’s job category and compare those figures to the percentage of minorities or women with the same skills in the relevant labor pool. Generally, it is not appropriate to compare the employer’s figures with the entire labor pool unless the particular job at issue involves skills that are easily acquired or widely possessed in the job market.
B. What actions will “unduly trammel the interests of the majority?”

An affirmative action plan also cannot “unduly trammel the interests of the majority.”65 For instance, a plan must be limited in duration.55 It cannot be intended to maintain racial balance.54 It cannot require discharging or displacing majority employees.55 Nor can the plan be an absolute bar to the advancement of majority employees or applicants.56 It is only valid if its purpose is to merely eliminate a manifest racial imbalance.53

Rigid quotas also are not tolerated because they absolutely or substantially bar the advancement of majority employees or applicants. In Bakke, the Supreme Court struck down a medical school admissions program that reserved 16 out of 100 spots for minority students.58 In Gratz v. Bollinger, decided just a few years ago, the Court struck down the University of Michigan’s undergraduate admissions program because, while not a strict quota, it stifled the rights of majority applicants.59 The university used a point system in which applicants were awarded a specific number of points based on a variety of factors.60 In order to gain admission to the university, an applicant had to accumulate 100 points.61 One of the factors used to evaluate applicants was membership in a minority group.62 Minority applicants were automatically awarded 20 points — one-fifth of the number of points needed for admission.63 The Court struck down the admissions policy because it unduly trammelled the interests of the majority.64

Conversely, in Grutter v. Bollinger, decided on the same day as Gratz, the Court upheld the University of Michigan’s law school admissions policy, which considered an applicant’s race as one factor among many.65 The law school sought to increase the diversity of its student body, so it used race as a “plus factor” in evaluating the various applicants.66 However, no bonus points were automatically awarded on that basis.67 The law school’s evaluation of each candidate was extremely broad rather than just race.68 Justice Sandra Day O’Connor, writing for the Court, distinguished the law school’s admissions policy from the undergraduate policy that the Court struck down in Gratz:

Here, the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either de jure or de facto, of automatic acceptance or rejection based on any single ‘soft’ variable. Unlike the program at issue in Gratz v. Bollinger, ante, the Law School awards no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity ... Like the Harvard plan, the Law School’s admissions policy ‘is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.’ (Citation omitted.)69

There are two lessons to be learned from Gratz and Grutter, (1) an affirmative action plan should require an individualized evaluation of each applicant or employee; and (2) the plan should be flexible and should not utilize rigid quotas, formulas, or award a predetermined number of points to an individual on the basis of a protected trait.

IV. Disparate Impact Reverse Discrimination Claims are Cognizable Under Title VII

When a traditional discrimination claim is filed, it is usually asserted on the basis of one of two theories: disparate treatment and disparate impact. Disparate treatment is easy to understand — it is intentional discrimination.70 Disparate impact, on the other hand, is where the employer does not intend to discriminate against a particular class of individuals, but the employer’s facially neutral policy has a disproportionate effect on a particular group of people.71 For example, requiring employees to live within a particular area, like an urban neighborhood, could have a disproportionate effect on whites.72 Requiring employees to possess a high school diploma or a college degree disproportionately affects racial minorities.73 Reductions in force generally affect older workers more than others.74 None of these policies is facially discriminatory, but, in some circumstances, such policies may amount to unlawful discrimination.

In Livingston v. Roadway Express Inc., an employer’s height restriction was challenged on the basis that it had a disparate impact on males.75 The employer, a trucking company,
restricted the height of its drivers to 6 feet 4 inches. The plaintiff claimed that the policy disproportionately affected men because “nine-tenths of 1 percent of adult men are 6 feet 4 inches or taller, while only three-tenths of 1 percent of women are 5 feet 11 inches or taller.” The plaintiff’s only evidence of alleged discrimination consisted of the above statistics. He offered no other evidence or background circumstances suggesting reverse discrimination.

The Tenth Circuit impliedly recognized the validity of disparate impact reverse discrimination claims, but it held that the plaintiff must introduce “background circumstances supporting the inference that a facially neutral policy with a disparate impact is in fact a vehicle for unlawful discrimination.” Because the plaintiff failed to provide any background circumstances, the court concluded, “under these circumstances, the only reasonable inference to be drawn from our common experience is that a maximum height restriction does not limit a male job applicant because of his sex but because of his height, a form of discrimination not prohibited by Title VII.”

Based on Livingston, a disparate impact reverse discrimination claim must be supported by background circumstances supporting an inference of discrimination.

V. Reverse Discrimination Comes in Different Shapes and Forms

Reverse discrimination claims have been recognized on the basis of race, national origin, and sex. Reverse discrimination claims are actionable even if the discrimination is committed by an individual who is a member of the same majority group as the plaintiff. In Castaneda v. Partida, the Supreme Court stated, “[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.” Reverse discrimination claims have been upheld based on a variety of employer practices, ranging from hiring, firing, promotion, transfer, grooming requirements, and health benefits.

A. Hiring

In McGarry v. Board of County Commissioners, the plaintiff, a white male, applied for a county job, but his application was rejected in favor of Hispanic and African-American candidates. When the plaintiff inquired why he was not hired, the county’s personnel director, who was not the decision-maker, conducted an investigation and informed the plaintiff that the successful applicants, although less qualified than the plaintiff, were “minority hirings” or “affirmative action hirings.” The county also issued a policy statement indicating that minority job candidates should be given every opportunity for employment or advancement, even if such person is not the best-qualified candidate. The trial court, nevertheless, granted summary judgment in favor of the county, only to be overturned by the Tenth Circuit. The Tenth Circuit held that the personnel director’s statements and the county’s policy statements were enough to create a genuine issue of material fact for purposes of avoiding summary judgment.

Courts have also held that advertisements seeking only female applicants violate Title VII. In Hailes v. United Air Lines, the Fifth Circuit held that a male plaintiff, who never applied for a job, stated a claim for reverse sex discrimination where the airline placed an advertisement for flight attendants under the “Help wanted — female” column of a newspaper without placing a similar advertisement in the “Help wanted — male” column. Likewise, an airline policy of refusing to hire male applicants for flight attendant and ticket agent positions amounts to unlawful reverse sex discrimination.

B. Promotion

In Reynolds v. School District No. 1, Denver, Colo., a white employee established a prima facie case of reverse discrimination after she was denied a promotion. She was the only white employee in her department and the decision-makers were Hispanic.

Likewise, summary judgment was denied in Eastridge v. Rhode Island College, where a white professor’s application for a tenure-track position was rejected after the position was offered to an African-American applicant, but then immediately abolished after that applicant declined the offer.

C. Discharge

Discharging employees for failing to comply with workplace rules can also result in reverse discrimination claims if the rules are not applied consistently. For instance, in McDonald, the Supreme Court upheld a reverse discrimination claim where three employees — two white and one black — were caught stealing a customer’s property and only the white employees were discharged.
In *Lisek v. Norfolk & W. Ry.*, a case arising out of the Northern District of Illinois, a white former employee stated a claim for reverse discrimination after he was discharged for sleeping on the job, while other minority employees similarly caught sleeping on the job were not fired. 101 The court distinguished the employer’s treatment of the female co-workers from its treatment of the male co-workers because the manager had recently attended a management seminar addressing sexual harassment; the female co-workers had received no such training. 104 The court also held that an employer can hold management personnel to a higher standard than nonmanagement personnel. 105

**D. Grooming requirements**

There is some conflict among courts about whether an employer may apply grooming standards to male employees differently from those applied to female employees. 106 For example, in *Rafford v. Randle Eastern Ambulance Service Inc.*, an employer engaged in unlawful reverse discrimination when it discharged a male employee for not cutting his hair, while female employees with equally long hair kept their jobs. 107 Similarly, an employee’s challenge to an employer’s grooming policy survived summary judgment in *Roberts v. General Mills Inc.* 108 The employer had a policy requiring male employees to wear hats and female employees to wear hairnets. 109 The plaintiff, who had long hair, requested permission to wear a hairnet instead of a hat, but the employer declined his request. 110 He, therefore, filed suit against his employer for reverse discrimination. 111

**E. Pregnancy benefits**

In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, the Supreme Court held that it is a violation of Title VII to provide comprehensive health insurance benefits to spouses of female employees, but to limit such coverage to spouses of male employees. At issue was coverage for pregnancy-related hospitalizations. 112 The plan provided comprehensive hospitalization coverage for all employee spouses, except in the case of pregnancy-related conditions. 113 The plan only covered up to $500 for uncomplicated pregnancies for spouses of male employees. 114 The Court held that this provision violated Title VII because married male employees received “a benefit package for their dependents that [was] less inclusive than the dependency coverage provided to married female employees.” 115 In other words, “the husbands of female employees receive a specified level of hospitalization coverage for all conditions; the wives of male employees receive such coverage except for pregnancy-related conditions.” 116

**F. Transfers**

In *Stover v. Martinez*, a white female attorney brought suit against her employer, the U.S. Department of Housing and Urban Development (HUD), alleging that she was the victim of unlawful reverse discrimination when she was reassigned from the position of assistant general counsel to managing attorney and subsequently passed over for promotion in favor of other minority employees. 117 HUD offered four legitimate nondiscriminatory reasons for the plaintiff’s reassignment: (1) her management style was inappropriate for the Denver office, (2) management had received complaints about the plaintiff’s management and supervision, (3) other HUD program managers had complained about the Denver office, and (4) the decision-maker believed the plaintiff lacked good communication skills. 118 The plaintiff challenged the employer’s articulated reasons by pointing to evidence that four other attorneys were reassigned and a disproportionate share of minority employees were promoted to management. 119 The Tenth Circuit, however, held that such evidence was not enough to establish pretext and affirmed the district court’s decision to grant summary judgment in favor of the employer. 120
G. Residency requirements

In urban settings, residency requirements may have a disproportionate effect on white employees. According to recent studies, African-Americans account for 82.3 percent of the population in Detroit, 67.3 percent in New Orleans, 64.8 percent in Baltimore, and 60.5 percent in Washington, D.C. Hispanics account for 44.6 percent of the population in Los Angeles and 65.8 percent in Miami.

While there are no published reverse discrimination cases addressing the legality of residency requirements, some courts have struck down residency requirements, which have a disproportionate effect on African-Americans in traditional discrimination cases. It is reasonable to conclude, therefore, that residency requirements that exclude members of a favored group are likewise unlawful under Title VII.

VI. Proving Reverse Discrimination Requires Background Circumstances

Establishing a claim of reverse discrimination is more difficult than establishing one of traditional Title VII discrimination. Reverse discrimination claims in the Tenth Circuit are evaluated under a heightened standard. Reverse discrimination claims can be established through direct or indirect evidence. Direct evidence of reverse discrimination is rare. For instance, in Mitchell v. City of Wichita, a white police lieutenant was discharged after an internal investigation for an alleged domestic violence incident. The plaintiff introduced evidence, which he claimed was direct evidence of reverse discrimination, concerning statements made by two investigators. One officer, who was not involved in the termination proceedings, told the plaintiff that the investigation was sensitive because “it was divided along racial lines.” The other officer, who recommended to his superior that the plaintiff be discharged, indicated that the plaintiff would have been treated differently if he had been an African-American. The Tenth Circuit held that neither statement amounted to direct evidence of reverse discrimination. The Tenth Circuit has defined direct evidence as “[e]vidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption.” Statements that evidence “an existing policy, which itself constitutes discrimination” are direct evidence of discrimination. Statements of personal opinion do not constitute direct evidence of discrimination, even if such statements evoke a personal bias or prejudice.

Cases involving indirect evidence of reverse discrimination are generally evaluated using the McDonnell Douglas burden-shifting approach. According to McDonnell Douglas, the plaintiff must initially establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the employer may then have the burden to present evidence that the plaintiff’s race or sex was not a motivating factor in the decision. If the employer presents such evidence, the burden shifts back to the plaintiff to prove that the employer’s proffered reason is a pretext for discrimination. If the plaintiff establishes a prima facie case of discrimination, the employer may then have the burden to present evidence that the plaintiff’s race or sex was not a motivating factor in the decision. If the employer presents such evidence, the burden shifts back to the plaintiff to prove that the employer’s proffered reason is a pretext for discrimination. If the plaintiff establishes a prima facie case of discrimination, the employer may then have the burden to present evidence that the plaintiff’s race or sex was not a motivating factor in the decision. If the employer presents such evidence, the burden shifts back to the plaintiff to prove that the employer’s proffered reason is a pretext for discrimination. If the plaintiff establishes a prima facie case of discrimination, the employer may then have the burden to present evidence that the plaintiff’s race or sex was not a motivating factor in the decision. If the employer presents such evidence, the burden shifts back to the plaintiff to prove that the employer’s proffered reason is a pretext for discrimination.

(continued on next page)
against the employee or applicant.\textsuperscript{138} The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the conduct that has been challenged.\textsuperscript{139} Once the employer satisfies its relatively easy burden, the plaintiff must come forward with evidence establishing that the employer’s articulated reason is a pretext for unlawful discrimination.\textsuperscript{140}

Throughout the entire analysis, the burden of persuasion always remains with the plaintiff.\textsuperscript{141}

In order to establish a prima facie case of discrimination in traditional discrimination cases using the \textit{McDonnell Douglas} model, the plaintiff must show that: (1) he or she belongs to a minority group, (2) he or she applied for and was qualified for a job for which the employer was seeking applicants, (3) he or she was rejected despite his or her qualifications, and (4) the position remained open after the rejection and the employer continued to seek applicants from individuals with qualifications similar to those of the plaintiff’s.\textsuperscript{142} The \textit{McDonnell Douglas} prima facie test, however, is not compatible with the fact pattern in reverse discrimination cases. The reverse discrimination plaintiff could never satisfy the first element of the test because he or she is not a member of a historically disfavored group. Because of this, the prima facie test for reverse discrimination claims has been modified.

Instead of showing that he or she is a member of a minority group, the reverse discrimination plaintiff must demonstrate “background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority.”\textsuperscript{143} This is a heightened standard.\textsuperscript{144}

This may be accomplished in several ways. For example, in \textit{Reynolds}, the Tenth Circuit found sufficient background circumstances where the plaintiff was the only white employee in her department and all of the decision-makers were Hispanic.\textsuperscript{145} Other courts have held that demonstrating qualifications superior to those of the successful minority candidate is enough to establish ample background circumstances.\textsuperscript{146} The existence of an affirmative action plan, by itself, generally is not enough to establish the necessary “background circumstances.”\textsuperscript{147} On the other hand, an invalid affirmative action program may be sufficient.\textsuperscript{148}

Many reverse discrimination plaintiffs do not possess the necessary background circumstances, so, in \textit{Notari v. Denver Water Department}, the Tenth Circuit created an alternative standard for those plaintiffs.\textsuperscript{149} In lieu of demonstrating background circumstances, a plaintiff can establish a prima facie case by presenting direct or indirect evidence, which supports a reasonable inference that, but for the plaintiff’s majority status, the employment decision would have been decided in the plaintiff’s favor.\textsuperscript{150} But, to succeed using the \textit{Notari} standard, the plaintiff must do more than claim that he or she was qualified and that a member of a historically disfavored group was the beneficiary.\textsuperscript{151} The plaintiff must produce specific evidence, which creates a reasonable inference that the plaintiff was the victim of reverse discrimination.\textsuperscript{152}

Reverse discrimination plaintiffs can satisfy their burden of proof in one of three ways: (1) direct evidence of reverse discrimination; (2) indirect evidence of reverse discrimination plaintiff relied solely on the fact that the promotion committee was comprised of two white and one African-American members).\textsuperscript{146}

To consider voluntary affirmative action programs as evidence of reverse discrimination would significantly discourage the lawful implementation of such plans. See, e.g., \textit{Ustrak v. Fairman}, 781 F.2d 573 (7th Cir. 1986) (Judge Posner wrote, “the existence of an affirmative action program cannot, standing alone, establish that an employer has discriminated against whites; otherwise affirmative action would be illegal per se, which it is not. The consent decree in this case ... establishes a preference for blacks the lawfulness of which has not been questioned. A preference for blacks means, by the iron laws of arithmetic, a handicap for whites. Hence the existence of that handicap cannot by itself carry the day for a white who is complaining of racial discrimination; and that is all [the plaintiff] has going for him in this case.”); \textit{Christensen v. Equitable Life Assurance Soc’y of the United States}, 767 F.2d 340 (7th Cir. 1985) (“National policy permits the use of voluntary affirmative action programs to remedy the legacy of discrimination. For the courts to discourage the use of such programs by treating them as evidence in themselves of the very discrimination they are designed to eradicate would be improper.”).

\textsuperscript{146} See, e.g., \textit{Harding v. Gray}, 9 F.3d 150, 153 (D.C. Cir. 1993) (finding sufficient background circumstances where the plaintiffs’ qualifications were superior to those of the individuals by whom they were passed over, the employer failed to follow normal hiring procedures, and evidence was presented to suggest that the performance rating system engineers to benefit minorities); \textit{Geerlings v. Henderson}, 2000 WL 33309723, *6 (S.D. Ind. 2000) (citing \textit{Mills v. Health Care Serv. Corp.}, 171 F.3d 450, 455 (7th Cir. 1999)).

\textsuperscript{147} To consider voluntary affirmative action programs as evidence of reverse discrimination would significantly discourage the lawful implementation of such plans. See, e.g., \textit{Ustrak v. Fairman}, 781 F.2d 573 (7th Cir. 1986) (Judge Posner wrote, “the existence of an affirmative action program cannot, standing alone, establish that an employer has discriminated against whites; otherwise affirmative action would be illegal per se, which it is not. The consent decree in this case ... establishes a preference for blacks the lawfulness of which has not been questioned. A preference for blacks means, by the iron laws of arithmetic, a handicap for whites. Hence the existence of that handicap cannot by itself carry the day for a white who is complaining of racial discrimination; and that is all [the plaintiff] has going for him in this case.”); \textit{Christensen v. Equitable Life Assurance Soc’y of the United States}, 767 F.2d 340 (7th Cir. 1985) (“National policy permits the use of voluntary affirmative action programs to remedy the legacy of discrimination. For the courts to discourage the use of such programs by treating them as evidence in themselves of the very discrimination they are designed to eradicate would be improper.”).
using the modified McDonnell Douglas approach, requiring the production of sufficient background circumstances; or (3) indirect or direct evidence of reverse discrimination, which supports a reasonable inference that, but for the plaintiff’s majority status, the challenged employment decision would have been decided in the plaintiff’s favor.153

VII. Conclusion

Reverse discrimination claims will likely increase as a result of the diversification of the workforce.154 Although Title VII was enacted primarily to protect minorities, absent a valid affirmative action plan, Title VII prohibits all preferences on the basis of race, color, religion, sex, and national origin.155 No matter how admirable an employer’s intentions, those intentions will in no way relieve that employer from liability for unlawful reverse discrimination because Title VII is color blind when it comes to reverse discrimination.

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154. Olson, supra, note 6.

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About the Author

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Supreme Court

Attorney Discipline

IN RE HENRY O. BOATEN
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 95,689 – APRIL 26, 2006

FACTS: In a letter to the clerk of the appellate courts, respondent, a practitioner from Topeka, voluntarily surrendered his license to practice law pursuant to Supreme Court Rule 217. At that time, oral arguments were scheduled before the Supreme Court on the disciplinary panel's final hearing report finding violations of KRPCs 1.15 (safekeeping property), 1.3 (diligence), 1.4 (communication), 1.5 (fees), 3.4 (disobeying an order to pay money), 4.1 (truthfulness in statements), and 8.4 (c) (misconduct) by converting client settlement proceeds to his own use and for repeatedly testifying falsely before the hearing panel.

HELD: The Court reviewed the files of the Disciplinary Administrator's Office and found that respondent should be disbarred.

IN RE DOUGLAS D. EASTEPP
ORIGINAL PROCEEDING IN DISCIPLINE
TWO-YEAR SUSPENSION
NO. 95,688 – APRIL 28, 2006

FACTS: Respondent, a practitioner in Colorado, was suspended for three months by the Colorado Supreme Court in 1994. In a case of reciprocal discipline, the Kansas Supreme Court suspended him for one year in 1995. Since that time, respondent has failed to file his Kansas registration forms, pay the annual fee, report his continuing legal education hours or pay the CLE fee, and his license remains suspended in Kansas.

In 2004, respondent was again disciplined by the Colorado court for violating Rules 4.4 (respect for rights of third persons) and 8.4(d) (misconduct prejudicial to the administration of justice). He was placed on probation for two years. In a second case of reciprocal discipline, respondent stipulated to the basis for the Colorado discipline. The Kansas hearing panel recommended definite suspension for six months with an evidentiary hearing required prior to reinstatement. The Disciplinary Administrator's Office recommended indefinite suspension, which respondent opposed.

HELD: The Kansas Supreme Court found definite suspension for two years to be the appropriate sanction.

IN RE CHRISTOPHER E. LUCAS
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 95,452 – APRIL 28, 2006

FACTS: In 2005, the respondent, a practitioner from Johnson County admitted in 1993, was convicted of two felony crimes and sentenced to eight months in prison. Based on the convictions, the disciplinary hearing panel found violations of KRPC 8.4(b) (conduct involving a criminal act) and 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The panel found two mitigating factors and seven aggravating factors, including a prior suspension of two years, and recommended disbarment.

HELD: Noting that respondent did not file exceptions to the final hearing report and failed to appear for oral argument, the Supreme Court ordered disbarment.

Civil

ARBITRATION
MBNA BANK V. CREDIT
BUTLER DISTRICT COURT – AFFIRMED
NO. 94,380 – APRIL 28, 2006

FACTS: MBNA submitted dispute regarding Credit's credit card debt to arbitration. Credit objected to the proceeding, contending there was no agreement to arbitrate. Arbitration award entered in favor of MBNA. When MBNA filed motion in district court to confirm the award, Credit submitted pro se motion to vacate the award, asserting MBNA had not provided copy of the alleged agreement and had not attached copy of any agreement to its motion to confirm. District court vacated the arbitration award finding there was no existing agreement between parties to arbitrate, thus, the award entered was null and void. MBNA appealed.

ISSUES: (1) Arbitration agreement and (2) award

HELD: Under Federal Arbitration Act and Kansas Uniform Arbitration Act, Credit's objection to arbitrator meant responsibility fell to MBNA to litigate issue of agreement's existence. Neither MBNA nor arbitrator was free to go forward with arbitration as though Credit had not challenged existence of the agreement. Also, record undercuts any assertion that Credit was properly served with copy of the award, and MBNA failed to attach copy of arbitration agreement to its motion to confirm. Credit filed timely motion to vacate and raised argument that no arbitration agreement existed, and MBNA made no legally sufficient response. District court did not err in vacating the award. Similar facts and conclusions in cases in Kansas and other states noted.
EMINENT DOMAIN – CONTRACTS
CITY OF ROELAND PARK V. JASAN TRUST
JOHNSON DISTRICT COURT – AFFIRMED
NO. 94,897 – APRIL 28, 2006

FACTS: City condemned shopping center for proposed redevelopment. District court apportioned condemnation award between fee owner of parcel of land (Jasan Trust) and leasehold interest (BCB). It then apportioned BCB’s award between BCB and a subtenant (Payless), awarding Payless $502,991 in damages for lost profits as provided in lease agreement. BCB appealed, arguing lost profits are not recoverable in Kansas condemnation action and district court lacked jurisdiction to award lost profits. Appeal transferred to Supreme Court.

ISSUES: (1) Payment for lost profits out of condemnation proceeds and (2) jurisdiction

HELD: As general rule under Kansas law, a tenant is entitled to compensation if leasehold interest is damaged by exercise of eminent domain. However, parties are free to contract around eminent domain rules. Here, condemnation provision in lease agreement is clear and should be enforced as agreed upon, and Payless proved through expert testimony that it had suffered lost profits. District court correctly apportioned BCB’s award to cover that loss.

If various parties in interest cannot agree as to division of appraisers’ award in condemnation proceeding, the court allocates the award pursuant to K.S.A. 26-517. District court had jurisdiction to apportion the award in accord with lease agreement.

STATUTE: K.S.A. 26-501 et seq., -504, -513, -517

HEALTH CARE STABILIZATION FUND AND INCREASED COVERAGE
DICKERSON ET AL. V. SCHROEDER ET AL.
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 94,620 – APRIL 28, 2006

FACTS: Dr. Schroeder provided professional health care services to Bertha Walker in 1998. In 2002, Walker’s heirs, Dickerson, filed a lawsuit alleging that Schroeder’s services to Walker were negligent. A jury awarded Dickerson $750,000. At the time of services to Walker, Schroeder had medical liability insurance of $200,000 per claim and $600,000 annual aggregate limit. Schroeder also had excess liability insurance through the Health Care Stabilization Fund (fund) of $100,000 per claim and $300,000 annual aggregate limit. Effective 2000, Schroeder had increased his fund insurance to $800,000 per claim and $2.4 million annual aggregate limit. Schroeder’s private insurance company went bankrupt and Dickerson sought garnishment of the full $750,000 from the fund. The fund paid $100,000, and then the district court granted the fund’s motion to quash or dismiss the garnishment action.

ISSUE: Is Dickerson entitled to the increased fund coverage effective in 2000?

HELD: Court affirmed. Court held that any change in the amount of the Health Care Stabilization Fund coverage applies to acts or omissions that occur after the date of the change. If a health care provider seeks to increase his or her election for fund coverage, the increased coverage is not effective until the fund approves the increase. The date of approval establishes a retroactive date for the increased amount of coverage. Thus, the new amount of fund coverage does not apply retroactively to acts or omissions that occurred prior to the date that the increase in the health care provider’s election is approved.

STATUTES: K.S.A. 20-3018(c); and K.S.A. 2005 Supp. 40-3401 et seq., -3402, -3403

INDIANS – INFANTS
IN RE ADOPTION OF B.G.J.
JOHNSON DISTRICT COURT – AFFIRMED AND COURT OF APPEALS – AFFIRMED
NO. 91,997 – APRIL 28, 2006


ISSUES: (1) Standard of review and (2) good cause determination

HELD: Standard of review of district court’s determination that good cause exists to deviate from ICWA’s adoptive placement preferences is substantial abuse of discretion. Substantial discretion is abused when district court fails to properly apply ICWA factors to findings of fact or if the factual findings are clearly erroneous.

District court’s analysis is in accord with federal statutes and guidelines. Under facts, no abuse of discretion in finding good cause existed to deviate from ICWA’s placement preferences. Tribe’s invitation to reject existing Indian family doctrine is declined because no matter at issue in this case would be affected.

STATUTES: 25 U.S.C. §§ 1902, 1903(4)(b), and 1915(a) and (c) (2000) and K.S.A. 59-2312(f)

SEXUALLY VIOLENT PREDATORS, COUNTY ZONING, AND SPECIAL-USE PERMITS
BOARD OF COUNTY COMMISSIONERS OF LEAVENWORTH COUNTY V. WHITSON
LEAVENWORTH DISTRICT COURT – AFFIRMED
NO. 95,193 – APRIL 28, 2006

FACTS: Leroy Hendricks was in sexually violent treatment and moved into a house owned by the Whitsons’ company. The Whitsons had contracted with Social and Rehabilitation Services to provide housing for similar sexually violent predator treatment. When Hendricks moved into the residence, the Whitsons had neither obtained an SRS license nor a special use permit. The operation of a group home in Leavenworth County required a special use permit. The Board of County Commissioners of Leavenworth County (county) filed and obtained a temporary restraining order based on the Whitsons’ failure to obtain an SRS license. After the Whitsons obtained a license, they moved to vacate the restraining order. The county adopted a resolution adding an adult care facility, detention facility, or post release facility to the list of uses requiring a special use permit. The County filed for a permanent injunction based on the Whitsons’ failure to obtain a permit. The district court granted the permanent injunction because the Whitsons failed to obtain a permit.

ISSUES: Did the county fail to provide evidence that county residents would suffer irreparable harm if injunctive relief was denied? Did the district court err in concluding that K.S.A. 12- 736(e) did not apply? Is the county’s resolution requiring a special use permit unconstitutional?

HELD: Court affirmed. The county presented evidence that Hendricks was a sexually violent predator. There was uncontested evidence that he was likely to re-offend if at large. Despite his reduced risk of re-offending because of his poor health and the structure and safeguards of the planned facility, the district judge implicitly determined that the county had made a sufficient showing of probability of irreparable injury when he granted the injunction it sought. Court held the district court did not abuse its discretion in granting the in-
juncture. Court held that K.S.A. 12-736(e) does not apply to group homes for disabled transitioning sexually violent predators. Court stated that the Legislature could not have been more clear about its desire to incapacitate sexually violent predators when it enacted the civil commitment process. Court did not address the constitutionality of the County's resolution finding the district court had not relied on the resolution in granting the County's injunction.

STATUTES: K.S.A. 12-736(b)(1), (3), (c)(1), (2), (e) and K.S.A. 59-29a01 et seq.

CONCURRENCE: Justice Rosen concurred with the majority’s conclusion that pre-existing Leavenworth County zoning regulations apply and affirmed the district court's decision enforcing those regulations.

**TAXATION AND EXPANSION AND INVESTMENT CREDIT IN RE TAX APPEAL OF PROFESSIONAL ENGINEERING CONSULTANTS**

**KANSAS BOARD OF TAX APPEALS – REVERSED NO. 94,021 – APRIL 28, 2006**

FACTS: Professional Engineering Consultants (PEC) is a Wichita-based corporation that provides professional engineering services, including consultation services. PEC made significant capital expenditures beginning in 1997 when it purchased another engineering firm and hired new employees. In its tax returns for 1997, 1998, and 1999, PEC claimed certain income tax credits under the Job Expansion and Investment Credit Act of 1976. The Kansas Department of Revenue (KDR) disallowed some of the credits and issued additional taxes, penalties, and interest. The Board of Tax Appeals (BOTA) held that PEC qualified for the tax credit only for 1997.

ISSUE: Whether BOTA erred in ruling that PEC qualified for the tax credit when PEC did not claim the credit on its income tax return and KDR neither allowed nor disallowed a claim for the credit in its Corporate Income Tax Audit Report or its Written Final Determination.

HELD: Court reversed. Court held that BOTA does not have jurisdiction to grant a corporate income tax credit against the tax owed by a taxpayer if the KDR has not allowed or disallowed the credit in any ruling, interpretation, finding, order, decision, or final determination.

STATUTES: K.S.A. 20-3018(c); K.S.A. 74-2437(a), -2438; K.S.A. 75-5153; K.S.A. 77-529(a)(1); and K.S.A. 79-3230, -3226, -32,160a, -32,153 et seq.

**TAXATION, MACHINERY AND EQUIPMENT EXEMPTION IN RE TAX APPEAL OF WESTERN RESOURCES**

**KANSAS BOARD OF TAX APPEALS – REVERSED NO. 92,379 – APRIL 28, 2006**

FACTS: Western Resources, an electric utility business, sought a refund of sales and compensating use tax paid on the machinery and equipment it claimed was exempt. The Kansas Department of Revenue (KDR) denied the requested refund on machinery and equipment, which was not located within the immediate boundaries of Western's generation plant, on the grounds that the machinery and equipment, which was used to distribute electricity from the generation plant to the customer, was not located at the plant as required by statute. BOTA disagreed and held that all of the subject equipment was necessary to produce and process the electrical energy and, thus, it was exempt from taxation. BOTA granted Western a refund of more than $2.5 million and that the refund should be paid in equal installments over a 10-year period without interest.

ISSUE: Does Western's equipment qualify for a tax exemption as machinery and equipment under K.S.A. 79-3606(kk)?

HELD: Court reversed. Court held that K.S.A. 79-3606(kk) must be interpreted strictly because it is a tax exemption statute, and under such an interpretation, if the manufacturing process takes place at a location other than the plant or facility, the sale of machinery and equipment, which perform that process, is not exempt from sales tax. In this case, the transformers, substations, lines, and poles, which are located outside the boundaries of the electricity generation plant itself, do not fall within the common meaning of the term “plant or facility.” Based on its reversal, the Court did not address any remaining claims because Western was not entitled to a refund.

STATUTES: K.S.A. 20-3018(c); K.S.A. 77-601 et seq., -621; K.S.A. 79-3606(kk); and K.S.A. 2005 Supp. 79-3609(e)

**WATER RIGHTS AND ABANDONMENT**

**HAWLEY ET AL. V. KANSAS DEPARTMENT OF AGRICULTURE**

**REPUBLIC DISTRICT COURT – REVERSED NO. 93,690 – APRIL 28, 2006**

FACTS: In 1953, E.E. Conzelman obtained a permit from the Division of Water Resources, Kansas Department of Agriculture (DWR), to appropriate water for beneficial use from the Republican River through use of a pump and sprinkling system. Upon his death, Conzelman's son, Max, took over operation of the farmland subject to the water right. After Max's death in 2000, the water right passed to his daughter, Karen Hawley. In 2000, DWR asserted that according to water use reports, the water right had only been exercised once in more than 40 years. In 2003, DWR initiated proceedings for abandonment and termination of Hawley's water right. A DWR hearing officer found no due and sufficient cause for the nonuse for 11 successive years (1959-1969) and for 31 successive years (1971-2001). The DWR hearing officer proposed an order of termination of water right. Hawley timely petitioned the secretary of agriculture for review based on lack of notice, but review was denied finding the DWR is not required to send notice to holders of water rights for which five or more successive years of nonuse had occurred prior to July 1, 1999. The district court entered judgment in favor of Hawley finding that compliance with the notice provisions of the termination statute was a condition precedent to an abandonment and termination proceeding, that the DWR had failed to provide Hawley with the required notice, and that the DWR's termination of Hawley's water right should be set aside.

ISSUE: Whether DWR erroneously interpreted K.S.A. 2005 Supp. 82a-718 when it concluded that one of the notice provisions of the statute, subsection (b), was not a condition precedent to termination of water right pursuant to subsection (a).

HELD: Court reversed. Court stated that the DWR's interpretation of the statute was correct, and the decision declaring the Hawley's water right to be "abandoned and terminated" is affirmed. The district court's order reversing the decision of the hearing officer is reversed. Court held that under the facts of the case, the DWR was correct in not providing notice under K.S.A. 2005 Supp. 82a718(b) to holders of water rights who, without due and sufficient cause, had not beneficially used the water for 31 successive years.

STATUTES: K.S.A. 3-316; K.S.A. 2005 Supp. 8-1021; K.S.A. 20-3018; K.S.A. 21-3401; K.S.A. 2005 Supp. 21-3436(a), (b); K.S.A. 55-1,120(a)(3), (b)(2); K.S.A. 58-3935(a)(15); K.S.A. 60-236; K.S.A. 61-3101(b); K.S.A. 2005 Supp. 66-1,129(a); K.S.A. 72-6433, -8801; K.S.A. 77-621(a)(1), (c)(4); K.S.A. 82a-701 et seq., -702, -703a, -706a, -707(b), (c), -718; and K.S.A. 2005 Supp. 82a718(b), -1901(a), (b)
FACTS: Scott was killed in accident while being driven to work site. Co-worker driver (Hughes) was under influence of alcohol or drugs at the time. Scott’s common-law widow (Brungardt-Scott) received workers’ compensation settlement and then filed wrongful death and survival action against Hughes. Hughes moved for summary judgment, arguing workers’ compensation exclusive remedy and fellow servant doctrines barred civil suit for damages. Brungardt-Scott moved for summary judgment, arguing Hughes’ intoxication made him ineligible for workers’ compensation benefits and, thus, ineligible for immunity under exclusive remedy and fellow servant doctrines. District court denied Hughes’ motion and granted partial summary judgment to Brungardt-Scott. Hughes filed interlocutory appeal.

ISSUES: (1) Fellow servant immunity and (2) partial summary judgment based on co-employee’s intoxication

HELD: Aspects of language in Blank v. Chatula, 234 Kan. 975 (1984), are found to be misleading. Whether entitlement to receive nor actual receipt of workers’ compensation benefits by a co-employee tort-feasor is required for fellow servant immunity to attach and bar a civil suit. What matters is whether co-employee was acting within scope and course of employment when causing injury to another. Denial of summary judgment is reversed and case remanded for further proceedings. If there is no evidence to controvert Hughes’ claim that he was acting within scope and course of employment at time of accident, then he is entitled to fellow servant immunity, and a wrongful death and survival suit is barred.

Whether a person is operating a vehicle under influence of alcohol or drugs is question of fact and cannot be determined by judge as matter of law unless record contains evidence to support only one finding. Here, record contains only allegations, and the question of Hughes’ alcohol or drug use not yet resolved in his workers’ compensation proceeding. Summary judgment on this issue in favor of Brungardt-Scott is reversed.

STATUTES: K.S.A. 2005 Supp. 21-3405, 44-501 et seq., -501(a), (b), (d)(1), (d)(2), and (g), -503, -504(a) and (b), -508(f), 65-4160, -4162(a)(3): K.S.A. 44-504 (Weeks); and K.S.A. 44-504 (Corrick)

Criminal

STATE V. BUNYARD
SEDGWICK DISTRICT COURT – REVISED AND COURT OF APPEALS – REVISED
NO. 88,546 – APRIL 28, 2006

FACTS: Bunyard charged with rape of E.N. and two other women. Jury convicted him on rape charge involving E.N. and acquitted on other charges. Court of Appeals affirmed in divided opinion, 31 Kan. App. 2d 853 (2003). Petition for review granted on three issues: (1) whether trial court erred in not granting motion to sever the rape charges for separate trials; (2) whether prosecutorial misconduct during closing argument denied Bunyard a fair trial; and (3) as issue of first impression, whether rape occurred when initial penetration was consensual but consent was withdrawn and intercourse continued for period of time.

ISSUES: (1) Joinder of charges, (2) prosecutorial misconduct, and (3) withdrawal of consent after consensual penetration

HELD: No abuse of discretion in denying motion to sever rape counts into separate jury trials. Severance in this case not justified by joinder statute or well-established case law. “Same or similar character” language in K.S.A. 22-3202(1) does not limit joinder only to crimes that are clones of each other. No merit to concerns voiced in Court of Appeals’ dissent.

Prosecutor repeatedly misstated Kansas law by equating “overcome by force or fear” element of rape with act of sexual intercourse/penetration. Under facts, this misconduct prejudiced the jury and denied Bunyard a fair trial. Reversed and remanded for new trial.

Under Kansas law, a person may be convicted of rape if consent is withdrawn after the initial penetration but intercourse is continued by use of force or fear. Trial court had a duty to instruct jury that post-penetration rape can occur, but only if consent is withdrawn and communicated to the defendant, the defendant does not respond within a reasonable time, and sexual intercourse continues where victim is overcome by force or fear. A reasonable time depends upon circumstances of each case and is judged by an objective reasonable person standard to be applied by trier of fact on case-by-case basis.

DISSENTING AND CONCURRING (McFarland, C.J.): Dissents from majority’s finding that prosecutor’s statements denied Bunyard a fair trial. Prosecutor’s misstatements of law do not satisfy second step of analysis in State v. Tosh, 278 Kan. 83 (2004). Would hold that misconduct was not “gross and flagrant,” was not a product of ill will, and would have had little weight in jurors’ minds. Misstatements did not prejudice Bunyard and were harmless error having little likelihood of changing the result.

DISSENTING AND CONCURRING (Luckert, J.): Joins Chief Justice McFarland’s dissent. Concurs in majority’s holding that rape can occur post-penetration, but dissents from majority’s conclusion that a defendant “is entitled to a reasonable time in which to act after consent is withdrawn.” Would hold that a defendant has committed rape if after consent is withdrawn, act of intercourse continues as a result of force or fear. Court should not judicially add a defense allowing a reasonable time in which to commit rape.


STATE V. ELLIOTT
JOHNSON DISTRICT COURT – AFFIRMED AND COURT OF APPEALS – AFFIRMED
NO. 92,853 – APRIL 28, 2006

FACTS: Elliott convicted in district court with driving on suspended license and DUI with two or more prior DUI convictions. Criminal history for sentencing included four prior DUI convictions in municipal court, each listed as misdemeanors. Prior to sentencing, Elliott challenged these four convictions. District court struck two from Elliott’s criminal history score and convicted Elliott of felony DUI as fourth time offender. In unpublished opinion, Court of Appeals affirmed. State’s petition for review was granted.

ISSUE: Municipal DUI convictions in criminal history

HELD: District court correctly excluded, for sentencing purposes, two of Elliott’s prior municipal court DUI convictions on the ground that municipal court lacked subject matter jurisdiction. Municipalities do not have jurisdiction and may not prosecute third and subsequent violations of city ordinances for DUI because such violations are felonies under K.S.A. 8-1567.

STATUTES: K.S.A. 2005 Supp. 8-1567 sections (a), (d)-(g), (m)(2) and (o)(1), 22-2902(3); K.S.A. 8-262, -1567, -1567(g), 12-4104, 21-4502(1)(b), 22-2601; and K.S.A. 1996 Supp. 8-1567

STATE V. NASH
JOHNSON DISTRICT COURT – AFFIRMED
NO. 93,575 – APRIL 28, 2006

FACTS: In 1994, Nash, Aikins, and Kelly drove to a liquor store with the intent to commit a robbery. Kelly went inside the store with a shotgun. He took money from the register and shot and killed the clerk. The three then drove away. Nash was convicted of felony mur-

ISSUES: (1) Assessed fees and (2) due process

HELD: Court of Appeals’ panels have split on this issue. A sentencing court assessing fees to reimburse BIDS under K.S.A. 2005 Supp. 22-4513 must consider on the record at the time of assessment the defendant's financial resources and the nature of the burden that payment of the fees will impose.

On facts of case, Robinson received all process he was due on this issue.

CONCURRING (Luckert, J.): Majority's conclusion that sentencing court must consider a defendant's financial resources at time of assessing fees pursuant to K.S.A. 2005 Supp. 22-4513 is contrary to plain and unambiguous language in 22-4513(a). Would hold that sentencing court is required to take a defendant's financial resources into account at time of determining amount and method of payment of that sum under 22-4513(b). Majority has blurred legislative distinction between taxation of the fees and an order to pay the fees.

STATUTES: K.S.A. 2005 Supp. 22-4504(b) and (c), -4507, -4510, -4513(a)-(c), -4603, -4610(d)(3), 77-201 and K.S.A. 21-4607, -4607(3), 22-3504, 75-6211(a)

STATE V. SANBORN

COWLEY DISTRICT COURT – AFFIRMED AND COURT OF APPEALS – AFFIRMED
NO. 92,272 – APRIL 28, 2006

FACTS: Based on evidence found in search of her house, Sanborn convicted of possession of drug sale paraphernalia and possession of drug use paraphernalia. She appealed, arguing trial court erred in failing to give unanimity instruction to jury.

ISSUE: Unanimity jury instruction

HELD: Schoonover, decided this same date, controls. Triple-beam scales, postage scales, and bags are multiple items of evidence to establish one act of possessing drug paraphernalia with intent to sell drugs. Pen casings and aluminum foil boats were multiple items of evidence used to prove crime of possessing drug paraphernalia with intent to use drugs. As in Schoonover, Sanborn charged with possessing all drug paraphernalia in her house. Possession of multiple items of drug paraphernalia does not constitute multiple acts requiring a unanimity instruction.

STATUTE: K.S.A. 22-3421, -3423(1)(d)

STATE V. SCHOONOVER

MCPHERSON DISTRICT COURT – AFFIRMED AND COURT OF APPEALS – AFFIRMED
NO. 90,360 – APRIL 28, 2006

FACTS: Schoonover convicted on seven counts arising from manufacture and possession of methamphetamine. Court of Appeals affirmed in unpublished opinion. Schoonover's petition for review granted on issues relating to multiplicity, lesser included offenses, double jeopardy, multiple acts, and search and seizure. Also as issue of first impression, whether a defendant can be guilty of possession of a controlled substance without the appropriate drug tax stamp if he did not have actual possession for sufficient period of time to obtain and affix stamps.

ISSUES: (1) Double jeopardy/multiplicity, (2) lesser-included offenses, (3) multiple acts/unanimity, (5) drug tax stamps/opportunity to affix/drug tax stamp instruction, and (6) search warrant and search

HELD: Extensive review of double jeopardy clauses in state and federal constitutions and of developing cases. Test to determine whether charges under different statutes are multiplicitous is wheth-
er each offense requires proof of an element not necessary to prove the other offenses. If so, the charges stemming from a single act are not multiplicitous. This same-elements test will determine whether Kansas Double Jeopardy Clause is violated when a defendant is charged with violations of multiple statutes arising from same course of conduct. Single act of violence/merger analysis will no longer be applied to analyze double jeopardy or multiplicity issues. Language to that effect in previous cases is disapproved. Applying same-elements test to Schoonover’s convictions, no multiplicitous offenses or double jeopardy violations are found.

Possession of drug paraphernalia with intent to manufacture and possession of methamphetamine are not lesser-included offenses of manufacture of methamphetamine.

State alleged that defendant possessed all the drug paraphernalia found in his vehicle thus no need for state to specify which particular piece of paraphernalia it was relying upon and no need for trial court to give unanimity instruction.


Omissions in affidavit were not material, and warrantless search or search incident to an arrest would have been justified under facts. Substantial competent evidence supports trial court’s finding that magistrate was neutral and detached. Search of defendant’s duffle bag in car did not exceed scope of the warrant.

STATUTES: K.S.A. 2005 Supp. 21-3107, -3107(b), -3107(2), -3107(2)(b), -3436; K.S.A. 2001 Supp. 21-3107(2)(b); K.S.A. 2000 Supp. 21-3107(2)(b); and K.S.A. 21-3107, -3107(2)(b), -3436, 65-4101(e), -4107(d)(3), -4152(a)(3) and (4), -4159m -4160, -7006(a), 79-5201(b), -5202, -5204(c) and (d)

STATE V. STEWART
RENO DISTRICT COURT – AFFIRMED
NO. 93,180 – APRIL 28, 2006

FACTS: Prison inmate appealed conviction of one count of riot, claiming there was no evidence that five or more persons had an express or implied agreement to breach the peace. Appeal transferred to Supreme Court.

ISSUE: Sufficiency of evidence of riot

HELD: Offenses of riot and incitement to riot are compared. Riot statute does not require proof of an actual agreement. State only had to prove the defendant, acting without authority or law and in a group of five or more persons, used force or violence that resulted in breach of public peace. Videotape of prison incident and testimony of officers provided sufficient evidence for the conviction.

STATUTE: K.S.A. 20-3018(c), 21-4104, -4104(a), -4105

STATE V. SWISHER
MCPHERSON DISTRICT COURT – REVERSED AND COURT OF APPEALS – REVERSED
NO. 89,957 – APRIL 28, 2006

FACTS: Swisher filed 60-1507 motion seeking resentencing pursuant to State v. Frazier, 30 Kan. App. 2d 398 (2002), which was pending during Swisher’s direct appeal. District court denied relief, but Court of Appeals vacated Swisher’s sentence for possession of ephedrine and remanded case for Frazier resentencing. State’s petition for review was granted.

ISSUE: Post-conviction relief under Frazier

HELD: Under rationale of Laymon v. State, 280 Kan. 430 (2005), sentencing benefit conferred by Frazier regarding two criminal offenses with identical elements but different sentences is available via 60-1507 motion to criminal defendant whose direct appeal of sentence was still pending when Frazier decided if defendant demonstrates that direct appeal counsel was ineffective in failing to raise issue. Under facts of case, an evidentiary hearing must be held in district court to determine whether direct appeal counsel was ineffective in failing to raise an argument regarding identical or overlapping offenses under Frazier.

STATUTES: K.S.A. 2005 Supp. 65-7006(b); K.S.A. 2001 Supp. 65-4160, -7006(a); and K.S.A. 22- 3504, 60-1507

STATE V. UNRUH
MCPherson District Court – Affirmed and Court of Appeals – Affirmed in Part and Reversed in Part
NO. 90,498 – APRIL 28, 2006

FACTS: Unruh convicted on drug charges arising from inventory search of van. While direct appeal was pending, Court of Appeals granted motion for remand for resentencing in accord with State v. McAdam, 277 Kan. 136 (2004). Trial court modified sentence for manufacture of methamphetamine and possession of ephedrine, refused to impose sentence on possession of drug paraphernalia because it was multiplicitous with possession of ephedrine conviction, and reimposed same sentence on all other convictions. In unpublished opinion, Court of Appeals ruled the trial court exceeded the appellate mandate when it vacated the conviction for possession of drug paraphernalia. Unruh’s petition for review was granted. Unruh claims Court of Appeals lacked jurisdiction to review resentencing from which state filed no appeal or cross appeal. Also claims state failed to elect which act it relied upon for his convictions, multiplicitous charges violated Double Jeopardy Clause, trial court failed to instruct jury on possession of drug paraphernalia with intent to manufacture and possession of methamphetamine as lesser included offenses of manufacture of methamphetamine, and insufficient evidence supported drug tax stamp conviction.

ISSUES: (1) Resentencing on remand, (2) multiple acts, (3) double jeopardy, (4) lesser included offenses, and (5) drug tax stamp conviction

HELD: Where state filed no appeal from resentencing, Court of Appeals lacked jurisdiction to consider any issues arising from that resentencing. Court of Appeals’ decision to remand to district court for reinstatement of conviction and sentence for possession of drug paraphernalia is reversed.

Each conviction examined, finding multiple items of evidence but no multiple acts. Although jury instruction improperly defined drug paraphernalia to include items used for “storing or containing” a controlled substance, no reversible error under facts. Trial courts are cautioned of need to carefully tailor PIK Crim. 3rd 67.18-B, which defines drug paraphernalia.

Same elements test in Schoonover, decided this date, applies. No double jeopardy violation.

As in Schoonover, possession of drug paraphernalia with intent to manufacture and possession of methamphetamine are not lesser-included offenses of manufacture of methamphetamine. Sufficient evidence supports drug tax stamp conviction because Unruh had sufficient access to and control over methamphetamine found in van to permit immediate affixing of drug tax stamps. While PIK Crim. 3d 67.13-D instruction would have been advisable, jury could not have been misled by instructions given.

STATUTES: K.S.A. 2005 Supp. 21-3107(2) and K.S.A. 22-3403(1), -3421, 65-4152(a)(2)-(3), -4152(b), -4251(c), 79-5204(c)-(d)

THE JOURNAL OF THE KANSAS BAR ASSOCIATION
Court of Appeals

Civil

DAMAGES, NEGLIGENCE, AND PETS
BURGESS V. SHAMPOOCH PET INDUSTRIES INC.
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 93,698 – APRIL 7, 2006

FACTS: Burgess took her 13-year-old Yorkshire terrier, Murphy, to Shampooch for grooming. Murphy appeared fine when Burgess dropped her off, but Murphy was limping when Burgess picked her up. Shampooch denied any responsibility. Murphy had surgery to repair a dislocated hip. Burgess incurred veterinary bills totaling $1,308.89. The district court awarded Burgess $1,308.89 plus court costs.

ISSUES: (1) Damages, (2) negligence, and (3) pets

HELD: Court affirmed. Court held that when an injured pet dog with no discernable market value is restored to its previous health, the measure of damages may include, but is not limited to, the reasonable and customary cost of necessary veterinary care and treatment.

STATUTE: K.S.A. 79-1301

INSURANCE, COINSURANCE DEDUCTION, JURY INSTRUCTIONS, AND ATTORNEY FEES
WENRICH V. EMPLOYERS MUTUAL INSURANCE COMPANIES
PRATT DISTRICT COURT – AFFIRMED
NO. 93,953 – APRIL 28, 2006

FACTS: Employers Mutual Insurance Co. (EMC) issued the Wenriches a commercial property insurance policy on their real and personal property. The declaration page designated an 80 percent coinsurance penalty. The Wenriches property was damaged by wind and hail in 2002. EMC issued a check for $7,481.50. Unsatisfied with his amount, the Wenriches eventually filed a petition against EMC seeking damages of $40,000 plus attorney fees. The jury returned a verdict in favor of EMC on the cost to repair, answering one of the special verdict questions, “We agree with all adjustments with insurance company,” but it rejected EMC’s claim for a coinsurance penalty on the Pedigo storage building, finding that EMC did not sustain its burden of proof that the coinsurance penalty should be applied. The district court entered judgment against EMC for $8,724.01, together with attorney fees and costs of $14,310.57.

ISSUES: Is the coinsurance deduction enforceable? Did the district court err in its jury instructions and special verdict question? Did the district court err in its award of attorney fees?

HELD: Court affirmed. Court held the district court did not err in denying EMC’s motion to alter or amend the judgment for the purported amount of coinsurance penalty. Court concluded there was no ambiguity in the coinsurance provisions, but that did not render the provisions enforceable as a matter of law where application inherently requires a determination of fact, specifically the replacement cost of the property at the time of loss. Court found no error in the jury instruction on resolving ambiguity or in the special verdict question regarding applicability of the coinsurance penalty. Court held the district court did not abuse its discretion in awarding attorney fees. Court stated that the district court did not award the full amount of attorney fees sought by the Wenriches, but reduced the award to account for the fact that the Wenriches did not prevail on all claims and that it would be an exercise in futility to attempt to separate the services provided by counsel any further.

STATUTES: K.S.A. 40-908 and K.S.A. 60-216(e), -259(f)

NEW TRIAL AND WAIVER
SULTANI V. BUNGARD
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 94,111 – APRIL 14, 2006

FACTS: The Sultanis brought a wrongful death action against Bungard after the Sultanis’ 34-year-old son sustained fatal injuries when his motorcycle collided with Bungard’s car. The Sultanis claimed that as a result of their son’s death, they suffered total damages of more than $75,000, which included both economic and noneconomic damages. A jury awarded zero damages for noneconomic losses and awarded other damages in the amount of $11,000. The trial court offered the Sultanis the option to require the jury to resume deliberations to consider an award of noneconomic damages, but the Sultanis decided to accept the verdict. The Sultanis later moved for a new trial arguing the jury’s failure to award noneconomic damages was contrary to the evidence. The trial court declined the Sultanis’ request finding they had waived their right to a new trial.

ISSUE: Waiver of right to a new trial

HELD: Court affirmed. Court agreed with the trial court that because the Sultanis decided to accept the verdict and not have the jury return to deliberations to award noneconomic damages, they waived any defect that existed in the jury’s failure to award noneconomic damages.

STATUTES: No statutes cited

TAX FORECLOSURE, NOTICE, AND SHERIFF’S SALE
BOARD OF JEFFERSON COUNTY COMMISSIONERS V.
ADCOX ET AL.
JEFFERSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 94,894 – APRIL 28, 2006

FACTS: In January 2003, the Board of Jefferson County Commissioners filed a tax foreclosure action that involved delinquent real estate taxes on more than 200 parcels of land. Two of the many owners were the Schrages and the Hummers. In the Schrages’ case, Jefferson County officials relied upon service by publication after an attempt to personally serve the couple in Douglas County failed. The Schrages lived on the real estate tract in question and had been served with process seven times in the three years prior to the tax sale. In the Hummers’ case, Terry Hummer was the president of RVH Inc., a corporation that was the title owner of the mobile home park in Jefferson County, but the Hummers live in Topeka, and Shawnee County officers tried twice to serve them at their Topeka home. Terry Hummer called the Shawnee County Sheriff’s Department and advised that he or an employee would pick up the papers. An RVH maintenance worker received the foreclosure petition and summons at the sheriff’s office after telling them he had been sent to pick up the papers. Both the Schrages and the Hummers’ property was sold at a sheriff’s sale. The district court denied both the Schrages’ and the Hummers’ motions to set aside the sheriff’s sale claiming they did not receive legally sufficient notice.

ISSUE: Legally sufficient notice of a sheriff’s sale

HELD: Court affirmed in part, reversed in part, and remanded. Court reversed the district court’s denial of the motion to set aside the sheriff’s sale regarding the Schrages. Court held because the Jefferson County Sheriff’s Department could have reasonably ascertained the Schrages’ address, the publication of notice was insufficient and denied them due process of law. Regarding the Hummers, the court affirmed the sheriff’s sale of their property. The court held
that the worker that Jerry Hummer sent to pick up the petition and summons was clothed with the apparent authority to receive process and that person service was achieved in their case.

STATUTES: K.S.A. 60-260(b)(4), -304(e), -307(e) and K.S.A. 79-2804b

**TELECOMMUNICATIONS, CONDITIONAL USE PERMIT, AND FLAGPOLES**

**R.H. GUMP REVOCABLE TRUST ET AL. V. THE CITY OF WICHITA**

**SEDGWICK DISTRICT COURT – AFFIRMED NO. 94,312 – APRIL 14, 2006**

FACTS: Gump filed a request seeking a conditional use permit to construct a “stealth flagpole” tower for use by Cricket Communications on the real property owned by Gump. The planning department found the proposed tower conformed to code and the Wireless Communication Master Plan and recommended approval of the conditional use permit subject to certain conditions. The planning commission and the District Advisory Board also recommended approval. The city council denied the conditional use permit finding overwhelming opposition, adverse visual impact, and eight other adverse factors. The district court remanded to the city council for clarification on the apparent finding that the council denied the permit based entirely on the aesthetic impact or visual impact of the tower. After further findings by the city, the district court concluded that the city could make its determination based on visual impact and aesthetics of the proposed tower and that the city had balanced the benefits and harms.

ISSUES: (1) Sufficiency of the evidence, (2) open meetings, and (3) conditional use permit

HELD: Court affirmed. Court stated that while aesthetic considerations may not be as precise as more technical measures and must be carefully reviewed to assure that they are not just a vague justification for arbitrary and capricious decisions, they may be considered as a basis for zoning rulings. Court found substantial evidence to support the city’s denial of Gump’s conditional use application, although reasonable persons might have found otherwise. Court rejected Gump’s argument on open meetings. Court stated that Gump does not dispute that it was able to present city with additional evidence at the remand hearing. There was no evidence city would not have examined any additional evidence Gump would have submitted as well. After deliberations in executive session, city took up the remand order on its agenda and made additional findings as directed by the district court. Court found no violation of due process concerning city’s actions on the court’s remand order.

STATE: K.S.A. 12-755

**WORKERS’ COMPENSATION**

**GRAJEDA V. ARAMARK CORPORATION ET AL.**

**WORKERS’ COMPENSATION BOARD – AFFIRMED IN PART, DISMISSED IN PART, AND REMANDED NO. 94,051 – APRIL 28, 2006**

FACTS: Grajeda sought workers’ compensation benefits for injuring her upper back and left arm. Grajeda and Aramark negotiated a one-time lump sum settlement of $5,000 in exchange for Grajeda’s waiving of hearing and that it was in her best interests to receive the settlement. The administrative law judge (ALJ) approved the settlement as fair, just, and reasonable. Grajeda applied to have her lump sum settlement reviewed by the Workers’ Compensation Board. The board found that it had jurisdiction to review Grajeda’s settlement award, but the board neither approved nor set aside the settlement. The board remanded the claim to the ALJ for further delineation of the issues of whether the lump sum payment was in Grajeda’s best interest and whether she fully understood the medical evidence regarding her disability.

ISSUES: (1) Jurisdiction and (2) err in remand

HELD: Court affirmed in part, dismissed in part, and remanded to the board. Court held that the workers’ compensation statutes provide the board with statutory authority to review Grajeda’s lump sum settlement award after it had been approved by the ALJ. Court concluded the board did not err in finding that it had jurisdiction to consider Grajeda’s appeal. Court declined to address the merits of Grajeda’s claim without a final order from the agency. Court stated it would be premature to address the merits of the substantive claims without allowing the parties to first compile an evidentiary record for the ALJ to address Grajeda’s request to set aside the settlement award. After the ALJ’s decision and review of the decision by the board, it will be ripe for appellate review.

STATE: K.S.A. 2005 Supp. 44-528, -531, -551(b)(1)

**Criminal**

**STATE V. ADAMS**

**GEARY DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS NO. 93,640 – APRIL 7, 2006**

FACTS: Adams was the focus of a drug investigation. Green, a confidential informant, told Officer Todd Godfrey that he had purchased crack cocaine from Adams in the past. Green called Adams from a hotel room to set up a drug buy. When Adams was outside the hotel room waiting for Green to come out, the police located Adams’ car and arrested him. Green did not testify at trial. Godfrey testified that Green could not be found, and he believed Green was dead. The trial court admitted Green’s hearsay statements at trial. Adams was convicted of possession of cocaine, conspiracy to sell cocaine, attempted sale of cocaine, possession of hydromorphone, possession of marijuana, and two counts of possession of drug paraphernalia.

ISSUES: (1) Right to confront accuser, (2) prior crime evidence, (3) admission of evidence, (4) motion for new trial, (5) sufficiency of the evidence, (6) jury instruction, (7) sentencing, and (8) Apprendi

HELD: Court reversed Adams’s conviction for attempted sale of cocaine. Court stated there was no actual transaction since Adams was apprehended before it took place. There was an offer for such a transaction, but it came from Green. Green’s hearsay testimony was offered to satisfy an essential element of the crime of attempted sale of cocaine and without it, there was no evidence of a proposed sales transaction, which Adams could attempt to consummate. Court held Godfrey’s testimony of Green’s conversation with Adams violated Crawford, and Adams’ conviction for attempted sale of cocaine conviction must be set aside and retried. However, the court held that Adams’ conviction for conspiracy to sell cocaine was not dependent upon the admission of Green’s hearsay statements, and the issue was not whether Green and Adams negotiated for the purchase and sale of cocaine, but whether there was an agreement to commit the crime and an overt act in furtherance of same. Court said the same analysis applied to the remaining convictions, and they were similarly affirmed. Court held the trial court did not abuse its discretion in admitting Adams’ prior convictions for possession of marijuana and possession and sale of cocaine as they demonstrated plan and intent. Court held the video showing Adams engaged in a drug transaction over the telephone was admissible to demonstrate plan or modus operandi. Court found the trial court did not err in denying Adams’ motion for a new trial based on admission into evidence the transcript of his wife’s prior testimony at the first trial along with a copy of court
file in the witness intimidation case against his wife. Court stated that the better practice would have been for the trial court to read the transcript to the jury in open court, but that allowing the jury to read the testimony in the jury room did not violate Adams' constitutional rights. Court held there was sufficient evidence to support the conviction that Adams had an agreement to engage in the sale of cocaine and drove his mother's car containing rocks of cocaine to meet a prospective customer to consummate a sale. Court also held there was sufficient evidence to establish that although Adams did not have exclusive possession of the contraband and paraphernalia, based upon his prior convictions, his proximity to the location where the drugs were found, and the proximity of his belongings to the drugs and paraphernalia, he knowingly and intentionally had control over them. Court found no cumulative err in Adams' issues involving his arrest warrants, the trial court's failure to give a unanimity instruction or a multiple-counts instruction. Court held the trial court properly used Adams' prior sale of cocaine conviction to classify his conspiracy multiple-counts instruction. Court held the trial court properly used Adams' prior sale of cocaine conviction to classify his conspiracy to sell cocaine as a severity level two offense. Court rejected Adams' Apprendi claim.

STATUTES: K.S.A. 21-3302; K.S.A. 60-420, -421, -455, -460(g); and K.S.A. 65-4161

STATE V. ALLEN
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 93,940 – APRIL 7, 2006

FACTS: Allen pled no contest to one count of aggravated indecent liberties with a child. Allen had a 1987 juvenile adjudication for aggravated incest. The trial court found it was clear that Allen's prior juvenile adjudication for aggravated incest could be determined beyond a reasonable doubt to have been sexually motivated. The trial court concluded that Allen qualified for sentencing as a persistent sex offender. Allen was sentenced to 110 months' imprisonment.

ISSUES: (1) Departure sentence, (2) persistent sexual offender, and (3) juvenile adjudication

HELD: Court reversed and remanded with directions. Court followed Kansas Supreme Court precedent that a trial court's decision to double an offender's sentence under K.S.A. 21-4704(j) did not violate Apprendi. Court held there was nothing in the record, to indicate that, at the time of Allen's juvenile adjudication or disposition for aggravated incest, the court made any determination beyond a reasonable doubt that the offense was sexually motivated. Court held that K.S.A. 2005 Supp. 22-3717(d)(2)(L) is not a “catch-all” provision to encompass any offense of a sexual nature within the meaning of a sexually violent crime for purpose of sentencing persistent sex offenders. Court stated that aggravated incest is not listed as a per se sexually violent crime. At the time of Allen's juvenile adjudication it was not determined beyond a reasonable doubt that it was sexually motivated. Court concluded that the trial court erred by finding Allen's prior juvenile adjudication for aggravated incest constituted a sexually violent crime for purpose of sentencing him as a persistent sex offender.

STATUTES: K.S.A. 21-4710(d)(11); K.S.A. 2005 Supp. 21-4704(j); and K.S.A. 2005 Supp. 22-3717(d)(2)(L), -4902(c)

DISSENT: Judge Marquardt dissented indicating the majority's opinion leads to an absurd reading of the sexual offender statutes. Marquardt stated that the trial court ruled beyond a reasonable doubt that Allen's prior crime was sexually motivated, and his sentence as a persistent sex offender should be affirmed.

STATE V. BARAHONA
RILEY DISTRICT COURT – AFFIRMED
NO. 94,130 – APRIL 28, 2006

FACTS: Barahona plead guilty to robbery and burglary. Nearly 10 years after being sentenced, Barahona filed a motion to withdraw his plea claiming the district court violated his due process rights by failing to address him to determine whether the plea was entered knowingly and voluntarily or alternatively that the district court should have allowed him to withdraw his plea due to ineffective assistance of trial counsel. The district court summarily denied Barahona's motion.

ISSUES: (1) Manifest injustice in refusing to allow withdrawal of plea and (2) ineffective assistance of counsel

HELD: Court affirmed. Court stated that the record of the original plea hearing disputes Barahona's claim that he maintained his innocence but was pressured into a plea by his attorney. Court held no reasonable person in the position of the district court judge would conclude that enforcing the plea agreement was obviously unfair or shocking to the conscience and the district court did not abuse its discretion in refusing to allow Barahona to withdraw his plea. Court also held Barahona failed to present a colorable claim for ineffective assistance of counsel in his claims that his trial counsel failed to file pretrial motions, failed to inform him of collateral consequences, failed to provide charges and a copy of the plea agreement, failed to notify him of post-release supervision period, and failed to advise him of his right to contact his consulate under the Geneva Convention.

STATUTES: K.S.A. 2005 Supp. 22-3210(a), (d) and K.S.A. 60-1507

STATE V. BIEKER
SALINE DISTRICT COURT – AFFIRMED
NO. 93,487 – APRIL 7, 2006

FACTS: Target employees reported that Bieker had purchased a 96-count box of ephedrine cold tablets and he was driving a blue Chevy Corsica. Officers followed Bieker to Dillons grocery store where he purchased more ephedrine products, and he did the same at Wal-Mart. As Bieker left Wal-Mart, officers stopped him for questioning. Bieker claimed that his wife suffered from severe sinus problems and that stores would only allow consumers to purchase three boxes per visit. Officers conducted a pat-down search and discovered, among other things, a baggie containing what looked like methamphetamine. Bieker was arrested and refused to speak to the police after receiving a Miranda warning. At the station, Bieker agreed to speak with the police, told them he denied buying the ephedrine tablets to make methamphetamine, but admitted to using methamphetamine and marijuana. The state charged Bieker with unlawful possession of ephedrine, possession of methamphetamine and marijuana. The state charged Bieker with unlawful possession of ephedrine, possession of methamphetamine and marijuana.

HELD: Court affirmed. Court held that officers were not required to inform Bieker of his Miranda rights in full at the police station but could have lawfully begun his interrogation...
by inquiring of him whether he was willing to speak to the investigator at that time. But, out of an abundance of caution, the investigator fully explained the defendant’s rights. Had Bieker wished to extend his invocation of the right to remain silent, he could have easily indicated such desire to the investigator. Court held the district court did not err in denying this motion to suppress. Court also found the district court was not relying on additional evidence, which had not previously been presented to the district court at the preliminary hearing, and there was no abuse of discretion in the court’s failure to hold a second hearing on the second motion to suppress. Court also held the stop of Bieker outside the Wal-Mart was justified by reasonable suspicion and afforded officers objective justification to stop Bieker for questioning concerning his purchase of cold tablets at three different stores. Court also found Bieker agreed to a consensual search of his person.

STATUTE: K.S.A. 22-2402, -3216(2)

**STATE V. BOLDEN**
SEWARD DISTRICT COURT – AFFIRMED
NO. 93,806 – APRIL 28, 2006

FACTS: Bolden drove her car into the side of another car, pushed it off the road, and then struck it again from behind. The other car was occupied by Bolden’s husband and his girlfriend. The girlfriend had previously obtained a protection from abuse order against Bolden. A jury convicted Bolden of two counts of 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. The district court sentenced Bolden to a presumptive prison sentence of 29 months. However, the district court granted a dispositional departure and placed Bolden on 24 months’ probation based on four factors: (1) the victim’s actions invited the reaction, (2) the long-term effects on Bolden’s children were not justified, (3) Bolden sought help for anger control, and (4) the probability of reformation was increased with probation. The state appealed the sentence.

ISSUE: Are there substantial and compelling reasons to justify the departure sentence?

HELD: Court affirmed the departure sentence. Court stated that not all the reasons given by the sentencing court to support a departure sentence must be substantial and compelling as long as one or more of the factors relied upon is substantial and compelling. Court held that under the facts of this case, the sentencing court’s finding that the victims’ behavior invited Bolden’s conduct was not a substantial and compelling basis for a dispositional departure. However, the remaining factors cited by the sentencing court, considered collectively, were sufficient to justify the downward departure.

STATUTE: K.S.A. 2005 Supp. 21-4716(a), (c)

**STATE V. MOODY**
SEWARD DISTRICT COURT – AFFIRMED
NO. 93,084 – APRIL 28, 2006

FACTS: Moody was convicted of attempted first-degree murder, conspiracy to commit first-degree murder, aggravated intimidation of a witness, and conspiracy to commit aggravated intimidation of a witness for his involvement in driving Travis Kohn three times to Liberal with the intent of Kohn killing Eric Pike. On the last trip, Kohn shot a gun at Pike, but it misfired. The district court sentenced Moody to 155 months’ incarceration and concurrent sentences on the remaining crimes.

ISSUES: Was the evidence sufficient to support Moody’s conviction? Did Moody receive ineffective assistance of counsel? Are Moody’s convictions for conspiracy to commit first-degree murder and conspiracy to commit aggravated intimidation of a witness multiplicitous? Are Moody’s convictions for attempted first-degree murder and aggravated intimidation of a witness multiplicitous?

HELD: Court affirmed. Court held the evidence, when viewed in the light most favorable to the state, was sufficient for a rational fact-finder to have found Moody guilty of all charges beyond a reasonable doubt. Court held the performance of Moody’s trial counsel was not deficient (1) in failing to impeach Kohn’s trial testimony with a previously videotaped statement given to a detective, (2) in failing to object to hearsay evidence during a co-conspirator’s testimony, (3) in failing to interview or subpoena Isaac Rodriguez who could have testified on Moody’s behalf by corroborating Moody’s assertion that he had no knowledge of the attempt to murder Pike, (4) in failing to call an expert witness to discuss the effects of drug use on memory, and (5) in failing to submit Moody’s interview as rebuttal evidence that would have revealed that a statement by the prosecutor during cross-examination of Moody was false. Under the **Patten** strict elements test, the court found none of Moody’s convictions were multiplicitous.

CONCURRENCE/DISSENT: J. Malone concurred and dissented. Malone concurred in the sufficiency result and the effective assistance of counsel result. However, Malone agreed with Moody on both multiplicity claims finding that Moody’s conviction for
conspiracy to commit aggravated intimidation of a witness and aggravated intimidation of a witness should be reversed.

STATUTES: K.S.A. 21-3205(1), -3301, -3302, -3401, -3833; K.S.A. 2005 Supp. 21-3107; and K.S.A. 60-456, -460(g), (i)(2), -463

STATE V. SYKES
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 94,075 – APRIL 21, 2006

FACTS: Sykes convicted of misdemeanor theft. In separate case, he was convicted of possession of cocaine with intent to sell after a prior conviction and no drug tax stamp. On appeal, Sykes claims district court erred in (1) not granting jury trial in misdemeanor theft case, (2) denying Sykes’ motions for new counsel where performance and significant communication problems were alleged, (3) denying motion to suppress statements Sykes made prior to Miranda warning, and (4) failing to instruct jury that it had to find Sykes possessed cocaine long enough to acquire stamp. Sykes also claimed the state failed to present evidence at trial of his prior conviction of sale of cocaine, but instead offered this evidence at sentencing. Sykes further claimed state failed to prove his criminal history after he objected to his criminal history score.

ISSUES: (1) Jury trial, (2) motions for new counsel, (3) motion to suppress, (4) jury instruction on drug tax stamp charge, (5) sufficiency of evidence, and (6) criminal history score.

HELD: Although Sykes did not timely exercise statutory right to request jury trial, constitutional right to jury trial not abrogated because he faced more than six months’ imprisonment. State concedes the record does not show a knowing waiver of this constitutional right. Sykes entitled to new trial. Conviction reversed and remanded.

No abuse of discretion in denying motions for appointment of new counsel. Nothing in record supports Sykes’ assertion of complete breakdown in communications with counsel. Case is closer than others, but no showing of justifiable dissatisfaction with appointed attorney.

No error in denying motion to suppress. Sykes’ statements to police were voluntary and there was no interrogation. Officer not required to interrupt Sykes with Miranda warnings to prevent further incriminating statements.

Instructions on drug tax stamp charge were not clearly erroneous. Under facts, Sykes possessed the cocaine for sufficient length of time to affix tax stamps.

Sufficient evidence at trial to support Sykes’ conviction. Sykes’ prior conviction of sale of cocaine was not an element of crime charged, which state was required to prove at trial. State only required to prove the prior conviction at sentencing in order to enhance punishment for the new offense.

Sykes’ general objection to 37 prior convictions was insufficient to shift burden of proof to state because Sykes failed to specify exact nature of the alleged error and failed to provide written notice to state of his objection.

STATUTES: K.S.A. 2005 Supp. 21-4715, -4715(a), 22-3404(1) and K.S.A. 79-5201 et seq., -5204(c) and (d), -5208

STATE V. WOOLVERTON
JOHNSON DISTRICT COURT – AFFIRMED
NO. 93,751 – APRIL 14, 2006

FACTS: Woolverton was convicted of criminal threat and telephone harassment. Woolverton and Rotski had a daughter. After Rotski called Woolverton and asked why he had missed a visitation with their daughter, Woolverton became livid. Woolverton threatened to kill Rotski and made repeated phone calls. He told her she better not go out or he would take their daughter and she would never see her again.

ISSUES: (1) Prior crimes evidence, (2) sufficiency of evidence, and (3) Miranda evidence.

HELD: Court affirmed conviction. Court rejected Woolverton’s argument that his prior conviction for criminal threat was irrelevant. Court stated that the prior conviction was relevant to show the continued friction and discord between Woolverton and his former girlfriend before the current offenses. Court also rejected Woolverton’s sufficiency argument that the crime occurred in Missouri because that was his location when he made the alleged threat. Court held that part of Woolverton’s crime was committed when he communicated the threat to the victim in Johnson County. Last, court held that Woolverton was not in custody when he made the statements to detectives and consequently the detectives were not required to give Miranda warnings. Court stated that Woolverton’s statements were freely and voluntarily given and were admissible at trial.

STATUTES: K.S.A. 21-3104(1)(a), (2), -3110(24), -3419, -4113 and K.S.A. 60-401(b), -403, -404, -455

U.S. Supreme Court Votes to Allow Citation to Unpublished Opinions in Federal Courts

On April 12, the U.S. Supreme Court issued Rule 32.1 of the Federal Rules of Appellate Procedure, which prohibits federal courts from prohibiting or restricting the citation of unpublished opinions. The rule will apply only to opinions issued after Jan. 1, 2007, and, if the cited opinion is not available in a publicly accessible electronic database, a copy of the opinion must be attached to the document in which it is cited.
Attorney Licensure Pursuant to Supreme Court Rule 706

Attorneys are familiar with admission to the bar by written examination (Rule 704) and reciprocal admission without written examination (Rule 703, effective July 1, 2005), but less is known about a special licensure available to corporate attorneys without written examination (Rule 706). All attorneys practicing in Kansas are subject to a licensure requirement, unlike some states, which exempt corporate attorneys who have only an office practice.

Rule 706 allows an attorney who is licensed by written examination in another state to perform legal services for a single entity in Kansas without written examination. That single entity must be “a person, firm, association, corporation, or accredited law school engaged in business in Kansas other than the practice of law.” The attorney’s full time must be devoted to the business of that employer.

Academic requirements and character and fitness background checks parallel those required for admission pursuant to Rules 703 and 704. See the text of Rule 706 (as amended Oct. 14, 2005) and the 706 application form online at www.kscourts.org. Attorneys admitted pursuant to Rule 706 are subject to CLE requirements and pay the active attorney registration fee annually to the clerk of the Supreme Court. Time in practice pursuant to Rule 706 can be used to meet the practice requirement for subsequent admission pursuant to Rule 703.

If you have questions about the application of this rule or other questions related to admission to practice law in Kansas, contact Carol G. Green, clerk of the Supreme Court, at (785) 296-3229 or Francine Acree, attorney admissions administrator, at (785) 296-2766.

Notice of Amendment of Local Rules of Practice of the United States District Court

The U.S. District Court for the District of Kansas gives notice of the amendment of local rule 5.1. Copies of the amendment are available to the bar and the public at the offices of the clerk at Wichita, Topeka, and Kansas City. The offices are open from 9 a.m. to 4:30 p.m. on all days except Saturdays, Sundays, and federal legal holidays. The amendment is also available on the U. S. District Court Web site at www.ksd.uscourts.gov.

Interested persons, whether members of the bar, may submit comments on the amendment addressed to the clerk at any of the record offices. All comments must be in writing and in order to receive consideration by the Court, must be received by the clerk on or before 4:30 p.m., July 3, 2006.

The addresses of the clerk’s offices are:

204 U.S. Courthouse
401 N. Market
Wichita, KS 67202

490 U.S. Courthouse
444 S.E. Quincy
Topeka, KS 66683

259 Robert J. Dole U.S. Courthouse
500 State Ave.
Kansas City, KS 66101

Signed: Ralph L. DeLoach
Clerk of Court
United States District Court
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BUSINESS LAW TRANSACTIONAL ASSOCIATES — The Kansas City office of Shook, Hardy & Bacon LLP has an immediate need to add several transactional associates to its Business Law Division. SHB is an Am Law 100, international firm with approximately 500 attorneys. For more firm information, visit www.shb.com. The Business Law Division needs associates at different levels of experience — 1-2 years, 3-5 years, and 5-7 years. Experience with ERIS and ESOP in at least one of the associates will be important. Also required will be an exceptional academic record from a nationally-respected law school. For confidential consideration, send resume and law school transcript to: Mary Reusser, Director/Lateral Hiring, Shook, Hardy & Bacon LLP, 2555 Grand Boulevard, Kansas City, MO 64108-2613. E-mail: mreusser@shb.com; fax: (816) 421-5547. No outside recruiters, please.

LEGAL SECRETARY — AV-rated Topeka civil litigation firm seeks experienced legal secretary. Very competitive salary and benefits. Please submit resume and cover e-mail to: topekalawfirm@hotmail.com.

ATTORNEY — Kansas Legal Services, a statewide nonprofit law firm, seeks a customer-focused Kansas licensed attorney who is committed to exceeding client/customer expectations. Lawyer will perform general civil casework in our Kansas City office. Spanish bilingual a plus. Paid employee benefits include health, dental, life, and disability. Malpractice insurance and CLE paid. Two-year contract for employment required. Salary DOE. Send resume to: Marc Berry, Managing Attorney, Kansas Legal Services, 707 Minnesota, Suite 600, Kansas City KS 66101 or e-mail to berrym@klsinc.org. EOE & Affirmative Action Employer. www.kansaslegalservices.org

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Positions Available

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Multiple sites statewide & Washington, D.C.
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26 Brown Bag Ethics Video Replay (morning and afternoon)
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2.0 hours CLE credit, including 2.0 hours PRC*

27 Purchase & Sale of a Business Video Replay (morning)
Multiple sites: Wyndham Garden, Overland Park; KBA Headquarters, Topeka; and Best Western Airport Inn, Wichita
4.0 hours CLE credit, including 1.0 hour PRC*

27 Brown Bag Ethics Video Replay (afternoon)
Multiple sites: Rebein Bangerter, Dodge City; Wyndham Garden, Overland Park; KBA Headquarters, Topeka; Best Western Airport Inn, Wichita
2.0 hours CLE credit, including 2.0 hours PRC*

28 Brown Bag Ethics Video Replay (morning)
Multiple sites: Wyndham Garden, Overland Park; Huck Boyd, Phillipsburg; KBA Headquarters, Topeka; and Best Western Airport Inn, Wichita
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28 Brown Bag Ethics Video Replay (afternoon)
Seneca Public Library, Seneca
(hosted by Northeast Kansas Bar Association)
2.0 hours CLE credit, including 2.0 hours PRC*

28 Purchase & Sale of a Business Video Replay (afternoon)
Multiple sites: Wyndham Garden, Overland Park; KBA Headquarters, Topeka; and Best Western Airport Inn, Wichita
4.0 hours CLE credit, including 1.0 hour PRC*

29 Brown Bag Ethics Video Replay (morning and afternoon)
KBA Headquarters, Topeka
2.0 hours CLE credit, including 2.0 hours PRC*

30 Legislative & Case Law Institute Video Replay
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