EXPLORING THE POWER OF CASEMAKER
Your exploration begins October 30th

Economic Survey of Kansas Lawyers Now Available – See Page 5!
Friday, Oct. 20
Wichita State University
Rhatigan Student Center
Wichita, Kan.

The KBA has applied for 8.0 hours of continuing legal education (CLE) credit, including 2.0 hours of professional responsibility credit.

Seminar Schedule
8:30 a.m. Registration and Continental Breakfast
9 a.m. Reporter’s Privilege: Should They Be Jailed?
10:15 a.m. Break
10:30 a.m. The Right to Privacy
Noon Lunch Buffet
1:30 p.m. How to Keep Government Open: An Exercise in Interpreting Kansas Sunshine Laws
Break
1:45 p.m. News Boycotts
3 p.m. Break
3:15 p.m. Legal Ethics: Extrajudicial Statements

Seminar Co-sponsors

Course Descriptions
Reporter’s Privilege: Should They Be Jailed? Professor Mike Kautsch, moderator, with Mike DiSilvestro, Sam Colville, and Sherry Chisenhall. What exactly is current state of a reporter’s right to protect source identity and unpublished information? Will the Chronicle reporters go to jail while Barry Bonds chases Hank Aaron? Elements and application of the constitutional privilege.

The Right To Privacy. Mike Merriam, moderator, with Raubin Pierce and Dean Rao Pal. Since when is personal privacy the highest achievement of the law? Is your privacy really all that important? And what is the government doing to invade it? The right of privacy discussed in the computer age.

Luncheon Program: How to Keep Government Open: An Exercise in Interpreting Kansas Sunshine Laws. During this interactive program with attorneys Mike Kautsch and Mike Merriam, you will work with others at your table as a team to discuss real-life access dilemmas regarding open meetings and open records. Afterward, Kautsch and Merriam will share what Kansas law says about each dilemma and how you can respond to access issues in your own community.

News Boycotts. Bill Trehbar, moderator, with Lyndon Vix and Hurst Laviana. Are reporters have a right of access to government officials? Can they be excluded from press conferences or denied credentials in retaliation for adverse coverage? Did the First Amendment disappear? Discussion of content based retaliation against the media.

Legal Ethics: Extrajudicial Statements. Randy Brown, moderator, with Marty Snyder, Hurst Laviana, Jim McLean, Kevin O’Connor, and Richard Ney. The Rules of Professional Conduct 3.6 and 3.8 limit what lawyers can say about pending cases. How enforceable are they? Are they being used to manipulate the media? Discussion of ethical considerations applied to public comments by lawyers.

Media Law Seminar
#3972
Please return this form with your check payable to: Kansas Bar Association, P.O. Box 1037, Topeka, KS 66601-1037 or call (785) 234-5696 and use your MasterCard, VISA, or AmEx. You may fax the registration to (785) 234-3813. CANCELLATION POLICY: Prepaid registration will be refunded with a credit voucher for requests submitted up to 48 hours before the seminar. No refunds will be allowed after that time. To qualify for early bird discounts, payment must be received by Oct. 13.

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

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Pfc. John Adams Rebein departed Dodge City for basic training and airborne school at Fort Benning, Ga., this summer. He knows that more than likely he will face danger in the mountains of Afghanistan or on the streets of Baghdad. Many of us had parting words of wisdom and encouragement. His brother, Ben, had a better idea. He gave him a pocket Constitution of the United States. In the back of the booklet is the Declaration of Independence.

Sometime during the boredom of basic, he was spied reading the Constitution by one of his fellow soldiers. They teased him. His answer, “THIS IS WHY WE FIGHT.” A discussion ensued that ended with the men taking turns reading the Declaration aloud. For many, it was the first time they had ever read it.

A good part of this last year was spent with the Board of Education debating evolution vs. Creationism vs. Intelligent Design. The debate made the editorial pages of The New York Times and the monologue of Jay Leno. To date, God has not weighed in on this controversy.

Kansas also roiled over school finance. The Kansas Supreme Court was denounced as a group of judicial activists and there were cries for reform in the way that justices are selected. An uneasy truce broke out when a school finance plan passed and was approved by the Court.

Now that we have a break in the action, I propose a different topic of discussion. Let’s address the deplorable state of civics education in this state and in this country. In the recent primary elections, about 18 percent of registered voters voted. Most citizens aren’t even registered.

It is no exaggeration to say that our high school graduates have little or no understanding of how the government works or why our democracy benefits from citizen involvement. Retired Supreme Court Justice Sandra Day O’Conner is leading a national discussion of the need for citizens trained in civics and able to exercise their rights and responsibilities as citizens.

The United States flourished as a land of freedom, ideals and ideas before it was a world power. We are the superpower of the world, but for how long? Where is Rome? Where is Greece? They crumbled and then fell. I suggest that they decayed from within and forgot what made them great. Freedom is not free. Let’s focus on teaching our children the basics of this amazing form of government bought for us with blood. This is a form of activism upon which all of us can agree.

David J. Rebein can be reached by e-mail at drebein@rebeinbangerter.com or by phone at (620) 227-8126.

FROM THE PRESIDENT
DAVID J. REBEIN

Activist Judges and Evolution: Shouldn’t we be Discussing Political Activism and Revolution?
Fall has always been my favorite season given the change to cooler weather, the excitement of students heading back to school (at least for most parents anyway), as well as the start of the college and professional football seasons.

This fall, however, I find myself even more raring to go as the Bar is preparing to unveil a number of new and enhanced member benefits that I know will be sure to please our membership.

**Casemaker Countdown**

By now, I hope most of you have heard about Casemaker. Given that we have been running the rocket liftoff sequence announcement on the back cover of *The Journal* for nine months, you might ask how you could not be aware. Well, a member benefit this important deserves first class treatment.

For those that have not yet heard the news, Casemaker is a computer-assisted legal research program, which promises to save our members two very precious assets: time and money.

The best part is that members of the KBA will receive free access to Casemaker. Casemaker’s search engine is very user friendly, allowing beginners to quickly start conducting effective searches and experienced researchers to make a quick transition from other more costly legal research services.

During the past year, the parent company of Casemaker, Lawriter LLC, and the KBA have been hard at work assembling an extensive law library, which will become live on Monday, Oct. 30. More information regarding the launch of Casemaker is described in the center-page spread of this issue of *The Journal*.

**Economic Survey of Kansas Lawyers Now Available**

Last October, the KBA invited members as well as non-members to participate in an Economic Survey of Kansas Lawyers. Our last survey, taken in 1997, proved immensely popular by providing significant data on the fiscal state of the legal profession in Kansas.

The new data has been collected, analyzed, and formatted into an easy to read reference guide to help attorneys plan and manage the financial aspects of their professional lives. Attorneys can compare themselves and their firms against benchmarks or norms by reviewing the survey data.

This comprehensive 35-page report is now available as a downloadable document in the members’ only portion of our Web site at www.ksbar.org.

By the way, any member who would prefer a hard copy of the report, please contact Bar headquarters and we would be happy to send one via first class mail.

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

The prosecution and defense of claims for damage to real property often involve relatively unique issues. For example, harm to real property, even if severe, can be latent and remain undiscovered for many years. Because the Kansas statute of repose bars claims that have not been instituted within 10 years of the act giving rise to the cause of action, state law claims may be barred before the damage is even discovered. Rural landowners could face numerous scenarios where discovery within 10 years is unlikely. For instance, realty adjacent to an industrial plant, refinery, gas station, or slaughterhouse is vulnerable to migration of petroleum products or chemical waste. If the migration occurs through the substrata, the resulting damage might only be detected by a test program involving numerous well-placed borings. Absentee owners are similarly at risk, especially if their property is densely matted with vegetation, because even visible surface flooding or migration can disappear over time. Thus, the harm may escape even a diligent owner’s periodic visual inspections. Nonetheless, the repose period will inexorably continue to run.

If the property has been sold, the general rule prohibiting the assignment of tort claims may come into play. Also, depending upon the type and character of the claim, the lawyer handling the lawsuit may grapple with procedural issues, such as the triggering and tolling of statutes of limitations. In addition, all damage to land must be evaluated and classified as either permanent or temporary and valued accordingly.

This article will provide a brief survey of property damage claims and defenses that are available in Kansas (with some abbreviated discussion of federal remedies). It will focus particularly on issues related to the statutes of limitations and repose, the assignment of claims, causation, and damage characterization.

A Compendium of Claims for Harm to Real Property

Trespass

A trespass can be (1) intentional, (2) the result of negligence, or (3) based on strict liability if the defendant was engaged in an abnormally dangerous activity. Stated differently, in the absence of proof that the defendant was engaged in an abnormally dangerous activity or that the defendant was negligent, a plaintiff must prove that the trespass was intentional. A trespass is intentional when:

FOOTNOTES

[The] defendant intends to have the foreign matter intrude upon the land, or where defendant's 'act is done with knowledge that it will to a substantial certainty result in the entry of foreign matter.'

When has a trespass occurred? In Nida v. American Rock Crusher Co., the Court held that "[t]here is no trespass until the entry is accomplished and the damage occurs (or has begun to occur as in a case of continuing trespass)" (emphasis in original). The trespass counterpart of the negligence 'wrongful act' is the entry and the damage.

In United Proteins Inc. v. Farmland Industries Inc., defendant Farmland's chemicals leaked into an aquifer, causing injury to a pet food producer. The plaintiff pled intentional trespass, negligence, and strict liability. The issue was whether Farmland's mere knowledge that the substance had reached the plaintiff's land would satisfy the plaintiff's burden to prove the original intrusion was intentional. The Court held in favor of Farmland because there was no evidence that the release of harmful chemicals "was either purposeful or substantially certain to occur." Without proof that the defendant intended to enter, or was substantially certain an entry would result, the mere knowledge (after-the-fact) that an entry occurred will not support a claim for trespass. The Court was not receptive to a constructive intent theory, viewing it as an impermissible attempt to impose absolute liability. Given the inherent difficulty of proving that the perpetrator either intended for mischievous agents to invade his neighbor's land or was substantially certain the invasion would occur, most lawyers prefer to base trespass claims on negligence or strict liability.

Trespass claims are ordinarily subject to a two-year statute of limitations. However, a continuing trespass that began more than two years prior to suit can survive a statute of limitations attack. Like trespass actions, continuing trespass actions must show that the original intrusion was tortious. In addition, a plaintiff must prove that the defendant allowed the contamination to remain on the plaintiff's property within the limitations period. In United Proteins, the plaintiff's strict liability and negligence theories had been dismissed prior to trial based on the two-year statute of limitations, but the plaintiff was allowed to pursue theories of continuing trespass and intentional nuisance. However, under these unique circumstances, a claimant may only recover for damages inflicted within the limitations period. In United Proteins, the Court stated:

"... [United Proteins] was left in the unenviable position of pursuing theories which alleged Farmland had engaged in some tortious conduct within the limitations period. Continuing trespass was one such possible theory. Although the original trespass was outside the limitations period, if [United Proteins] could prove that Farmland permitted the contamination to remain on [United Proteins'] property within the limitations period and that the original intrusion was tortious, there might be culpable conduct on which recovery could be based."

Nuisance
Nuisance actions can be framed as intentional, or can be based on negligence or strict liability. In Finlay v. Finlay, the damage occurred within the limitations period (i.e. how long it took the harmful substances to migrate) can create a fact question for trial.

14. United Proteins, 259 Kan. at 732, 915 P.2d at 85. The Pattern Instructions in Kansas (PIK) contain two nuisance instructions – one in the negligence section (PIK. 3d 103.06, "Nuisance") and one in the intentional torts section (PIK. 3d 127.90, "Private Nuisance"). PIK. 3d 103.06, Cmt. 3, states that "[a] nuisance may result from conduct, which is intentional or negligent or conduct, which falls within the principle of strict liability without fault." See Culwell v.Abbott Constr. Co., 211 Kan. 359, 506 P.2d 1191 (1973) for distinctions between private and public nuisances.

the issue was whether a malodorous cattle feeding operation was a nuisance to adjacent property owners. The court defined nuisance as "an annoyance, and any use of property by one, which gives offense to or endangers the life or health, violates the laws of decency, unreasonably pollutes the air with foul, noxious odors or smoke, or obstructs the reasonable and comfortable use and enjoyment of the property of another ..."16 The court further stated that "[w]hat may or may not constitute a nuisance in a particular case depends upon many things, such as the type of neighborhood, the nature of the thing or wrong complained of, its proximity to those alleging injury or damage, its frequency, continuity or duration, and the damage or annoyance resulting."17 A nuisance claim is only proper where the alleged nuisance "has been in existence for some period of time rather than being an isolated instance of a temporary nature."18 Isolated instances are properly addressed through negligence claims.19

Claims for intentional nuisance have been upheld where other tort claims were barred by the statute of limitations. Comment 3 to PIK 3d 127.90 states that "if the statute of limitations has run on the strict liability and negligence theories, a plaintiff may find relief under the theory of intentional nuisance."20 In United Proteins, the Court noted that because the limitations period had run on the plaintiff’s negligence and strict liability claims, the plaintiff was forced to pursue claims — intentional nuisance and continuing trespass — based on tortious conduct that occurred within the limitations period.21 The Culwell v. Abbott Constr. Co. Court delineated nuisance from negligence and strict liability, stating that "a nuisance may result from conduct, which is intentional or negligent or conduct, which falls within the principle of strict liability without fault. The point is that nuisance is a result

and negligence is a cause ..."22 Therefore, the doctrine of intentional nuisance can save at least a portion of some time-barred claims.

However, the elements of intentional nuisance can be problematic. It is difficult in most circumstances to prove that the perpetrator intended to interfere with the owner’s use and enjoyment of the property. The dilemma has been summarized as follows:

To create an ‘intentional’ nuisance, it is not enough to intend to create a condition causing harm; the defendant must either specifically intend to damage the plaintiff or act in such a way as to make it ‘substantially certain’ that damage will follow.23

In United Proteins, the plaintiff asserted a claim for intentional private nuisance.24 The Court stated that intentional nuisance applies only if a party acts with intent to cause the nuisance, or knows that it is substantially certain to result from his actions.25 An invasion is not “intentional” simply because “an actor realizes or should realize that his conduct involves a serious risk or likelihood of causing invasion.”26 Thus, nuisance claims based on negligence or strict liability (if available) are easier to prove.27

**Strict liability**

Strict liability for harm to land is imposed apart from either: (1) an intent to interfere with a legally protected interest or (2) a breach of a duty to exercise reasonable care (i.e., actionable negligence).28 In Williams v. Amoco

(continued on Page 24)
Teddy Bears, Books, and a Child’s Smile

By Beth Warrington, publications coordinator

Within the first three months of being on the bench of the Johnson County District Court’s Child in Need of Care (CINC) docket, Judge Kathleen Sloan met an 11-year-old girl who had the saddest face she had ever seen. She seemed somewhat lost, sad, and lonely.

Getting little reaction from the girl, Sloan asked a somewhat odd question – if she liked stuffed animals – and it was the first smile she received. The only stuffed animals in Sloan’s chambers were a few that she had purchased for herself some time ago.

“I selected one of my favorite teddy bears and when I gave it to her, she was thrilled and held onto the bear tightly,” Sloan said. “It was hers and something she got to keep and love.”

That same day, Sloan e-mailed her family, Guardians ad Litem (GALs), and the CINC providers to request ideas on how she could get donations of stuffed animals to be able to give to children who came to her court.

“There is not a girl who appears in my court, whether she is 2 or 17, who declines a stuffed animal,” she said.

After starting the stuffed animal program, Sloan was thinking of additional ways to make connections and perhaps inspire more children and their families. With a lifelong love of reading and books, she started the Division 10 Book Program.

“The purpose of the program is to encourage children to read,” she said, “and for the children who have cases in my court to know that we care about them and are interested in their lives.”

Sloan said she wants the children to have something to hold, so perhaps the court proceedings will not be so intimidating. She also wants them to know they are important, we care, and we always have their best interests at heart. To her, reading is critically important to the development of children’s minds, and she wants to be able to help and encourage reading in all ages, knowing how important it was to her and how important it was and should be to them.

Sloan contacted a friend she worked with while serving on the Changing Lives Through Literature project for juvenile defenders and told her about the plan. After meeting on several occasions to discuss how such a program would work, they came up with a list of books for various age groups. She contacted the Johnson County Library Foundation, which generously offered $1,000 worth of books, the GALs, and various CINC providers and the donations began.

“The books that are available to the children consistently provide interest to the kids,” she said. “They always seem excited by what they find to read.”

The relationship between the two projects is for the child to have something to hold on to and to lessen the anxiety of court, she said.

“Each time a child comes to court, they are invited to select a stuffed animal and a book, even if they got one the last time they came to court,” she said. “Occasionally, when I ask an older child if they like to read, I will sometimes get a rather sullen ‘no.’”

Sloan will always invite them to take a book from the bookshelves in the back of the courtroom. Not once has she been turned down.

The support for both projects has been wonderful, according to Sloan, but the book program, to her, has been a particular success. The success, she said, is marked by the enthusiasm of the children, the GALs and the social workers who appear in her court day in and day out.

“I wish everyone could see the looks on the children’s faces when they are invited to take a book,” she said. “Frequently, there is a look or inquiry of disbelief that they can not only select a book, but it is also theirs to keep for good.”

The biggest challenge that Sloan has faced has been maintaining the books on the shelves so that they never run out. They have been very fortunate to have individuals who have purchased and donated books. The GALs have made donations, as well as the Johnson County Library Foundation and Johnson/Wyandotte County CASA Inc.

Donations of books and stuffed animals can be made by contacting Trina Nudson of Scott Wasserman & Associates LLC by phone at (913) 438-4636 or by e-mail at trina@yourchild1st.com.

Since joining the Johnson County District Court in 2004, Sloan’s caseload has been devoted solely to CINC cases, which range from temporary custody hearings to first appearances to review hearings. She received her bachelor’s degree from George Washington University in 1983 and her juris doctorate from the University of Kansas in 1991.
1967 — The Year of Handcuffs, Jimmy Green, and Perfect Attendance

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

A ccording to the history books, 1967 was a pretty boring year. As best I can tell, not much happened in the world, save for a couple exceptions. Things started to get ugly in Southeast Asia, Elvis married Priscilla in Las Vegas, a guitarist named Hendrix released his album, “Are You Experienced,” and there were a couple wars in the Middle East. But that year was noteworthy for something not found in a Google search. Something that happened in Lawrence, at the KU law school made the headlines in Kansas, New York, and even around the world. And 39 years later, what happened that day is a story still worth telling.

You see, the KU class of 1967 was probably like most classes at the school. It had its share of gunners and slackers and people who were adept at hiding in the back row of class. But there was one student in that class who had a special distinction, perhaps not shared by any of his classmates, then or since. He had perfect attendance. Three years, 35 classes, countless subjects, no missed classes. But that was about to change on the last day of class of his third year. That was the day his classmates were determined to break the streak. And their technique was truly unconventional — chaining him to the statue of Uncle Jimmy Green.

The class was trust law, and the professor was Jim Logan, the law school’s dean. Jim Logan’s memoirs pick up the story from here.

“I was teaching a course in trust law and had already made up the examination. I was preparing to go to my last class of the semester when students came into my class, laughing. They told me their classmate Frank Kirk had never missed a class during three years in law school but that he was going to miss this one. I said, ‘What do you mean?’ They said, ‘We have him handcuffed to Uncle Jimmy Green’s statue in front of the law school so that he will not be able to go to class. We are going to destroy his perfect attendance record.’ I told them they could not do that. In so speaking, I was not thinking of Kirk and how important it was that he have a perfect attendance record; I was thinking of my trust exam. I had put a question on the exam with an issue I had not yet covered in the class, but intended to cover during this last class. If Kirk missed the class he might not be able to answer this portion of the exam. But I could not say anything to the students about this without tipping my hand as to my exam question.”

The students professed that they had lost the key to the handcuffs. At this point, Logan’s response separated him from most other professors. Some teachers, I suppose, would threaten horrible punishment if the key did not turn up. After all, law professors have immense power. And he was the Dean, meaning he had more power than God. Other teachers would require the unfortunate student to borrow someone else’s notes. But Logan’s reply was not predicted by anyone — and what he said next made this a story that went around the world.

“OK, we will have class on the steps of Green Hall in front of Uncle Jimmy.” Logan paraded the entire class outside and seated them on the steps. And there he began his final lecture, with one Frank Kirk doing his best to take notes.

What happened next was almost as unpredictable as a class taught in the open air with one handcuffed student. A news photographer captured the moment, and on what was a “slow news day,” it became a story of national interest. “Professor takes class to student.” It appeared on the front page of the New York Post, the Washington Post, and papers as far away as London and Paris.

And Logan went on to be a federal judge, write thousands of opinions, and continue to show a penchant for the unexpected. And what about student Kirk? He went on to become a successful stock broker in Kansas City, and now is the managing director for Wachovia Securities in Kansas City, Mo. And when contacted, Kirk added another wrinkle to this story, which never made the newspapers. Turns out that this was the third attempt to detain Kirk from his perfect attendance record. In Kirk’s first year, classmates removed his car battery on the last day of school forcing Kirk to take a cab. The second year, they locked the front door of his apartment and he went out a window. “You can imagine how concerned I was about making it to the bar exam.” Frank said.

“Circumstances were such that I covered my lecture material in a hurry,” Logan explained to the Lawrence Journal-World, May 20, 1967. “It was fun. Law school final examinations begin Saturday. Students will remember their examinations begin Saturday. Students will remember their

From the original article published in the Lawrence Journal-World, May 20, 1967.

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.
Young Lawyers Answer the Call to Assist Disaster Victims

By Paul T. Davis, KBA Young Lawyers Section president

As I write this column, it is the fifth anniversary of the Sept. 11 terrorist attacks. I have spent a good deal of time today and in the past few days reflecting upon how our country has changed in the last five years and remembering that unbelievable day in September 2001. Most people in my parents’ generation easily recall where they were when President Kennedy was shot. My generation will most certainly always remember where they were and what they were doing when the two planes struck the World Trade Center towers on the morning of Sept. 11. I was watching the “Today Show” and preparing to leave my house for work. I vividly recall watching the live footage of the second plane slamming into the south tower and the sense of shock that all Americans were experiencing at the time.

I continued to watch the television coverage that morning and pondered the question of how in the world this had happened. Who would do such a thing? Was it another Timothy McVeigh or was this an attack perpetrated by foreigners? How many innocent lives had been lost? Did I know anyone who could have been there? These questions were ruminating through my mind and undoubtedly the minds of most Americans. I later decided to go into work (I was then working at the Kansas Bar Association as legislative counsel), mostly because I was anxious to share my thoughts and emotions with my friends and co-workers. It was a somber day that I will never forget.

At the same time, I had just started my involvement with the KBA Young Lawyers Section and the American Bar Association (ABA) Young Lawyers Division. I had been serving as the ABA Young Lawyers Division district representative for Kansas and Missouri for only a few weeks. About three weeks before the 9/11 tragedy, I had attended the ABA annual meeting in Chicago and had participated in extensive emergency management training conducted by the Federal Emergency Management Agency (FEMA). This was due to a long-standing agreement that the ABA Young Lawyers Division has had with FEMA to coordinate legal services in the event of a disaster. And as a district representative, I was given the responsibility of coordinating legal services if a federally declared disaster were to occur in Kansas or Missouri. A pretty daunting job, to say the least!

When 9/11 occurred, I, along with the district representatives in other states, had just completed a plan of action as to how we would muster the assistance of young lawyers in our districts to assist victims and their families in the event of a disaster. In preparing this plan of action, I spent some time talking with the affiliate leaders of our young lawyer organizations in Kansas and Missouri in an effort to make them aware of our responsibilities and to enlist their members’ assistance. But for my colleagues in New Jersey, New York, and Connecticut (and also Maryland, Virginia, and the District of Columbia), no amount of preparation was going to prepare them for what they faced on and after Sept 11.

About one month after 9/11, young lawyers from across the country gathered for a conference in St. Louis. Somehow, the district representatives from these affected areas were able to attend. The report they made to the young lawyers that were in attendance was mind-blowing. The district representative from Connecticut had actually left her job at a New York law firm to work full-time at coordinating legal services for the hundreds and hundreds of victims and their families. There were many more heart-wrenching stories that were recited by these district representatives about the incredible work that young lawyers were doing to assist persons who had been affected by 9/11. It is definitely the only bar association meeting I’ve been to where there was hardly a dry eye.

Young lawyers continue to answer the call from FEMA whenever there is a federal disaster declared. Many Kansas young lawyers assisted persons who had their homes destroyed by tornados later in my tenure as district representative. Every time I called upon a young lawyer to assist someone, I was never turned down. In recent years, young lawyers in Louisiana and Mississippi have spent countless hours assisting victims of Hurricane Katrina. These efforts continue as you read this column.

I recall the words of President Bush on 9/11 when he stated that “the will of a great nation is being tested.” The greatness of our nation is reflected in the compassion of our people. Americans have always come together in times of need to assist those who require help. All Americans have different ways in which they can assist those in need. I’m proud that our profession has done its part to uphold this great American tradition. We certainly hope that disasters like 9/11 will never occur again. But if so, young lawyers in Kansas and all across America stand ready to do their part to provide whatever assistance is needed to disaster victims. ■

Paul T. Davis is a partner with the firm of Skepnek Fagan Meyer & Davis P.A., Lawrence. He may be reached by phone at (785) 843-7674 or by e-mail at pauldavis@sunflower.com.
KBA Mock Trial Program Needs Coaches

By Chelsey G. Langland, YLS Mock Trial chairperson, research attorney for Hon. Christel E. Marquardt

The Kansas Bar Association’s high school mock trial program allows all KBA members to interact with high school students from across the state. Most people participate by judging at the regional and state tournaments. However, some attorneys invest their time and energy in coaching a team, a pursuit that yields much greater rewards.

John Andra, research attorney for Hon. Michael B. Buser of the Kansas Court of Appeals, has started two mock trial programs—one at Kapaun Mt. Carmel Catholic High School in Wichita and one at Topeka High School. When asked about the process of founding a team, he advises the best way to start is to make contact with a teacher or administrator within the school. That person can find practice facilities, arrange for transportation, and generally assist with logistical difficulties.

Andra said the next “challenge” is finding students for the team. He suggests making announcements, writing articles in school newspapers, or speaking to government classes. He believes word of mouth among students is also a big help. Although the students involved in mock trial are often active in debate or student government, Andra thinks there is a big talent pool beyond those kids that is often untapped. Some of his team members have done no other activity in high school beyond mock trial, and he describes it as a “great opportunity for kids to spread their wings a bit.”

Once students are identified, Andra admits that the biggest hurdle to overcome is flexibility. Attorneys are always run by their calendars, of course, but the kids are busy too. His approach is to let the kids do other things and accept that conflicts may arise, which keep kids from attending practices or competitions. He keeps a “roll with the punches” attitude and a lot of willingness to accommodate schedules, but generally starts weekly practices in mid-January, with a full practice trial in the week leading up to the competition.

The hard work that is put into mock trial is realized each spring when one team from Kansas attends the National Mock Trial Tournament. This past year, a team from Shawnee Mission East High School attended the national tournament in Oklahoma City. The KBA provides a travel scholarship to help defray expenses.

Aishlinn O’Connon was a member of the winning team. She described nationals as “a blast” and said that the trip really helped the team bond. She also appreciated the opportunity to compete against better teams, especially the Hawaiian team, which was returning in 2006 after a second place finish in 2005. O’Connon said that the Hawaiians fielded a very tough team, and she was pleased that the final outcome of the round was close. She said that even though Shawnee Mission East ultimately lost the round, they learned more about “confidence, selective argumentation, and presentation” in that round than in all of the others combined. The 2007 national tournament will be held in Dallas.

Andra knows that most mock trial coaches are not attorneys. However, he believes “the more contact with practicing attorneys and judges, the better.” He continues, “This is the particular genius of mock trial, that it is judged by real-world legal professionals, usually in real courtrooms.”

We are grateful for all of the assistance we’ve had in the past and are encouraged by Shook, Hardy & Bacon’s rock-solid commitment to fostering this program well into the future. However, they can’t do it alone, and the program cannot run without attorney volunteers. I’d encourage each and every KBA member to become involved through coaching a team or committing to judging at the regional or state tournaments.

For more information, please contact Meg Wickham, manager of public services, at (785) 234-5696 or at mwickham@ksbar.org for more information.
**Members in the News**

**CHANGING POSITIONS**

Vincent K. Bates has joined KPMG, Kansas City, Mo.

Steven J. Book has joined Doster Mickes Lawyers, 200 N. Main St., Ste. D-1, Kansas City, Mo.

Mark S. Braut has been appointed district judge of the 3rd Judicial District by Gov. Kathleen Sebelius.

Michael L. Brown has joined walnut, Saunders, Austin, Brown & Enochs Chtd., Overland Park.

Brian R. Carman and Shawn P. Lautz have joined Maughan Hitchcock L.C., Wichita, as associates.

Stuart R. Collier has joined Spirit AeroSystems Inc., Wichita.

Steven G. Cooper has joined ConocoPhillips Co., Houston.

Elizabeth R. Dotson has been named a shareholder with McAnany, Van Cleave & Phillips P.C., Kansas City, Kan.

James S. Eicher has joined HQ, 89th Regional Readiness Command, Wichita.

Brennan P. Fagan and William J. Skepnek have joined Meyer & Davis LLC, Lawrence, to form Skepnek Fagan Meyer & Davis P.A. Milton P. Allen Jr. has joined the firm as of counsel and Mark J. Emert has also joined.

Geoffrey L. Fugus has joined the District Attorney’s Office, Augusta Judicial Circuit, Augusta, Ga.

Mark A. Galloway has joined Telthorst & Associates LLC, Wichita.

Jody R. Gondring has joined Moore & Hennessy P.C., Kansas City, Mo.


Mark Hargrave and Mark D. Ovington have joined Stinson Morrison Hecker LLP, Kansas City, Mo., as partners. Barkley Clark has joined the firm’s Washington, D.C., office as a partner.

Brandon D. Henry has joined Wagstaff & Cartmell LLP, Kansas City, Mo.

Terry L. Hurley has joined R.H. Donnelly Corp., Cary, N.C.

Michael H. Ireland has been appointed district judge of the 2nd Judicial District by Gov. Kathleen Sebelius.

David M. Kight has joined Spencer Fane Britt & Brown LLP, Kansas City, Mo., as of counsel.

Zachary W.J. King has joined White & Case LLP, Washington, D.C.

John M. Kratoft has joined Sanders Conkright & Warren LLP, Overland Park, as an associate.

Jeffrey B. Lapin has joined Friedman Law Offices, Lincoln, Neb.

William F. Logan and David W. White have become members of Foland Wickens Eifelder Roper & Hofer P.C., Kansas City, Mo.

Kathleen M. Lynch has been appointed district judge of the 29th Judicial District by Gov. Kathleen Sebelius.

J. Donald Lysaught Jr. has joined Evans & Mullinix, Shawnee.

Lisa A. McPherson, Adam T. Pankratz, and Marcia A. Wood have joined the Wichita office of Martin, Pringle, Oliver, Wallace & Bauier LLP.

Steven C. Montgomery has been appointed district judge of the 6th Judicial District by Gov. Kathleen Sebelius.

Jennifer R. O’Hare has joined Metz Law Firm, Lincoln, Kan.

Anne H. Pankratz has joined Warner Law Offices P.A., Wichita.

Reneé W. Parsons has joined Aquila Inc., Kansas City, Mo.

Joshua P. Perkins has joined Spooner & Spooner P.C., Kansas City, Mo.

Kylie K. Polson has joined the Kansas Court of Appeals as a research attorney.

LaRonna Lassiter Saunders and Matthew S. Walsh have joined Shook, Hardy & Bacon LLP, Kansas City, Mo.

J. Donald Lysaught Jr. has joined Evans & Mullinix, Shawnee, as of counsel.

Richard S. Schoenfeld has joined Polsinelli Shalton Welte Suelthaus P.C., Kansas City, Mo.

Emie W. Stehley has joined the Kansas Department of Social and Rehabilitation Services, Newton.

Jeffrey L. Syrios has joined Martin & Churchill Chtd., Wichita, as special counsel.

**CHANGING PLACES**

Brendon P. Barker, Keenan M. Post, and Matthew C. Warren have started Post Warren & Barker LLP, 12980 Metcalf Ave., Ste. 180, Overland Park, KS 66213.

Mark E. Brown has established his own firm at 4700 Belleview, Ste. 210, Kansas City, KS 69112.

Kevin S. Cavanaugh has a new business address, 7500 College Blvd., Ste. 500, Overland Park, KS 66210-1855.

David E. Harvey has started his own firm located at 13225 Falmouth, Leawood, KS 66209.

Charles J. Hyland has moved to 7300 W. 110th St., Ste. 925, Overland Park, KS 66210.

James R. Lloyd has started Lloyd & Lloyd Lawyers, 200 N. Main St., Ste. D-1, Sand Springs, OK 74063.

Menghini & Mazurek LLC has moved to 302 E. 4th St, Ste. A, Pittsburg, KS 66762.

Ronald W. Nelson and Joseph W. Booth have moved their firm of Nelson & Booth to 11900 W. 87th St. Parkway, Ste. 117, Lenexa, KS 66215.

Clyde W. Toland has been named executive director and curator of the Allen County Historical Society, Iola.

Debra A. Vermillion has joined Shawnee Mission Medical Center, Shawnee Mission.

Andrew E. Werring has become Atchison County Attorney, Atchison.

Stephen P. Wright has joined Bank of America, Chicago.

Dustin Zander has joined Halliburton Energy Services Inc., Houston.

**Dan’s Cartoon**

Dan’s Cartoon by Dan Rosandich

“I Always Cry at the Ending”

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(continued on next page)
Michael G. Coash
Michael G. Coash, 58, of El Dorado, died July 28 following a brief illness.

He was born July 23, 1948, in Concordia to Gene and Donna Bertrand Coash. He graduated from Clifton High School and then joined the U.S. Marine Corps, serving his country in Vietnam. Coash attended the University of Kansas following his discharge from the Marines and received his bachelor’s degree in political science in 1973 and his juris doctorate in 1975.

Coash’s law career began in El Dorado in 1975 after joining the firm of Bond & Bond. In 1993, he opened his own office, where he practiced until his death. He served as city attorney of El Dorado for 15 years and was also city attorney for Douglass for many years.

He was a member and past president of the El Dorado Chamber of Commerce; a member of El Dorado Inc.; American Legion; Veterans of Foreign Wars; and the Kansas, 13th Judicial District, and Sedgwick County bar associations. Coash was also a supporter of the University of Kansas Alumni Association and was coordinator of the Butler County KU Honors Program for more than 25 years.

Survivors include his wife, Vicki, of the home; children, Kevin and Melissa, both of the home; his mother, Clifton; two brothers, Steven, Weeping Water, Neb., and James, Concordia; and one sister, Gina Hamm, Wichita. His father preceded him in death.

Hon. Marvin W. Meyer
Hon. Marvin W. Meyer, 84, of Topeka, died July 27 after a prolonged illness. He was born April 22, 1922, in Palmer, the son of Alfred and Martha May Meyer. From 1940 to 1947, he served in the U.S. Navy and rose to the rank of chief pharmacist’s mate.

After leaving the Navy, Meyer attended the University of Kansas, where he would earn his law degree in 1952. He practiced law from 1952 until 1974 in Oberlin, where he was also city and county attorney. In 1974, Meyer was elected judge of the 17th Judicial District. He moved to Topeka after being appointed to the Court of Appeals by Gov. Robert F. Bennett in 1978. After his retirement from the court in 1987, Meyer continued to serve as an arbitrator and on ad hoc panels for the appellate courts.

He was a lifetime member of the Kansas Bar Association, joining in 1952, and was also active in the Rotary. Meyer was preceded in death by his parents and his sister, Alice E. Meyer. He is survived by his wife, Ruth, of the home; two sons, Mark, Kalamazoo, Mich., and Timothy, Woodville, Wis.; a daughter, Pamela Cheng, San Quentin, Calif.; a brother, Robert, Estes Park, Colo.; and one granddaughter.

Members ...
(continued from Page 13)

Denise E. Tomasie has established her own firm at 419 N. 6th St., P.O. Box 171855, Kansas City, KS 66117-1855.
Bruce H. Wyatt has moved to 200 S. Santa Fe, Ste. 2, Salina, KS 67402-0053.

MISCELLANEOUS
Mary Blake, Polsinelli Shalton Welte Suelthaus P.C., Kansas City, Mo., was elected president of the Shawnee Mission Education Foundation board of directors. Leslie A. Greathouse, Kutak Rock LLP, Kansas City, Mo., was elected as a director to the board.
Gregory P. Goheen, McAnany, Van Cleave & Phillips P.A., Kansas City, Kan., was elected to the board of directors for the Kansas Attorneys Association.
William N. Lacy, Yates Center, was elected vice president of the Kansas School Attorneys Association.
Robert L. Pottroff, Myers, Pottroff, & Ball P.A., Manhattan, has been named president of the Kansas Trial Lawyers Association.
Douglas L. Stanley has been elected a Fellow of the College of Labor and Employment Lawyers.
Melissa A. Wangemann, Office of Kansas Secretary of State, Topeka, has been reappointed to an additional term as a board member of the Kansas State Board of Mortuary Arts by Gov. Kathleen Sebelius.

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

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This past summer the four of us spent six weeks in the Netherlands taking two law courses — Comparative American-Dutch Legal Systems and International Commercial Arbitration — at the University of Utrecht. The courses were offered in conjunction with the Washburn University’s School of Law study abroad program. Located about 40 kilometers south of Amsterdam, Utrecht is a charming midsize city with a colorful history dating back to 1122 A.D.

Each of us had our own reason for attending the Utrecht program, separate from simply wanting to travel in Europe. Amy Taylor went because it gave her a chance to live in a different culture for an extended period of time, as well as an opportunity to gain an international legal perspective for her undergraduate study of intercultural communication. Jennifer Zook attended because she had a strong urge to explore the world outside the United States and wanted to meet new people and develop contacts in foreign countries. Shawn Jurgensen attended the Utrecht program because he had always wanted to study abroad and knew that this was his last opportunity to do so. Taylor Hight went because the program appealed to his desire to learn about arbitration and international law.

The Washburn study abroad program is relatively new to Utrecht, but it seems destined for long-term success. Each course, which ran three weeks apiece, was co-taught by one faculty member from Washburn School of Law and one from the University of Utrecht. We attended classes Monday through Thursday for four hours a day. The first two hours were lecture, equally divided between the instructors. The third hour was dedicated to group learning amongst the students, and the final hour was spent presenting the group project to the class. The instructors always divided the groups so that there was an equal representation of American and European students in each group. This optimized our ability to learn the material covered in lectures because we debated and discussed the issues with persons who did not have the same views as our own. As Zook observed, “This was an extremely important part, and where most of our learning happened.”

Much of our learning also occurred outside of the classroom. Taylor commented that some of her most memorable moments occurred at plaza cafes in Utrecht, discussing political issues with Dutch and French students, and being introduced to a vastly different global perspective. We all learned to cheer for the Italian football team while watching the World Cup (except for Jurgensen, who refused to yield and give up on his beloved English team). The neighborhood baker provided not only a delicious daily breakfast, but also travel tips and friendship as well. And when the entire parliament resigned amid scandal during our second week there, we were shocked to learn that this was not a crippling national crisis, but a fairly common event that the pragmatic Dutch people easily took in stride.

Program Director and Washburn Law Professor Nancy Maxwell said, there was more to be learned outside the Netherlands. Having three-day weekends to travel was an invaluable addition to our learning process. We started small, venturing only to Amsterdam (a 30-minute train ride), to explore the economic and cultural capital of Holland. We also visited The Hague and Peace Palace, both shining examples of a truly international cooperative effort that represents how far the world has come in its efforts to establish peace and justice on a global scale. However, as the weekends progressed, we began to venture farther afield, including trips to France, England, Germany, and the Czech Republic. We stood atop the Eiffel Tower, crossed the famous Tower Bridge in London, raced across the Autobahn, and sampled exotic delicacies in Prague. As Jurgensen noted, “The best experience of all was simply being in Europe and interacting with the locals in every locale.”

However, we never forgot that the main purpose of our trip abroad was to continue and enrich our legal education. There was still studying every night in our dorm room for the next day’s class, returning to our hotel rooms in Paris or London.
in order to prepare for oral exams, and hopping planes at 6 a.m. in England to return to Washburn in time to begin fall semester classes. Fun was a very important part of our trip, but we were in Europe, first and foremost, to expand our legal understanding of the European culture. As Hight remarked, “I not only went for the legal education, but also for the social and cultural experience.”

The program immersed all of us in another culture, requiring us to be out of our element, and allowing debate with individuals who do not hold the same belief systems or social structure. This experience will help us relate the law to all of our future clients because we now understand how varied different cultures can be. The Washburn-Utrecht study abroad program has proved to be an invaluable learning experience, both inside the classroom and out, that has equipped each of us with a greater understanding of the law’s role in our global society. Our six weeks in Utrecht demonstrated the law’s power to transcend borders and politics, and has given all of us the tools and the courage to strive to use the law to achieve something greater than us all.

**About the Authors**

**Taylor Hight**, originally from Riverton, earned a Bachelor of Science degree in criminal justice and a master’s degree in justice studies and justice administration at Pittsburg State University. He also completed several hours of graduate work in business administration at Washburn before entering law school in August 2005. He has interned for the Hon. Kent Lynch and the Hon. Don Noland of the Cherokee County District Court.

**Shawn Jurgensen** arrived at Washburn School of Law following a four-year undergraduate career at Missouri State University, where he studied history. Jurgensen plans to complete his law degree in May 2008. He claims both Springfield, Mo., and Pittsburg as his hometowns.

**Amy Taylor** is a second-year law student at Washburn University School of Law, currently working toward her Certificate in Advocacy. She hails from Houston and in 2005, she earned a Bachelor of Arts degree in speech communication from Trinity University in San Antonio.

**Jennifer Zook**, also a second-year law student at Washburn University School of Law, currently works as an intern for U.S. District Magistrate Judge K. Gary Sebelius. She comes from Phoenix after earning her Bachelor of Arts in psychology from Arizona State University.

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**Studying Law**
(continued from Page 15)

Students from around the world studied law at the University of Utrecht, Netherlands.

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<table>
<thead>
<tr>
<th>Health Insurance</th>
<th>Long-Term Care Insurance</th>
<th>Life Insurance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>Home Care</td>
<td>Term</td>
</tr>
<tr>
<td>Group — Full/Part-time</td>
<td>Assisted Living Care</td>
<td>Universal</td>
</tr>
<tr>
<td>Employees</td>
<td>Nursing Home Care</td>
<td>Survivorship (2nd to Die)</td>
</tr>
<tr>
<td>Student Plans</td>
<td></td>
<td>Key Person</td>
</tr>
<tr>
<td>Short-Term Coverage</td>
<td></td>
<td>Executive Benefit Life</td>
</tr>
<tr>
<td>Medicare Supplements</td>
<td></td>
<td></td>
</tr>
<tr>
<td>International Travel Insurance</td>
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16 – OCTOBER 2006
Thinking Ethics

Responding to an Ethics Complaint

By Stanton A. Hazlett, disciplinary administrator

The mail comes to your office. One of the envelopes is a light gray and the return address indicates the letter is from the Disciplinary Administrator’s Office (DAO). An ominous warning in the lower left hand corner of the envelope indicates that the information contained is personal and confidential. It is likely that the envelope contains an ethics complaint. After you get over the anxiety and fright of receiving such a letter, what do you do? First, open the letter. No kidding. One Kansas attorney was disciplined because of his failure to open the correspondence notifying him of the complaint and promptly responding to the complaint filed against him. Ultimately, that lawyer received an informal admonition because he did not timely respond to the complaint received even though it was subsequently determined that the underlying complaint against the lawyer had no merit.

Remember that Supreme Court Rule 207 (SCR) and Kansas Rules of Professional Conduct 8.1 (KRPC), Bar Admission and Disciplinary Matters, require Kansas lawyers to cooperate in responding to a disciplinary complaint. Failure to cooperate and respond will result in the lawyer being disciplined. The letters from the DAO advising a Kansas lawyer that a complaint has been filed against him or her will set out the time limits for the lawyer to respond. If, for some reason, a lawyer cannot respond within the time limits set out, the lawyer need only call the lawyer assigned to the case in the DAO and a reasonable request for additional time will be granted.

The DAO receives approximately 1,000 complaints each year. Around 70 percent of those complaints are handled informally. Those complaints are not docketed for investigation, but the attorney is asked to provide a response to the DAO within 15 days. Complaints are handled in an informal fashion when it appears to the lawyer handling the case in the DAO that the complaint probably does not have merit and the lawyer will likely have an explanation for the allegations made by the complainant. The remaining 30 percent of the cases are docketed for investigation and assigned an investigator. The fact that the case is docketed does not mean that a determination has been made that misconduct likely occurred, but does signal that issues were raised in the complaint letter that merited investigation. The letter advising the attorney of the complaint will explain the time frame in which a response should be prepared by the attorney. The attorney will also be advised of his or her duty to cooperate fully with the investigation and that an investigator will be appointed to investigate the complaint.

The majority of complaints are filed by clients. Complaints are also filed by judges, other attorneys and even opposing parties. There is no standing requirement to file a complaint. To the extent necessary, a lawyer may reveal confidential information to respond to a disciplinary complaint, KRPC 1.6(b)(3). This rule applies even if the complaint is filed against the lawyer by someone other than a client.

The vast majority of complaints filed with the DAO are found to have no merit. It is understandable that an attorney receiving a complaint without merit would be upset. However, an attorney still has the responsibility to respond. You should be aware that the response may be shared with the complainant. Keep the response professional and avoid any personal attacks on the complainant. Provide a concise written response to the complaint that addresses each allegation against you. Attach copies of documents that support your position.

If the complaint against you has merit, you should immediately retain counsel to assist you in preparing your response to the complaint. If the conduct does not involve dishonesty or self-dealing, you may be eligible for the Attorney Diversion Program, SCR 203. A request to be admitted to the diversion program should be made by an attorney before the investigation is concluded. If misconduct has occurred, the attorney can benefit from a frank acknowledgement of a violation of the rules. In fact, full and free disclosure and a cooperative attitude during the disciplinary process is considered to be a mitigating factor. In re Conwell, 271 Kan. 304 (2001). On the other hand, obstruction of the disciplinary proceeding or intentionally failing to follow the rules governing the proceeding is an aggravating factor. In re Lober, 276 Kan. 633 (2003).

Receiving a complaint alleging that you have violated the KRPC is obviously not a pleasant experience. However, it is very likely that a determination will be made that you have done nothing wrong. A prompt and thorough response to the complaint is your responsibility under the Kansas SCRs and the KRPC. This is true whether the complaint has merit or not. A lawyer’s responsibility to respond to an ethics complaint is part of the self-regulation of our profession, which is vitally important and must be maintained.

About the Author

Stanton A. Hazlett received his BGS from the University of Kansas and his J.D. from Washburn University School of Law. From 1977 through 1986 he was engaged in private practice in Lawrence. He has been with the Disciplinary Administrator’s Office since 1986. In September 1997 he was appointed disciplinary administrator.
The National Conference of Commissioners on Uniform State Laws (NCCUSL) recently concluded its 115th annual meeting in South Carolina. The NCCUSL approved eight new acts dealing with issues ranging from new rules on volunteer health care services in declared emergencies to a revision of the established rules governing organ donations.

The conference is comprised of more than 300 lawyers, judges, law professors, legislators, and government attorneys, appointed by every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. The uniform law commissioners draft proposals for uniform laws on issues where disparity between the states is a problem.

As they have done each summer since 1892, uniform law commissioners gathered for a full week to discuss — and debate line by line, word by word — legislative proposals drafted by their colleagues during the year. The eight acts just approved in South Carolina are now available for state enactment.

The new Uniform Emergency Volunteer Health Care Practitioners Act will allow state governments to give reciprocity to other states, licensees or emergency services providers so that covered individuals may provide services without meeting the disaster state’s licensing requirements. This act was drafted in response to the recent devastation in the Gulf States from hurricanes Katrina and Rita, specifically the problem of allowing out-of-state medical professionals to practice in the afflicted areas.

The new Uniform Anatomical Gift Act updates the act (which was originally promulgated in 1968 and adopted in every state; a revised version has been available since 1987) in light of changes in federal law relating to the role of hospitals and procurement organizations in securing organs for transplantation. The new act expands the number of individuals authorized to make anatomical gifts; it also authorizes the creation of donor registries, which are already in use in some states.

The Uniform Prudent Management of Institutional Funds Act, like its predecessor, the Uniform Management of Institutional Funds Act, provides statutory guidelines for management, investment, and expenditures of endowment funds of charitable institutions — institutions such as colleges, universities, and hospitals. The new act expressly provides for diversification of assets, pooling of assets, and total return investment, to implement whole portfolio management, bringing the law governing charitable institutions in line with modern investment and expenditure practice.

The Uniform Child Abduction Prevention Act provides courts with guidelines to follow during domestic dispute proceedings, in order to help courts identify families with children at risk for abduction, and to provide methods to prevent the abduction of children.

The Uniform Power of Attorney Act provides a simple way for people to deal with their property by providing a power of attorney that survives the incapacity of the principal. While the act is primarily a set of default rules that can be altered by specific provisions within a power of attorney, the act does contain safeguards for the protection of an incapacitated principal.

The Uniform Limited Liability Company Act permits the formation of limited liability companies (LLCs), which provide the owners with the advantages of both corporate-type limited liability and partnership tax treatment. Though every state has enacted some sort of LLC legislation, state LLC laws are far from uniform. This new act provides the states with modern, updated legislation governing the formation and operation of LLCs.

The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act seeks to improve the representation of children in proceedings directly affecting their custody by clearly defining the roles and responsibilities of children’s representatives and by providing guidelines to courts in appointing representatives.

The Model Registered Agents Act provides states with one registration procedure for registered agents no matter the kind of business entity represented by the agent. Since almost every state requires an entity created in another jurisdiction to designate a registered agent for service of process and other legal proceedings, this act should simplify registration procedures by providing one registered agent database in each state.

Information on all of these acts, including the approved text of each act, can be found at the conference Web site at www.nccusl.org.

Once an act is approved by NCCUSL, it is officially promulgated for consideration by the states, and legislatures are urged to adopt it. Since its inception, NCCUSL has been responsible for more than 200 acts, among them such bulwarks of state statutory law as the Uniform Commercial Code, the Uniform Probate Code, the Uniform Partnership Act, and the Uniform Interstate Family Support Act.

Kansas joined the conference in 1893 and, since that time, has enacted more than 100 uniform or model acts promulgated by the conference. Kansas currently has seven uniform law commissioners: James M. Concannon, Topeka; John F. Hayes, Hutchinson; Richard C. Hite, Wichita; Rep. Michael R. O’Neal, Hutchinson; Elwaine F. Pomeroy, Topeka; Glee S. Smith, Lawrence; and Sen. John L. Vratil, Overland Park.

This was the 44th consecutive annual meeting of the conference attended by Smith. The Kansas commissioners have been active in the conference, have served on many drafting committees, have chaired several drafting committees, and Hite served as president of the conference from 1993 to 1995. Pomeroy has for many years chaired the Committee on Parliamentary Practice. Smith chaired the drafting committee for the original Uniform Anatomical Gift Act adopted in 1968 and has served on the drafting committees for the updates, including the one adopted this year. Hite chaired the drafting committee for the Uniform Athlete Agents Act adopted in 2000.

The procedures of the conference ensure meticulous consideration of each uniform or model act. The conference usually spends a minimum of two years on each draft. Sometimes, the drafting work extends much longer. No single state has the resources necessary to duplicate this meticulous, careful, and nonpartisan effort. Working together with pooled resources through the conference, Kansas joins with every other state to produce the impressive body of laws known as the “Uniform State Laws.”
Welcome Fall 2006 Admittees to the Kansas Bar

| Jessica Marie Agnelly                  | Ivery Anne Goldstein                  |
| Alene Denise Aguilera                 | Kelly Nicole Goodwin                  |
| Angela-Marie Peredo Agustin           | Schyler D. Goodwin                    |
| Craig J. Albers                       | Roarke Russell Gordon                 |
| Derek A. Aldridge                     | Wendeep Dawn Grady                    |
| Kristopher Steven Amos                | Jason T. Gray                         |
| Katie L. Anderson                     | Chad Michael Griffith                 |
| Lee R. Anderson                       | Burke William Griggs                  |
| James Jason Armbrust                  | Ryan Patrick Haga                     |
| Stanley Benjamin Bachman              | Virgil Ian Hale                        |
| Elizabeth A. Baskerville-Hiltgen      | Leslie Kathleen Harrell-Latham        |
| Brandon Hunter Bauer                  | Travis B. Harrod                      |
| Dallas F. Bauer                       | Benjamin Hart                         |
| Chad Ryan Beashore                    | Melissa Carol Hasso                   |
| Jessica Ryan Beever                   | Reese H. Hays III                    |
| Branden Alexander Bell                | Jillian Hekmati                       |
| Bradly Harold Bergman                 | Thomas Nathaniel Tobias Henry         |
| Eric R. B. Furt                       | Lynne J. Herman                       |
| Jamie Marie Boldt                     | Garth J. Hermann                      |
| Tina M. Boschert                      | Aaron M. House                        |
| Maureen Michaela Brady                | Bartholomew W. Howk                   |
| David Michael Breiner                 | Matthew Redwood Hubbard               |
| Amy Christine Brooks                  | Anthony T. Hunter                     |
| Logan M. Brown                        | Kevin Douglas Hyland                  |
| Jessica A. Bryson                     | Lora D. Ingels                        |
| Lorraine Catherine Buck               | Casey Allen Jenkins                   |
| Pamela Sue Burrrough                  | Derek Glenn Johannsen                 |
| Jenoise Marianne Callahan             | Jeremiah L. Johnson                   |
| Paul David Carlson                    | Joni C. Johnson                       |
| Melissa LeAnne Castillo               | Miranda Beth Johnson                  |
| Michael Dominic Cerulo                | Schalie Anne Johnson                  |
| Kevin David Chambers                  | Leslie Kingsford Jones                |
| Leslie Denchambers                    | Matthew Scott Jordan                  |
| John Aaron Christensen                | Alex B. Judd                          |
| Casey Michael Clark                   | Sarah L. King                         |
| Norah Lee Golf Clark                  | Brandon Gordon Kinney                 |
| Brian M. Clarke                       | Charles Frederick Kitt                |
| Kimberlee Kay Conard                  | Amanda Baker Kivett                   |
| Jeffrey M. Cook                       | Derek Brewer Kleinmann                |
| John Frederick Crawford               | Lydia Hazel Krebs                     |
| Kristy Khan Cuevas                    | Jason Michael Kueser                  |
| Daniel Graham Curry                   | Kevin M. Kuhlman                      |
| Mary Ruth Daniel                      | Amy Nicole Kutschka                   |
| Sandra Ann Davison                    | Jay Michael Leese                     |
| Peter Nyman Dawson                    | Michelle R. Levine                    |
| Mark D. Dodd                          | Tim Alan Liesmann                     |
| Lori Deann Dougherty                  | Samuel Guy MacRoberts                 |
| Kurt Edward Drozd                     | Aaron J. Mansfield                    |
| Tara Sue Eberline                     | Angela Robinson Markley               |
| Elizabeth Ann Evers                   | Daniel J. Martinez                    |
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Deadline to Submit 2007 IOLTA Grant Applications is Dec. 1

The Kansas Bar Foundation (KBF) is soliciting grant applications for the 2007 Interest on Lawyers’ Trust Accounts (IOLTA) grant cycle that runs from April 1, 2007, through March 31, 2008. The deadline to submit applications is Dec. 1. The KBF Board of Trustees will make a decision on the applications in February 2007.

The Kansas IOLTA program, approved by the Kansas Supreme Court in 1984, is supported by more than 3,450 lawyers across the state. The program collects interest from trust accounts in which funds are nominal in amount or are expected to be held for a short period of time. IOLTA grants are primarily aimed at funding programs that provide civil legal services for low-income people, law-related charitable public service projects, and improvements to the administration of justice, with the largest share going to provide direct legal services for victims of domestic violence.

Grant applications are reviewed by the KBF’s IOLTA Committee, comprised of appointees from the KBF, the Kansas Bar Association, the Kansas Supreme Court, the Kansas Trial Lawyers Association, the Kansas Association of Defense Counsel, and the governor’s office. The committee forwards its recommendations to the KBF Board of Trustees for final approval.

In order to qualify for IOLTA funds, an organization must:

• be a 501 (c) (3) or 501 (c) (6) if a local bar association,
• use the funds for a specific charitable purpose,
• agree to an audit or a review of expenses,
• provide quarterly and year-end reports as necessary, and
• demonstrate fiscal responsibility and the ability to provide quality services.

If your organization would like an IOLTA grant application for 2007, contact Meg Wickham, manager of public services, at (785) 234-5696, e-mail mwickham@ksbar.org, or visit www.ksbar.org/public/kbf/iolta.shtml.
Practice Makes Perfect
By Katharine J. Jackson, KBA Young Lawyers Section editor, Morrison, Frost, Olsen & Irvine LLP, Manhattan

Interviewing for a job can be a nerve-wracking experience that causes sweaty palms, fingernail biting, and meandering responses to questions. However, the career planning professionals at the state’s law schools hope to combat anxious fidgeting and awkward pauses with mock interview programs designed to sharpen law students’ interviewing skills.

In a mock interview, a practicing attorney interviews a law student for 20 minutes and then provides 10 minutes of feedback. The mock interviews are videotaped, and each law student reviews his or her performance with a law school career planning staff member. The mock interview programs are scheduled for each semester, preceding on-campus recruiting, in which employers consider prospective candidates for summer clerkship and full-time positions.

The KBA Young Lawyers Section provided assistance at the University of Kansas School of Law and the Washburn University School of Law, with several YLS members participating as interviewers. The programs gave the YLS members an opportunity to meet law students and to provide valuable advice and guidance.

At KU Law, the Office of Career Services recently administered the mock interview program to prepare law students for the arrival of approximately 75 employers for fall on-campus interviewing.

“The process simulates the pressure of actual interviews,” said Todd Rogers, Career Services director. Rogers said that following the mock interview, the law student and Office of Career Services staff member review the videotape together to identify any nervous habits and evaluate responses to typical interview questions.

Maren Ludwig, a second-year student at KU Law, participated because she believes that practicing interviewing is important. “I did this last year, and it made me more comfortable going into the actual interviews,” she said.

At the Washburn University School of Law, the Professional Development Office recently conducted its mock interview program to prepare for the participation of approximately 45 employers in fall recruiting. Margann Bennett, director of Professional Development, said that the program provides great practice because it is structured so similarly to fall recruiting.

“Students are required to dress in business formal attire, and we conduct the interviews in the same rooms employers will use when interviewing on campus,” she said. Bennett has received “overwhelmingly positive feedback” about the mock interview program.

Michael Lam, a second-year at Washburn Law, said that the program was an enjoyable experience. “The lawyer who interviewed me was very positive and gave worthwhile tips,” he said.

Amanda J. Kiefer, YLS member and assistant counsel for Security Benefit Group in Topeka, was impressed with the students she interviewed at Washburn Law. “They were composed and enthusiastic. They expressed appreciation for our part in helping them prepare for the upcoming interview season,” she said.

Both law schools welcome assistance from attorneys for the mock interview programs and encourage employers to register for on-campus interviewing. At KU Law, contact Todd Rogers at (785) 864-4377 and at Washburn Law, contact Margann Bennett at (785) 670-1703.

About the Author
Katharine J. Jackson is an associate with the law firm of Morrison, Frost, Olsen & Irvine LLP, Manhattan, and also serves as the assistant city attorney for Manhattan. She earned her B.A. from Kansas State University and her J.D. from the University of Colorado School of Law. She may be reached at Jackson@mfoilaw.com.
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Real Property

(continued from Page 8)

Production Co., the Kansas Supreme Court adopted the approach set forth in the Second Restatement of Torts to determine when a party should be held strictly liable. This approach has made it increasingly difficult to impose strict liability. Restatement section 519 sets forth the general rule for strict liability based on abnormally dangerous activities as follows:

1. One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

2. This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

The core structure of the analysis turns on “whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even ... without the need of a finding of negligence.”

In Williams, farmers brought an action when natural gas invaded their irrigation water. The Williams Court noted that the gas field where defendants were drilling was the largest known reservoir of natural gas in the world, thus, the drilling and operation of natural gas wells in that area was common, accepted, and a natural use of the land. The Court noted that natural gas is not a “harmful agent” once it is brought above ground, that natural gas does not spoil drinking water, destroy vegetation, or harm livestock, and that natural gas is not known to be “mischievous” if it enters the property of another. Therefore, the Williams Court held that the drilling and operation of natural gas wells is not an abnormally dangerous activity in relation to the type of harm sustained by the plaintiffs.

Negligence/negligence per se

Negligence liability for harm to land is governed by fundamental negligence principles. However, when attempting to prove that a business was negligent, the fight can move to the arena of compliance with industry practices. Conformity

29. This approach replaced the common law doctrine promulgated in the English case of Fletcher v. Rylands, L.R. 1 Exchequer 263, first recognized by a Kansas court in Helmi v. Eastern Kansas Oil Co., 102 Kan. 164, 169 P. 208 (1917). Under the Rylands doctrine, liability arises when a defendant brings a harmful substance onto his property and allows it to escape. Id. See also Berry v. Shell Petroleum Co., 33 P2d 953 (Kan. 1934).


31. Williams, 241 Kan. at 114 (quoting Restatement (Second) of Torts § 519 (1976)), Restatement (Second) of Torts, § 520 provides the following factors for determining whether an activity is abnormally dangerous:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

Compare this approach with PIK 3d 126.80 (2003). “Ultrahazardous Activities,” which seems to codify the Rylands (pre-Williams) doctrine, discussed in FN 29, supra. In Greene v. Product Mfg. Corp., 842 F. Supp. 1321 (D. Kan. 1993), the plaintiffs asserted that there are two forms of strict liability – one involving abnormally dangerous activities (the Restatement doctrine) and the other involving Rylands activities. Greene, at 1326. The Court disagreed, indicating that the two doctrines are not separate recovery theories. Id.


33. Williams, 241 Kan. at 115. 34. Id. at 115-116

35. Kansas has always applied a negligence standard rather than strict liability to explosion or fire caused by natural gas. See Milwaukee Ins. Co. v. Gas Service Co., 185 Kan. 604, 347 P.2d 394 (1959) (plaintiff’s home partially destroyed by natural gas explosion). Similarly, one who allows fire to escape his property is not subject to strict liability. Koger v. Ferrin, 23 Kan. App. 2d 47, 926 P.2d 680 (1996). The Koger court distinguished several pre-Williams cases, noting that even though the damaging instrumentalities in those cases did not meet the definition of abnormally dangerous, the Kansas Supreme Court has exempted certain chemical agents from Restatement analysis, presumably to promote safe, clean water. Id. at 55. See Klausen v. Central Kansas Co-op. Creamery Ass’n, 160 Kan. 697, 165 P.2d 601 (1946) (creamery waste produced by defendant constituted a “non-natural” use of the land, which was dangerous and likely to cause damage if permitted to escape); Atkinson v. The Herington Cattle Co., 200 Kan. 298, 436 P.2d 816 (1968) (defendant strictly liable for allowing contaminated water, the source of which defendant had produced on his land, to escape and damage neighboring land, despite the fact that defendant’s business was lawful); Berry v. Shell Petroleum Co., 33 P2d 953 (Kan. 1934) (oil company held strictly liable for damages caused by salt water that escaped its premises). Koger referred to these cases as “water law cases,” indicating that their precedent was limited to “water cases” based on an absolute nuisance theory. Koger v. Ferrin, 23 Kan. App. 2d 47, 54, 926 P.2d 680 (1996) (citing Berry, 140 Kan. at 102); Prosser and Keeton on Torts, § 78, pp. 546-47 (5th Ed. 1984).
with industry-wide standards is not an absolute defense to negligence claims. Although in some instances conformity may be presented as evidence of due care, or compliance with industry standards (or standards imposed administratively or legislatively), it does not preclude liability if a reasonable person would have taken additional precautions. Furthermore, “evidence of prior similar accidents is admissible to prove foreseeability as long as the prior accidents involve substantially similar circumstances.”

To recover under a theory of negligence per se, a plaintiff must establish the following: (1) the defendant violated a statute, ordinance, or regulation; (2) an individual right of action for injury arising out of violation was intended by the legislative body that passed the statute, ordinance, or regulation; and (3) the defendant's violation caused the plaintiff's damages. Violation of an ordinance alone is insufficient to prove negligence per se. Furthermore, if the statute was enacted to protect the public at large, then no individual right of action exists.

Contract

A lawsuit on a breach of contract theory always has advantages. The contract may provide attorney's fees for the prevailing party. The contract may contain an arbitration clause, which may truncate the litigation and reduce your client's overall costs. Also, actions on a written contract are governed by a five-year statute of limitations instead of the two-year limitations period applicable to torts. Contract suits are especially attractive to avoid claims assignment issues. However, no punitive damages are available.

(continued on next page)
Federal statutes

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides a right of recovery for damages caused by release of various hazardous chemicals, but it specifically exempts petroleum products. CERCLA actions are particularly attractive to landowners seeking relief, because certain attorney's fees are assessable. In addition, CERCLA pre-empts state repose and limitation statutes, imposing a federally required commencement date of when “the plaintiff knew (or reasonably should have known) that the personal injury or property damages ... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.” Unlike CERCLA, the Resource Conservation and Recovery Act only provides for injunctive relief – it does not create a private cause of action for damages. Similarly, the Kansas Solid and Hazardous Waste Act will not support a private action for damages.

Repose and Assignment: Bitter Enemies of Landowners

Repose

Whereas the statute of limitations is nuanced, the statute of repose is a rule of “extreme harshness and dubious fairness.” Subsection (b) of K.S.A. 60-513 limits commencement of tort actions in the following way:

47. 42 U.S.C. § 9607 (2002). To fall within CERCLA's purview, a plaintiff must show that damages were caused by exposure to a hazardous substance that was released into the environment. Morgan v. Exxon Corp., 869 So.2d 446, 450 (Ala. 2003). See also Bolin v. Cesna Aircraft Co., 759 F. Supp. 692, 698 (D. Kan. 1991).


49. City of Wichita v. Trustees of APCO Oil Corp. Liquidating Trust, 306 F. Supp. 2d 1040, 1095 (D. Kan. 2003) (attorney's fees related to identification of potentially responsible parties recoverable as necessary response costs); Sinclair Oil Corp. v. Dymon Inc., 988 F. Supp. 1394, 1398 (D. Kan. 1997) (attorney fees allowable if they represent response costs incurred in relation to cleanup of hazardous waste). See also Greene v. Product Mfg. Corp., 842 F. Supp. 1321, 1323-24 (D. Kan. 1993) (attorney fees stemming from litigation of recovery action are not recoverable, but necessary attorney fees for removal-related nonlitigation activities are recoverable); FMC Corp. v. Aero Indus., Inc., 998 F.2d 842, 847 (10th Cir. 1993) (attorney fees related to removal activities are recoverable, whereas litigation fees are not); Key Tronic Corp. v. United States, 511 U.S. 809, 114 S. Ct. 1960 (1994) (CERCLA does not provide for litigation fees related to bringing a cost of recovery action, but it does provide for attorney fees related to actual cleanup, such as identifying potentially responsible parties). For a different application, see Bolin v. Cesna Aircraft Co., 759 F. Supp. 692, 710 (D. Kan. 1991) (litigation costs are recoverable to the extent they constitute “necessary costs”).


51. 42 U.S.C. §§ 6901 et. seq.


53. K.S.A. 65-3401 et. seq.

54. Id.


58. Id. at 1356 (quoting Harding v. K.C. Wall Products Inc., 250 Kan. 655, 668, 831 P.2d 958 (1992)).

59. Id.

60. Id. at 1351.

61. Id. at 1358.

62. The plaintiffs were allowed to proceed against two of the defendants pursuant to CERCLA claims, which are not subject to the Kansas 10-year statute of repose. Id. at 1355, 1358. To overcome the statute of repose, a plaintiff may also employ the doctrine of equitable estoppel if evidence exists that the defendant affirmatively acted to fraudulently conceal its tortious conduct. Robinson v. Shah, 23 Kan. App. 2d 812, 826, 936 P.2d 784 (1997).

63. Kansas Midland Ry. Co. v. Brehm, 39 F.690 (1895). See also Heinsohn v. Porter, 244 Kan. 667, 772 P.2d 778 (1989) (tort claims remain unsignizable in Kansas); Schenewer v. General Host Corp., 126 F.3d 1261 (10th Cir. 1997) (property interest of a landowner and tenant are distinct, and one may not recover damages based upon the other's interests).

64. Morsey v. Chevron U.S.A. Inc., 94 F.3d 1470, 1478 (10th Cir. 1996).
an action against a neighboring leaseholder based on damage caused by Chevron’s water flooding of oil and gas fields, the majority of which occurred prior to Morsey’s ownership of his lease. Shortly after Morsey purchased his lease, he learned that there had been communication between Chevron’s pipes and his pipes, which had damaged the oil producing capabilities of his lease. Morsey alleged trespass, conversion, private nuisance, breach of contract, breach of duties owed to owners of a common pool, and strict liability for permanent and temporary damages. He posited that because his predecessors-in-interest assigned their rights to him, he was entitled to recover for damage that occurred prior to his purchase. The Court held that “any tort for damages done to the leasehold before [Morsey] acquired it belonged to his predecessors-in-interest and lapsed when they transferred it. In Kansas, tort claims such as those in question are unassignable.”

Permanent or continuing damage?

Injuries to land, whether framed in tort or contract, are divided into two categories: permanent and temporary. Generally speaking, permanent damages are damages that are practically irremediable. Permanent damages are based on the theory that the cause of the damage is fixed. Evidence that damage will exist indefinitely will support a judgment for permanent damages. Past, present, and future damages based upon a permanent injury must be collected in a single action. The measure of damages for a permanent injury is based upon a permanent injury must be collected in a single action. The measure of damages for a permanent injury is classified as permanent damage.

Temporary damages include only injuries that are intermittent and occasional. Temporary damages are based on the theory that the cause of the injury will eventually be eliminated. A plaintiff may recover temporary damages as they occur. Damages are classified as temporary only if they are remediable within feasible economic and temporal limits. If damages may be remedied, removed, or abated within a reasonable period of time and at a reasonable expense, then they are temporary. The measure of temporary damages is the “reasonable cost of repairing the injury with interest, which may include value of use, or diminution of rental value, together with special damages for injury to crops or improvements.”

In Monfort v. Layton, crop damage was classified as temporary damage while soil damage resulting in a failure to produce future crops was classified as permanent damage.

Causation: RIL and Alternative Liability

Res ipsa loquitur

When a property owner discovers damage years after it occurred, the cold trail to the responsible party creates a proof problem. Furthermore, nearby landowners may shy away from sharing information that could implicate them. Since negligence is never presumed, the occurrence of injury by itself does not establish liability. However, where direct proof does not exist, circumstantial proof may be used. Res ipsa loquitur (RIL), which means “the thing speaks for itself,” is a rule of evidence that allows a claimant to plead circumstances, which infer negligence. Upon making a prima facie case, the burden shifts to the defendant to prove that he was not at fault. The underlying rationale is that the defendant who is in control of the instrumentality that has caused the damage has access to, and control over, causation evidence, whereas the plaintiff must rely on circumstantial evidence.

To apply RIL, a party’s petition must contain the following three elements:

65. Id. at 1474.
66. Id.
67. Id.
68. Id. at 1478. Some jurisdictions, including Missouri, distinguish between personal torts and property torts, holding that the latter are assignable.Gretinger v. Missouri Labor & Indus. Relations Comm’n, 129 S.W.3d 399, 403 (Mo. App. E.D. 2004).
69. Whether damages are classified as temporary or permanent is a question of fact. Berry v. Shell Petroleum Co. et al., 33 P.2d 953 (Kan. 1934).
71. Id.
73. McAlister, at Syll. ¶ 8.
75. Williams, 241 Kan. at 110-11
76. Id.
77. McAlister, at Syll. ¶ 5.
78. Id. Water law provides several applications of this rule. In actions for damages resulting from recurring or transient contamination or flooding, a separate cause of action accrues for temporary damages each time the plaintiff’s land or crops are harmed by overflow, and each injury commences a fresh two-year limitations period. McAlister v. Atlantic Richfield Co., 233 Kan. 252, 662 P.2d 1203 (1983), quoting Gowing v. McCandles, 219 Kan. 140, 144, 547 P.2d 338 (1976). If damages are permanent, then the action must be filed within two years of the time the injury became reasonably ascertainable. Dougan v. Rosville Drainage Dist., 270 Kan. 468, 473, 15 P.3d 338 (2000) (citing Thierer v. Bd. of County Comm’rs, 212 Kan. 571, 574, 512 P.2d 343 (1973)). Nuisance appears to be the preferred cause of action in flooding cases.
79. Id.
80. Id. at Syll. ¶ 6.
82. Id.
86. Id.
1. The thing or instrumentality causing injury or damage was within the exclusive control of the defendant;

2. The occurrence must be of such kind or nature as ordinarily does not occur in the absence of someone’s negligence; and

3. The occurrence must not have been due to contributory negligence (or fault) of the plaintiff.90

RIL does not apply where a plaintiff has pled specific acts of negligence.91 The RIL doctrine is especially helpful where there are two or more possible responsible parties.92 However, there are caveats. First, the doctrine is stronger in cases involving joint tortfeasors, than where the plaintiff is unsure which of multiple parties caused the harm.93 If there are two or more injuring instrumentalities, any of which were not under the defendant’s control, RIL does not apply.94 But, a plaintiff is not required to eliminate all other possible causes; he merely must produce evidence, which prompts a reasonable person to conclude that more likely than not the defendant was negligent.95

In cases involving gas and water pipeline leaks, emphasis is placed on the requirement that the evidence prove that a leak would not have occurred in the absence of negligence.96 In these cases, the courts accept that a pipeline company has a duty to inspect and maintain in order to prevent leaks and breaks. Thus, plaintiffs typically plead that the broken or leaky pipe was either defective when laid, or was carelessly laid or maintained, and/or broke under unsafe external or internal force.97 However, where the pipes have been buried for years, RIL is less likely to be applied because there is a greater chance that the leak occurred in the absence of fault.98

Alternative liability
Some jurisdictions have adopted the theory of alternative liability,99 whereby two or more potentially responsible parties will be presumed liable unless they can exonerate themselves. One court explained the doctrine as follows:

When more than one negligent defendant cannot be identified as the specific source for an injury, a plaintiff need not prove causation as to each individual defendant, but need only prove that the one who caused the injury is among the group of negligent defendants. The court will presume each individual defendant caused the whole injury unless the defendant can prove otherwise. “The Summers burden shift seems intuitively fair where all those who could have caused the injury are before the court and the odds are equal and significant that each is liable and to the same degree.”100

It appears the doctrine is ripe for acceptance in Kansas. In Mason v. Texaco Inc.,101 the U.S. District Court for the District of Kansas indicated that the Kansas Supreme Court would likely follow:

(continued on next page)

92. Worden at 689.
93. Voss v. Bridwell, 188 Kan. 643, 364 P.2d 955 (1961). See 65 C.J.S. Negligence §220(8), p. 1014 (“Where either one of two defendants wholly independent of each other may be responsible for the injury complained of, the rule of res ipsa loquitur ... cannot be applied. However, the doctrine may be availed of as against plural defendants who were, under the circumstances involved, joint tort-feasors.”).
98. George Foltis Inc. v. City of New York, 38 N.E.2d 455 (1941); Midwest Oil Co. v. City of Aberdeen, 10 N.W.2d 701 (S.D. 1943).
99. This theory of liability first surfaced in a California Supreme Court Case, Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). Kansas has not yet adopted this doctrine.
100. Wood v. Eli Lilly & Co., 38 F.3d 510, 512 (10th Cir. Okla. 1994), (citing Menne v. Celotex Corp., 861 E.2d 1453 (10th Cir. 1988) (applying Nebraska law)).
low other jurisdictions under factual scenarios involving two independent wrong-doers who attempt to escape liability by arguing there has been a lack of proof as to which of them caused the injury. Thus, in cases where it is unclear which potential defendant caused the harm, it might be advisable to sue under theories of RIL and alternative liability, urging the adoption of the doctrine.

Conclusion

A practitioner representing the owner of real estate subject to harm has a variety of state and federal claims available. Recovery for past harm (especially latent harm) may be complicated by the powerful defenses of repose, limitations, and assignment. The lawyer should determine whether the mischievous agent qualifies for a CERCLA recovery action, and search for any applicable contract rights, such as may be found in easement or right-of-way agreements. In addition, in appropriate circumstances, counsel may consider the application of RIL or alternative liability theories to prove causation.

About the Author

Arthur E. Rhodes practices civil litigation with Smithyman & Zakoura Chtd., Overland Park, in the areas of business and public utility law. Rhodes received his undergraduate degree in 1987 from the College of the Holy Cross, Worcester, Mass., and his J.D. in 1996 from Washburn University School of Law. He was the managing editor of the Washburn Law Journal from 1995-96.

During his six years as an assistant district attorney in Wyandotte County, he litigated numerous criminal cases, ranging from property offenses to homicides. Since joining Smithyman & Zakoura in 2003, Rhodes has handled cases involving common carrier, petroleum pipeline, and property line issues. He practices in the state courts of Kansas and Missouri and the U.S. District Court for the District of Kansas.

102. Id.
Commission on Judicial Qualifications

INQUIRY CONCERNING LAWTON R. NUSS, JUSTICE, KANSAS SUPREME COURT
ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS
ADMONISHMENT, AND CEASE AND DESIST
DOCKET NO. 954 – AUGUST 18, 2006

FACTS: Respondent, a member of the Kansas Supreme Court, self-reported a discussion over lunch that he had with two state senators regarding a matter over which the Court still retained jurisdiction. Respondent had been following media reports of various school finance proposals before the 2006 Legislature. Based on questions he had regarding dollar amounts of various studies and proposals, he prepared a chart and brought it to the lunch. By all accounts, the chart was discussed for less than five minutes.

A panel of the Kansas Commission on Judicial Qualifications found probable cause by clear and convincing evidence of violations of the Code of Judicial Conduct and referred the matter to formal hearing before a different panel of the Commission. After reviewing the pleadings, accepting stipulations, and hearing additional evidence, the Commission unanimously concluded that the conduct violated Canon 1, "A Judge Shall Uphold the Integrity and Independence of the Judiciary," Canon 2A, "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities" and Canon 3B(7), which provides "A judge shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding ..."

HELD: Based on these conclusions, the panel voted unanimously to admonish respondent for this conduct and order him to cease and desist from future activity in violation of these Canons. The panel found no prejudice to the parties or the public as a result of the misconduct.

Supreme Court

Attorney Discipline

IN RE COLIN K. KAUFMAN
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 09,239 – AUGUST 30, 2006

FACTS: Respondent, of Corpus Christi, Texas, wrote to the clerk of the appellate courts, voluntarily surrendering his license to practice law pursuant to SCR 217. A hearing on reciprocal discipline was pending at the time of the surrender. Respondent was disbarred in the state of Texas in October 2004 based on violations of Model Rules of Professional Conduct 1.5, 1.15, and 8.4(c) in representing a bankruptcy client.

HELD: The Court examined the files of the Disciplinary Administrator’s Office and found that the surrender of the license should be accepted and the respondent should be disbarred.

IN RE DANIEL J. MARKOWITZ
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 09,724 – AUGUST 30, 2006

FACTS: Respondent, a private practitioner from Overland Park, wrote to the clerk of the appellate courts, voluntarily surrendering his license to practice law pursuant to SCR 217. At the time of the surrender, a disciplinary hearing was pending on a formal complaint that alleged violations of Kansas Rules of Professional Conduct 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.15 (safekeeping property), 1.16 (terminating representation), and 8.1 (cooperation in disciplinary proceedings).

HELD: The Court examined the files of the Disciplinary Administrator’s Office and found that the surrender of the license should be accepted and the respondent should be disbarred.
Civil

ARBITRATION, PARTIALITY AND BIAS, AND FRAUD

GRIFFITH V. MCGOVERN AND SII INVESTMENTS

JOHNSON DISTRICT COURT – AFFIRMED

NO. 94,513 – SEPTEMBER 1, 2006

FACTS: Griffith claimed she was an elderly retired widow who, based on fraudulent misrepresentations and the withholding of material facts, was prompted to convert her secure investment in certificates of deposit into a high risk portfolio of unsuitable stocks and junk bonds. An arbitration panel found SII Investments liable and only awarded Griffith $3,000 in compensatory damages, denied damages against the other defendants, and ordered the parties to bear their own costs and attorney fees. The district court confirmed the arbitration award.

ISSUES: (1) Arbitrator’s partiality and (2) fraud

HELD: Court stated that neither the sanctions against one of the arbitrators in an unrelated civil suit nor his child support litigation presented the least suggestion that he would be anything other than fair and impartial in arbitrating the issues raised in Griffith’s complaint. Court held there was no nexus between Griffith’s claim and the unrelated lawsuits that could raise in the mind of any reasonable litigant the prospect of bias or prejudice on the arbitrator’s part. Court also held that Griffith failed to demonstrate to the district court that the arbitrator’s nondisclosure constituted fraud under the statutes or case law. Court held there was no nexus between Griffith’s claim and the unrelated lawsuits that could raise in the mind of any reasonable litigant the prospect of bias or prejudice on the arbitrator’s part. Court also held that Griffith failed to demonstrate to the district court that the arbitrator’s nondisclosure constituted fraud under the statutes or case law. Court found no evidence the arbitration panel confirmed the arbitration award.

STATUTES: K.S.A. 5-412(a) and K.S.A. 60-211

CONTRACT, OIL AND GAS, VENUE, AND
PARTITIONABLE INTEREST

NELSON ENERGY PROGRAMS INC. V.
OIL & GAS TECHNOLOGY FUND INC. ET AL.

CHAUTAUQUA DISTRICT COURT
REVERSED AND REMANDED


FACTS: Nelson Energy Programs (Nelson) entered into agreements with Oil & Gas Technology Fund (OGTF) to invest in a coalbed methane redevelopment project involving the exploration and development of 5,200 acres in Chautauqua County covered by oil and gas lease purportedly held by OGTF. The agreement had a venue clause providing Washoe County, Nev., as venue for any action. Nelson initially filed suit against OGTF and related parties in Chautauqua County District Court alleging fraud and securities violations and seeking rescission, injunctive relief, and partition of the leasehold interests. The district court dismissed the action, concluding the forum selection clause was enforceable and the plaintiff had no partitionable interest. After dismissal, OGTF filed assignments to Nelson, but the district court adhered to its order of dismissal.

ISSUE: Venue clause

HELD: Court held the district court erred in dismissing Nelson’s action based either on the forum selection clause or on a mistaken understanding that Nelson failed to plead a partitionable interest. Court concluded that the Kansas venue statute and long-standing case law requiring local venue for actions affecting real property may not be superseded by agreement and the allegations of Nelson’s amended petition supported a partitionable interest under Kansas law.

STATUTE: K.S.A. 60-212(b)(6), (c), -601, -1003(c)

HABEAS CORPUS

SCHUYLER V. ROBERTS

BUTLER COUNTY DISTRICT COURT
REVERSED AND REMANDED

NO. 94,227 – SEPTEMBER 1, 2006

FACTS: Schuyler classified as sex offender based on aggravated sexual battery charge that was dismissed when Schuyler entered guilty plea to aggravated assault. Schuyler denied he was a sexual offender and filed habeas action to challenge the classification. District court summarily denied the petition, finding it was matter of internal prison management. Schuyler appealed.

ISSUES: (1) Due process and (2) sex offender classification

HELD: “Stigma plus” standard adopted by 10th Circuit is applied. Stigma established because Schuyler’s sex offender classification was sufficiently derogatory to injure his reputation, and the statement was capable of being proved false as Schuyler claims. District court should have inquired further to determine whether increased responsibilities and restrictions imposed by this classification created a burden that significantly altered Schuyler’s status compared with inmates not so classified. Standard of review in Turner v. Safley, 482 U.S. 78 (1987), is distinguished. District court is reversed and case is remanded to allow district court to hear evidence and determine whether Schuyler has shown a liberty interest under stigma plus standard, and what process is due if liberty interest in not being classified as sex offender is established.

STATUTE: K.S.A. 60-1501

HABEAS CORPUS

UPCHURCH V. STATE

SEDGWICK DISTRICT COURT – AFFIRMED IN PART
AND REVERSED IN PART

NO. 94,227 – SEPTEMBER 1, 2006

FACTS: Upchurch’s convictions included aggravated robbery and aggravated kidnapping of Jessica and Daron Green. All convictions and the denial of Upchurch’s 1507 alleging ineffective assistance of counsel were affirmed on appeal. Federal habeas court reversed both aggravated kidnapping convictions. State appealed the reversal of aggravated kidnapping conviction of Jessica. Tenth Circuit reversed that habeas relief, but no remedial action taken on habeas relief for aggravated kidnapping conviction of Daron. Upchurch filed second 1507 to challenge both aggravated kidnapping convictions. District court summarily dismissed the petition as time barred, successive, and abuse of remedy. Upchurch appealed.

ISSUES: (1) Aggravated kidnapping of Daron Green and (2) aggravated kidnapping conviction of Jessica Green

HELD: Manifest injustice established by state’s failure to comply with federal habeas relief, and Upchurch’s previous counsel’s failure to ensure federal habeas ruling was fulfilled. Abuse of discretion to find Upchurch was entitled to no relief, as record should have led district court to find Upchurch was entitled to relief from aggravated kidnapping conviction of Daron.

Denial of 1507 regarding aggravated kidnapping conviction of Jessica is affirmed. No exceptional circumstances warranting consideration of successive 1507 motion and no manifest injustice allowing untimely 1507.

STATUTE: K.S.A. 60-1507, -1507(f), -1507(f)(2)
FACTS: Candi Atchison was driving a vehicle involved in a single-car accident traveling at a high speed on a gravel road. There were four passengers in the vehicle. The accident killed one passenger and severely injured Candi and the other three passengers. Candi was insured by Benchmark with $25,000 bodily injury per person limit and a $50,000 bodily injury per accident aggregate. Benchmark knew the accident's claims would clearly exceed the $50,000 policy limit. One of the passengers, Mell, sent a demand letter to Benchmark offering to settle the case for the individual policy limit of $25,000. In reply, Benchmark confirmed the policy limits and encouraged all the passengers to come to an agreement on how to apportion the policy limits otherwise it would file an action asking the court to do the apportionment. Benchmark ultimately filed an interpleader action and submitted the $50,000 as its policy limits of Candi's insurance coverage. Mell answered alleging Benchmark acted negligently or without good faith in failing to accept his settlement demand and thus Benchmark was liable in excess of policy limits. The district court granted summary judgment in favor of Benchmark finding no evidence of negligence or bad faith on the part of Benchmark in failing to accept Mell's settlement offer.

ISSUES: (1) Negligence or bad faith and (2) duty to Mell

HELD: Court affirmed, but for another reason. Court stated that an insurer has no duty to reasonably negotiate and settle with a third-party claimant where there is no contract to Mell and Candi was not a party to the interpleader action. Court stated that Candi did not assign her rights under the insurance contract (or assignment of policy rights) between them. Court stated that third parties who are strangers to an insurance contract cannot maintain an action against an insurer for the failure to negotiate and settle a third party's claim against the insured because the duty of good faith and fair dealing in the handling of claims runs only from the insurance company to its insured.

STATUTE: K.S.A. 60-254(b)

FACTS: Sanchez and Reyes were passengers in a car driven by Gutierrez when Sanchez fired shots at people at a pub. During high-speed flight from police, Gutierrez and Sanchez were killed and Reyes was injured when their car wrecked. Reyes and Sanchez's mother filed declaratory judgment action to determine if Gutierrez had liability coverage for the wreck under her Benchmark car insurance policy. Trial court granted summary judgment to plaintiffs, finding illegality defense was not applicable. Trial court did not address Benchmark's alternative argument that liability coverage was excluded under unexpected and unintended act provisions in Benchmark policy. Benchmark appealed.

ISSUES: (1) Intentional acts and (2) illegality defense

HELD: Trial court's grant of summary judgment to plaintiffs is reversed based on the intentional act exclusion in Benchmark's insurance policy. "Natural and probable consequences" test in Bell v. Tilton, 234 Kan. 461 (1983), and Harris v. Richards, 254 Kan. 549 (1994), is applied. Gutierrez's purposeful conduct in high-speed attempt to elude police officers was substantially certain to result in injury. Because loss or injury was foreseeable and substantially certain to occur, such loss or injury was barred under intentional act exclusion of Gutierrez's policy.

Record does not support an illegality defense based upon Gutierrez's conduct of fleeing and eluding police. No showing that wreck damages resulted from Sanchez's earlier illegal shooting.

CONCURRENCE and DISSENT (Bukaty, J.): Agrees that illegality defense does not preclude coverage to plaintiffs for Gutierrez's acts.

Disagrees that intentional act exclusion of Benchmark policy precluded coverage to plaintiffs under facts of case. Would apply majority view of other courts that "the insured must have intended to lose control of the act and to cause some kind of injury or damage," and here there is no direct evidence that Gutierrez intended to lose control of vehicle or harm anyone.

STATUTES: K.S.A. 2005 Supp. 21-3705(a) and K.S.A. 8-1568(a), 21-3205, 40-3107(i)(6)
was no prejudice to the substantial rights of the plaintiffs arising from the error. Court also held the no settlement evidence was actually submitted to the jury. Court also held the proposed instruction was inapplicable because the doctor was actually practicing under a temporary post-graduate permit authorized by a different statute than that quoted in the proposed instruction. Because of its holding, court did not consider the cross-appeal.

STATUTES: K.S.A. 60-258a(c), -452, 453 and K.S.A. 65-2811, -2873, -28,123(c)

PROBATE AND ADMISSION OF WILL
IN RE ESTATE OF TRACY
SUMNER DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 94,593 – AUGUST 18, 2006

FACTS: Avis Tracy died on Aug. 21, 2003. A petition was filed for the appointment of an administratrix and the issuance of letters of administration, on Oct. 14, 2003, by Tracy’s sister and niece. On Oct. 17, 2003, a guardian ad litem was appointed to represent unknown heirs. On Nov. 20, 2003, the district court found that Tracy died intestate and appointed Tracy's sister and niece as co-administrators. On March 9, 2004, the co-administrators filed an amended petition to probate Tracy’s will and for issuance of letters testamentary. The petition stated that Tracy's will had been discovered on Feb. 24, 2004. No notice had been sent to Sallie Shore or the First Christian Church, the beneficiary in Tracy’s will. Shore also filed a petition to probate the will stating she had access to the will for less than 90 days. The district court denied the petition to admit Tracy’s will to probate finding no exception to the six-month time limit for presentation of wills.

ISSUES: (1) Jurisdiction and (2) K.S.A. 59-617 and K.S.A. 59-618

HELD: Court held that the legislative intent of K.S.A. 59-518 is to submit every legally executed will to probate. It imposes a penalty on those who wrongfully withhold a will, but also provides an exception for innocent beneficiaries, allowing them to submit a will to probate beyond the six-month limit if they do so within 90 days after having knowledge of the existence of the will. Court found the district court’s interpretation of K.S.A. 59-618 was contrary to the underlying intent of the probate code, particularly under the facts of the case, where the will was found with the deceased decedent's papers within a few days after the six-month limitation period, Shore had access to the will for less than 90 days, and the co-administrators also petitioned the district court to probate the will.

STATUTES: K.S.A. 59-617, 618, -2239 and K.S.A. 60-208(c)

SERVICE OF PROCESS
THE ESTATE OF MELVIN NORRIS V. MANDY HASTINGS
RENO DISTRICT COURT – AFFIRMED
NO. 93,927 – SEPTEMBER 1, 2006

FACTS: The underlying claim involved a personal injury suit stemming from an automobile collision on April 27, 2002, between plaintiff and defendant. Service of summons and petition were to an address that was given at the accident scene, but was not the defendant's address by the time the plaintiff filed suit. However, the defendant filed an answer in the case denying that she lived in Reno County and raising the defenses of insufficient process and insufficiency of service of process. The district court found the plaintiff’s initial service was invalid and defective and granted summary judgment to the defendant.

ISSUE: Service of process

HELD: Court held that even though defendant was notified of the suit based on the initial service, such did not diminish the reality that (1) the original service did not appear to be valid, (2) plaintiff could not claim a good faith belief that service was valid, and (3) plaintiff had a reason to believe defendant was contesting service prior to the expiration of the statute of limitations. Court concluded the district court did not err in granting summary judgment to the defendant.

DISSENT: J. Knudson dissented arguing the majority’s opinion was harsh and inconsistent with a liberal construction of the service of process statutes.

STATUTE: K.S.A. 60-203(a), (b), -513

HEIRS LOCATED
NO FEE TO THE ESTATE

THE JOURNAL OF THE KANSAS BAR ASSOCIATION

October 2006 – 33
duty to Seeber under § 324A and would instead apply § 324A as to any other tortfeasor. Inclined to conclude Ebeling had such a duty, but duty was not breached where uncontested evidence established that Ebeling fulfilled limited on-call duties of “consultation.”

STATUTES: None

WORKERS’ COMPENSATION
GRAHAM V. DOKTER TRUCKING GROUP ET AL.
WORKERS’ COMPENSATION BOARD
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 95,650 – SEPTEMBER 1, 2006

FACTS: Graham was an over-the-road truck driver, who fell from a truck trailer and sustained injuries to his neck, right arm, and right leg. Graham was accommodated, but left work due to the pain. He returned to work, but was restricted to less than full time based on Graham’s reported pain. There was no physician’s opinion expressly restricting Graham’s work due to his injury. The administrative law judge (ALJ) found that Graham was performing his truck driving tasks when he was injured and could no longer perform those tasks full time. The ALJ awarded 33.5 percent work disability. The board affirmed with two dissenting opinions.

ISSUES: (1) Self-imposed restriction due to pain and (2) reimbursement of a doctor's medical care

HELD: Court agreed with the board’s finding that Graham experienced actual pain that prohibited him from working a 40-hour week without taking some time off between work periods. However, the court reversed the award of work disability for two reasons, (1) court concluded that the controlling statute contemplates that a wage loss must be supported by an opinion of a physician, and (2) the record did not support the board’s finding of a wage loss because Graham was engaging in work for wages equal to his preinjury wage. Court affirmed the board's reasoning that Dokter authorized the physician and the board did not err in awarding reimbursement of certain prescription costs resulting from his treatment. Court reversed the award of work disability, affirmed the award of medical costs, and remanded with directions to limit the award to functional impairment.

STATUTE: K.S.A. 44-510e(a), -510h, -511

STATE V. BENNETT
SEDGWICK DISTRICT COURT
REVERSED AND REMANDED
NO. 94,492 – AUGUST 4, 2006

FACTS: Bennett placed on 12-month probation in December 2002. Probation violation warrant issued February 2003, based on urinalysis test result. Bennett not arrested on the warrant until March 2005. In revocation proceeding, district court found that Bennett had attempted to conceal herself and state had used reasonable diligence to find her, and that Bennett had violated conditions of probation. Bennett appealed.

ISSUES: (1) Due process and (2) delay in probation revocation

HELD: Under facts, the revocation and reinstatement of Bennett’s probation violated due process. Sheriff's department not having correct address on its version of the warrant is error attributable to the state, and Bennett’s actions did not excuse state’s failure to conduct a reasonable investigation into Bennett’s whereabouts. Delay in executing the warrant waived the probation violation, and Bennett not required to prove prejudice from the delay. District court lost jurisdiction to revoke Bennett’s probation. Probation revocation is reversed and case is remanded to terminate Bennett’s probation.

STATUTES: None

STATE V. GONZALES
BUTLER COUNTY DISTRICT COURT – REVERSED
NO. 93,845 – AUGUST 25, 2006

FACTS: Gonzales convicted of offenses based on drugs found in car following trooper’s stop of Gonzales’ pickup truck for safety reasons and his search of the vehicle. Issues on appeal were (1) whether trooper was justified in initially stopping Gonzales, (2) if stop was valid, whether trooper exceeded his authority by starting investigation and search, and (3) whether Gonzales’ consent purged the taint of an illegal search.

ISSUES: (1) Public safety stop, (2) detention beyond scope of basis for stop, and (3) consent to search

HELD: Extended discussion of public safety stops. Safety stop of Gonzales was authorized under facts of this case.

Whether detention exceeded basis for stop was an issue not raised in district court, but is reviewed on appeal. Applying three-step test from a Montana case, stop in this case exceeded the public safety reasons for the detention and became a seizure implicating Fourth Amendment protections. Investigative stops in Pennsylvania v. Mimms, 434 U.S. 106 (1977), and State v. Schmitter, 23 Kan. App. 2d 547 (1997), are distinguished. Here, trooper clearly exceeded scope of public safety stop by conducting investigation rather than focusing on safety issues used to justify stop of vehicle. Subsequent search of vehicle was illegal. Gonzales’ conviction is reversed.

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STATE V. GONZALES
BUTLER COUNTY DISTRICT COURT – REVERSED
NO. 93,845 – AUGUST 25, 2006

FACTS: Gonzales convicted of offenses based on drugs found in car following trooper’s stop of Gonzales’ pickup truck for safety reasons and his search of the vehicle. Issues on appeal were (1) whether trooper was justified in initially stopping Gonzales, (2) if stop was valid, whether trooper exceeded his authority by starting investigation and search, and (3) whether Gonzales’ consent purged the taint of an illegal search.

ISSUES: (1) Public safety stop, (2) detention beyond scope of basis for stop, and (3) consent to search

HELD: Extended discussion of public safety stops. Safety stop of Gonzales was authorized under facts of this case.

Whether detention exceeded basis for stop was an issue not raised in district court, but is reviewed on appeal. Applying three-step test from a Montana case, stop in this case exceeded the public safety reasons for the detention and became a seizure implicating Fourth Amendment protections. Investigative stops in Pennsylvania v. Mimms, 434 U.S. 106 (1977), and State v. Schmitter, 23 Kan. App. 2d 547 (1997), are distinguished. Here, trooper clearly exceeded scope of public safety stop by conducting investigation rather than focusing on safety issues used to justify stop of vehicle. Subsequent search of vehicle was illegal. Gonzales’ conviction is reversed.

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Whether Gonzales’ consent to search purged the taint of trooper’s illegal detention was an issue not presented to district court, but is reviewed on appeal. Under the circumstances, Gonzales’ consent was not voluntary and there was no intervening time or event sufficient to purge the taint of the illegal detention.

STATUTES: None

STATE V. RUSSELL
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 94,757 – AUGUST 11, 2006

FACTS: Russell was convicted of aggravated battery and his presentence investigation report reflected a criminal history score of “B,” which included two prior person felonies. Russell challenged one of the person felony convictions of arson of an inhabited structure in California. At sentencing, during the hearing on the criminal history challenge, the state stated it had received information that Russell had pled guilty to the arson, but that he failed to appear for sentencing. The district court sided with Russell that the arson did not count in Russell’s criminal history, which moved Russell to a presumptive probation sentence. The court sentenced Russell to 29 months’ imprisonment and granted Russell probation for 24 months. Russell filed a notice of appeal, but before he docketed the appeal, the state filed a motion to reconsider the sentence and include the arson plea as a conviction in his criminal history. The district court reversed itself and included the arson in Russell’s criminal history score of “B,” which included two prior person felonies. Russell challenged one of the person felony convictions of arson of an inhabited structure in California. At sentencing, during the hearing on the criminal history challenge, the state stated it had received information that Russell had pled guilty to the arson, but that he failed to appear for sentencing. The district court sided with Russell that the arson did not count in Russell’s criminal history, which moved Russell to a presumptive probation sentence. The court sentenced Russell to 29 months’ imprisonment and granted Russell probation for 24 months. Russell filed a notice of appeal, but before he docketed the appeal, the state filed a motion to reconsider the sentence and include the arson plea as a conviction in his criminal history. The district court reversed itself and included the arson in Russell’s criminal history and again sentenced him to 29 months’ imprisonment, but this time ordered him to serve his prison sentence.

ISSUES: (1) Sentencing and (2) criminal history

HELD: Initially, the court found Russell had not docketed his appeal so the district court had not yet lost jurisdiction to the appellate courts. Court held that the parties did not stipulated to the criminal history; therefore, an error in determining criminal history can subsequently be corrected by the district court. Court stated that Russell’s initial sentence based on an incorrect criminal history was illegal because it did not conform to the statutory provision in the character of punishment authorized. The district court was authorized to correct Russell’s illegal sentence at any time. The court also stated the correction of Russell’s sentence was sound public policy in not requiring the state to appeal the original sentence rather than file a motion for reconsideration in the district court.

STATUTES: K.S.A. 21-4710, -4721(i) and K.S.A. 22-3504(1)

TATE V. THORPE
SEDGWICK DISTRICT COURT – APPEAL DISMISSED
NO. 93,563 – SEPTEMBER 1, 2006

FACTS: Thorpe pled guilty to involuntary manslaughter while driving under the influence and to two counts of aggravated battery. Consecutive sentences imposed for a controlling 94-month prison term. On appeal, Thorpe claimed his statement to trial court provided insufficient factual basis to support the involuntary manslaughter conviction, and claimed the trial court abused its discretion in imposing consecutive sentences.

ISSUES: (1) Plea and (2) sentencing

HELD: Because Thorpe did not move to withdraw his plea. He may not file a direct appeal from his plea. Also, no exceptional circumstances exist to deviate from rule that issues raised for first time on appeal will not be considered.

Appellate court has no jurisdiction to review a presumptive sentence, and this includes presumptive sentences ordered to be served consecutively.

STATUTES: K.S.A. 2005 Supp. 22-3210(d), -3602(a) and K.S.A. 21-4720(b)(4), -4721, -4721(c)(1)

United States Court of Appeals for the Tenth Circuit
Proposed Rules Changes for 2007

Effective Jan. 1, 2007, the U.S. Court of Appeals for the Tenth Circuit will issue new rules. All interested persons will find a redlined version of the rules available on the court’s Web site. See www.ca10.uscourts.gov. Comments should be e-mailed to Clerk@ca10.uscourts.gov or mailed to the Office of the Clerk at the Byron White U.S. Courthouse, 1823 Stout St., Denver, CO 80257. The comment period will end Oct. 20, 2006. The court welcomes all comments, suggestions, and questions.

I. Federal Rule of Appellate Procedure 32.1
   Effective Dec. 1, 2006, new Rule 32.1 will be added to the Federal Rules of Appellate Procedure.

II. Federal Rule of Appellate Procedure 25(a)(2)(D)
   The court proposes revising local rule 25.5 to incorporate the federal rule change.

III. Proposed Changes to the Plan for the Appointment of Counsel in Special Civil Appeals
   The court has made several changes to the Plan For Appointment of Counsel in Special Civil Appeals. Interested parties are invited to review the redlined version of the plan for specific changes. In particular, please note the changes to the compensation section of the plan.

IV. Proposed Change to the Plan for Attorney Disciplinary Enforcement and Tenth Circuit Local Rule 46.2
   The court proposes to change local Rule 46.2 to require any lawyer disbarred from practice before the Tenth Circuit to pay the admission fee upon reinstatement. The court proposes adding a new section 10.7 to the Attorney Discipline Plan to incorporate this change as well.
Appellate Practice Reminders . . .  
From the Appellate Court Clerk’s Office

Petition for Review and Brief Covers

The same rules govern the format of petitions for review and briefs. Color cover, however, is found in two different rules. For petitions for review, the cover color is white. See Rule 8.03(a)(4). Brief covers vary according to which party is filing the brief. Appellants and appellant/cross-appellants file yellow-covered briefs. Appellees, appellee/cross-appellants, and appellee/cross-appellants file briefs with blue covers. Intervenors and amicus curiae file green-covered briefs. Any reply brief is gray. See Rule 6.07(b).

There is no Kansas Supreme Court rule requiring the use of clear, plastic covers on either petitions for review or briefs. These covers add only to the appearance of the filing and are used at the attorney’s discretion.

Appearances and Withdrawals

The attorney who signs and files a docketing statement is designated to receive notice that the appeal has been filed. See Rule 2.04. This attorney will be designated as appellant’s counsel as well. To withdraw as appellant’s counsel, a motion must be served on the client, filed with the appropriate appellate court, and granted. See Rule 1.09(b).

Attorneys listed in the certificate of service of a docketing statement are designated to receive notice that an appeal has been docketed. See Rule 2.04. These attorneys are designated as counsel for appellee until a motion to withdraw has been filed with the appropriate appellate court and granted. See Rule 1.09(b). This motion must also be served on the client.

Any attorney who enters an appearance after an appeal has been docketed, must file an entry of appearance with the appropriate appellate court. See Rule 1.09.

If you have any questions about these or other appellate court rules and practices, call the Clerk’s Office and ask to speak with Jason Oldham, chief deputy clerk, (785) 368-7170.
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NOVEMBER

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