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KBA to Email Election Biographies

Every year the Journal of the Kansas Bar Association features biographies for candidates of both the contested and uncontested elections for the KBA Officers and Board of Governors. This year, however, the biographies will be emailed to all members before ballots are mailed Monday, March 19. Please watch your email for these biographies.
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In Memoriam
The Hon. Wesley E. Brown (1907–2012)

Give a Hand Up to Those in Need

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Greetings friends and colleagues, I would like to report on just a few, but very important, local bar association meetings this month. In February, I was able to spend the afternoon with the Clay County Bar Association in Clay Center at Pinsetters Bowling Center. Lunch was followed by an ethics presentation by L.J. Leatherman. Following the ethics presentation the attendees bowled. Be warned, if you bowl with Dusty Mullin, his brother-in-law, Monte Green, owns Pinsetters and he obviously bowls for free — a lot, so I would suggest that you avoid any enticement to place any bet on the game. John Bosch, Bruce Wingerd, Rick James, and Judge William Malcolm, all from Clay Center, attended. They were also joined by David Swenson, Dana Brewer, Jennifer Wickersham, and Donna Long, of Concordia. I had a wonderful opportunity to talk with Gary Howland from Marysville. Gary has served on the executive committee of the KBA Real Estate, Trust and Probate Law Section for many years; it was just great to match a face with a name. It was also nice to meet Charles Baskins from Troy, which is in the far northeast corner of Doniphan County.

In February, I was also invited to address the Kansas Association of Legal Assistants (KALA). I expected 30 or so to attend and 65 were there. What a wonderful group and many of them are members of the KBA. We do have paralegal members that receive all of the member benefits, short of holding office in our association. We discussed the recommendations of the Blue Ribbon Commission and many initiatives currently underway in the KBA. I was pleased to meet KALA’s board that includes Shelly Bird, ACP, president; Christi Powell, ACP, president-elect; Annette Meece, CLA, NALA liaison; Mary Calisti, PLS, secretary; Sharla Englebright, CLA, treasurer; Susan Teel, director; Sharon Kincaid, CLA, director; and Treva Hansen, CP, director. It was a thoroughly enjoyable meeting. More about our local bar meetings next month.

KBA President Rachael Pirner may be reached by email at rpirner@ksbar.org, by phone at (316) 630-8100, or by posting a note on our Facebook page at www.facebook.com/ksbar.
Keynote Address
Thursday, June 14, 2012
Sheraton Overland Park Hotel
at the Convention Center
Overland Park, Kan.

Justice Alan Page

- Minnesota’s first African-American Supreme Court Justice
- Established the Page Education Foundation
- Member of the famed “Purple People Eaters,”
  the Minnesota Vikings’ fierce defensive unit of the 1970s
- Pro Football Hall of Fame inductee
We all experience delays that slow down and frustrate our daily lives, from traffic jams on a city street to long lines at a grocery store. But some delays are more than an inconvenience — they threaten the very core of our constitutional democracy.

For several years, the American Bar Association has identified a troubling trend in our state courts resulting from increasing workloads and declining budgets. State judiciaries handle approximately 95 percent of all cases filed in the United States, according to the National Center for State Courts. In 2008, the most recent year for which data is available, states reported 106 million incoming trial court cases — the most in 35 years. Anecdotally, we know that trend has continued as more people represent themselves and legislators add more laws to the books.

NCSC says 32 states — including Kansas — reduced their court budgets in fiscal year 2010, and cuts have continued from Hawaii to Maine in 2011. In 2011, Kansas legislators gave a small increase in funding for its courts, but left 80 staff positions vacant and 36 courts operating on reduced hours to keep costs down.

Courts around the country have made difficult decisions just as they have in Kansas. New Hampshire delayed civil trials for a year. A municipal court in Ohio announced that no new cases could be filed unless the litigants brought their own paper to the courthouse. In Alabama, a judge asked the charitable arm of a local bar association to donate money to help pay juror stipends.

People should never have to jump over budgetary hurdles to reach the courtroom. If our legal system isn’t accessible, then it can’t be just and it won’t be fair.

The constitutional argument for sustainable funding for our courts is simple: The judiciary is a co-equal branch of government responsible for protecting our rights. The practical argument is equally compelling. The courts decide matters that go to the very core of our daily lives, such as when a parent petitions for custody of a child or when a family fights foreclosure of their home.

The financial argument is stunning. Judiciaries typically receive just 1 percent of a state’s entire budget; that’s often less than a state allocates for an executive branch agency.

Members of the legal community are beginning to understand this situation and take action. To their credit, courts are doing their part to demonstrate efficiency and innovation, including those in Kansas. The payment of fines and fees is now conducted online; and the courts use e-filing, an electronic document management system. Kansas also instituted the Blue Ribbon Commission to review each court’s hours of operation, services, technological resources, costs, and staffing to provide adequate access to justice.

The ABA is continuing the work of its Task Force on Preservation of the Justice System, bringing together those affected by this crisis to discuss strategies to help our judiciary. The task force has created a venue to share court funding stories and creative ideas at http://bit.ly/mPjNoc.

The ABA is also working with state and local bar associations to rethink how to sensibly spend taxpayer dollars to ensure public safety. In 1974, about 175,000 people were incarcerated in state prisons in the United States. In 2010, that number had risen to 1.4 million, an increase of 705 percent.

Then there’s the issue of the punishment fitting the crime. In some states, fish and game violations, dog leash violations, and feeding the homeless are offenses punishable by time in jail. We need to decriminalize minor offenses, utilize pretrial release, and implement effective re-entry programs, among other reforms.

Finally, we must articulate what courts do and why they are so essential by more effectively educating legislators and the general public — especially young people, because that civic knowledge will drive a renewed dedication to the preservation of our justice system.

Courts must be open, available and adequately staffed. No one would accept closing the local emergency room, or the local fire house or the local police station for one day a week. Our justice system is no different. Let’s join together to fight for this access, otherwise … No courts. No justice. No freedom.

About the Author

William T. “Bill” Robinson III is president of the American Bar Association and member-in-charge of the Northern Kentucky offices of Frost Brown Todd LLC.
Networking. This is a word that, for many people, dredges-up images of hotel conference rooms, tightly formed circles of cliques, $7 bottles of Heineken, and $8 glasses of Merlot. I want to dispel this misconception on a couple of fronts. First, “networking” does not just take place at the type of events I just described. Secondly, the traditional “networking” event does not have to be a painful and uncomfortable experience.

Unfortunately, it seems like in college and law school many of us are left with the misconception that “networking” has to consist of a formal event where interaction consists only of serious conversations about careers, the law, and resume qualifications. This is far from the truth. I think networking should just be a part of your everyday life experience. Almost every day, you will run into other lawyers, clients, possible future clients, or even judges. The goal is to always put your best foot forward and to make as good an impression as possible at all times. You never know when you might meet your next client, opposing counsel, or even law partner or boss.

One of the best ways to “network” is to put yourself out in your community. Get involved in your kids’ schools or volunteer for local organizations. Get involved with your church. This will allow you to meet new people. Be sure to casually let people know what you do and the areas of law in which you practice. A very wise attorney once told me, as you move through different parts of your life, you will be exposed to different people. These people will become your colleagues, clients, and friends. If you do your best to leave favorable impressions with those you meet, it just might pay large dividends in the future.

My second attack on the traditional misconceptions regarding “networking” is to dispel the notion that the traditional events, like I described at the beginning of this column, have to be a painful experience. Throughout your career, you will have the opportunity to attend these kinds of events. As much as I argued that “networking” does not have to take place at such formal occasions, the fact is, these types of events will be important to your career. They can be a great chance to meet new and important people. Often times, you may find yourself at these events without anyone that you know. In some respects, it is better to show up to these events by yourself, because that will force you to meet new people, instead of just chatting with those you already know.

The first hurdle is to break into the cliques. The only way to break into a circle of people that you don’t know is to just dive right in. Assert yourself into the circle (not rudely) and introduce yourself. I promise you that nine times out of 10 people will react positively and will be happy to meet a new person. If the circle does not welcome you, don’t worry, just move on. This will not happen often, and if a group is not inviting to you, you probably don’t want to meet those people anyway. My advice to you is to not be discouraged. If you keep with it, you will come away from these events meeting people that will have a valuable impact on you.

Networking isn’t easy, but it doesn’t have to be painful. The important thing to focus on is building meaningful and lasting relationships.

About the Author

Vincent M. Cox is an associate with the Topeka firm of Cavanaugh & Lemon P.A., where he maintains a civil litigation practice. He received his bachelor’s degree from Benedictine College in 2002 and his juris doctorate from Washburn University School of Law in 2005, where he was a member of the Washburn Law Journal. Cox is a member of the Topeka and Kansas bar associations and is past president of the Topeka Bar Association Young Lawyers Division.
The U.S. District Court lost an individual whose devotion to justice kept him on the bench up until his death. The Hon. Wesley E. Brown died January 23 at the age of 104 in Wichita, where he served as a senior judge for the District of Kansas — in fact, he was the nation’s oldest working federal judge. He came to the courthouse every day up until a month when his health deteriorated. But his law clerks brought work to the hospital and later to the assisted living center where he lived while he recuperated.

He became known for his longevity, but his colleagues knew him as a man who lived in the present with a passion for the job, a wry sense of humor, and an eagerness to keep up with the times.

Four years prior to Brown’s birth, the Wright brothers made the first flight, he lived more than 40 years after man first set foot on the moon, and he bought his first cell phone at 94. He lived on his own terms, and his life was governed by two oaths, one he took to be a district judge in 1962 and the other when he became a Boy Scout in 1920.

Born June 22, 1907, in Hutchinson, Brown attended Hutchinson High School where he was involved with theater, debate, Latin, and science. He was even an official cheerleader for the school.

Brown took time off from his law practice at the firm of Williams, Martinell, Carey & Brown in 1944 to serve as a lieutenant in the U.S. Navy during World War II in the Pacific Campaign. He was the oldest man in his unit at the age of 37 and enlisted because he thought it was the right thing to do. He returned to his law practice in 1946 and would eventually become a senior partner at the law firm and also be twice-elected Reno County attorney. In 1958, Brown left the firm to become what is now the equivalent to a bankruptcy judge for the District of Kansas. He would remain in that position until his appointment to the federal bench by President John F. Kennedy in 1962.

In a 2007 interview, Brown said that he still believed that the ultimate responsibility was to see within the framework of the law so that justice could be done, and, by extending that responsibility, society could be provided with a reason-able means of resolving disputes. He said could recall sleepless nights, pacing the floor as he tried to reach a decision. In 1979, Brown officially took senior status, a type of semiretirement which allows federal judges to work with a full or reduced case level.

“He demands excellent representation and advocacy from all attorneys who appear before him.” Deanell Tacha, former chief judge of the Tenth U.S. Circuit Court of Appeals, said in a 2007 KBA interview. “He is, and always has been, a model of the good lawyer, the good judge, and the consummate legal professional from which the highest standards of ethics, professionalism, and civility are not just easily uttered platitudes, but operated principles from which he never deviates.”

He has been an active participant in many organizations, including the Kansas and American bar associations. He served on the KBA Executive Council from 1950 to 1965 and served as the Bar’s president in 1964. He was the Kansas delegate to the Judicial Administration Section of the ABA and a member of the Consumer Bankruptcy Committee of the ABA’s Corporate, Banking, and Business Section from 1960 to 1966.

Throughout his lifetime, Brown received many accolades, including the Phil Lewis Medal of Distinction in 1998 for outstanding and conspicuous service to the state and to the nation in the administration of justice; Washburn University Law School Association Honorary Life Member for exceptional and meritorious service to Washburn Law in 2000; Franklin G. Theis Lifetime Achievement Award from the Wichita Bar Association in 2000; and the Judicial Council of the Tenth Circuit Lifetime Achievement Award that included not only the Tenth Circuit, but also the Sixth, Seventh, Ninth, and Eleventh circuits.

Upon receiving the Tenth Circuit award, Brown quipped, “I’m pleased to be here, fundamentally because I think that milestones are better than gravestones.”

Brown was preceded in death by his wives, Mary Miller Brown and Thadene “Sis” Moore Brown. Survivors include two children, four granddaughters, and eight great-grandchildren.
In a relatively short period of time, email has become a routine if not the predominant means for communication between lawyers and their clients. Just as lawyers need to take care when talking to a client in a setting where their conversation may be overheard, lawyers need to exercise caution and remind their clients to exercise caution to preserve the confidentiality of email communications. In the last Thinking Ethics column, Nick Badgerow highlighted ABA Formal Opinion 11-460, which concluded that none of the Model Rules of Professional Responsibility requires an employer’s lawyer to notify an opposing employee’s counsel if the employee’s privileged emails are found on the employer’s email system. Although an employee’s use of an employer’s email system appears to be the most common context in which this question has arisen, there are a number of circumstances in which email communications with a client may lose any protection of confidentiality. As a result, at the same time it issued the aforementioned opinion, the ABA also issued Formal Opinion 11-459, which states that a lawyer ordinarily must warn clients about the risk of sending or receiving electronic communications from a computer or other device to which a third-party may gain access. The opinion identifies several settings in which the confidentiality of a client’s email may be jeopardized:

- use of an employer’s email system (whether by computer, smart phone, tablet, or other electronic device);
- use of an employer’s computer or other device to access personal email accounts;
- use of a public computer, such as at a library or hotel, to which third parties may have access;
- use of a borrowed computer; and
- use of a home computer to which others have access (this problem commonly arises in matrimonial disputes).

The client’s use of an employer’s email system to communicate with her lawyer has been the subject of several cases that have reached varying results depending on the facts and particular states’ laws. Often, employers have policies restricting personal use of their email systems and giving them the right to monitor use of their devices and to retain or review any communications, even personal communications, made with the device. Some courts have found that if the employer has such a policy, an employee’s communications with his or her lawyer using the employer’s device either is not privileged or the privilege has been waived because there was no reasonable expectation of privacy. See, e.g., Hanson v. First National Bank, No. 5:10-0906, 2011 WL 5201430 (S.D. W. Va. Oct. 31, 2011) (former bank president waived privilege by using bank’s email system to communicate with criminal defense counsel despite his awareness of bank policy resolving right to access all electronic mail messages on its system and that employees should not assume that such messages are private and confidential). In Hanson, the plaintiff obtained the former bank president’s emails with his personal lawyer by serving discovery on the bank, which was also a defendant. Of course, even if the employer is not a party to the lawsuit, third-party subpoenas may be used to obtain an employee’s emails that are housed on the employer’s system.

ABA Formal Op. 11-459 emphasizes the lawyer’s duty of confidentiality under Rule 1.6(a) and focuses on two of the rule’s comments requiring lawyers to act competently in preserving confidentiality. Comment [16] states, “A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.” And Comment [17] requires lawyers to “take reasonable precautions to prevent [information relating to the representation of a client] from coming into the hands of unintended recipients.”

Given those duties and the disclosure risks identified above, the opinion concludes that lawyers should (1) refrain from sending emails to an employee-client’s workplace; and (2) as soon as practical, “instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client communications, because even seemingly ministerial communications involving matters such as scheduling can have substantive ramifications.” By implementing these simple guidelines, lawyers and clients can continue to take advantage of the convenient communication platform that email provides without unreasonably risking disclosure of confidential or privileged information.

About the Author

Mark M. Iba is a partner with Stinson Morrison Hecker LLP and practices in the firm’s business litigation division, focusing on complex civil litigation and arbitration. He also currently serves as assistant general counsel for the firm. He received his juris doctorate from the University of Chicago and is a member of the Kansas and Missouri bars.

Footnote
W hen asked by students or colleagues for one good way to improve legal writing, my response is usually quick and to the point: begin your paragraphs with a thesis sentence – always. Just like everyone believes he does his share of the dishes, however, everyone believes she uses thesis sentences in her writing. It is not until you realize that you cannot locate the dish soap when asked by your spouse or roommate that you begin to recognize the problem. So, how can you put my advice into practice? First, we need to identify what are and what are not thesis sentences. Second, we need to understand how they improve writing. Third, we need to understand how they can improve the impact of your writing on your reader.

The thesis sentence, or persuasive topic sentence, as your seventh grade grammar teacher may have labeled it, tells the reader precisely why the paragraph that it begins is in the document and asserts a conclusion that forwards the writer’s overall goal. It does this much better than its scrawny younger brother, the regular topic sentence. The thesis sentence not only identifies the topic of the paragraph but also asserts a testable conclusion that the remainder of the paragraph will endeavor to prove is correct. The two competing siblings are best distinguished usually in paragraphs addressing counter arguments. A wimpy topic sentence might read like this: “Defendants can argue that the claim should be dismissed under the three-year statute of limitations.” While that topic sentence helps tell the reader what the author will be discussing, it fails to assert what the writer thinks about that argument or – more importantly – what the writer wants the reader to think about that argument. In contrast, its stronger brother, the thesis sentence, steps in and takes charge: “The Defendants’ statute of limitations defense will fail because the statute of limitations was tolled during the Defendants’ active concealment of their wrongdoing.” That thesis sentence not only tells the reader that the writer will be analyzing a statute of limitations defense but it also tells the reader what to consider as she further reads the argument.

Asserting conclusions at the start of paragraphs helps both novice and advanced writers improve their writing by keeping them on task and by forcing them to take a position on what they are writing about. First, drafting and checking thesis sentences imposes on the writer the discipline of ensuring that each paragraph is pulling its weight in the document. It also has the convenient benefit of creating an outline of the points supporting the main argument of the document. In fact, I often suggest to students that they read only the first sentences of the paragraphs in the discussion section of a memo or brief. If reading those sentences gives them a full picture of their argument, they have written some pretty good thesis sentences. If, however, they can no longer follow the point halfway through that endeavor, their reader would likely be confused too and there is still work to do. Second, drafting a thesis sentence requires the writer to take a stand: to predict how a legal issue will be resolved in a memo or to argue in a brief why a judge should rule a certain way. Without thesis sentences, writing tends to waffle – offering unhelpful advice, making weak arguments, or, even worse, setting out multiple arguments but failing to tell the reader why one is better than the others.

The thesis sentence also dramatically increases the impact of one’s writing on the reader by taking charge and giving the reader the tools she needs to probe and to test the writer’s conclusions. In any kind of legal writing, failing to start a paragraph with a thesis cedes ground to the inherently skeptical legal reader. It allows her to form her own opinions as to what the law is or how it applies – free from the writer’s input. Further, the use of strong assertive thesis sentences not only keeps the writer in control of the argument, but it gives the reader the tools that she needs to critically test the analysis that follows. The skeptical legal reader wants to test the writer’s conclusions while he or she is reading. If the reader fails to provide the conclusion up front, the reader is frustrated because she often has to read the paragraph twice – once to understand what the reader is concluding and again to test that conclusion against the proof provided. Thus the absence of a thesis sentence creates a legal writer’s worst nightmare – a frustrated reader free to reach conclusions without the writer’s input. Whether that frustrated reader is a judge or senior partner, the writer has put himself at a distinct disadvantage.

I hope that this convinces you to beef up the strength of your legal writing by using strong thesis sentences to begin your paragraphs. Your keen eye may have noticed that if you read the first sentence of the preceding three paragraphs they form a concise outline of the precise reasons why you should employ them in your writing. So, at least on that point – mission accomplished. Now, if I can only find that dish soap.

About the Author

Joseph P. Mastrosimone is an associate professor of law at Washburn University School of Law and teaches in its nationally ranked Legal Analysis, Research, and Writing program. Before joining Washburn’s faculty, Mastrosimone served as the chief legal counsel for the Kansas Human Rights Commission and as senior legal counsel to the former chairman of the National Labor Relations Board. He also practiced labor and employment law with Stinson Morrison Hecker LLP and Crowell Moring LLP.

Despite claims to the contrary, he routinely does his fair share of the family dishes.
A Nostalgic Touch of Humor

Motels and Bad Odors – Tips and Tricks for a Great Stay

By Matthew D. Keenan, Shook, Hardy & Bacon LLP, Kansas City, Mo., mkeenan@shb.com

Editor’s note: The Bar Journal is reprinting several of Matt Keenan’s columns. This article, originally published in the September 2008 issue, remains one of the most requested columns.

Hollywood has mastered the story line surrounding bad hotels. For starters you have “Psycho I and II,” “The Shining,” and “Room 1408.” A less well-known movie I’d recommend is “Identity.” And then you have hotel/motel plotlines that aren’t showing at the Crest Theater in Great Bend. Hotel stories so bad and so unbelievable no one would turn them into movies. Because it wouldn’t be entertaining or believable. Like what happened at the Capri Motel in Kansas City, Mo., on July 14, 2003.

This is what the local news reported: “Police were called to the motel Sunday after a guest checked out of a room because he could no longer tolerate the smell. He had complained about the odor when he checked in last Thursday, but management informed him nothing could be done about it. A cleaning crew finally lifted the mattress off the only bed in the room and discovered a body, that, the police said, was ‘in an advanced stage of decomposition.’ The unidentified remains had been hidden by wooden panels around the base of the bed.”

So stop and ponder the thought — the guest slept over a dead body for three days — that’s 72 hours or 4,320 minutes. This poor loser either had a bad sinus infection or grew up near a landfill. But to his defense, he did complain to management — they replied “nothing could be done about it.” Really? There goes their Zagat and Mobile Travel Guide five-star rating. As one blogger commented: “That’s right. All of our rooms smell like dead, bloated, rotting, decomposing, maggot-filled corpses. There’s nothing we can do about it.”

Some were quick to criticize the paying guest. But in fairness to the guy, who thinks “I’m sleeping on top of a dead body” when a bad odor invades the nostrils? As a father of four teenagers, the differential diagnosis of bad odors includes many things before you get to “dead guy below.” So here are the “tips and tricks” to make sure your hotel room isn’t also serving as a poor man’s funeral home with you unknowingly paying respects.

1. Let’s begin with the obvious: Avoid the Capri Motel. Let’s include all Independence, Mo., motels. Especially ones that advertise “Jacuzzis and hot tubs.”

2. Your nose knows. Avoid smelly rooms — good or bad. If the second you turn the room key you think “dead guy” — request a suite upgrade.

3. When you walk into the hotel room, always check under the bed. This is an old trick I learned a long time ago. While you are at it, try the closet and shower too. If there is cheap wood paneling separating you from the unknown — be persistent. If curiosity killed the cat, that cat would have died anyway.

4. Avoid hotels that rent rooms by the hour.

5. Stick to Marriott, Hyatt, and Holiday Inn. It’s more than the points. It’s peace of mind.


7. Larger red flag: Note left on the night stand — “I want out!”

8. Mattresses that sag horribly in the middle, surrounded by wood paneling.

9. Hotels across the street from the funeral home.

10. Hotels across the street from police station.

If you follow these simple rules, the odds of sleeping with a dead guy are greatly diminished.

Someday you may thank me.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
Seeing Blue Sky: Researching History Provides Context to the Law

By ReAnne E. Utemark Wentz, Washburn University School of Law, Topeka

Many legal scholars and practitioners would likely shudder at the thought of spending hours in the dusty stacks of the local historical society. For me, that is an exciting prospect. As a history major in my “previous life” (before coming to law school), I learned history is not simply rote memorization of names, dates, and places. History is one of the keys to studying any discipline. History provides context and understanding of the topic at hand. In the legal profession, the study of history is not simply an aid to hard core Originalists, but, as I found out the last year, a way to supplement the study of securities law, banking law, and a variety of other topics.

Kansas was the first state to pass a “blue sky law” – a regulation regarding the sale of securities. That Kansas law became the template for other states’ blue sky laws and ultimately influenced securities regulations as they currently stand. Kansas passed its law in 1911, and thus, last year was the 100th anniversary of that progressive legislation. I had the opportunity to work with the Kansas Securities Commission and Washburn Associate Professor Amy Westbrook on a project that detailed, among other aspects, the political and social context surrounding the passage of the blue sky legislation. I learned more about not only the history of securities regulation but also the progressive history of Kansas during the early part of the 20th century.

As an aside, rarely do people, even its own citizens, consider Kansas progressive. For many, Kansas is a flyover state filled with cows, corn, and conservatives. However, in the early part of the 20th century, Kansas was at the national forefront of progressivism. The blue sky law was a product of this progressive movement. Part of progressivism is using government regulation as a means of protecting citizens. Bank Commissioner J.N. Dolley promulgated the blue sky regulation to protect unsuspecting Kansans from worthless investments. Dolley, then-governor Walter R. Stubbs, and newspaperman William Allen White all fed into the progressive momentum in Kansas in a variety of ways. Kansas remains a remarkable state with a rich history that more Kansans should be aware and proud of.

I will not repeat the entirety of the research that we helped uncover. The stories are recounted and analyzed much more thoroughly and thoughtfully than I ever could in Vol. 50, No. 3 of the Washburn Law Journal by Rick Fleming, general counsel for the office of the Kansas Securities Commissioner, and by Professor Westbrook. After spending the last year in the Kansas State Historical Archives researching the 1911 Kansas Blue Sky Law, the importance of history in the study of the law was brought into sharp focus for me. I feel like understanding more about the players and politics in passing that law helped me understand the law more fully. Understanding progressive Kansas helped me understand the motivation and philosophy behind the blue sky law.

The context of the law or a court decision is not just important for Originalists. It is important for every practicing attorney to think about why particular law exists. Of course, in our legal writing classes, we are taught to look at the legislative history. The legislative history usually consists of legislators’ remarks. However, what is equally important is perhaps looking at historical context through newspaper articles or the state of the world, country, state, and city at the time. Answering the question of what was happening in the world that caused the legislature, or sometimes, courts, to react in a way that produced a particular law can be helpful in understanding the law and crafting arguments for or against it.

I understand that it is unlikely for a practicing attorney or judge to be able to take valuable time out of his or her day to go and sift through clipping books in the historical society. I do not think it is impossible, though, to include a brief search of the basic history in the regular course of research. Scholars often publish law review articles on the history of certain laws and court decisions and Google Scholar and Google Books are also quick, free ways to search through some history.

I enjoyed my work on the blue sky project. I will rarely have such an opportunity – to be a very small part in the development of a nearly complete history of a particular piece of legislation. It was a valuable experience that helped shape me during my time in law school. As I go forward in my own practice of law, I want to make sure that I remember to think about the whole picture, not merely the narrow part directly in front of me. Doing a little extra historical research is part of seeing that whole picture. Thinking about the history will make me a better lawyer and a better advocate.

About the Author

ReAnne R. Utemark Wentz is a transplanted Kansan, amateur historian and former student journalist. She is also a 3L at Washburn University School of Law, president of Moot Court council and married to a native Kansan. She may be reached at reanne.wentz@gmail.com.
The time is near for the annual migration of legal techies to Chicago and the ABA TECHSHOW, and Kansas Bar Association members can claim a discount by registering with our KBA code: EP1224. This premier national conference has been running for more than 25 years helping thousands of lawyers move their firms forward with new and innovative legal technologies. The sage advice and war stories of the presenters and co-attendees provide something for firms of every size and lawyers of every practice area.

Educational Tracks – All Abilities, All Practices

There are more than 50 educational sessions over the three-day conference so making a plan is important. Sessions are divided into tracks aimed at a specific technology or based on the level of expertise prerequisite to the material. Popping open this year’s syllabus shows several tracks that have popped up throughout various Kansas CLE sessions lately, such as paperless technology. Within that track are four sessions: “The Business Case for Going Paperless,” “Lost My Smoking Gun: Finding Documents in a Paperless Office,” “Managing the Transition to Paperless,” and “Productive PDF Tips and Tricks Every Lawyer Should Know.” Each session is presented by a panel of lawyers who have traveled the road before.

Though technology is certainly front and foremost at the ABA TECHSHOW, the legal component of tools on display receives ample billing as well. After spending Day One on the paperless track, for example, Day Two has its counterpart – E-Discovery/Advanced Topics. This track dives headlong into legal updates on e-discovery, legal analysis of new IT tools as they relate to discovery, and deployable technology tools for managing e-discovery. If the sessions themselves are not formative enough, the presenters are on hand for one-on-one discussion or even a lunch/dinner meeting.

Sometimes, however, those strictly legal sessions can get a bit dry. There is plenty in the program to indulge gadget junkies looking to scratch the “needs new stuff” itch. Nowhere is this as evident as in the mobile technology and smart phone tracks. Smart phones and tablets have become so ubiquitous in lawyers’ hands that the ABA TECHSHOW has retained its full-day track and has added a second with three sessions for Android, iOS, and Blackberry for lawyers.

CLE

In prior years, there has been little CLE value to the meetings for Kansas attendees. Knowledge gained was for actual use in improving profitability or competence rather than the pressing need for credit as June loomed. The newly adopted Law Practice Management credit alters that situation for the better and most sessions will qualify for Kansas CLE credit. All materials are provided in digital form on a flashdrive for easy submission for credit and easy access in planning and implementation of initiatives gleaned from the conference.

Vendor Exhibition Hall

The sessions are cram-packed with information on all manner of technology but, sometimes, you just want to drill down and fiddle with one specific tool. The huge vendor hall provides the space. Close to 100 vendors showcase a staggering array of technology products – hardware and software – for every imaginable project. Vendor break-out sessions provide a good opportunity to dig even deeper with a wider variety of toys and tools than possible at a crowded exhibit booth. Last year, several companies with interesting micro-projectors were on hand to test and compare and half a dozen iPad litigation software apps were available for demo and use as well. Within a few hours, I had tested them all and found exactly the features and price needed in person rather than via trial and error with Internet reviews and purchases.

SuperPass

The best deal for the whole conference is gathering with a group of like-minded, Kansas lawyers and registering under a SuperPass. Up to 10 people may register together under a SuperPass for huge savings – an especially great deal for late registrations as it can cut costs in half. SuperPass members do not have to be from the same firm, organization, or city (or even the same state for that matter). Appoint an organizer to coordinate payment and registration for a great deal.

A full TECHSHOW schedule and registration information is available at techshow.com. We will look for you on the roster, in the sessions, and at the vendor booths.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine, Zimmerman & Zimmerman P.A. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas Credit Attorney Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as president-elect and legislative liaison.
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Case Studies
By Anne McDonald, Kansas Lawyers Assistance Program, Topeka, Executive Director, mcdonalda@kscourts.org

So, you may wonder, “what kind of people come to KALAP for services”? All kinds, but they have two things in common: (1) they are lawyers or law students and (2) they are suffering. They are lawyers who hold themselves out as problem solvers for others but may be stymied by their own. Law students who just thought their way through three years of law school exams but can’t think their way out of choices or events that now are an impediment to taking the bar exam.

Let me give you a few case studies. (These are based on actual clients but some details have been changed to preserve confidentiality.)

1. Christine

This client contacted KALAP voluntarily at the recommendation of a judge. At various times she met with KALAP staff and four different KALAP volunteers. All of them believed her demeanor and behavior indicated some condition, most likely a mental illness, Asperger’s syndrome or possibly a personality disorder. Because of their concern, KALAP asked this client to obtain a psychological evaluation. Due to financial difficulties, she could only go to a local community mental health center, where they did not do a full examination. About that time she received notice of a disciplinary complaint and was eventually put on diversion, which required her to obtain a psychiatric evaluation. She was finally evaluated by a social worker. The evaluation came back with a diagnosis of mild depression. She was prescribed anti-depressants and sent on her way. No in-depth testing or other evaluation methods were used, no therapy was required and her situation remains the same—she is “stuck” with an undiagnosed, untreated ailment. She is not able to move forward in the practice of law.

2. Percy

Percy is a sole practitioner in his late 40s. When a family member was seriously hurt in an assault, Percy experienced an episode of mental illness and was briefly hospitalized. Due to a pre-existing medical condition he cannot get health insurance. Percy needs a psychiatric evaluation and probably a prescription for medication; he also needs some kind of talk therapy. Since he cannot afford to pay himself and has no insurance, his only source is the local mental health center which is itself stretched to the extreme due to lack of funding. Percy has been told it could be up to three months before he can see a doctor and begin therapy; further, sessions may only be available once a month.

3. Jeremy

Jeremy has a problem with alcohol. He was referred to KALAP by a judge and when he met with KALAP staff he appeared to have been drinking. He has tried to withdraw from alcohol previously and when he does, his blood pressure spikes so he needs to detox in a medical environment. Being a sole practitioner without insurance, Jeremy cannot get into the local treatment center as they are not equipped to deal with medical problems. Jeremy needs to get detoxed and then into an inpatient treatment facility. But there are no beds available at any state facilities for approximately four months.

It is frustrating to know these attorneys need help and are willing to get help but do not have the resources to assist them in getting that help from professionals. KALAP volunteers are the best in all the world, but their function is to be more monitor, mentor and coach. It is not their role to be the primary health care providers. So when the lawyers they are working with can’t get the help they need, the volunteers’ effectiveness is stymied.

In a recent CLE presentation one of the deputy disciplinary administrators mentioned that there were presently close to 100 attorneys on diversion and that the great majority of them said that they were impaired and their condition had contributed to their ethical lapse. Other authors have cited studies in California, New York, and Oregon that indicate there is a high correlation between alcohol or other drug abuse and disciplinary and malpractice actions.1 Those studies were conducted in the 1980s; if studies were done today, depression, stress, and anxiety would no doubt also be major factors – and we are still in the preliminary stages of figuring out how to handle them in the context of disciplinary actions, how to reduce the stigma of mental illness, and encourage and enable people to get the help they need.

All these conditions are treatable and many lawyers’ lives and careers can be salvaged, if only we have the resources and the will to do it. We have formed the KALAP Foundation for just this purpose – more about it in the April Journal.

About the Author

Anne McDonald graduated from University of Kansas School of Law in 1982 and spent most of her legal career as court trustee in Wyandotte County. After she retired in 2006, she has served as a judge pro tem in Kansas City, Kan., Municipal Court and in Wyandotte County District Court. She is a member of four boards or commissions and three book clubs, along with the Sierra Club. She frequently hikes or backpacks with her husband and other Sierra Club members. She is a prior chair of the KBA Committee on Impaired Lawyers and has been a KALAP commissioner from its inception, and now serves as executive director.

Footnote
Members in the News

**Changing Positions**

Daniel B. Boatright, Jeannie M. DeVeney, and Jeffrey M. Place have become shareholders with Littler Mendelson P.C., Kansas City, Mo.

Douglas B. Breyfogle and Paul K. Hentzen have joined Kriegel & Kriegel P.C., Kansas City, Mo.

Gwynne H. Birzer has become a partner with Hite, Fanning & Honeyman LLP, Wichita.

Allison G. Confer and Jonathan W. Davis have been elected shareholders and directors of Wallace, Saunders, Austin, Brown & Enochs Chrd., Overland Park.

Nathaniel A. Dulle has become of counsel in the firm’s Overland Park office.

Vincent M. Cox has joined Cavanaugh & Lemon P.A., Topeka, as an associate.

Brian M. Devling and Christopher C. Javillnar have been promoted to partners at Bryan Cave LLP, Kansas City, Mo.

Lewis D. Gregory has joined U.S. Trust, Kansas City, Mo., as senior vice president.

Tyler E. Heffron has become partner at Triplet, Woolf & Garretson LLC, Wichita.

Terelle A. Mock has become partner at Fisher, Patterson, Saylor & Smith LLP, Topeka.

Jason D. Stitt has been promoted as partner for Kutak Rock LLP, Wichita.

Bradley R. Ward has joined the Kansas Department of Social and Rehabilitation Services/Child Support Enforcement Center in the Legal Department, Wichita.

John F. Wilcox Jr. has been elected managing director of Dysart Taylor Cotter McMonigle & Montemore P.C., Kansas City, Mo.

**Changing Locations**

J. Randall Clinkscales Elder Law Practice P.A. has moved to 201 W. 11th St., Hays, KS 67601.

Steven F. Coronado and Mark D. Katz have started a firm, Coronado Katz LLC, 14 W. 3rd St., Ste. 200, Kansas City, MO 64105.

Dustin L. DeVaughn, Cody G. Claassen, and Richard W. James have started a firm, DeVaughn James, 12219 E. Central, Ste. 250, Wichita, KS 67206.

Denise F. Fields has moved to 4900 Main St., Ste. 650, Kansas City, MO 64112.

Michael J. Fleming has moved to 200 Business Exchange Building, 200 NE Missouri Rd., Lee’s Summit, MO 64086.

Jeffrey B. Hurt has moved to 9225 Indian Creek Parkway, Ste. 600, 32 Corporate Woods, Overland Park, KS 66210.

Kathleen R. Reeves has moved her office to 245 N. Waco, Ste. 260, Wichita, KS 67202.

Lucas L. Thompson has started a practice, Ledbetter & Thompson Law Office LLC, 5942 SW 29th St., Ste. A, Topeka, KS 66614.

**Miscellaneous**

Kevin N. Berens, Colby, has been appointed by Gov. Sam Brownback to the Kansas Sentencing Commission.

Robert G. Martin II, Wichita, has been accepted into the American Academy of Estate Planning Attorneys.

Ronald D. Smith, Larned, has been appointed president of the Southwest Kansas Bar Association.

**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.
Lester C. Arvin

Lester C. Arvin, 88, of Wichita, died January 22. He served in Army Intelligence during World War II, spending nearly three years in the Pacific Theater. He and his wife, Kay, anchored a law firm together in Wichita for five decades. Arvin was active in the church and community, and served in the Kansas State Senate. He served as trustee to five universities.

He is survived by his wife of 66 years, Kay; and sons, Scott and Reed, both of Nashville.

Frank Delano Gaines

Franklin Delano Gaines, 77, of Eureka, died December 25. He was born April 21, 1934, in Peabody, the son of Robert W. and Freda L. (Boling) Gaines.

He earned an associate's degree from Butler County Junior College that led him to graduate from Washburn University and then earn a law degree from Washburn University School of Law. Gaines first practiced law in Augusta and then served in the Kansas Legislature as a representative for six years and then as a senator for 20 years.

He is survived by his wife, Beverly Gaines, of Hamilton; sons, William Gaines, of Eureka, and Shelby Gaines, of Seattle; daughter, Betheny Winkler, of Eureka; grandson, Sebastian Summers; brother, Richard Gaines, of Spearman, Texas; and sister, Beverly Martin, of Eureka. He was preceded in death by his son, Franklin Delano Gaines Jr.; grandson, Jacob Winkler; brother, Robert Gaines; and sister, Elizabeth Gaines.

D. Lee McMaster

D. Lee McMaster, 74, of Wichita, died January 2. He graduated from the University of Notre Dame and the University of Kansas School of Law. He served in the U.S. Marine Corps for 12 years and attained the rank of major, and was also a trial lawyer for 50 years.

He is survived by his wife of 50 years, Jane, of the home; daughters, Margaret Caccia, of Potomac Falls, Va., Kathryn Kraske, of Westwood, and Sarah Helbig, of Moseley, Va.; and seven grandchildren. He was preceded in death by his parents, Augustine and Patricia McMaster, and brother, Frank McMaster.

Bryson E. Mills

Bryson E. Mills, 75, of Wichita, died January 19. He was a retired attorney, mediator, municipal court judge, and race car owner/driver.

He is survived by his wife of 35 years, Kathy, of the home; daughter, Karla Allen, of Mill Valley, Calif.; brother, William Mills, of Newton; brother-in-law, Vance Hendry, of Hutchinson; and may family and friends.

Orlin L. Wagner

Orlin L. Wagner, 84, of Wichita, died January 22; he was an attorney and a retired lieutenant colonel. He is survived by his wife, Norma Jean; children, Orlin Wagner II; Mark Wagner, and Tracy Brandt; and two grandchildren.

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One Site Fits All: The KBA Unveils a New Website!

By Meg Wickham, Kansas Bar Association, Topeka, member services director, mwickham@ksbar.org

In late January, the KBA released its new website: www.ksbar.org. It’s now easier to navigate and user-friendly website, bringing our members and the public a new way to access information. A website is a perpetual work-in-progress, constantly receiving additional and updated content.

Our members will still enjoy access to Casemaker, CLEs, KBA Bookstore, sections, and legislative information as before. The navigation will be much cleaner and easier to use. When a KBA member, non-member, or member of the general public goes to www.ksbar.org, he or she will be greeted with a brightly colored website partitioned into specific areas of interest.

KBA Home Page

1. Immediate Navigation: The upper right-hand portion of the home page will look the same on every page throughout the website. Home, Member’s Login, and Contact Us are the three options. Home will always navigate you back to the Home Page, Member’s Login will allow you to sign in as a KBA member to have access to certain member benefits, such as Casemaker, legislative resources, discounts on CLEs and KBA Bookstore items, and much more. Contact Us brings up a KBA staff roster with each name linked, so they can be emailed directly. On the upper left, you will be able to click on the KBA logo to take you to the home page anytime.

2. Navigation/Fly Out Menus: We have seven categories – Membership, CLE, Legislative, Public Resources, Sections, Casemaker, and Career Center. Each of these categories are linked to the main page of the category. Fly out screens will offer more detailed sections within the main heading to allow immediate navigation to a specific topic. For example the fly out by Sections features a direct navigation point to the KBA Young Lawyers Section. Beside the navigation menu is a highlighted rotating billboard of important and timely featured items.

3. Three Column Overview Section: About the KBA, About the KBF and Lawyer Referral Service are featured here to give the public, members, and potential members information about us.

4. News: To the left of the three-columns is our news portion. This will include important upcoming events. Currently featured are; the KBA Delegation to Cuba, KBA YLS Mock Trial, and 2012 KBA Awards.

5. KBA Bookstore: Below the News, the KBA Bookstore is highlighted by listing our latest releases and a link to all available KBA Handbooks.

6. Upcoming Events: This will include CLEs, board, section, and committee meetings, as well as social events presented by the KBA or KBF. The events are linked to more information about the event, maps and a registration form. When you register for an event you will have the option to export the calendar event to your Outlook calendar, giving you one less step to remember.

7. Member Login: This is a blue box just to the right of Upcoming Events. If you have not signed in, it will say Member Login Welcome; as a KBA member, you will click on that to log in. This will take you directly to your member portal which is one of the most exciting elements of our new website. I will go into the member portal more in detail below.

8. Rotating Advertising Banner: This will feature member benefits and other KBA marketing partners.

9. Home Page Footer: The blue banner at the bottom features most often requested website links. You will find both Kansas law schools, the courts, and many other important
Member Portal

Once you click into the member login portion of the website you will be directed to your member portal. This is your personal connection to the KBA. In your portal, you will be able to upload a photo of yourself, update contact information, have control of your own password, see upcoming events for which you are registered, open invoices, be able to print/reprint your own receipts, and view events specific to you. When you edit your information you will be able to enter concentration areas, whether you participate in IOLTA. One of the most exciting opportunities we will be able to offer our members is a public listing of your primary contact information for the public to view. In order for you to be on a public listing, you must be a member of a KBA Section and you will have to check the box which says, “Check to participate in public listing, displaying your primary contact information.” The primary contact information is what you designate as primary in your profile. The attorney advertising rule also applies to your public listing.

Potential members will also have access to CLE, KBA Bookstore, and other non-member information included on the website. The KBA continues to offer the public services of law-related education and much more for the public. Check the website often, as it will be growing and updating daily.

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*Awaiting approval by the Kansas CLE Commission for 6.0 CLE credit hour, including 1.0 hour professional responsibility credit.
The ADAAA:
Congress Breathes New Life into the Americans with Disabilities Act
by Scott Johnson
I. Introduction

In 1990, two-thirds of disabled Americans were not working, despite being otherwise qualified for jobs.1 In response, Congress passed the Americans with Disabilities Act (ADA).2 The ADA created a cause of action against employers who take adverse action against disabled employees based on their disability.3 To invoke the protections under the ADA, a plaintiff was required to have a “disability”4 that “substantially limits”5 a “major life activity.”6

After passage, the ADA faced a hostile judicial reaction.7 Many courts characterized it as an affirmative action program for the disabled, rather than as an antidiscrimination statute.8 Even the U.S. Supreme Court explicitly referred to certain accommodations as “preferences for individuals with disabilities.”9 In a pair of cases, the U.S. Supreme Court narrowly construed the scope of the ADA’s definition of who is disabled. First, the Supreme Court held that two nearsighted people were not disabled for the purposes of the ADA, because their eyeglasses successfully mitigated the disability.10 Subsequently, the Court further narrowed the protected class of persons under the ADA. The Court held that for a person to qualify as disabled under the ADA, the disability must make it extremely difficult to impossible to perform tasks that are “of central importance to most people’s daily lives.”11 Being able to work a particular job was not considered to be such a task.12

In response to these Supreme Court decisions, Congress passed the Americans with Disabilities Act Amendments Act (ADAAA).13 The law became effective January 1, 2009. The statute overturns the Supreme Court’s narrow interpretation of “substantially limiting a major life activity,” and creates a broader class of persons who are considered “disabled” under the ADA.14 Under the ADAAA, the definition of a qualified disability was substantially broadened, and plaintiffs are more easily able to maintain ADA claims. This article will examine the recent amendments, regulations, and case law, and demonstrates how they have changed the analysis under the new statute.

II. Sutton and Toyota

The ADA provides a cause of action for a person discriminated against on the basis of his disability. To establish a prima facie case of disability discrimination under the ADA, a plaintiff must show that he: (1) is a disabled person as defined by the ADA; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer because of that disability.15 Although the courts of appeal agreed for the most part on the second and third prongs of an ADA case, the circuits were split on the definition of “disabled person.”16 Most of the circuits, as well as the Equal Employment Opportunity Commission (EEOC), took the view that a plaintiff’s disability should be examined without regard to any sort of mitigating measures they are taking to improve their condition.17 The Tenth Circuit took the opposing view, holding that if a plaintiff could correct the impairment, then he or she was not substantially limited in any major life activity and therefore not disabled for the purposes of the ADA.18 The Supreme Court granted certiorari to resolve the circuit split in Sutton v. United Air Lines.19

In Sutton, twin sisters suffering from severe nearsightedness applied for positions as pilots for United Air Lines.20 With corrective lenses, they “both function identically to individuals without a similar impairment.”21 Although they both met United Air Lines’ “basic age, education, experience, and FAA certification qualifications,” their job interviews were ended early due to their vision.22 Neither was hired.23

The two filed suit under the ADA, alleging that United Air Lines discriminated against them on the basis of their disability, or because United Air Lines regarded the Sutton twins as having a disability.24 The district court ruled that because they could “fully correct their visual impairments,” they were not “substantially limited in a major life activity.”25

On appeal, the Tenth Circuit affirmed the decision, holding that the EEOC Interpretive Guidance, which calls for

Footnotes
2. 42 U.S.C. § 12101 et seq.
6. Id.
7. See Michelle A. Travis, Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities, 76 Tenn L. Rev. 311, 318 (2009) (“Many legal scholars have documented how judges’ misunderstanding of the ADA as a subsidy program entitling its recipients to special benefits—not as an antidiscrimination statute—has contributed to an increasingly narrow construction of the ADA’s protected class.”).
8. Id. at 317.
12. See id. at 198.
14. See infra section III.
15. Zwygart v. Bd. of County Comm’rs, 483 F.3d 1086, 1090 (10th Cir. 2007).
16. Prior to the Tenth Circuit’s decision in Sutton v. United Air Lines, 130 F.3d 893, all of the other circuits that had heard such cases had ruled that mitigation was not to be taken into account when examining the existence of a disability. See Bartlett v. New York State Bd. of Law Exam’n, 156 F.3d 321, 329 (2nd Cir. 1998) (holding that a dyslexic man who learned how to mitigate his condition was disabled under the ADA), Baert v. Euclid Beverage Ltd., 149 F.3d 626, (7th Cir. 1998) (holding that insulin-mitigated diabetes was a disability), Arnold v. United Parcel Service Inc., 136 F.3d 854, 859-866 (1st Cir. 1998) (same), Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3rd Cir. 1997) (medication-controlled epilepsy constituted a disability), and Washington v. HCA Health Servs. of Texas Inc., 152 F.3d 464, 470 (5th Cir. 1998) (holding that some disabilities were to be examined in their unmitigated state, but disabilities that were severe “in common parlance” were to be evaluated without regard to mitigation).
17. See Sutton, 527 U.S. at 477.
19. 527 U.S. 471.
20. Id. at 475-76.
21. Id. at 475.
22. Id. at 476.
23. Id.
24. Id.
25. Id.

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evaluating a disability without regard to mitigating measures, was in direct conflict with the plain language of the statute. The court agreed with the Sutton twins that their vision was a physical impairment under the ADA. The court next analyzed whether their myopia substantially limited a major life activity. The twins argued that the court should defer to the EEOC’s guidance, which states that the court should evaluate their impairment “without regard to mitigating measures.” The Tenth Circuit agreed with United Air Lines. It held that the EEOC’s guidance regarding mitigating measures was not only in direct conflict with the ADA, but was generally inconsistent with other portions of the EEOC’s own guidance.

The court held that to establish a prima facie case under the ADA, the twins must show that their vision in its corrected state substantially limits the major life activity of seeing. Because the twins admitted that their corrected vision allowed them to “function identically to individuals without a similar impairment,” their vision did not substantially limit a major life activity. Thus, the twins were not disabled for the purposes of the ADA.

The Supreme Court granted certiorari. The Sutton twins argued that because the ADA did not directly address the question of mitigation, the Court should defer to the agency interpretation of the statute. The EEOC had previously stated that determination of whether an impairment substantially limited a major life activity “be made without regard to mitigating measures.” Additionally, they argued that their nearsightedness substantially limited them in the major life activity of working, because they were denied employment as global airline pilots, which they regarded as a “class of employment,” due to their impairment.

In response, United Air Lines argued that an impairment does not substantially limit a major life activity if it can be corrected. United Air Lines pointed to the phrase “substantially limits one or more major life activities,” to advance the contention that the substantial limitations “actually and presently exist.” United Air Lines noted that disregarding the mitigating measures that an individual takes conflicted with the ADA’s command to examine an impairment of the major life activities “of such individual.” United Air Lines urged the Court to reject the EEOC’s Interpretive Guidance, because it was in direct conflict with the statute.

The Supreme Court agreed with United Air Lines’ position. The Court first noted that the EEOC did not have the authority to interpret the term “disability.” The Court reasoned that the definition of disability requires that disabilities be evaluated “with respect to an individual.” Thus, the Court held that the mitigating measures that an individual takes regarding an impairment must be taken into account to determine if an impairment substantially limits the major life activities of that individual. The Court held that Congress never intended for the ADA to cover conditions that are controlled by medication or other measures. Thus, if the mitigated condition did not substantially limit a major life activity, it was not a disability for the purposes of the ADA.

The Court also addressed the Sutton twins’ argument that United Air Lines regarded them as substantially limited in the major life activity of working. It held that the statutory phrase “substantially limits” requires, at a minimum, that the plaintiffs allege that they are unable to work in a broad class of jobs. Although the twins were precluded from doing the work of a global airline pilot, there were a number of other available positions utilizing their skills, such as regional pilot and pilot instructor. Given that the twins had similar job opportunities, the Court concluded that they were not substantially limited in the major life activity of working.
The Court further narrowed the definition of “disability” in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams. In Toyota, Ella Williams, an assembly line worker at a Toyota plant in Kentucky, developed carpal tunnel syndrome. Her personal physician “placed her on permanent work restrictions that precluded her from lifting more than 20 pounds or from ‘frequently lifting or carrying of objects weighing up to 10 pounds,’ engaging in ‘constant repetitive ... flexion or extension of [her] wrists or elbows,’ performing ‘overhead work,’ or using ‘vibratory or pneumatic tools.’” The plant initially attempted to accommodate this restriction by assigning Williams to positions in the plant that required few manual tasks. Three years later, the plant adopted a new policy which required employees in Williams’ position to manually wipe down cars with highlight oil. Soon after, Williams developed, among other conditions, “myotendinitis bilateral periscapular, an inflammation of the muscles and tendons around both of her shoulder blades.” The condition worsened and her physician placed her under a “no-work-of-any-kind” restriction. The plant later fired her for failing to show up to work for nearly two months.

Williams filed suit, alleging that the plant violated the ADA by failing to reasonably accommodate her disability. The district court found that she was not disabled under the ADA, because her particular job was not a major life activity. On appeal, the Sixth Circuit reversed the decision. The court determined that Williams’ ability to perform “isolated, non-repetitive manual tasks over a short period of time” was not relevant to the question of whether her impairment “substantially limited her ability to perform the range of manual tasks associated with an assembly line job.” Because she was substantially limited in this major life activity, she was therefore protected by the ADA.

The Supreme Court granted certiorari to determine the proper standard for “assessing whether an individual is substantially limited in performing manual tasks.” Williams interpreted Sutton to mean that a plaintiff must allege that he or she is barred from a “class” of jobs for an impairment to substantially limit the major life activity of working. She contended that the same logic applied to the major life activity of performing manual tasks. Because Williams’ impairment kept her from performing a broad class of manual tasks, she argued that the Court should find that she was substantially limited in performing manual tasks.

The Court disagreed with that argument, holding that “to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” The Court rejected Williams’ argument that a class-based analysis should be applied to any other major life activity. Relying heavily on Sutton, the Court ruled that an inability to perform a particular job was not “of central importance to most people’s daily lives.” Although Williams was unable to perform her job, she admitted that she was able to “tend to her personal hygiene and carry out personal or household chores.” Because the Sixth Circuit failed to take those facts into account, the Court reversed the Sixth Circuit’s holding that Williams was disabled.

Sutton and Williams created a Catch-22 for ADA plaintiffs. The ADA requires that plaintiffs prove they are otherwise qualified for the position for which they are requesting an accommodation. This leads to the situation in which

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49. 534 U.S. 184 (2002).
50. Id. at 187.
51. Id. at 187-88.
52. Id. at 188-89.
53. Id. at 189.
54. Id.
55. Id. at 189-90.
56. Id. at 190.
57. Id.
58. Id.
60. Id. at 840.
61. Id.
62. Id.
63. Id. at 200.
64. Id. at 198.
65. Id. at 200.
66. Id. at 200.
67. Id. at 201.
68. Sharon Hoffman, Settling the Matter, Does Title I of the ADA Work? 59 Ala. L. Rev. 305, 328 (2008). See also Kemp v. Holder, 610 F.3d 231, 236 (5th Cir. 2010) (“[A]n employer may evaluate an employee’s capabilities without regard to mitigating devices, but the use of such devices is nevertheless considered when the court determines whether that employee is “disabled” under the terms of the ADA.”). The Tenth Circuit in Sutton made this Catch-22 clear. See Sutton, 130 F.3d at 903 (“Plaintiffs ... are either disabled because their uncorrected vision substantially restricts their major life activity of seeing and, thus, they are not qualified individuals ... or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing [and are not entitled to the protections of the ADA].”).
many workers with impairments are either considered not impaired enough to qualify as disabled under the law, or their impairment is great enough that they are not qualified for the job.\textsuperscript{69} Both situations result in a verdict for the defendant, and led lower courts to rule that many plaintiffs failed to qualify as disabled under the ADA.\textsuperscript{70} For example, in Sorensen \textit{v.} University of Utah Hospital,\textsuperscript{71} the Tenth Circuit refused to classify as disabled Loren K. Sorensen, whose multiple sclerosis caused a five-day hospitalization, despite the University of Utah Hospital’s reliance on her doctor’s opinion that she could not work as a flight nurse in her condition.\textsuperscript{72} Relying on the framework articulated in \textit{Sutton}, the Tenth Circuit held that because Sorensen’s condition did not restrict her from the entire class of nursing jobs, merely the job of flight nurse, she was not substantially restricted in the major life activity of working.\textsuperscript{73} Therefore, Sorensen was not disabled under the ADA.\textsuperscript{74}

\section*{III. New Definitions}

In response to the Supreme Court’s narrow holdings in \textit{Sutton} and \textit{Toyota}, Congress has amended the ADA with ADAAA to broaden ADAs coverage. For the ADA to apply in an employment discrimination case, the plaintiff must show that he is a “qualified individual:” a person who has a “disability” that “substantially limits” a “major life activity.”\textsuperscript{75} The ADAAA expanded the class of persons protected by the ADA as qualified individuals in several ways: (1) by overturning \textit{Sutton’s} rule that courts must look to a person’s mitigating measures in evaluating the presence of a disability,\textsuperscript{76} (2) by explicitly defining what a major life activity is,\textsuperscript{77} and (3) by expanding protections for people who are “regarded as disabled.”\textsuperscript{78}

\subsection*{A. Mitigation not taken into account}

The ADAAA does not actually alter the ADA’s definition of “disability.”\textsuperscript{79} What it does alter are the rules of construction regarding the definition of disability. Explicitly abrogating the \textit{Sutton} decision, the ADAAA states that:

\begin{quotation}
The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as – medication, medical supplies, equipment or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses) ... use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications.\textsuperscript{80}
\end{quotation}

Following the \textit{Sutton} decision, if an employee had a disabling condition that was controlled with medication or some other mitigating measure, the employee was not disabled for the purposes of the ADA. The ADAAA alters that rule. Under the ADAAA, an employee’s condition must be considered without taking into account any mitigating measures.\textsuperscript{81} There is only one mitigating condition that may be taken into account – ordinary eyeglasses or contact lenses.\textsuperscript{82} That is ironic, because the ADAAA was intended to overturn the Court’s decision in \textit{Sutton}.\textsuperscript{83} Because ordinary eyeglasses or contact lenses can be taken into account as a mitigating measure, if a case like \textit{Sutton} were to come before the Court today, its decision would likely be the same.\textsuperscript{84}

\subsection*{B. Major life activities defined}

The original ADA did not define the term “major life activity.” The Supreme Court in \textit{Toyota} narrowed the class of persons who were considered disabled with its holding that a “major life activity was an activity that was “central ... to most people’s daily lives.”\textsuperscript{85} Following that logic, a court deciding an ADA case could no longer simply rely on the fact that a worker was unable to perform certain manual tasks at her job to determine whether she had a disability.\textsuperscript{86} The court was required to also take into...
account the plaintiff’s home life activities, such as whether the plaintiff could perform household chores and other manual tasks. For example, under the Toyota framework, brushing one’s teeth is a major life activity, but operating an engine lathe, because it is not central to most people’s daily lives, is not.

In the ADAAA, Congress more explicitly defined “major life activity,” expanding the definition to include “major bodily functions.” The rules of construction in the ADAAA state that “[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.” The expansive definition changes the focus of an ADA dispute from whether or not a person is disabled for the purposes of the ADA to whether discrimination has occurred.

The result of the ADAAA is that the new definition of major life activity is much broader than the one used by the courts in Sutton and Toyota. Under the ADAAA, an employee may request a reasonable accommodation from an employer for impairment of a single category of major life activities. Because courts are not allowed to look at whether the impairment is episodic or mitigated, the impairment must be examined by itself to determine whether a person qualifies for an accommodation under the ADA.

Defining major life activities to include major bodily functions, combined with the requirement that courts determine the existence of a disability without regard to mitigation, makes qualifying as disabled under the ADAAA a much easier task. The amendments remove the requirement that a plaintiff prove that the failure of one of his major bodily functions substantially limits a major life activity, because the major bodily function is explicitly defined as a major life activity. For example, under the old definition of major life activity, a diabetic who controlled his condition with insulin would not be considered to be disabled. The new amendments change this result.

C. “Regarded as” expanded

The ADA, like the Rehabilitation Act that preceded it, was originally written not only to protect those with actual disabilities, but also to protect those whom employers believe to be limited in some way. That could occur either by misperceiving that a disability exists in the first place, or by wrongly believing that a disability impairs a person in a major life activity when it in fact does not. The ADAAA disregards the question of whether a perceived disability limits or is perceived to limit a major life activity in determining whether or not a person is regarded as having an impairment. Under the ADAAA, the perceived impairment must not be “transitory and minor.” Employers do not have to provide reasonable accommodations to persons who qualify as disabled solely from the “regarded as” prong of the ADAAA, but a plaintiff can sue his employer for taking adverse action against him because the employer regards the person as disabled.

The “regarded as” option to qualify a person as disabled has not yet been fleshed out by the courts. The statute and the EEOC regulations implementing the ADAAA indicate that an employer who discriminates against a person based on a perceived disability, even without knowing what the disability actually is, or whether the perceived disability actually exists, commits a prohibited action under the ADA.

IV. New EEOC Regulations

The EEOC released its final revised ADA regulations and accompanying interpretive guidance to the ADAAA on March 25, 2011, and these changes became effective May 21, 2011. Now with solid statutory backing, the new regulations give new guidance as to who should be considered disabled under the amended ADA. The regulations follow the ADAAA in making the focus of analysis on an employer’s alleged discriminatory behavior, rather than whether someone’s impairment substantially limits a major life activity.

87. See id. at 201-02.
88. 42 U.S.C. § 12102(2)(A) (“In General – For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”).
89. 42 U.S.C. § 12102(2)(B) (“(B) Major Bodily Functions – For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”).
91. See 42 U.S.C. § 12101(b)(5).
94. 42 U.S.C. § 501 et seq.
95. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 283 (1987) (“[A]n impairment might not diminish a person’s physical or mental capabilities, but could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.”).
96. See id.
97. § 12102(3)(A)
98. § 12102(3)(B) (“Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.”).
99. 29 C.E.R § 1630.2(g)(3).
101. 29 C.F.R. § 1630 et seq.
A. Further defining “substantially limits”

The EEOC’s regulations explicitly define what will be considered a disability under the amended ADA. In § 1630.2(j)(1), the EEOC lays out rules of construction regarding when an impairment substantially limits a major life activity. Taking its cue from the ADAAA, the EEOC states, “The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual’s impairment substantially limits a major life activity.”102 However, the regulations give no absolutes as to whether an impairment is substantially limiting; it calls for an individualized assessment of each case.103 Nonetheless, the degree of functional limitation does not need to be as great as the original ADA required.104 Echoing its own regulations pre-Sutton, the EEOC regulations state that the determination of whether an impairment substantially limits a major life activity “shall be made without regard to the ameliorative effects of mitigating measures.”105 Finally, an individual does not have to prove that an impairment “substantially limits” a major life activity when pursuing a cause of action under the “regarded as” prong of the ADA.106

The EEOC regulations expressly state that, applying those principles, certain people would usually be considered disabled under the ADAAA.107 Though many of the examples seem obvious, one should take special note of the mental illnesses that the EEOC states will usually be considered disabilities under the ADAAA: major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.108 As one in four Americans is likely to experience a mental health disorder in a given year,109 it is important that employers be aware of this major change in the law.

B. “Regarded as”

The EEOC regulations take an expansive view of the “regarded as” prong of the ADAAA. Under the original ADA, a plaintiff alleging that an employer discriminated against him under the “regarded as” prong of the ADA had to prove not only that his employer regarded him as having a disability, but also that the alleged disability substantially limited a major life activity.110 The ADAAA abrogates that former definition. The EEOC regulations state “an individual is “regarded as having ... an impairment” if he is “subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.”111 That is a broader standard than under the original ADA. Without the need to prove substantial impairment to a major life activity, a plaintiff can make a prima facie case of discrimination simply by showing that an employer thought that he was impaired in some way, and took adverse action based on that belief.112 Rather than looking at the objective question of whether a perceived disability actually substantially limited a major life activity, courts must now look at the subjective beliefs of employers as to whether they regarded an employee as disabled, regardless of the limitation the disability actually creates.

V. Current Case Law

No federal appellate court has yet decided an ADAAA case on its merits.113 One issue that the circuit courts are in agreement on is that the ADAAA does not provide retroactive remedies to plaintiffs.114 Claims for actions that took place prior to January 1, 2009 (the date the ADAAA went into effect), will use the original ADA’s definition of disability.115

A pair of federal district courts has construed the new amendments. In Hoffman v. Carefirst of Fort Wayne Inc.,116 Stephen Hoffman was hired as a technician for a medical supply company, delivering home medical devices to patients.117 In 2007, Hoffman was diagnosed with kidney cancer and had his left kidney surgically removed.118 His doctors determined that his cancer was in remission, and that Hoffman could return to work.119 When Hoffman returned to work on January 2, 2008, he worked his standard 40-hour shift with no complaints.120 In January 2009, Hoffman’s supervisor informed him that all service technicians would have to work overtime due to a new contract.121 Hoffman obtained a doctor’s note stating that “[p]atient may not work more than 8 hours/day, 5 days/week. Dx: Stage III renal cancer.”122 Hoffman was initially given the option to resign or work 70-hour weeks, but Hoffman’s supervisor reconsidered and told Hoffman he could continue working 40-hour weeks, but at another office.

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102. 29 C.F.R. § 1630.2(j)(1)(iii).
103. Id. § 1630.2(j)(1)(iv).
104. Id.
106. Id. § 1630.2(j)(2). See section III(b), supra.
107. See 29 C.F.R. § 1630.2(j)(3)(i). An “impairment” is a physical or mental impairment.
108. 29 C.F.R. § 1630.2(j)(3)(i). An “impairment” is a physical or mental impairment.
109. NIMH: The numbers count—Mental disorders in America.” National Institute of Health. Available at http://www.nimh.nih.gov/publications/numbers.cfm. One in 17 lives with a serious mental illness, such as schizophrenia, major depression, or bipolar disorder. Id.
110. Sutton, 527 U.S. at 489.
111. 29 C.F.R. § 1630.20(b)(1).
112. See 29 C.F.R. § 1630.2(g)(3).
113. “Because the ADAAA amendments have been ruled as not retroactive, at this point in time, there is a lack of case law on this issue.” Hoffman v. Carefirst of Fort Wayne Inc., 2010 U.S. Dist. LEXIS 90879 (N.D. Ind. 2010) (internal citations omitted).
114. See, e.g., Milholland v. Sumner County Bd. of Educ., 569 F.3d 562, 567 (6th Cir. 2009), EEOC v. Agro Distrikc. LCC, 555 F.3d 462, 469 n.8 (5th Cir. 2009).
115. Cf. Milholland, 569 F.3d at 567 (“[T]he ADA Amendments Act does not apply to pre-amendment conduct.”).
116. 2010 U.S. Dist. LEXIS 90879 (N.D. Ind. 2010)
117. Id. at 8.
118. Id. at *9.
119. Id.
120. Id.
121. Id. at *11.
122. Id. at *11-12.
with a two-hour commute.123 Hoffman refused and sued under the amended ADA, claiming that his Stage III renal cancer, even though it was in remission, constituted a disability under the ADA.124

Hoffman’s employer argued that “Hoffman did not have a physical impairment which substantially limited any major life activity in January 2009 – his cancer was in remission, he returned to work without restrictions, he carried out his regular job duties of 40 hours a week as a service technician for a full year, and he did not miss any significant time off work.”125 The court was not persuaded. The court reasoned that the ADAAA “clearly provides that ‘an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active,’ and neither side disputes that Stage III Renal Cancer, when active, constitutes a disability.” Hoffman was held to be disabled under the ADAAA.126

The court emphasized the ADAAA’s new language stating that the operation of a major bodily function is a major life activity.127 It also upheld the new law’s procedure for disabilities that are mitigated or transitory; the court must examine them without regard to any mitigation.128 One should note that if this had been decided under the prior law, the court would likely have relied upon the Sutton decision and delivered summary judgment to the employer.

Lowe v. American Eurocopter LLC129 also addresses the ADAAA’s broader classification of disability. In Lowe, Yolanda Lowe was employed as a receptionist between 2007 and 2009 with American Eurocopter. After she was fired in May 2009, she filed a claim alleging disability discrimination and disability-based hostile work environment, due to the fact that she was obese.130 The employer moved to dismiss, citing pre-ADAAA case law that found obesity was “not a disabling impairment” under the ADA.131

The court rejected the employer’s argument and ruled that obesity could be a disabling condition.132 The court found that the plaintiff should have the opportunity to present facts to “prove that her weight rises to the level of a disability under the ADA[,]”133 Alternatively, the court ruled that the plaintiff could proceed under the “regarded as” option of showing disability. The court noted that the ADAAA requires a plaintiff only to show “that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”134 Thus, if the plaintiff could prove that her employer regarded her obesity as a disability, and that a prohibited action was taken against her based on that perception, her claim was viable.

These two cases give a good illustration of the broad scope of the ADAAA. Per Congress’ instructions, the inquiry taken by the district courts in these cases focused on the alleged discriminatory actions of the employers, rather than the status of the plaintiff’s alleged disability. The cumulative effect of the new amendments is to tilt the playing field in the direction of plaintiffs.

VI. Conclusion

The ADAAA makes the ADA a more plaintiff-friendly law. Employers who engage in prohibited actions against disabled employees will now find the focus of the lawsuit to be whether or not an employer engaged in discriminatory behavior, rather than whether or not the plaintiff is disabled. As a result, employers will need to be careful in how they interact with employees. Employers must make sure that their words and actions cannot be construed as regarding an employee as having a disability, so that employees who are not disabled under the new definitions do not suddenly become disabled by the employer’s opinion.

Given the EEOC’s broad definition of disability, the class of disabled persons will be enlarged. This law may result in increased costs to employers, in the form of viable lawsuits and the cost of accommodating disabled employees.

About the Author

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123. Id. at *12.
124. Id. at *19.
125. Id. at *20.
126. Id. at *21-22 (quoting 42 U.S.C. § 12102 ).
127. § 12102(2)(B).
129. 2010 U.S. Dist. LEXIS 133343 (N.D. Miss. 2010).
130. Id. at *1. Lowe also alleged race, gender, and age discrimination, but these claims were dismissed. Id. at *31.
131. Id. at *21-22.
132. Id. at *26.
133. Id. at *25-26.
134. 2010 U.S. Dist. LEXIS at *25.
CIVIL

TAXATION
IN RE TAX APPEAL OF FLEET
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 102,645 – JANUARY 27, 2012

FACTS: Fleet National Bank and Connell Finance Co. owned business aircraft leased to Westar Energy Inc. Owners applied to Board of Tax Appeals (BOTA) which granted ad valorem tax exemption based on owner's exclusive business use of the aircraft, with no regard to Westar's usage. Following publicity that Westar had misused the aircraft for personal travel, County issued correction orders to add aircraft to tax roll and announce assessments for back taxes, interest and penalties. In re Tax Application of Central Kansas E.N.T. Associates P.A., 275 Kan. 893 (2003), decided the next day, held aircraft would not qualify for exemption if either the owner or lessee did not operate aircraft exclusively for business purpose. Here, owners initiated grievance, and prevailed before BOTA and district court. County appealed.

ISSUE: Issue and claim preclusion

HELD: All elements of both issue and claim preclusion are satisfied in this case, and prevent the County from relitigating the aircraft's exemption status for the tax years in controversy. Full discussion of why County's objections to application of issue and claim preclusion based on owner's exclusive business use of the aircraft, with no regard to Westar's usage. Following publicity that Westar had misused the aircraft for personal travel, County issued correction orders to add aircraft to tax roll and announce assessments for back taxes, interest and penalties. In re Tax Application of Central Kansas E.N.T. Associates P.A., 275 Kan. 893 (2003), decided the next day, held aircraft would not qualify for exemption if either the owner or lessee did not operate aircraft exclusively for business purpose. Here, owners initiated grievance, and prevailed before BOTA and district court. County appealed.

STATUTES: K.S.A. 2010 Supp. 60-2103(h); K.S.A. 20-3018(c); K.S.A. 60-2103(h); K.S.A. 74-2426(c); K.S.A. 77-607, -614, -618, -619(a), -621, -621(c), -621(c)(4); K.S.A. 79-201k First, -201k(b) First, -214, -1422, -1422(a), -1422(c), -1427a, -1427a(a), -1475; and K.S.A. 79-201k(b) First (Ensey 1989)

CRIMINAL

STATE V. BOGGUESS
SEDGWICK DISTRICT COURT – AFFIRMED IN PART
AND DISMISSED IN PART
NO. 103,245 – JANUARY 20, 2012

FACTS: Bogguess convicted of first-degree murder, aggravated robbery, aggravated kidnapping, aggravated assault, and criminal possession of a firearm. He elected to proceed in bench trial on stipulated facts after district court denied motion to suppress Bogguess’ confession. Bogguess appealed. State argued Bogguess failed to lodge a contemporaneous objection during the bench trial and no specific reservation of right to appeal trial court's ruling in the Jackson v. Denno hearing or decision on motion to suppress.

ISSUES: (1) Reservation of appellate rights, (2) Jackson v. Denno hearing, (3) suppression of confession, (4) trial issues, (5) motion to disqualify trial counsel, and (6) sentencing issues

HELD: Kansas Supreme Court has not weighed in directly on issue of contemporaneous objection rule in a bench trial. Cases in Kansas and other jurisdictions reviewed. When a bench trial consists solely of stipulated facts, there is no opportunity for the defendant to make a contemporaneous objection to the admission of specific evidence. If the bench trial is conducted by same judge who presided over hearing on motion to suppress that evidence, lack of a contemporaneous objection does not bar appellate review of ruling on motion to suppress.

At Jackson v. Denno hearing, issue before trial court is whether a defendant's statement is voluntary. Truthfulness of the statement is not at issue. A defendant may take the stand for limited purpose of testifying about events related to whether the statement was voluntarily made. Questions going to the substance of the statements are outside the scope of a Jackson v. Denno hearing. Here, Bogguess had valid Fifth Amendment privilege. District court ruled in ruling that Bogguess must answer questions about events that were the bases for crimes charged and erred in allowing a detective to sit at prosecutor's table contrary to sequestration order. Bogguess also alleged error in sentencing, including the trial court's refusal to consider modification of sentence in unrelated case for which Bogguess was on probation when he committed the stipulated offenses.

Bogguess also claimed he had a valid Fifth Amendment privilege in the Jackson v. Denno hearing, and that trial court erred in finding Bogguess waived that privilege during the hearing. Bogguess also claimed trial court erred in denying motion to suppress statements regarding prior criminal conduct, and erred in allowing a detective to sit at prosecutor's table contrary to sequestration order. Bogguess also claimed district court erred in not appointing new counsel on pro se claim that counsel had conflict of interest and was ineffective for failing to make closing arguments at bench trial. And Bogguess also alleged error in sentencing, including the trial court's refusal to consider modification of sentence in unrelated case for which Bogguess was on probation when he committed the stipulated offenses.

Bogguess was on probation when he committed the stipulated offenses.

Under facts of case, including testimony erroneously excluded by the district court, Bogguess’ confession was voluntary. No error in denying motion to suppress.

Trial error issues are moot because case was tried on stipulated facts.

No abuse of discretion in refusing to appoint new counsel. Trial court had reasonable basis for believing the attorney-client relationship had not deteriorated to where appointed counsel could no longer give effective aid in fair presentation of Bogguess’ defense.

No appellate jurisdiction to review presumptive sentence, and Kansas has previously found no merit to Apprendi claim that jury must decide criminal history. No appellate jurisdiction to review sentence imposed in different case for which Court of Appeals had issued mandate when Bogguess failed to seek review.

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STATUTES: K.S.A. 60-404

STATE V. JONES
DOUGLAS DISTRICT COURT – SENTENCED VACATED AND REMANDED WITH DIRECTIONS
NO. 104,018 – JANUARY 20, 2012

FACTS: Jones pleaded no contest to aggravated indecent liberties with a 6-year-old, an off-grid person felony. Under K.S.A. 21-4643(a) (1), (d), the prescribed sentence was life imprisonment with a mandatory minimum of 25 years. The statute allows for a departure if the defendant is a first-time offender and the sentencing court finds substantial and compelling mitigating factors. The sentencing court found there were substantial and compelling reasons to depart from the life sentence and mandatory minimum of Jessica’s Law. The court did not make any additional findings before imposing the 120-month sentence agreed upon by the parties. The court denied Jones’ argument that lifetime post-release supervision is disproportionate and unconstitutional under § 9 of the Kansas Constitution Bill of Rights and the Eighth Amendment to the U.S. Constitution. As Jones had requested, the court stated its findings on the record; Jones did not object to the findings as being inadequate.

ISSUE: Jessica’s Law

HELD: Court held that under the facts of this case, the sentencing court imposed an illegal sentence when it departed from the sentence of life imprisonment that was prescribed in K.S.A. 21-4643(a) (Jessica’s Law) without proceeding to the Kansas Sentencing Guidelines Act grid box corresponding to the crime of conviction and the defendant’s criminal history.

STATESTATUTES: K.S.A. 21-3504, -4643(a), -4701, -4704, -4721; and K.S.A. 22-3504, -3601(b)(1)

STATE V. GUDER
BOURBON DISTRICT COURT – MODIFIED SENTENCE IS VACATED IN PART AND CASE IS REMANDED COURT OF APPEALS – REVERSED
NO. 101,632 – JANUARY 27, 2012

FACTS: Guder pleaded guilty and was sentenced on drug charges. In appeal not docketed for seven years, Court of Appeals vacated Guder’s sentence on the manufacturing charge and remanded for resentencing. District court resentedenced as directed in accord with State v. McAdam, 277 Kan. 136 (2004), but also modified the paraphernalia sentence from concurrent to consecutive. Guder appealed. Relying on State v. Snow, 282 Kan. 323 (2006), and State v. Woburn, 133 Kan. 1 (1931), Court of Appeals affirmed in unpublished opinion. Review granted on issue of whether a district court may modify a previously imposed sentence on one conviction following an appellate court’s remand for resentencing based on a different conviction.

ISSUE: Sentencing after remand

HELD: Statutory changes to jurisdiction of district courts to modify sentences have superseded the Woburn rationale. The Kansas Sentencing Guidelines Act does not grant district court authority to modify sentences following remand unless the primary conviction was reversed on appeal. Although Guder’s sentence was vacated, his conviction was not reversed, thus district court lacked authority to modify any sentence not vacated on appeal. Remanded for resentencing. Holding in Snow is disapproved to the extent it is contrary to this opinion.

STATESTATUTE: K.S.A. 21-4701 et seq., -4720(b)(5)

STATE V. TORMES
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 104,642 – JANUARY 27, 2012

FACTS: Torres convicted pursuant to plea agreement. In unpublished opinion, Supreme Court vacated the sentence and remanded for resentencing. Prior to resentencing, Torres moved to withdraw his plea, arguing state violated the plea agreement at the initial sentencing by reading into record a letter from victim’s mother. District court denied the motion. At resentencing hearing, at which victim’s mother personally addressed the court, district court imposed sentence consistent with the plea agreement. Torres appealed, arguing district court erred in finding prosecutor’s reading of letter by victim’s mother asking for maximum sentence did not provide good cause to withdraw plea.

ISSUE: Violation of plea agreement

HELD: Torres ultimately received sentence he bargained for. Sentence is affirmed. Torres’ claims regarding the alleged violation of the plea agreement at initial sentencing hearing are moot.

STATESTATUTE: K.S.A. 2010 Supp. 22-3210(d)(1), -3210(d)(2)

STATE V. WASHINGTON
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 102,521 – JANUARY 20, 2012

FACTS: A jury convicted Washington of first-degree felony murder and attempted aggravated robbery. On appeal Washington claimed insufficient evidence was presented at the preliminary hearing to find probable cause that attempted aggravated robbery and felony murder were committed and that Washington committed those felonies. He also claimed that the Allen-type jury instruction given before deliberations began was clearly erroneous.

ISSUES: (1) Sufficiency of the evidence and (2) Allen-type jury instruction

HELD: Comparable to State v. Calvin, 279 Kan. 193 (2005), the inference that Washington and others intended to rob the victim is reasonable based on the evidence of their plan, and witness testimony that the group performed overt acts in furtherance of the plan. Also, there was sufficient evidence to establish probable cause that the victim died as a result of the attempted aggravated robbery in which Washington participated.

Washington did not object to the instruction, and he made no showing of a real possibility the jury would have returned a different verdict.

STATESTATUTES: K.S.A. 21-3301, -3301(a), -3426, -3427, -3401(b), -3436(a)(4); and K.S.A. 22-2902(3), -3601(b)(1)

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**FACTS:** Kathy Ann Bradley, Patti June Gibbs, Debra Lynn Whitebird, Barbara Jean Weaver, Raymond C. Schuetz, and Nancy Sue Bear are the adult children of Robert and Geraldine Schuetz, now both deceased. At the time of their deaths, the Schuetzes owned the fee simple absolute title to several tracts of real estate all located within the Kickapoo Nation Indian Reservation. By conveyance and then descent proceedings filed in the Brown County District Court, the Schuetz children became owners of undivided interests in the real estate as tenants in common. The children operated the real estate under an oral partnership known as Schuetz Farms on the reservation. The Schuetz children are all members of the Kickapoo Indian Tribe. In 2002, the district court granted the plaintiffs a partition of the partnership and appointed a panel of commissioners to partition the property at issue, with the proviso that the property would be sold at a sheriff’s sale if it could not be partitioned. After examining the property, the commissioners determined that partition was impractical and could not be made without manifest injury to the property and interested parties. The district court ultimately ordered that the property be sold at a sheriff’s sale. An advertisement was placed in the local newspaper notifying the public that a sale would take place on June 15, 2004. For the first time, on June 15, 2004, Bear asked the district court to dismiss the case and cancel the sale of the partnership property, arguing the court lacked subject matter jurisdiction over the real estate. Bear claimed the Kansas Enabling Act excludes Indian land from the territorial boundaries and civil jurisdiction of the state of Kansas and noted that the property was indeed located on a reservation. Despite Bear’s motion, the partnership property was sold by the Brown County sheriff on June 15, 2004. The Kickapoo Nation Tribe purchased some of the real property, while Bear purchased certain tracts; Bear purchased all the personal property that was sold.

**ISSUES:** (1) American Indian law and (2) tribal property

**HELD:** Court stated that Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories. Indian reservations are separate and distinct nations inside the boundaries of the state of Kansas. Indian rights are protected by treaty with the United States. The inherent sovereignty possessed by Indian tribes allows the tribes to form their own laws and to be ruled by them. Court held that because all of the parties to their action are enrolled members of the Kickapoo Nation Tribe and all of the land is located within the Kickapoo Reservation, the tribal court is the proper forum for resolving this dispute. It is a matter of sovereignty. Court reversed the judgments of the district court and remanded the matter with directions to dismiss the case.

**STATUTES:** No statutes cited.
OIL AND GAS
DEXTER ET AL. V. BRAKE ET AL.
CHAUTAUQUA DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
WITH DIRECTIONS
NO. 104,457 – JANUARY 20, 2012

FACTS: Dexter and Nelson own two separate tracts of land in Chautauqua County. Before their purchases, the tracts were part of a larger parcel of 520 acres that had been subject to a Lease since 1964. Nelson owns all of the mineral interest in 280 acres. Dexter owns a 1/2 mineral interest in 240 acres, with Monroe owning the other 1/2 mineral interest. The lease was assigned to Brake in 1995. Brake has a 7/8 working interest in the Lease, and the remaining 1/8 royalty interest is shared by Dexter, Monroe, and Nelson based on their respective interests in the land. This court previously held the district court was correct in canceling the lease. And that while Brake was no longer allowed to explore and produce oil or gas on the Nelson land, Dexter was still required to allow Brake to enter onto the Dexter land to fulfill his obligation to Monroe's 1/2 mineral interest in the Dexter land. Despite this court's ruling, Brake continued to operate the wells on both the Nelson and Dexter tracts. In late 2006, Dexter and Nelson filed a petition against Brake requesting an accounting from Brake of all the oil sold under the lease after August 1, 2004 (the date the lease was deemed terminated/canceled). In addition, Nelson alleged that Brake committed trespass and conversion on the Nelson land by continuing to produce oil from the land despite the lease's cancellation. In early 2007, Monroe filed a petition against Brake for cancellation of the lease as to his 1/2 mineral interest in the Dexter land and for an accounting of all the oil produced after August 1, 2004. The Dexter-Nelson lawsuit and the Monroe lawsuit were consolidated at Brake's request. A bench trial was held. The trial court found that the facts supported a finding of a material breach of the terms and provisions of the addendum and canceled the lease as to Monroe's 1/2 mineral interest in the Dexter tract.

In addition, the trial court found that the value of the oil produced and sold after the August 1, 2004, cancellation date from both the Nelson and Dexter tracts was $264,982.95. The court was then required to determine the reasonable operating expenses since August 1, 2004, finding Brake would be entitled to those expenses. Brake claimed reasonable operating expenses of $258,138.14, while Dexter, Nelson, and Monroe argued that allowable expenses totaled only $86,584.16. After a review of the expenses, the court concluded that Brake was entitled to $186,631.77 in operating expenses. The court then determined that Brake could not recover any expenses from Nelson because the lease had been canceled regarding that entire tract.

ISSUE: Oil and gas

HELD: Court rejected Brake's argument that res judicata barred the Dexter-Nelson claims for trespass, conversion, and an accounting. Court held the Dexter-Nelson petition was not time barred because Dexter and Nelson brought their claims within three months of the trial court's decision terminating the lease. It was the lease cancellation that served to legally recognize Brake's status as a trespasser. And Brake's trespass was a continuing trespass which fails to implicite the statute of limitations until it is completed. Court held there was substantial evidence to support a finding that Brake failed to abide by the requirements as set out in the addendum, the trial court did not err in finding that the lease should be deemed terminated and canceled as to Monroe's 1/2 mineral interest in the Dexter land as of August 1, 2004. Court held the trial court did not err in its assessment of Brake's reasonable and necessary operating expenses. However, court held the trial court did err in its allocation of Brake's operating expenses. Court held Brake had an objectively reasonable belief that the entirety clause of the lease required him to continue to operate the lease on all tracts unless or until it was canceled as to all lessors. Moreover, Brake continued to pay royalties to Nelson, and Nelson accepted these payments. Accordingly, we find that in this case Brake remained a good-faith trespasser until January 25, 2008. Any continued operations conducted by Brake after January 25, 2008, on the Nelson land were conducted in bad faith. Court found the trial court erred in not assessing any operating expenses against the Nelson tract and remanded for recalculation.

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

RACIAL PROFILING AND KANSAS TORT CLAIMS ACT
GARCIA V. ANDERSON ET AL.
FINNEY DISTRICT COURT – AFFIRMED
NO. 105,033 – JANUARY 20, 2012

FACTS: Garcia was stopped for a defective brake light. She presented her driver's license and registration. Officers called in the wrong license number causing Garcia to be aggressively searched and accused of having open arrest warrants for DUI and immigration related charges. When officers discovered the error, they offered no apology and let her go. Garcia filed a complaint with the Kansas Human Rights Commission and the commission issued a probable cause finding that racial profiling had occurred. Garcia filed a petition in the district court against the officers and the police department alleging profiling violations, but gave no prior written notice to the city clerk. The district court dismissed Garcia's petition because she failed to comply with the statutory notice provisions to a municipality for claims that could give rise to an action under the Kansas Tort Claims Act (KTCA).

ISSUES: (1) Racial profiling and (2) KTCA

HELD: Court held that litigants with a cause of action for racial profiling, created under K.S.A. 22-4611, must comply with the mandatory notice requirements found in K.S.A. 2010 Supp. 12-105(b)(d) for claims made against a municipality subject to the KTCA. Since Garcia failed to give written notice to the city, Court held the claims were properly dismissed by the district court.

STATUTES: K.S.A. 12-105(b); K.S.A. 22-4611; K.S.A. 44-1001; and K.S.A. 75-6101

TAX APPEAL, OIL AND GAS, AND INTEGRAL PART OF AN INTEGRATED PRODUCTION OPERATION
IN RE TAX APPEAL OF EDMISTON OIL CO.
COURT OF TAX APPEALS – AFFIRMED
NO. 104,950 – JANUARY 13, 2012

FACTS: EDMiston Oil Co. and a host of other oil and gas producers (Taxpayers) applied to the director of taxation for a refund of sales and use taxes paid in Kansas for the purchases of certain oilfield machinery and equipment after the legislature substantially amended K.S.A. 79-3606(kk) in the 2000 session. Specifically, their claims included requests for sales and use tax refunds on purchases of pumping and down-hole machinery and equipment, including gas compressors and lines; surface pumping units, engines, and motors; down-hole pumps, rods, tubing, tubing strings, production casing strings, and cathodic protection; valves and fittings; and electrical equipment. Taxpayers essentially claimed these purchases were for machinery and equipment used as an integral part of an integrated production operation by a processing plant owned by a processing business, and thus eligible for exemption under K.S.A. 2010 Supp. 79-3606(kk). Taxpayers appeal was denied by the director of taxation, the secretary of revenue, and then the Court of Tax Appeals.

ISSUES: (1) Tax appeal, (2) oil and gas, and (3) integral part of an integrated production operation

HELD: Court held the subject machinery and equipment is not used as an integral part of integrated production operations by a processing plant or facility operated by a processing business where
the oil or gas that has been extracted from the earth is then treated or prepared before its transmission to a refinery or wholesale distribution as contemplated by K.S.A. 79-3606(kk).

STATUTES: K.S.A. 77-601; and K.S.A. 79-3606(kk), -4216(l)

TEACHING LICENSURE AND REHABILITATION
WRIGHT V. KANSAS STATE BOARD OF EDUCATION
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 104,634 – JANUARY 20, 2012

FACTS: Wright began practicing law in 1973. That career ended in 2003, when he was convicted of four counts of stealing money. He was also convicted of perjury for lying to an investigator during his disbarment procedure. Wright served a prison sentence. These convictions were expunged in March 2009. The Kansas Supreme Court had disbarred Wright in September 2003. One cannot ex- punge the record of a disbarment proceeding. After his release from prison, Wright sold cars at two different dealerships that required him to obtain a car seller’s license through the Kansas Department of Revenue. Then, in 2007, he took some education classes at Washburn University, earned good grades, and took the first steps toward a career in public education by trying to get a license to teach in Kansas. First, Wright applied to the State Board of Education for an emergency substitute and conditional teacher’s license. After reviewing his application, the Professional Practices Commission recommended unanimously that the Board should deny Wright’s application because it believed Wright’s felony convictions and disbarment stemming from his work as an attorney violated the public trust and confidence placed in teachers. The State Board of Education adopted the findings of fact and conclusions of the Commission and denied Wright’s application for a teaching license. After remand for additional findings by the district court the Board made additional findings of fact and conclusions of law and again decided there was insufficient evidence of Wright’s rehabilitation to permit his licensure. This time, while reviewing the Board’s findings and conclusions after remand, the district court determined the Board’s decision should be affirmed. When viewing the agency record as a whole, the district court determined it could not find that the Board’s decision was without foundation in fact. The district court stated it also could not find the Board acted in an arbitrary or capricious manner. The district court found there was evidence that the Board had considered the expungement of Wright’s criminal record.

ISSUES: (1) Teaching licensure and (2) rehabilitation

HELD: Court stated that under K.S.A. 2008 Supp. 72-1397(b) and (c), the State Board of Education shall not knowingly issue a license to teach to a person convicted of felony theft unless the Board first determines the person had been rehabilitated for a period of at least five years from the date of conviction or commission of the act. Court held that the Board is required to determine the extent of an applicant’s efforts at rehabilitation, as well as the fitness of an applicant to be a member of the teaching profession. Five years of rehabilitation may not necessarily mean an applicant is fit to teach. Court held the Board did not misinterpret the law or misapply the regulations. Court held the Board’s decision is supported by substantial competent evidence, the district court looked at the record as a whole as required by law, and the Board’s decision was not unreasonable, arbitrary, and capricious. Court stated the public policy that in the end, if the Board has followed the rules, it is the judgment of the State Board of Education that matters when deciding who is fit to teach in Kansas, and not the courts. That is the public trust placed on the Board. Court agreed with the district court that the Board followed the rules and the Court would not substitute its view for that of the Board.

DISSENT: Judge Atcheson concurred stating that the Board supported it decision with factual distortions, specious legal interpretations, and lofty sounding rhetoric signifying little of substance. However, Judge Atcheson would find the decision still contains enough to support the denial given the statutory and regulatory standards governing teacher licensure and the decidedly deferential judicial review of administrative actions. Judge Atcheson stated the Board has constructed a challenge for Wright to meet to attain a license. But the Board has failed to share its definition or criteria for determining his success. The Board has slyly created a game without discernible rules, and such a game can never be won.

STATUTES: K.S.A. 21-4619; K.S.A. 72-1397, -8501; and K.S.A. 77-621

ZONING AND TAXATION
IN RE TAX APPEAL OF OAKHILL LAND CO. ET AL.
COURT OF TAX APPEALS – AFFIRMED
NO. 104,161 – JANUARY 27, 2012

FACTS: This tax appeal involves six tracts of land in Wyandotte County owned by three different legal entities. Dale Barnhart is a principal owner of all three companies. Barnhart bought the property when it was being used for agricultural purposes. Barnhart sought to get the properties rezoned to residential use, which had a much higher property-tax rate. After the 2006 appraisals, the county classified four out of the six tracts as vacant which also increased the valuation. Barnhart claimed all the tracts should be zoned agricultural based on the harvest of saleable timber. Inspections did not reveal any agricultural activity and the Court of Tax Appeals concluded there wasn’t sufficient evidence of agricultural use.

ISSUES: (1) Zoning and (2) taxation

HELD: Court concluded that a county appraiser must make an initial classification and determine the appraised value of each parcel by March 1, the date on which notice of this information is to be mailed to the taxpayer. Only “necessary changes” may be made between March 1 and certification of the tax rolls. In this case, there simply was no necessity to the change in valuations. The county chose not to investigate the status of the parcels between January 1, the “as of” date for the valuation, and March 1. A county may not later change the classification or increase the appraised valuation simply because the county chooses to wait to inspect the property until after the deadline. There is no evidence in our record that the county was for any reason unable to inspect these properties by March 1; on this record, there is no showing of necessity. The county is therefore precluded from changing the classification and appraised valuation as it did here, on June 9. Court found the Court of Appeals correctly held the county to the classification and appraised valuation determined by March 1. Court also held that when a taxpayer has won an appeal about the classification or appraised valuation of real estate for property-tax purposes, the county may not increase the valuation for the following year unless the county provides documented, compelling, and substantial reasons for the increase. Court also held that whether the land was being used for agricultural purposes was a contested factual issue and substantial evidence supported the Court of Tax Appeals conclusion that it was not.

STATUTES: K.S.A. 74-2426; K.S.A. 77-601, -621; and K.S.A. 79-1448, -1455, -1460, -1465, -1476, -2005

CRIMINAL

STATE V. BUTTS
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 104,817 – JANUARY 20, 2012

FACTS: Butts convicted in bench trial on stipulated facts to charges of possession of cocaine and driving under the influence. On appeal he first contended trial court erred in denying his motion to suppress incriminating evidence seized during traffic stop, and claimed the traffic stop was not justified by officer’s reasonable
suspicion that Butts was speeding. Second, he claimed that district court erred in denying motion to dismiss for violation of speedy trial statute.

ISSUES: (1) Validity of traffic stop and (2) statutory right to speedy trial

HELD: No Kansas case directly on issue. Kansas and Tenth Circuit cases reviewed, holding that a law enforcement officer’s observation of a moving vehicle which results in officer’s estimation that vehicle is moving in excess of posted speed limit may constitute, under totality of circumstances, reasonable suspicion that driver is speeding. In this case, district court’s factual findings were supported by substantial competent evidence, and given the totality of circumstances, district court did not err in concluding as matter of law that officer had reasonable suspicion to believe Butts was traveling in violation of posted speed limit. No error in denying Butts’s motion to suppress.

Under circumstances of case, district court’s assessment of 21 days of speedy trial time against Butts while motion to suppress was under advisement was supported by substantial competent evidence. Those facts supported district court’s legal conclusion that Butts was tried within the statutory 180-day time period.

STATUTES: K.S.A. 8-1522(a), -1567; K.S.A. 22-3402, -3402(2); and K.S.A. 60-456(b), -4160(a)

STATE V. GREY
DOUGLAS DISTRICT COURT – REVERSED
AND REMANDED
NO. 103,234 – JANUARY 20, 2012

FACTS: In appeal from rape conviction, Grey claimed three instances of prosecutorial misconduct: First, in failing to disclose additions made to previously disclosed expert reports; second, in consistently representing to court and defense counsel that victim could not identify Grey as the rapist, and then failing to notify the court or Grey once prosecutor discovered that victim could identify Grey; and third, in making comments during closing argument that are not supported by the evidence.

ISSUES: (1) Disclosure of additional reports, (2) disclosure that victim could identify rapist, and (3) comment on evidence not in the record

HELD: State provided doctor’s report that indicated sperm was present in victim’s vaginal sample, but in response to prosecutor’s query one week prior to trial, doctor reexamined the evidence to address quantity of sperm to determine when Grey likely had sex with the victim. Prosecutor was required to promptly notify Grey of the results of that additional testing but failed to do so. This misconduct was gross and flagrant, and prejudiced the defense such that outcome of the trial might have been different.

If prosecutor becomes aware that state’s prior position communicated to the defendant has become false, prosecutor must disclose to the defendant within reasonable time the fact that the opposite is now true. Under facts of this case, prosecutor had duty to disclose to defense that victim could now identify the defendant and the state’s prior representation to the contrary was false. The failure to do so amounted to a deception that created great prejudice to the defense.

Under facts of case, prosecutor clearly commented on evidence not in the record by adding words to Grey’s statement, which served to make Grey appear less credible. This was out of bounds. While not itself reversible error, it is further support for finding that Grey was denied a fair trial. Remaining claims examined, finding only fair comment in prosecutor’s comment on picture of victim, and no misconduct in prosecutor’s comment regarding state’s burden of proof.

STATUTES: K.S.A. 21-3502(a)(1)(A); and K.S.A. 22-3212(g)

CITY OF WICHITA V. MOLITOR
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 104,940 – JANUARY 13, 2012

FACTS: Molitor was stopped for making a right turn without using his turn signal. During the stop, he was suspected of driving
under the influence. Officers had Molitor perform several field sobriety tests, one of which was the horizontal gaze nystagmus (HGN) test. Officers requested that Molitor take a preliminary breath test (PBT) and he blew a 0.090. After the PBT, officers requested that Molitor take a test using the Intoxilyzer 8000 and he blew a 0.091. The court requested Molitor’s motion to suppress the PBT arguing it was error for the district court to consider evidence of an HGN test in determining whether a police officer had reasonable suspicion to request that he submit to a PBT. Molitor was convicted of DUI.

ISSUES: (1) DUI and (2) HGN

HELD: Court held that it was appropriate for the district court to consider the results of the HGN test administered to Molitor as part of its reasonable suspicion analysis under K.S.A. 2010 Supp. 8-1012(b). Court stated that even without the HGN evidence, there was reasonable suspicion for the police officer to believe that Molitor had been operating a vehicle under the influence of alcohol. Court concluded that although HGN test results are not admissible at trial without meeting the foundation requirements for scientific evidence set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), testimony from a law enforcement officer trained in administering HGN tests may properly be considered at a pretrial hearing to assist the court in determining from the totality of circumstances whether a law enforcement officer had reasonable suspicion to request a preliminary breath test.

STATUTES: K.S.A. 8-1012(b); and K.S.A. 60-456

CITY OF JUNCTION CITY V. SOMRAK
GEARY DISTRICT COURT – APPEAL DENIED
NO. 104,729 – JANUARY 27, 2012

FACTS: On March 1, 2010, Somrak received a citation for illegal parking within the city. Somrak challenged the citation in municipal court, and on April 28, 2010, Somrak was convicted in municipal court for the parking violation. On May 10, 2010, Somrak filed a handwritten notice of appeal and appearance bond in district court, but she did not serve a copy of the original notice of appeal on the city attorney. On June 28, 2010, Somrak filed an amended notice of appeal which was served on the city attorney. On July 2, 2010, the city filed a motion to dismiss the appeal, arguing that under K.S.A. 22-3609, the statute governing appeals from municipal court to district court, Somrak was required to serve the notice of appeal on the city attorney within 10 days after her conviction in municipal court and that her failure to do so deprived the district court of jurisdiction to hear the appeal. Somrak claimed the deputy clerk told her that the clerk would serve the notice of appeal on the city attorney. The district court found that although Somrak was required to properly serve the notice of appeal on the city attorney, nothing under K.S.A. 22-3609 required Somrak to serve the notice of appeal on the city attorney within 10 days after her conviction in municipal court. The district court denied the city’s motion to dismiss the appeal.

ISSUES: (1) Municipal court appeal and (2) notice to city attorney

HELD: Court held that in an appeal from a municipal court under K.S.A. 22-3609, the defendant’s failure to serve the notice of appeal on the city attorney prosecuting the case within 10 days after the date of the judgment appealed from does not deprive the district court of jurisdiction to hear the appeal.

STATUTES: K.S.A. 22-3602, -3609, -3610; and K.S.A. 60-2103
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