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Sheraton Overland Park, Overland Park

September 7
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Kansas Law Center, Topeka

September 14
Mini LPM/Tech Show
Kansas Law Center, Topeka

September 21
Appellate Practice
Overland Park Convention Center, Overland Park

September 21
Recreational Law & Clay Shoot
Flint Oak, Fall River

September 28
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DoubleTree, Overland Park

OCTOBER

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LGBT
Stinson Morrison Hecker, Kansas City, Mo

October 12
Employment Law with Immigration Law
The Oread, Lawrence

October 12
Elder Law
Courtyard Marriott, Junction City

October 19
37th Annual KBA/KIOGA Conference
Hyatt Regency, Wichita

October 19
Nuts & Bolts 1 for the Transactional Attorney
Crowne Plaza, Lenexa

October 26
Agricultural Law
Kansas Farm Bureau, Manhattan

NOVEMBER/DECEMBER

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Kansans Deploy to Horn of Africa
By Bill Yanek, Timothy Stock, and Cody Phillips

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Kansas Bar Association, Topeka, Kan.
Introductions and What Was the KBA Annual Meeting

In this, my first president’s column, I am pleased to introduce the KBA’s new executive director, Jordan Yochim, to our membership. Jordan is a born-and-raised Kansan. For the last seven years, Jordan served as the associate director of the University of Kansas Biodiversity Institute. With a budget of $3.1 million per year, the Institute (formerly the Natural History Museum) conducts biodiversity research through field expeditions at a number of sites across the seven continents. Jordan also served as a graduate student instructor and trainer in biodiversity law compliance.

In the last five years of his KU service, Jordan launched a tri-party partnership called The Commons. The Commons is comprised of the Biodiversity Institute, the Hall Center for Humanities, and the Spencer Museum of Art. It explores the intersection between human and natural systems across the sciences, arts and humanities.

The KBA’s selection of Jordan has been an arduous process. More than 80 applications were received from across the nation for the position of executive director. Of the many excellent applicants, only 12 could be interviewed by a panel of past presidents, which included Richard Hayse, David Rebein, Linda Parks, Tom Wright, Tim O’Brien, Glenn Braun, and Rachel Pirner. After those interviews (and much difficulty by the panel), the final four applicants were interviewed by the entire KBA Board of Governors. At the end of that time-consuming and challenging process, the KBA selected Jordan Yochim. I can assure you that Jordan is worth all of the time and effort undertaken. I am confident that he will faithfully and capably lead the KBA for years to come. Welcome Jordan!

Those of you who were unable to attend the KBA’s Annual Meeting at the Overland Park Sheraton missed excellent programs and much fun. Alan Page, the Minnesota State Supreme Court Justice and Pro Football Hall of Fame inductee, gave a thoughtful and inspiring keynote address. Justice Page and Len Dawson were available for an hour of questions concerning National Football League issues, then and now. Their presentation was riveting. More than 100 golfers played at Deer Creek Golf Club, a course designed by Robert Trent Jones Jr. With perfect weather and the course in excellent condition, the winning scramble score of 57 (15 under par) was turned in by John Eyer, Paul Monty, Timothy Chambers, and Jon Weingart.

The Bar Show was presented at the Jewish Community Center to a nearly full house. The band (Judge Pat McAnany, Judge Ernie Johnson, Dennis Stanchik, Ray Probst, Ernie Ballweg, and Scott Nehrbass) were awesome!

The “The First Annual Academy Red Solo Cup ‘Lawards,’” written by Mark Hinderks (with the help of his friends) and directed by Veronica Dersch, included a series of video background vignettes, starring Court of Appeals Judges Mike Buser, Karen Arnold-Burger, Steve Leben, and Melissa Standridge, Wyandotte County Judges Dan Duncan and Kathy Lynch, and Johnson County Judges Charles Droega, Kelly Ryan, Brenda Cameron, Dave Hauber, and Steve Tatum. Altogether, great fun was had by all as the cast poked humor at the year’s events in Kansas law. Thereafter, the entire cast (and audience) retired to the Sheraton Hotel for a curtain call celebration that lasted as long as the show.

The awards dinner held on Friday night highlighted a number of amazing achievements by members of the Kansas Bar. However, most amazing were the certificates awarded to attorneys who had been members of the KBA for 50, 60, and 70 (yes, I said 70!) years. I hope that when you see one of our certificate holders, you will congratulate them on this remarkable achievement. For 60-year certificates, they are William E. Goss, El Paso, Texas; John H. Lungren, Waupun, Wis.; James W. Sloan, Topeka; Robert D. Caplinger, Kansas City, Mo.; Hon. Sam A. Crow, Topeka; R.G. Henley, Lawrence; Thomas R. McCue, Overland Park; Jerry M. Ward, Great Bend; Deborah E. Berkley, Great Bend; Robert M. Brock, Wichita; Don O. Concannon, Hugoton; Robert L. Davis, Wichita; Frank M. Lewis Jr., Independence, Mo.; Don W. Noah, Beloit; G. Hal Ross, Wichita; Laird P. Bowman, Lawrence; and Theodore C. Geisert, Kingman. For 70-year certificates, they are George S. Reynolds, University Park, Fla.; and Claude L. Rice, Overland Park.

Many of the awardees continue an active practice. How wonderful it is to be in a profession in which one can contribute to society for so many years!
Introducing the YLS Board for 2012-13

By Brooks G. Severson, Fleeson, Gooring, Coulson & Kitch LLC, Wichita, bkancel@fleeson.com

In the spring of 2009, I was contacted by Jennifer Hill about serving on the KBA YLS board. At that time, I knew relatively little about the YLS, including what it did or what it meant to serve on its board. However, Jennifer spoke very highly of the KBA and eventually convinced me to jump on board (for those of you that know Jennifer, she can be very hard to say no to).

For my first two years on the board, I served as the co-editor of the YLS Forum, which is the section’s quarterly newsletter. It is probably one of the more demanding positions on the board, because it is extremely difficult to find volunteers to write articles and even more challenging to get those people to submit their articles in a timely fashion.

Despite any challenges, I found those two years to be very rewarding. I got to meet and network with many other young lawyers located throughout the state that I otherwise likely never would have met. I also had the pleasure of reconnecting with my old friends from law school that I had not spoken to in several years. However, the most rewarding part of the experience was watching dedicated and passionate young lawyers step up as representatives of the KBA YLS and work to bring the young lawyers of Kansas together. Those reasons, and many others, were why I had little to no reservations when asked if I would accept a nomination for president-elect in the spring of 2011.

Accepting that position was slightly overwhelming, because for the previous two years, I was in a co-editor “bubble” of sorts. I really did not know all the behind-the-scenes work a president has to do, and I also was not that familiar with what everyone else on the board was doing. Thankfully, the year I was president-elect, Vince Cox was the president. He kept me 100 percent informed of everything going on throughout the year to make my transition into being president as easy as possible. On more than one occasion, I was amazed by his reasonable thinking and his ability to effectively solve problems (need I mention the debut of the YLS listserv last fall?). I only hope that we can have just as successful an upcoming year as Vince had last year.

One of the most challenging tasks as an incoming president is finding people who want to serve on the board. Thankfully, this year we not only had people who wanted to remain on the board, but several new people express interest in assuming a position. One of the goals of the upcoming year is to work to increase the involvement of young lawyers in both the KBA and in events and projects sponsored by the YLS.

As a result, I want all of you to feel comfortable and willing to contact any YLS board member, should you want to become involved with the YLS in any way. Whether you are interested in contributing an article to the Forum, volunteering to help with our annual Mock Trial Tournament, helping organize a social event in your area, or donating your time to assist with a pro bono event, please feel free to contact me or any board member. All that having been said, it is my pleasure to introduce the very talented board for 2012-13!

President: Brooks Severson

I graduated from Washburn Law School in 2005 and am a partner at Fleeson, Gooring, Coulson & Kitch LLC, where I practice in civil litigation. In my spare time, I like to run and participate in triathlons. My husband and I also have three dogs that keep us very busy. I can be reached at bkancel@fleeson.com.

President-Elect: Jeffrey Gettler

Jeff went to law school at the University of Kansas and is now a partner in the firm Emert, Chubb & Gettler LLC in Independence. Jeff is a big Jayhawk fan and is the proud owner of a wiener dog named Gracie. He can be contacted at jgettler@sehc-law.com.

Secretary-Treasurer: Jennifer Horchem

Jennifer is an associate attorney with Martin Pringle, Oliver, Wallace & Bauer LLP in Wichita. She focuses her practice on oil and gas, real estate law, and probate matters. Jennifer loves to hike and has hiked to the bottom and back of the Grand Canyon. Jennifer can be contacted at jnorchem@martinpringle.com.

Past President: Vincent Cox

Vince practices at Cavanaugh & Lemon P.A. in Topeka, focusing on civil litigation, including appellate and administrative litigation, automobile accidents, construction law, landlord/tenant, personal injury, real estate, and school law. Vince previously served as president of the Topeka Bar Association Young Lawyers Division. In his free time, he likes to spend as much time as he can with his family and on the golf course. Vince can be contacted at vcox@cavlem.com.

American Bar Association Liaison: Justin Ferrell

Justin is currently the in-house counsel for Kansas Counties Association Multi-line Pool. In his spare time, he enjoys running, hunting, gardening, and hanging out with his wife, Traci, who is also an attorney and their two daughters, Piper and Maizy. Justin can be reached at jferrell@kcamp.org.
Legislative Liaison: Nathan Eberline
Nathan works at the Kansas Association of Counties as the associate legislative director and legal counsel. He has been with KAC since December and previously worked at the League of Kansas Municipalities in a similar capacity. Nathan’s wife is also an attorney and works for Foulston Siefkin LLP. They have a 2-year old daughter and another one on the way. Outside of family and work, Nathan enjoys playing sports, including basketball and competing in triathlons. Nathan once took his dear love for karaoke and turned it into an audition for American Idol. Needless to say, there is a reason why he is still practicing law. Nathan can be contacted by eberline@kansascounties.org.

CLE Committee Liaison: Shawn Yancy
Shawn has worked as an unemployment insurance appeals referee with the Kansas Department of Labor since January 2012. Prior to that, he clerked for the district court judges in Shawnee County during and briefly after law school. In his spare time he enjoys cooking, model railroading, and architecture. Shawn can be reached at Shawn.Yancy@dol.ks.gov.

Newsletter Co-Editor: Ashley Dopita
Ashley is originally from the small town of Zurich. She currently resides in Lawrence and works as the media specialist at the Kansas Corporation Commission. She is a graduate of Washburn University School of Law, where she earned a certificate in law and government. Before law school, Ashley lived in Beijing, Guadalajara, and New York City, resulting in a passion for traveling and photography. Ashley can be reached at a.dopita@kcc.ks.gov.

Newsletter Co-Editor: Sarah Warner
Sarah is an associate at Thompson Ramsdell & Qualseth P.A. in Lawrence, where her practice focuses primarily on insurance litigation, business and contract disputes, and civil rights actions brought under 42 U.S.C. § 1983. Sarah also teaches Conflict of Laws at Washburn Law School and is on the executive board of the KBA Appellate Section. Sarah and her husband, Brandon, live in Lenexa and love traveling, camping, hanging out with their dog, Kolbe, and all things barbecue. Sarah can be reached at sarah.warner@trqlaw.com.

Mock Trial Liaison: Jenny Michaels
Jenny is an associate attorney at Millsap & Singer LLC in St. Louis, where she practices banking and real estate law. She enjoys spending time with her husband, Jon, and 7-month-old daughter, Stella. Jenny can be contacted at jmichaels@msfirm.com.

Pro Bono Liaison: Melissa Doeblin
Melissa works at the Kansas Corporation Commission in its Advisory Counsel Office. She previously served as president of the KBA YLS. In her spare time, she loves to cook and has taken up making fondant cakes for friends’ baby showers. Melissa can be contacted at melissadoeblin@gmail.com.

Social Chair: Margaret P. Mahoney
Margaret graduated from the University of Kansas School of Law in 2010. She is the county attorney in Logan County, the Oakley city attorney, the assistant Decatur County attorney, and a partner at Hirsch & Mahoney LLP. Margaret is currently running for county attorney in both Thomas and Logan counties. On an interesting note, she was involved with synchronized swimming for 11 years and absolutely loves the sport. Margaret’s email address is mahoneymargaretp@gmail.com.

Social Chair: Stacy Burrows
Stacy practices complex commercial litigation with a small boutique firm in Kansas City. She lives with her husband of almost four years in the country between Lawrence and Kansas City, and they have three unique and affectionate dogs (LaLa, pug terrier mix, Bristol, a Labrador, and Cisco, an English Mastiff). They adore summer, because they enjoy boating and fishing, camping, softball, volleyball, soccer, and golf; pretty much anything that allows them to spend time outdoors. Stacy loves being an attorney and most of the things that come with that title. However, she never tells anyone unless specifically asked. She considers it her little secret. Stacy can be reached at stacy@georgebartonlaw.com.

As the incoming board for 2012-13, we want to work to make this the best year yet! Please do not hesitate to contact any one of us, whether it be with a concern, a suggestion, or just to chat! We look forward to hearing from you and hopefully seeing you at upcoming events. As usual, the YLS Forum will be issued in four installments, with the first expected issue due for release on or around September 14, 2012. Here’s to a great 2012-13!
Always Responsible: The Kansas Local Counsel

By Hon. Steve Leben, Kansas Court of Appeals, Topeka

The common disclaimer—“Your experience may vary”—added to the end of an advertisement signals that your experience using the advertised product is unlikely to match all of the claims you’ve just heard, seen, or read. But it’s also a useful reminder that we will have different experiences in a variety of contexts, something of importance if you ever serve as Kansas counsel to an out-of-state attorney involved in litigation here.

Out-of-state lawyers may have a very different experience with local-counsel requirements than we’re used to in Kansas. And our requirements in Kansas state court have been strengthened even further effective July 1. So let’s take a moment to consider them—in context.

Part of the context is that it’s hard to be sure that the out-of-state attorney you are working with comes from a similar background. A Westlaw search finds more than 25 articles in legal texts and periodicals using the words “mail drop” close by the term “local counsel.”

But that form of local-counsel practice has not been accepted in Kansas for decades. Since at least the 1980s, Kansas state and federal court rules have required that local counsel sign all pleadings, documents, and briefs. Two recent developments have underscored the importance of diligently carrying out these duties as local counsel.

First, in In re Roswold, the Kansas Supreme Court suspended an attorney’s license because he failed to heed rules governing the admission of out-of-state counsel pro hac vice and failed himself to provide adequate representation to the client. In that case, James Roswold and Mark Schmid were law partners, but Schmid officed in Missouri and wasn’t admitted in Kansas. Schmid accepted a Kansas medical-malpractice case and Roswold signed the petition, which Schmid prepared. Roswold never met the client, didn’t make sure the case was progressing properly, and didn’t get Schmid admitted pro hac vice. Serious problems arose when a defense motion for summary judgment arrived, was given to Schmid, and Schmid neither responded nor told Roswold. The rest of the story is a bit involved, but Roswold ended up in disciplinary trouble, something that the Kansas Supreme Court said underscored the importance of the rule requiring pro hac vice admission of out-of-state attorneys. The Court noted that the rule also requires that Kansas counsel be “actively engaged” in the lawsuit. And the Court rejected the disciplinary panel’s recommendation of public censure, opting instead to suspend Roswold’s license for one year (with an option to seek reinstatement after six months).

Second, consistent with Roswold, the Kansas Supreme Court has amended the rules on pro hac vice admission, effective July 1. In the district courts, Rule 116 requires that out-of-state counsel be admitted pro hac vice “as soon as reasonably possible.” In the appellate courts, the motion must be filed when the case is docketed or, if the motion relates to briefing or oral argument, at least 15 days before the brief’s due date or the oral argument date. Local counsel remains obligated to sign all pleadings, documents, and briefs. In addition, local counsel must be present at all court appearances, administrative hearings, depositions, and mediations; the appellate rule specifically covers oral arguments and prehearing conferences.

Rule 116 also emphasizes that local counsel must “be actively engaged in the case” before the district court. The rule contemplates that counsel may be excused from attending depositions or mediations “by the court or tribunal or under local rule.” Neither Rule 116 (district courts) nor Rule 1.10 (appellate courts) has a provision to excuse local counsel from attending court proceedings.

Attorneys providing local counsel services in federal court should review D. Kan. Rule 83.5.4, which has somewhat less stringent requirements. It requires that local counsel “participate meaningfully in the preparation and trial . . . to the extent the court requires,” which gives considerable leeway in administration but mirrors the state-court requirement that local counsel sign all pleadings and court papers. Keep in mind, too, that the signing requirement triggers the prospect of sanctions under federal Rule 11 or K.S.A. 60-211, something that can happen to local counsel.

Counsel who act as local counsel for out-of-state attorneys in Kansas state courts should carefully review the new versions of these rules.

About the Author

Hon. Steve Leben has been a member of the Kansas Court of Appeals since 2007. Before that, he was a district judge in Johnson County for nearly 14 years. He has been a co-presenter of Ethics for Good, a CLE program presented each June in the Kansas City area, for 13 years.

Footnotes
4. See Peter E. Heuser & Elizabeth A. Tedesco, Local Counsel: Take the Job Seriously, or Don’t Take the Job, 56 Fed. Lawyer 20, 20-21 (June 2009); Leben, supra note 1, at 19-20. Each of these articles has suggestions local counsel might consider in making sure that their obligations are met. Heuser & Tedesco, supra at 21; Leben, supra at 21-22.
Diversity and the Kansas Bar: A Journey, Not a Destination

By Eunice C. Peters, Kansas Office of Revisor of Statutes, Topeka, Eunice.Peters@rs.ks.gov

This year, I have the great honor of serving as the chair of the KBA Diversity Committee and continuing KBA’s journey towards fostering, supporting, and promoting diversity within the Kansas legal community. I am humbled to follow in the steps of my own personal mentors who were former chairs of this committee: Hon. Melissa Taylor Strandridge, Gwynne E. Birzer, and, our most recent chair, Karen H. Hester. Thank you Karen for your outstanding and inspiring leadership these past years!

Chief among the goals of this year’s committee is to carry out the mission statement we adopted this past year. Our new mission statement is as follows:

To help the KBA foster an inclusive, diverse bar association, promote understanding and respect for different points of view, and support the advancement of diversity within the Kansas legal profession and justice system.

By recrafting our vision, we have the opportunity to engage in diversity initiatives that are part of an ongoing process rather than a single event.

In the next two months, I will personally be reaching out to KBA leadership, each of our committee members, presidents of the diverse law student associations at KU and Washburn University schools of law, and presidents of neighboring minority bar associations, for their input.

I also welcome any suggestions from the KBA membership. Whether positive or negative, I understand that diversity does not mean the same to everyone. You can share your thoughts by emailing me at Eunice.Peters@rs.ks.gov, joining us at one of our diversity committee’s monthly teleconference meetings, or attending one of our events where you can personally speak with a diversity committee member. The dates of those events will be posted in KBA’s weekly eJournal as they come up.

To encourage members to contact me, I thought I would share a little about myself, specifically why I became active in the KBA. Like others, I let my free membership in the KBA post-law school graduation lapse after my first year. Instead, I elected to participate in bar association activities on a more local level. It was during one of those activities that certain persons produced written materials, a portion of which I believed were culturally insensitive. I ended my participation in that particular activity but was sure my silent/not-so-silent protest would have no influence on the end product. My disappointment quickly ended, however, when I received a telephone call from a member of the KBA Diversity Committee. After reviewing the matter, the committee issued a letter to the leaders of that activity, effecting a change to the written materials.

Since serving as a member on the KBA Diversity Committee, I have been fortunate to be part of a legal community where we share and learn from our differing viewpoints on what it means to be an attorney in Kansas. I have made friends throughout the state I never would have met had I not been a part of this committee. I have been provided the opportunity to have a voice in the community.

In this next leg of the journey, I look forward to leading our committee in helping the KBA become more successful with (1) recruiting and retaining diverse attorneys to practice in Kansas, (2) supporting the advancement of diversity in leadership positions, including the judiciary, and (3) achieving an inclusive legal community. I end with these thoughts from the ABA Presidential Initiative Commission on Diversity:

How we view our efforts to improve diversity in the legal profession must evolve to reflect changes in society. Today, diversity must be seen as an ongoing practice, and not an end-state. It requires sustained long-term commitment, leadership, innovation, and continuous financing. Like financial planning, marketing, and client relations, diversity must hold a permanent position within legal organizations’ standard operations. National and international demographics, constituencies of legal organizations, and social conditions influencing inclusion and opportunity are continually changing. Such regular change requires us to evaluate, modify, and improve our work on diversity — perpetually. Diversity is not a destination but a journey.

About the Author

Eunice C. Peters is an assistant revisor for the Kansas Office of Revisor of Statutes. She is chair of the KBA Diversity Committee and a member of the Kansas Supreme Court-Kansas Bar Association Joint Commission on Professionalism.

Footnote

Attendees at the Kansas Bar Association Annual Meeting in Overland Park had the opportunity to obtain certification in Lean Six Sigma management through a collaborative effort of the KBA and the Washburn School of Business. The two-hour course was taught by Doug Von Feldt, an instructor at Washburn and a director at Collective Brands Inc., along with Miguel Rivera Sr., deputy general counsel of Collective Brands Inc., and Angel Zimmerman, president of the KBA Law Practice Management Section. The course kicked off at the staggeringly early 7 a.m. slot, but the conference hall was full – a majority being judges joining the KBA from their own annual meeting.

Negative Impressions

Business management gets a bad reputation in the legal community. At one of the KBA Annual Meeting sessions, a panelist lamented that part of the perceived decline in professionalism among lawyers stems from practices that are too business-oriented and too focused on corporate assembly line theories. I disagree with his belief and diagnosis but I think his concerns underscore the problems that give rise to Lean Six Sigma.

Assembly lines are often experienced as unchecked environments where speed and low cost dominate all other concerns and seemingly autonomous processes alienate us from accountability or pride of workmanship and even institutionalize certain defects. Such assembly line processes result in a mass-produced, anonymous, disposable product anathema to us as attorneys and judges. Those are the very weaknesses Lean Six Sigma was developed to vanquish.

Variation

Variation is one of the key concepts driving a Lean Six Sigma analysis of processes. Imagine your office procedure for returning a client phone call – a process governed by KRCP 1.4(a). Sometimes, that process results in the client hearing back on their matter within two hours whereas other times result in a communication 48 hours later. Your average is, however, 18 hours from client message to your call back. You may think you have a great response time. Your client, however, describes you as “unpredictable” because they may wait as little as two hours or as long as 48. The client may be worried more about consistency than any average.

Those variations from the average (defects) negatively affect how the client views your communication. Those defects are measurable. If your communication process operates at one sigma, then you will have 690,000 DPMO (defects per million opportunities) or 31 percent efficiency – 31 percent of your calls fall outside your target 18 hour response time. Three sigma would bring your KRCP 1.4(a) process to 93.32 percent efficiency while the Holy Grail of Six Sigma would be 99.9997 percent efficient. In other words, at Six Sigma, virtually every single return call you made would be around 18 hours and your clients would set their watches by your caller ID.

DMAIC Process

Lean Six Sigma has a host of tools designed to assure clients know they will get a quality, reliable product from their attorney. One such tool is the DMAIC (pronounced duh-MAY-ick) process, an acronym for Define, Measure, Analyze, Improve, and Control. In communication process discussed above, the defined problem is clients frustrated that calls take anywhere from two hours to 48 hours to be returned. We could simply jump to an attempted solution but a better approach would involve measuring. Plot out the time for each return call and collect the data for a month. Analyze trends in the “defective” calls outside your hoped norm of 18 hours. The data from one attorney’s office revealed that return calls were made on a “whenever there’s a free moment” basis and that scheduling a block of time each day (communicated to clients in the engagement letter) provided a disciplined mechanism for returning all calls on a consistent and efficient basis.

Washburn School of Business

The Lean Six Sigma methodology requires well more than the 700 words I have here to describe it. It is more than the certification provided to those attending at the KBA Annual Meeting. It is very much worth the effort to investigate and work toward implementation, however, and the Washburn School of Business provides an excellent resource and will hopefully continue outreach to Kansas attorneys through the KBA.

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.
Straight from the Horses’ Mouths

By Emily Grant, Washburn University School of Law, Topeka, emily.grant@washburn.edu

The divide between law school and practice has come under intense scrutiny recently. Some contend that much of what was learned in law school was merely an exercise in mental endurance, with little real-world application. As a legal writing professor, I am sensitive to the concerns of practitioners—the same concerns about time, money, and client demands that my students will face soon. But I am also mindful of my responsibility to lay a foundation of best practices for conducting legal research, analyzing a legal problem, and communicating in the customary language of the industry. This article highlights the fact that the execution of many fundamental legal research, analysis, and writing skills is indeed relevant to practicing law. Further, the disregard of research and communications norms is likely to draw the ire of the judges who evaluate the merits of your clients’ positions.

To determine the writing issues most likely to draw scrutiny from the courts, I conducted an informal survey of Kansas state and federal judges and their law clerks. I asked them to identify some of the most common or egregious legal writing issues they encounter. Many responded, and not surprisingly, they very often identified the same general problems.

Organization and Clarity

The most common comment I received dealt with organization and clarity of court filings. This issue is obviously broad, but the overriding message was that long, rambling briefs are ineffective. It takes longer to write a short concise brief than it does to spew out a long disorganized one. But more often than not, a longer brief is confusing for the reader and less effective because the writer fails to clarify and hone the issues facing the court. Last month’s Substance and Style column offered several ideas for writing more concisely—avoiding legalese, using strong subjects and verbs, eliminating unnecessary wordiness—many of which were mentioned specifically by the judges and law clerks who responded to my inquiry.

In addition to advocating for clear and concise writing, many judges and clerks reiterated the importance of proofreading. It’s a basic housekeeping skill for writers, but it’s also a difficult one given the time constraints of practice. The Substance and Style column from this past April highlighted the need for thorough proofreading and offered some excellent suggestions for doing so more effectively.

Citations

I was thrilled to see so many citation complaints from judges. I love the Bluebook, and I’ve been itching to talk about it with people other than my students, who are outraged about my incessant Bluebook exercises. Both judges and clerks noted the need for complete case citations, including all of the requisite information, and a pincite to identify the specific page of a case or deposition cited. If using a string cite for a particular proposition, consider adding parentheticals to explain the relevance of the cases in the string.

Citations should also be substantively precise; they should actually support the proposition you’re citing. Accordingly, be sure that you’re accurately reading the case and not just citing to, for example, the headnotes of the case or one party’s argument that was ultimately rejected by the court.

The takeaway is that the form and the substance of your citations matter. The judges, or at the very least the law clerks, are looking. They’re checking your authorities as part of their own research. Make it easy on them.

Interactions with Opposing Counsel

I was surprised by the number of responses I received regarding interactions with opposing counsel. Several judges and clerks suggested that attorneys initiate communication with opposing counsel before filing any motion for additional time, even if not required to do so. Additionally, consider preemptively communicating with opposing counsel on bigger issues, like motions to dismiss, which can generate piles of paperwork and sometimes result only in an opportunity for a plaintiff to amend the complaint.

In your written communication, always maintain focus on the arguments and not on the people making the arguments. Don’t be accusatory of opposing counsel; it’s neither helpful nor convincing, and it frankly makes you look like part of the problem. The Substance and Style column from February offers some tips for being persuasive and adversarial while still maintaining your professionalism.

Miscellaneous Substantive Issues

In addition to writing style, judges and clerks are (obviously) concerned about the substance of the submissions they receive. Specifically, they mentioned the importance of centering any particular filing around the applicable standard or rule that allows for the relief you’re seeking. Include a definition of the legal standard for that particular rule, identify the burden of proof, and then structure your argument around that standard.

Be specific in the relief you’re requesting, particularly in discovery disputes. Identify clearly, for example, the discovery you wish to have compelled or quashed (Production Nos. 1, 5, and 10, and Interrogatory Nos. 5-8).

Finally, provide enough information in your arguments. Include basic relevant facts without assuming that the court knows (or remembers) everything that you do. Don’t ignore (Con’t on Page 19)
The most beautiful night sky I ever saw was in the most dangerous environment in which I ever lived: Tikrit, Iraq, 2005. I was still just a teenager, but no longer penniless, directionless, or uneducated. I had a new car (2003 Kia Rio), a steady paycheck, and a nearly completed associate’s degree in information systems technology from the Community College of the Air Force. Life was good.

Uncle Sam is sometimes the best alternative for many young adults who find themselves between a rock and a hard place. He offers them jobs, training, roofs over their heads, and an education. In return, these young adults sacrifice their youth, their bodies, and sometimes their lives. So why not milk Uncle Sam while you still can?

That was the tradeoff I accepted. I was 17 years old, without any money or any clear direction when I decided to answer Uncle Sam’s call. Sure, I could have sunk into student loan debt and gone to a local community college to pursue my desire of one day becoming an attorney, but Uncle Sam offered more. He offered a way out. Just four days after my high school graduation, still only 17, I was headed to Lackland Air Force Base for basic military training. Six years and several deployments later, my enlistment had come to an end. But I did not walk away empty-handed. I earned my associate’s degree, as well as a certificate in paralegal studies and, ultimately, a bachelor’s degree in legal studies, all for free.

This was made possible by the Servicemen’s Readjustment Act of 1944, or the GI Bill of Rights, which was signed into law by President Franklin D. Roosevelt on June 22, 1944. It provided education and training, loan guaranty for homes, farms, or businesses, and unemployment pay to servicemembers. In 1984, the Act was revamped and renamed the “Montgomery GI Bill” after Mississippi Congressman Gillespie V. “Sonny” Montgomery who led its revision, giving him the lifelong nickname “the veteran’s champion.”

In 2008, the GI Bill was updated yet again, giving veterans with active duty service on or after Sept. 11, 2001, enhanced educational benefits that cover more educational expenses including a living allowance and money for books, and the ability to transfer unused educational benefits to their spouse or children. This is where law school came into play for me. While I was never shot, injured, or diagnosed with post-traumatic stress disorder as a result of my service, had these laws not been put into place, I would have ended my enlistment the same way I started it — with no money and no clear life path — and certainly law school would be out of the question. Grateful is an understatement.

To say that law school is an expensive investment in one’s future may be a cosmic understatement. So, it sure is nice to have a rich “uncle” who’s willing to foot the bill. In that way, the post-9/11 GI Bill helps to bridge the gap between the haves and the have-nots. The haves usually don’t enlist at 17 or lug around an M-16 rifle in the Middle East. It is without doubt that absent the GI Bill I wouldn’t be graduating from law school next semester. To be a lawyer, a doctor, an engineer, a scientist, a business executive, or a Le Cordon Bleu chef takes money and a higher education; something most teenaged have-nots only dream about. Until now.

It is no wonder, then, that I found myself a part of the Veterans’ Legal Association of Washburn (VLAW). This organization of law students provides support and guidance for its members and fellow law student veterans. Additionally, VLAW serves its community by addressing military, veteran, and law enforcement concerns. Informing our veterans about all the benefits to which they are entitled is something very near and dear to my heart. So many men and women braver than me have made greater sacrifices; they desire great rewards. And like “Sonny” Montgomery, attorneys too can fight for our veteran clients to ensure they are aware of the laws drafted for their benefit. Like “Sonny,” you too can be a veteran’s champion.

About the Author

Lyndzie M. Carter is a third-year law student at Washburn University School of Law. She is also a six-year active duty Air Force veteran, having served in Operation Iraqi Freedom. In the Air Force, Carter was a joint nuclear command post controller, something she calls a “fancy stepping stone” to her real ambition of practicing law. You may contact her at lyndzie.carter@washburn.edu.
Stepping off the plane in a little airport in Havana, Cuba, we didn’t know what to expect. After all, we not only were traveling to a foreign country that technically we were not supposed to be in, but we were also traveling with people we had never met. (However, I will note that we later found out that two people actually knew each other as they were opposing counsel in a case, and one asked if the other was going on the trip, which prompted “what trip?” and a call to me the next day). Little did we know that when we stepped off that plane in that little airport we would be so impacted by our experiences, by the Cuban people, and by each other.

As we exited the airport doors we walked right out into a different world from what we are used to seeing every day. Of course the streets were filled with the old classic cars and buildings reminiscent of old beautiful architecture, and right there in the middle of it all were murals of Che Guevara and Fidel Castro prominently displayed. We certainly weren’t in Kansas anymore. However, there was a large painting of Dorothy’s red slippers painted by a local artist in our hotel. Despite this familiar image, we all realized we were some place different from what we were used to in Kansas.

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The first person to greet us upon our arrival was our tour guide, Arturo Mesa, and we immediately got the opportunity to see Cuba and its culture. The first place we went was Revolution Square then to old Havana, where we walked the streets taking everything in. We were immersed in Cuban culture. We saw the capitol, the courthouse, and statues of Jose Marti, a writer and poet who is considered to be the Father of Independence in Cuba. We also noticed the people. There were street vendors trying to sell souvenirs to tourists. There was even a group of men standing in the square arguing about baseball as they often do, since it was during the Cuban National Baseball Series.

As we took in the sights around us, we began to learn about our guide as well. We quickly learned Arturo was a former English and French teacher at the university in Havana. Of course we wondered why he left teaching at the university to become a travel guide, and that would later be a topic of discussion that led to questions about Cuba’s economic structure and whether it was changing. We would later decide at the end of our trip that we were lucky to have had Arturo as our guide. He was very knowledgeable and showed us many different places, including museums and historical sites, cultural locations, and the different neighborhoods of the area.

The purpose of our delegation was to learn about Cuba’s government and legal system. As a result, we had the opportunity to partake in different lectures with members of the profession in addition to the tours our guide took us on. A majority of our meetings took place at the Cuban Jurist Association (their bar association). The program director and law professor, Dorris Cantana, was very welcoming and encouraged us to have an exchange with the guest lecturers, not only so we could learn about their legal system but so they could also pose questions to us as well. Our lectures included topics...
on the Cuban Constitution, the criminal system, Cuba’s economic system, and their family law code just to name a few. We met with professors, attorneys, and judges. We discussed the setup of their judicial system and economic policies, including the good and the bad of each, and, of course, we discussed the U.S. embargo.

When the Delegation first embarked on our journey in Cuba, we didn’t know what to expect. We didn’t know if our lectures would just be filled with propaganda or one-sided conversations or if we were going to learn what Cuba was really all about. As our week passed it became apparent that while we were receiving some of the push of the old ideals of the government, there were also people who had opinions on matters and would express opinions with us. We got opportunities to hear different points of view, and we also got to come to our own opinions about the country that can be a controversial topic of conversation. In the end, we learned a lot from the trip and found the Cuban people to be very welcoming. They were happy to have the group of seven from Kansas in Cuba.

To read more about our delegation and specifically what we learned, look for my next article in the Journal.

The Kansas Bar Delegation spent a week in Cuba from May 6-11, 2012. The delegates included Lisa Herbert, Kassie McEntire, Joy Williams, Vic Panus Jr., Scott Long, Gordon Olson, and Danielle Hall.

About the Author

Danielle M. Hall is the publications administrator and sections coordinator for the Kansas Bar Association. She received a B.A. in political science in 2006 and a J.D. in 2009 from Washburn University. Prior to joining the KBA her primary legal practice was in civil litigation. Hall is also an adjunct professor at Washburn, teaching trial advocacy and coaching the advocacy competition teams.
Mary Jane Joyce

Mary Jane Joyce, 93, of Jacksonville, Fla., died June 14. She was born May 13, 1919, in Cullison, Kan., to Oscar and Mamie Keller. She spent her childhood in Pratt and after graduating from Marymount College in Salina, was a school teacher before completing her law degree at Washburn University School of Law.

She practiced law in Kansas City, Kan., and was actively involved in Zonta International, a service organization of professional and executive women, and was a member of the Kansas Bar Association.

Joyce was preceded in death by her husband, Thomas Edward Joyce; and son, Thomas Keller Joyce. She is survived by her son, James Joyce; and grandson, Thomas Robert Joyce.

Byron Gardner “Skip” Larson

Byron Gardner “Skip” Larson, 88, of Dodge City, died May 2. He was born October 12, 1923, in Muskegon, Mich., the son of Adolf G. and Fannie (Gardner) Larson. After graduating from high school in 1941, he attended Ohio Wesleyan University, Gonzaga University, and St. Mary’s College. In 1942, Larson enlisted in the U.S. Navy pilot program and trained at the Norman Naval Air Station in Norman, Okla., and at Corpus Christi, Texas, graduating in 1944. He would also train in PBY’s in Jacksonville, Fla., at the Naval Air Station and later transfer to San Diego when World War II ended.

After the war, Larson enrolled at the University of Colorado, majoring in political science and economics. In 1948, he attended the University of Colorado Law School, where he received his law degree in 1950. He moved to Dodge City in

Obituaries
1951; became a partner in the firm of Van Riper, Williams, Hughes and Larson the following year; and from 1953 to 1961, served as city attorney of Dodge City. In 1989, Larson left the firm of Williams, Larson, Strobel, Ester, Malone and Mason P.A., and went into private practice. He was a member of the Kansas and American bar associations, the Kansas Association of Defense Counsel, and the Defense Research Institute.

Larson is survived by his wife, Jeanette, of the home; four children and one grandchild, Ted Larson, of Boulder, Colo., Eric Larson and son, Tanner Larson, Charlie Larson, and Jeffrey Larson, and Dr. Lora Larson, all of Tulsa, Okla.; and sister, Bernadine Dykstra, of Grandville, Mich.

Hon. Patrick J. Reardon

Hon. Patrick J. Reardon, 77, of Leavenworth, died June 3. He was born December 8, 1934, and later won a scholarship to the Georgetown University Law Center and was later appointed head of Georgetown’s legal aid program.

Reardon served as a law clerk on the U.S. Court of Appeals for the D.C. Circuit for one year. He practiced law in Leavenworth from 1962 until 1990 when he was appointed district judge in Leavenworth County. Reardon served as Leavenworth County attorney from 1971 to 1981, Leavenworth County counselor from 1985 to 1990, and municipal judge from 1984 to 1990.

He is survived by his wife of 44 years, Dolores Reardon; four children; 11 grandchildren; and seven great-grandchildren. He was preceded in death by his son, Chris Patrick Reardon.

Dennis E. Shay

Dennis E. Shay, 68, of Wichita, died June 10. He was an attorney with the firm of Smith, Shay, Farmer & Wetta. He was preceded in death by his parents, Douglas and Virginia (Newman), and sister, Kathy Aring. Shay is survived by his wife of 43 years, Judy; children, Carrie Glennon, of Overland Park, Pete Shay, of Haysville, Sarah Shay-Middleton, of Corvallis, Ore., and Zac Shay, of Kansas City, Mo.; brothers, Martin Shay, the Rev. Michael Shay, John Shay, and Tom Shay; brothers-in-law, Jack Aring, Joe, and David; and five grandchildren.

Otto Russell “Russ” Stites Jr.

Otto Russell “Russ” Stites Jr., 87, of Lawrence, died June 2 at Pioneer Ridge Rapid Recovery. He was born on February 17, 1925, in Washington, D.C., to Otto Russell and Margaret Ramseyer Stites. After graduating high school in Bartlesville, Okla., he attended Purdue University and graduated from the University of Kansas in 1948 with a Bachelor of Arts degree and a law degree in 1951.

Stites enlisted in the U.S. Marine Corps V-12 Program at 17 in 1943 and spent three years on active duty during World War II, serving in the United States, Pacific Theatre, and North China. He was recalled to active duty during the Korean War and retired from the U.S. Marine Corps Reserve with the rank of captain.

In 1953, he began practicing law in Topeka with the firm of Doran, Kline, Cosgrove and Russell. From 1961 to 1969, he was assistant attorney general for the state of Kansas; and in 1969, he was appointed regional counsel for the Post Office Department in Wichita and retired from federal service in 1992.

Stites was a member of Beta Theta Pi fraternity, Phi Delta Phi International Legal fraternity, the Kansas Bar Association, the University of Kansas Alumni Association, the National Association of Retired Federal Employees, American Legion Post No. 14 in Lawrence, Fraternal Order of Eagles in Lawrence, and Elks Lodge No. 803 in Ottawa.

He is survived by one son, Todd Russell Stites, of Los Angeles; one daughter, Robin Lynn Breit, of Lawrence; one brother, John Stites, of Manhattan; and one sister, Jane Leo, of Prairie Village. He was preceded in death by his wife, Betty Mae Meyers.

Hon. Richard W. Wahl

Hon. Richard W. Wahl, 89, of Salina, died May 21 at Salina Regional Health Center. He was born in Saxman on January 26, 1923, the youngest of eight surviving children to August and Olga Wahl. Wahl attended public schools in Saxman and Lyons, graduating from Lyons High School in 1940. He briefly attended the University of Kansas before enlisting in the U.S. Army in 1943, serving in the medical units in Ireland, England, and France during World War II and in Germany following the war.

After being discharged in 1946, Wahl returned to KU and graduated with a degree in business in 1949 and graduated with a law degree from KU Law School in 1951. After graduating he moved to Lincoln and established a solo practice that he maintained until he was appointed chief judge of the 12th Judicial District in 1975. Wahl retired in 1989 but continued to sit by appointment, including on the Kansas Court of Appeals until a few years before his death.

Wahl was preceded in death by his wife, Harriet McGuire; parents; and siblings. He is survived by his son, Phillip Wahl; four grandchildren; and three great-grandchildren.
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The Robert K. Weary Award

On Thursday, June 14 the Kansas Bar Foundation honored Wichita attorney Gloria Farha Flentje with the Robert K. Weary Award at its annual fellows dinner.

Flentje was admitted to the Kansas Bar in 1976 after graduating cum laude from Southern Illinois University School of Law. She began her law practice as an attorney at Southwestern Bell before joining Foulston Siefkin LLP in 1980 becoming partner in 1984. In 2000, she joined the Boeing Co. as chief counsel at its Wichita facility. When Boeing sold the Wichita, Tulsa, Okla., and McAlistер, Okla., commercial plane facilities to Spirit Aerosystems Inc. in 2005, she was vice president and general counsel before becoming senior vice president for administration and human resources. In May 2011 Flentje retired from Spirit.

Throughout her career, Flentje’s practice has varied. She has practiced primarily in the areas in employment and labor law, and has worked in many areas of business law. While general counsel at Spirit, Flentje oversaw the firm’s initial public offering in 2006; the acquisition of facilities in Prestwick, Scotland, and Salmsbury, England; and the development of major factories in Malaysia and North Carolina.

Flentje has been active in the bar association and the community. She served as president of both the Wichita Bar Association and Kansas Bar Foundation; served on and chaired numerous bar committees and served as stage manager of four Wichita Bar Shows; is chair of the WBA Professional Diversity Committee; and is a member of the WBA CLE and Service to the Bar committees. She is past member and chair of the Kansas Client Security Fund Commission and served as a Kansas Supreme Court appointee to the Kansas Citizens Justice Initiative. Flentje also serves as chair of the Judicial Evaluation Commission and has been a member since its inception. She is active in the Wichita community, having served on numerous boards, including the Wichita Area Girl Scout Council, Music Theatre of Wichita, Music Theatre for Young People, Harry Hynes Memorial Hospice, and the Community Council of the Wichita State University Women’s Studies Department. Flentje currently serves as chair of the board of United Way of the Plains.

Flentje received the KBA’s Distinguished Service Award, the WBA’s Howard C. Kline Award, and the Wichita Woman Attorneys Association’s Louis Mattox Award. In addition, she was honored by the Girl Scouts as Woman of Distinction, received the YWCA Woman of Vision Award, and was inducted into the University of Kansas Women’s Hall of Fame. Flentje and her husband, Jack Focht, received the Donna Sweet Humanitarian of the Year award in 2006.

The Foundation’s board of trustees created the Weary Award in 2000 to recognize “lawyers or law firms for their exemplary service and commitment to the goals of the Kansas Bar Foundation.” Weary was the initial recipient of the award — despite objections — for his decades of service to the community, the Foundation and the legal profession in Kansas.


Straight from the Horses’ Mouths

(Cont. from Page 12)

weaknesses in your arguments. Address counter arguments and adverse authorities head-on without waiting for the other side to mention a potentially detrimental factual or legal argument. Doing so allows you to frame the issue and builds your credibility with the court.

Conclusion

While this casual survey did not necessarily yield curtain-drawing insights into the Kansas judicial mindset, it did iterate the need to evaluate the care, precision, and manner used to draft legal communications, even on the simplest matters. Empirical evidence straight from the horses’ mouths shows that being mindful of the best practices learned in your legal research and writing class may indeed be the most effective way to present your argument to judges.

About the Author

Emily Grant has been teaching legal writing since 2005, and she is currently an associate professor at Washburn University School of Law. Before and in between her various teaching gigs, Grant clerked for judges on the Seventh Circuit, the U.S. District Court for the Central District of Illinois, the U.S. District Court for the District of Kansas, and the Palau Supreme Court. She intends no disrespect to the honorable members of the state and federal judiciary by her comparison of them to equine creatures; she really just liked the cliche. Grant can be reached at emily.grant@washburn.edu.
The Blue Ribbon Commission was created with the goal to find improvements in the way the courts serve Kansas. The commission was authorized to consider such issues as the number of court locations needed to provide Kansans access to justice, the services to be provided in each court location, hours of operation, appropriate use of technology, cost containment or reductions, and flexibility in the use of human resources. Hon. Patrick D. McAnany, of the Kansas Court of Appeals, chaired the 24-member panel that was appointed by the Kansas Supreme Court in late 2010. Members of the commission included appointments from Gov. Sam Brownback, former Gov. Mark Parkinson, Speaker of the House Mike O’Neal, and President of the Senate Steve Morris.

The commission completed its work with a report to the Supreme Court, which was submitted to the Court on January 3, 2012, with various recommendations for action. To help aid in their work, the commission had the results of a weighted caseload study of both judicial and non-judicial staff time required to process the court system cases. This study was the first review in Kansas history to accurately measure the time and personnel required to process cases by considering influences, such as case complexity, driving time of some judges in less populated areas to travel from court to court within their district, and administrative burdens.

In addition to the weighted study, the commission also held a series of public hearing across the state to gain input from court users, other stakeholders in the system, as well as the general public.

The Phil Lewis Medal of Distinction recognizes individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in the administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.

Hon. Julie A. Robinson was appointed a U.S. district judge for the District of Kansas in 2001. She previously served as a U.S. bankruptcy judge for seven years, including five years as a judge on the 10th Circuit Bankruptcy Appellate Panel. Robinson practiced law from 1983-94 as an assistant U.S. attorney in Kansas City, Kan., handling civil and criminal cases and was designated the senior litigation counsel from 1992-94. From 1981-83, she was a law clerk for Chief Bankruptcy Judge Benjamin E. Franklin.

A fourth generation Kansan, Robinson received a bachelor’s degree and juris doctorate from the University of Kansas, and has taught trial practice, and served as president of the Board of Governors of the School of Law. She is a Kansas Fellow of the American Bar Foundation, has been a member of three chapters of the Inns of Court in Kansas, and has served on several committees of the Kansas Bar Association. Robinson serves on the board of trustees of the Saint Paul School of Theology. She is also chair of the Court Administration and Case Management Committee of the Judicial Conference of the United States, and in that capacity, she is leading the project to design and develop the next generation of CMECF, the federal judiciary’s case management and electronic case filing system.

Robinson has been honored with the National Bar Association’s Wiley A. Branton Symposium Award, the NAACP’s Diversity Advocate for Law Award, Washburn BALSA’s Women Pioneer Award, the Links of Topeka’s Outstanding Achievement Award, and Baker University’s Commendation for Public Service.

The Distinguished Service Award recognizes an individual for continuous longstanding service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service. The recipient of this award must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.

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

She is a member of the Kansas and Wichita bar associations, the Wichita Women Attorneys Association, and the Kansas Women Attorneys Association. With the KBA, she serves on the Nominating and Awards committees. She previously served as a KBA delegate to the American Bar Association, and then president-elect and president of the KBA in 2007-08. After serving as president, Parks again served as one of the KBA’s delegates to the ABA’s House of Delegates. She is a Fellow Silver with the Kansas Bar Foundation and previously served of the KBF Board of Trustees.

Parks has been a member of the ABA since 1983 and as a KBA delegate to the ABA, she has served on the Commission on Mental and Physical Disability Law, State Membership chair, Select Committee of the House of Delegates, Minority Caucus, and the National Caucus of State Bar Associations to the ABA. She is a life Fellow of the American Bar Foundation and has previously served on the board of the National Conference of Women’s Bar Associations. Parks served as a member of the Blue Ribbon Commission and also serves on the Washburn Law School Alumni Association Board.

Parks earned her Bachelor of Arts degree, summa cum laude, in political science from Washburn University in 1979 and her Juris Doctor from Washburn University School of Law in 1983, where she was a member of the Washburn Law Journal.

Sen. Thomas C. (Tim) Owens was elected to his first term in the Kansas Senate, representing the 8th District, in 2008 and served as chair of the Senate Judiciary Committee during the 2009 session. He previously served seven years as a state representative in the 19th District of the House of Representatives.

Owens is currently a solo practitioner in Overland Park, a member of the Kansas and Johnson County bar associations, and an adjunct professor in political science at Johnson County Community College. He is a retired colonel from the U.S. Army Reserve, a Vietnam veteran, and a graduate of the U.S. Army’s Command and General Staff College.

Owens earned a bachelor’s degree in political science from Kansas State University and a juris doctorate from Washburn University School of Law in 1974. Upon being admitted to the bar, he was employed by Employers Reinsurace Corp. in Kansas City, Mo., and by the city of Overland Park. Owens then became a partner at the firm of McAulay, Owens, Heyl & Kincaid for 10 years before becoming general counsel for the Kansas Department of Social and Rehabilitation Services, where he served from 1988 until his return to private practice in 1991.
Dale M. Dennis began his career as a business teacher and principal in the 1960s. He was employed as the state school finance administrator in the Kansas State Department of Education in 1967, becoming assistant commissioner and then deputy commissioner in 1976. Since 1995, he has served as interim commissioner of education for the Kansas State Department of Education on four occasions.

Dennis currently supervises the administration of approximately $3.5 billion state and federal funds that flow through the Department of Education to unified school districts and nonpublic schools. He serves as liaison for the State Board of Education to the legislature and the governor, spending considerable time providing information necessary in the decision-making process in the area of education and more specifically, school finance. Dennis also supervises the preparation of the State Department of Education budget as well as the auditing of all state and federal programs administered by the agency.

Margaret A. Farley has been in solo practice in Lawrence since 1996. She currently serves on the Kansas Bar Foundation Board of Trustees as the Kansas Association for Justice representative. She is the 2011-12 chair of the Legacy of Justice Foundation and was president of Consumer Voice (formerly known as the National Citizens’ Coalition for Nursing Home Reform) from 1998-2000.

Farley was honored with the Community Partner Award by AARP Kansas in 2006 for her work on their successful bill to increase personal needs allowance for nursing home residents; she received the Helen Fluker Open and Accessible Government Award from the League of Women Voters of Lawrence-Douglas County in 2010; and today she is working in partnership with KABC and AARP Kansas on legislation that would raise the staffing ratio in nursing homes for the first time in 30 years.

Matthew D. Keenan has been practicing in Kansas for 27 years. For the past seven years, he has authored the Journal of the Kansas Bar Association column, “A Nostalgic Touch of Humor,” is published in Law 360, and has appeared in the International Association of Defense Counsel Journal on litigating third party payer liens in a mass tort context. Keenan has also published and spoken on the topic of professionalism and civility.

He was a law clerk for the Hon. James K. Logan of the 10th U.S. Circuit Court of Appeals following law school and then joined Shook, Hardy & Bacon LLP, where he has remained for the entirety of his practice. Keenan is the attorney member to the Kansas Supreme Court Nominating Commission for the 3rd Congressional District.

Keenan is a fourth generation Kansan and has both his undergraduate and law degrees from the University of Kansas. His father, Larry, is also a KU Law graduate and has been practicing in Barton County for 60 years.

Prof. David E. Pierce is a professor at Washburn University School of Law in Topeka, where he teaches oil and gas law, advanced oil and gas law, mineral title examination, energy regulation, property, and drafting contracts and conveyances. Prior to teaching, he was an oil and gas attorney in private practice in Neodesha and served as city attorney for Cherryvale. Pierce also worked as of counsel with the Tulsa-based firm of Gable & Gotwals and with the Kansas City-based firm of Shughart Thomas & Kilroy.

He has a Bachelor of Arts degree from Pittsburg State University, a Juris Doctor from Washburn University School of Law, and a Master of Law in energy law from the University of Utah College of Law.

Insurance Commissioner Sandy Praeger was elected Kansas’ 24th insurance commissioner in 2002 and re-elected in both 2006 and 2010. She is responsible for regulating all insurance sold in Kansas and overseeing the nearly 1,700 insurance companies and more than 94,000 agents licensed in the state. Praeger previously served in the Kansas Senate and the Kansas House of Representatives; served as mayor of Lawrence (1986-87); and served as Lawrence city commissioner (1985-89).

She is past president (2008) of the National Association of Insurance Commissioners and serves as chair of the NAIC Health Insurance and Managed Health Care Committee and a member of other NAIC committees and task forces. Praeger also served on the United Way of Douglas County board of directors and is a founding member of Health Care Access, the Haskell Indian Nations University Foundation, and CASA.

Praeger is a two-time recipient (1999 and 2010) of the Dr. Nathan B. Davis Award from the American Medical Association, which is given annually to individuals who have made a significant contribution to the public health through elected and government service. The AARP and Kansas Wildlife Federation recognized her as their “legislator of the year” for her work, and the Kansas Association for the Medically Under-served recognized her leadership in 1997 on health care issues.

Praeger is a graduate of the University of Kansas.
OUTSTANDING YOUNG LAWYER AWARD

The Outstanding Young Lawyer Award recognizes the efforts of a Kansas Bar Association Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

Vincent M. Cox is an associate at the Topeka law firm of Cavanaugh & Lemon P.A. Born and raised in Halstead, he earned his bachelor’s degree, magna cum laude, from Benedictine College in 2002 and his juris doctorate from Washburn University School of Law in 2005.

Cox is active in the Kansas Bar Association, serving the Young Lawyers Section, as social chair (2008-09), secretary-treasurer (2009-10), president-elect (2010-11), and president (2011-12). He is also active in the Topeka Bar Association, serving the Young Lawyers Division as social chair (2008-09), president-elect (2009-10), and president (2010-11). He is a member of the American Bar Association and the Sam A. Crow Inns of Court, and has served in the Washburn Law School mentor program. Cox is also a member of the Topeka Active 20-30 Club.

COURAGEOUS ATTORNEY AWARD

The Kansas Bar Association created the Courageous Attorney Award in 2000 to recognize a lawyer who displayed exceptional courage in the face of adversity, thus, bringing credit to the legal profession. Past award recipients include a lawyer accepting the representation of a client challenging the application of the Kansas sexual predator law, a judge for his courage in the face of controversy after his decision on state public school funding thrust him into the public eye, and a deputy staff judge advocate for meritorious legal services he performed while in Iraq, often under fire, attack, or high pressure. This award is only given in those years when it is determined that there is a worthy recipient.

Melanie S. Morgan is a founding partner of Morgan Pilate LLC, a Kansas City-area law firm dedicated to criminal defense and civil rights litigation. After graduating from the University of Kansas School of Law in 1993, she began her practice as an associate with the Hon. Joseph D. Johnson, a former criminal defense attorney, whom she worked for until she began her own practice in 2002. Morgan’s caseload is comprised mostly of federal cases in the District of Kansas and the Western District of Missouri, as well as trying cases that include drug and drug conspiracy, gun and firearm violations, robbery, sex and pornography offenses, immigration violations, and various types of fraud cases. Most recently, Morgan co-defended the nation’s first genocide case based on the 1994 Rwandan genocide, ultimately securing an acquittal.

She is a member of multiple bar associations, including past president and board member of the Kansas Association of Criminal Defense Lawyers, and education liaison of the Federal Courts Advocates Committee of the Kansas City Metropolitan Bar Association. In addition, Morgan is a faculty member of the National Criminal Defense College.

DIVERSITY AWARD

The Diversity Award recognizes a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans that include the following criteria:

• A pattern of the recruitment and hiring of diverse attorneys; • The promotion of diverse attorneys; • The existence of overall diversity in the workplace; • Cultivating a friendly climate in a law firm or organization toward diverse attorneys and others; • Involvement of diverse members in the planning and setting of policy for diversity; • Commitment to mentoring diverse attorneys; and • Adoption of plans to continue to improve diversity within the law firm or organization.

Kansas Legal Services is the statewide provider of civil legal services to low- and moderate-income persons, and operates as a Kansas not-for-profit corporation with a diverse 23-member board of directors. While the majority of the board is attorneys, many of its board members are low-income Kansans.

The commitment to diversity is part of a plan to provide excellent service to its clients. A preference for Spanish-speaking professional and support staff aids in communication with that part of the Kansas low-income community that speaks Spanish as a primary language. The gender and racial diversity of the KLS staff reflects the low-income population of Kansas as well. In 2011, KLS provided legal or mediation services to 30,000 Kansans. In addition, the job-training program assists low-income Kansans in overcoming the effects of poverty on their lives.

Marilyn Harp serves as KLS’ executive director and John K. Chenowith, a Fredonia attorney, serves as the board’s president.
**Pro Bono Award**

The Pro Bono Award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor.

William K. Schmidt has provided pro bono services to Kansas Legal Services in family law and other practice areas, has worked in tax law Offers in Compromise for clients in the Kansas City Tax Clinic and the Legal Aid of Western Missouri Low Income Taxpayer Clinic, the Midwestern Innocence Project, and the Kansas City Metropolitan Bar Association’s Fox 4 Ask-A-Lawyer Telethon.

He is a solo practitioner from Roeland Park, who works in the areas of tax, family law, entrepreneurial law, and other fields. He has also worked for three tax seasons providing research at the Tax Institute at H&R Block and has written tax memos as a legal intern for Warner Robinson LLC. Schmidt graduated from Bethel College with a Bachelor of Arts in English, a Juris Doctor from Washburn University in 2009, and a Master of Law in taxation from the University of Missouri-Kansas in 2010. While at Washburn, he took part in the Small Business & Transactional Law Clinic and Washburn Children and Family Law Clinic, and was both the junior and senior student editor for *Family Law Quarterly*. At UMKC, he took part in the Entrepreneurial Legal Services Clinic and the Kansas City Tax Clinic.

He is licensed to practice in Kansas, Missouri, the U.S. District Courts for the District of Kansas and Western Missouri, and the U.S. Tax Court.

**Pro Bono Certificate of Appreciation**

In addition to the Pro Bono Award given out each year, the Kansas Bar Association awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

- Lawyers who are not employed full time by an organization that has as its primary purpose the provision of free legal service to the poor;
- Lawyers who, with no expectation of receiving a fee, have provided direct delivery of legal services in civil or criminal matters to a client or client group that does not have the resources to employ compensated counsel;
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low- and moderate-income persons.

**Teresa L. Anderson** is an attorney in the Overland Park office of Polsinelli Shughart P.C., where she handles family court appointments for the firm’s attorneys, which includes allegations of abuse and neglect of children in Jackson County. In addition, she is a volunteer for both Legal Aid in their V.A.P. program and Kansas Legal Services, where she handles domestic cases.

Anderson graduated from the University of Kansas in 1991 and Washburn University School of Law in 1997. She is on the Jackson County Family Court advisory panel and serves as the attorney member of the Jackson County Drug Court consultation group. She is also a member of the Kansas City Metropolitan Bar Association’s Juvenile Law and Domestic Relations committees.

**Nithin Chillal** currently works in immigration law, specifically in cancellation removal defense for a Nebraska branch of the Animense organization. He began working as a volunteer for Kansas Legal Services in 2010 while working as a summer intern in a Medical Legal Partnership in Southeast Kansas. After graduating from the University of Kansas School of Law in 2011, Chillal continued his work with KLS in the Kansas City area, handling 158 cases and spending 165 hours working directly with those clients. Chillal volunteers three days a week at the Kansas City office. He is a member of the American Immigration Lawyers Association.

**January M. Bailey** is a consumer bankruptcy attorney for Rick Hodge, Attorney at Law, L.C. in Wichita. She has filed many pro bono bankruptcy cases for low-income families and individuals. A native of Kansas, she attended the University of Kansas for her undergraduate degree and the University of Cincinnati for both her law degree and master’s in business administration.

**Carly E. Farrell** is a family law practitioner from Johnson County who is finalizing her mediation certification and enjoys offering mediation as a low-conflict solution to potentially high-conflict situations. Prior to going into private practice, she was a domestic violence prosecutor with the Unified Government of Wyandotte County/Kansas City, Kan.

Farrell earned her juris doctorate from the University of Kansas School of Law, where she served as president of Women in Law, vice president of the Student Bar Association, and was recipient of the Janean Meigs Memorial Award. A swimmer at Louisiana State Uni-
versity, she graduated summa cum laude, Phi Beta Kappa, and with honors.

Farrell is a member of the Johnson County Bar Association, Kansas Bar Association, and The Central Exchange.

**Lori A. Jones**, of Overland Park, is a 2004 graduate of the University of Kansas School of Law and was admitted to the Kansas Bar in 2005. She has several years of experience drafting and negotiating corporate agreements and enjoys her pro bono work through Kansas Legal Services. She assists individuals in need with family law, unemployment issues, contract disputes, and other matters. Jones credits her experience in the Legal Aid and Indian Law clinics at KU Law School for her ability to help people with few resources resolve their legal problems.

**Benjamin E. Long** is a native of Bowling Green, Ohio, who graduated from Kansas State University in 2006 with a degree in biology. After graduating he joined the AmeriCorps program and was stationed in Western Massachusetts, performing service as an environmental educator and caretaker of backcountry trails and public land. Long graduated from Washburn University School of Law in 2011 and is an associate attorney at the Schlagel Kinzer law firm in Olathe. He currently practices in civil litigation, property and environmental law, oil and gas, and family law.

In addition to his legal practice, Long is an adjunct professor at both the University of Kansas and Washburn, and is also the head coach of the Kansas State University Mock Trial Team. He is a member of the Order of the Barristers honorary, Kansas Bar Association, Johnson County Bar Association, and the American Association for Justice.

**Joy A. Springfield** has been in practice with Shook, Hardy & Bacon LLP in Kansas City, Mo., since 2006 and works with trial teams handling complex product liability, business, and pharmaceutical litigation in both state and federal courts. She graduated from Howard University with a bachelor’s degree in finance and from the University of Baltimore School of Law with a juris doctorate.

Her commitment to the community is demonstrated by the many hours she devotes to pro bono practice on behalf of Kansas Legal Services and Volunteer Attorney Project, representing low-income clients facing, among other matters, divorce and guardianship issues. Springfield also helps foster families adopt children who have experienced abuse, neglect, or abandonment. She currently volunteers with the United Way, chairing a grant review committee. Springfield is also an active member of the Kansas Bar Association, The Missouri Bar, and the Jackson County Bar Association.
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Hon. Paul Monty
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1st Place – 2nd Flight
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Hon. Jim Patton
Hon. Tim Lahey
David Berkowitz

2nd Place – 2nd Flight
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Larry Bork
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Hon. Jerome Hellmer
Ryan Hellmer
Tom Lemon

Judge Champion Score
Hon. Gary Nafziger, 80/100

Lawyer Champion Score
Steve Doering, 82/100
Thank you for another great year!

Keynote speaker

Justice Alan C. Page
Thank you for another great year!
The 2012 legislative session saw an ambitious legislative agenda coupled with Republican Party infighting, which created the perfect environment for little progress. Each session the Kansas legislature is required to pass a budget. However, both chambers had the task of reapportioning all 165 House and Senate seats, and the U.S. Congressional district seats this session. With that additional task, one can see how progress was stymied with added attempts to reformulate school finance, pass a tax cut bill, deal with KanCare, and alter Kansas Public Employees Retirement System contributions.

The Kansas legislature did pass a budget but only after going two weeks into the veto session. That delay can be directly attributed to the tax cut bill that is estimated to cause a significant revenue shortfall in five years. The number crunchers have projected that by 2017, under the newly passed tax plan, the state of Kansas will have a $2.5 billion shortage. The governor’s office released its own numbers showing a surplus by 2018 due to an uptick in new jobs. Both sides dug in on this issue and when given the option to water down the tax cuts, the Senate decided against it. That will give all sides an opportunity to besmirch opponents come election time.

However, for elections to be held, candidates need to know which district they live in and that proved to be the most difficult question to answer this year. Redistricting was the wedge issue of 2012, pitting conservative Republicans against their more moderate colleagues. The creation of a more conservative Kansas Senate has been a primary goal of the governor who recently announced that the executive branch will begin weighing in on primary races. With the animosity within the upper chamber at an all-time high, redrawing boundary lines became impossible. Dozens of maps were drafted but none were able to garner support from all interested parties. In the end a lawsuit was required to finish the redistricting process, and not many people are happy about the outcome. The three-judge panel decided to create its own map, using Kansas Legislative Research software to draw new lines that disregarded incumbents. That blinder effect resulted in a number of incumbent versus incumbent primary races. It also opened the door for a new crop of freshman legislators to make their name in an unoccupied district. We could see as many as 50 new faces come January 2013. If you want to learn more about the remapping issue, visit http://bit.ly/redistricting_ks. Information on candidates and the new districts they hope to represent can be found at http://bit.ly/elections_candidate.

While taxes, redistricting, and the budget took center stage and most of the drama in 2012, a number of issues did make its way through the legislative process to become law. We hope this information will prove useful to both you and your clients for familiarizing yourself with the new laws that impact your practice. For full text of the bills, please visit the Kansas Legislative Information Systems and Services website at www.kslegislature.com/li. (All bills became law on July 1, 2012, unless specified otherwise)

Judicial Branch and Administrative Law Bills

Once again the Kansas Judicial Branch required additional funding to keep the courts open. The legislature agreed to provide a supplemental appropriation but included that request in the overall FY 2013 budget. That delay caused the court to furlough nonjudicial personnel for one day in April.
Gov. Brownback approved this bill on April 3, 2012. This will allow a $22 judicial surcharge on those two statutes originally authorized in 2010 to fund non-judicial personnel. SB 322, Docket fee surcharge extensions, bill did not pass but will be reintroduced in 2013. Members feel this is a negative incentive to force compliance and that fees should be placed on paper filers and the e-filing vice, execution, and return of any process. Sub. for SB 283 was introduced by several law enforcement organizations because law enforcement officers and judicial personnel. It was approved by the governor on May 25, 2012.

The legislature has decided to use the FY 2012 funds, appropriated through docket fees, for a new position with the Kansas Judicial Council ($80,000), fund the project for e-filing ($107,000) and reimburse the state general fund for an advance to cover the Judicial Branch shortfall ($600,000). It could be argued that by diverting the docket fees used to fund the commission for other purposes the legislature has simply instituted an additional tax on lawyers.

SB 423, One judge per county
The Supreme Court continues to work on the authority to reallocate judicial resources. This was a very important piece of the Blue Ribbon Commission/Weighted Caseload Study. Unfortunately, the district magistrate judges, several western Kansas communities, and law enforcement in a limited role, felt that this issue did not provide a specific enough plan that they could support. Those concerns were expressed to Sen. Tim Owens and members of the Senate Judiciary Committee and eliminated any momentum the bill received from Chief Justice Nuss’ State of the Judiciary address. As such, SB 423 struggled to get out of the Senate Judiciary Committee and failed to move in the Kansas House. The Supreme Court is undeterred by this result and intends to bring the issue up again in 2013.

SB 425, E-filing
The Supreme Court has also been leading the discussion on the e-filing debate. While SB 425 passed the Kansas Senate 30-10, it has had a much more difficult time in the Kansas House. Several groups have opposed the implementation plan for e-filing as well as the cost. The Senate amended SB 425 to cap the amount the court can charge to 10 cents per page or $10 per document. Several House Appropriation Committee members feel this is a negative incentive to force compliance and that fees should be placed on paper filers and the e-filing should be free and gradually phased in over several years. This bill did not pass but will be reintroduced in 2013.

SB 322, Docket fee surcharge extensions
This bill extends the judicial branch surcharge that was originally authorized in 2010 to fund non-judicial personnel salaries for one fiscal year. SB 322 also adds hospital lien fees and wildlife and park reinstatement fees to the surcharge list. This will allow a $22 judicial surcharge on those two statutes. Gov. Brownback approved this bill on April 3, 2012.
a groundwater right provided such flexibility does not impair an existing water right.

SB 310, Establishing local enhanced management areas
This bill sets up a process by which a local enhanced management area (LEMA) can be established within a groundwater management district (GMD). The process for establishment of a LEMA requires a GMD to recommend a plan to the chief engineer of the Kansas Department of Agriculture’s Division of Water Resources. The chief engineer reviews the plan for clear geographic boundaries within the GMD, and ensures that the plan includes a compliance monitoring and enforcement element, as well as proposed corrective control provisions that meet the goals of the plan. The chief engineer is required to conduct public hearings on the reasonableness of the geographic boundaries of the plan, whether public interest requires that corrective control provisions be adopted, and whether groundwater conditions exist in the area so as to warrant a local enhanced management plan. The chief engineer then has the option to accept the LEMA plan as submitted, reject it as insufficient to address the conditions, or return it with the option for the GMD to revise and resubmit the plan.

HB 2451, “Use it or lose it” bill
This bill deals with abandonment of water rights by deleting the requirement that the owner of a groundwater right is in an area declared closed to further appropriations of water has a means of diversion available to put water to a beneficial use. More commonly referred to the “use it or lose it” bill.

HB 2491, Possess handgun while hunting, fishing, or fur harvesting
This bill allows an individual to carry a handgun while lawfully hunting, fishing or fur harvesting.

SB 314, Hunting and fishing license fees
This bill amends laws regarding hunting and fishing license fees for resident seniors; requires the secretary of wildlife, parks, and tourism to develop pre-rut antlerless deer rifle season and to allow the use of crossbows during archery season. This bill increases the age of a person exempt from purchasing hunting or fishing license from 65 or more to 75 or more years of age. The bill also changes the hunting and fishing license fee structure.

Business and Corporation Bills

HB 2261, Revised Uniform LLC Act
This bill would repeal our current Delaware-based LLC code and replace it with statutes developed by the Uniform Laws Commission (ULC). Rep. Lance Kinzer (R-Olathe) is a sitting member of the ULC, and he personally introduced this bill in 2011. The KBA opposed this bill and created a subcommittee to revise our current LLC code. A hearing was held on HB 2261 but no action was taken. The subcommittee continues to review case law to update the LLC code.

HB 2207, Enacting series LLC
This bill, introduced by Rep. Rob Bruchman (R-Overland Park), would allow for the formation of a business entity known as series limited liability company (series LLC) and include provisions concerning its operation. The bill was approved by Gov. Brownback on March 29, 2012. See http://bit.ly/hb2207_01.

House Sub. for SB 287, Kansas Credit Services Organization Act
This bill contains a section amending definitions within the Kansas Credit Services Organization Act. Specifically, the bill modifies an existing exemption from the Act for individuals licensed to practice law in Kansas acting within the course and scope of such individual’s practice as an attorney, by adding law firms of such individuals to this exemption.

Civil Law

SB 83, Resale of used products
This bill was introduced by the Kansas Chamber of Commerce to clarify the Gaumer decision. A number of interested groups spoke out against this bill as it would potentially affect charitable giving. In the end, a compromise was reached and SB 83 becomes law on July 1, 2012. Specifically SB 83 amends the Kansas Product Liability Act to provide that a retail seller of used products is not subject to liability in a claim arising from an alleged defect in a used product sold if the seller is tax exempt; or the claim is for strict liability or the seller resold the item after it was previously used.

HB 2562, Liability in emergency care
This bill provides that a non-health care provider, acting in good faith and without compensation, to render emergency
HB 2742, Medical recovery assistance program

This bill would alter what proceeds could be used to repay Medicaid expenses. By law all states must recover medical cost from deceased Medicaid recipients. The Kansas House held a hearing on this matter and assigned a subcommittee to review the bill language. The subcommittee recommended that further study be done and that HB 2742 be referred to an interim committee or to the Kansas Judicial Council.

House Sub. for SB 79, Foreign law bill (Sharia law issue)

House Sub. for SB 79 notes the Kansas legislature’s recognition of the right to contract freely under Kansas law, which can be reasonably and rationally circumscribed pursuant to the state’s interest in protecting and promoting rights and privileges granted by the U.S. and Kansas constitutions. It makes void and unenforceable judicial decisions and certain severable contractual provisions if such decisions or provisions rely on a foreign law, legal code, or system that does not grant the parties the fundamental liberties, rights, and privileges granted by the U.S. and Kansas constitutions. The bill states it shall not be construed to disapprove of or abrogate previously rendered Kansas Supreme Court decisions, and shall not allow a court to prevent a religious organization from deciding ecclesiastical matters or to determine or interpret the doctrine of a religious organization. Further, the bill states it does not apply to a corporation, association, partnership, limited liability company, limited liability partnership, or other legal entity that contracts to subject itself to foreign law or courts in a jurisdiction other than Kansas or the United States.

Criminal Law

Sub. for SB 307, Omnibus criminal procedure bill

This bill contains several provisions relating to criminal law, both substantive and procedural. It amends the felony murder statute to exclude lesser degrees of first-degree murder; it makes adjustments to speedy trial computations; it amends the crime of intimidation of a witness to include persuading a witness from making a report to the Department for Children and Families (DCF, formerly Social and Rehabilitation Services).

Sen. Sub. for Sub. for HB 2318, Drug code crimes

This bill creates the crime of endangerment; allows for the unilateral theory of conspiracy; adds abandonment to the list of inherently dangerous felonies; and adds a number of new drugs to the drug code sentencing grid.

HB 2468, Disclosure of discovery

This bill deals with discovery in a criminal prosecution and requires the defendant who seeks discovery and inspection to provide to the prosecutor within 30 days of trial a summary or written report of what any expert witness intends to testify, including the witness’s qualifications, opinions, and the bases and reasons for such opinions. Further, the bill requires all disclosures to be made at the times and in the sequence directed by the court and, absent other directions from the court or stipulation by the parties, made as provided in the statute amended by the bill.

HB 2568, Kansas Offender Registration Act

This bill amends the Kansas Offender Registration Act to include revision of the offender registration responsibilities of the courts; the registering law enforcement agency, upon the reporting of any offender; correctional facilities or the registering law enforcement agency’s designee; the staff of any treatment facility; and the Kansas Bureau of Investigation. Additionally, the bill revises offender registration requirements in certain circumstances and with regard to the length of registration for some crimes and clarifies registration requirements when a court orders expungement.

Family Law

Sub. for SB 304, Family law recodification clean-up

In 2011 the legislature passed SB 24, which reorganized the domestic code statutes into a single family law code. However, there were a number of inadvertent omissions in various divorce statutes and unintentional substantive changes to the code. HB 2741 was crafted to correct these errors. The KBA supported SB 24 in 2011 and extended that support to the clean-up bill, HB 2741. HB 2741 was placed into a conference committee report for SB 304. SB 304 also contains language dealing with the certified batterer intervention program certification act. This bill was signed into law by Gov. Brownback on May 25, 2012. See http://bit.ly/sb304_01.

SB 262, Grandparent custody

SB 262 requires substantial consideration of a grandparent who requests custody when a court evaluates what custody, visitation, or residency arrangements are in the best interest of a child who has been removed from custody of a parent and not placed with the child’s other parent. The court must consider (on the record) the wishes of the parents, child, and grandparent; the extent that the grandparent has cared for the child; the intent and circumstances under which the child is placed with the grandparent; and the physical and mental health of all involved individuals. If the court does not give custody to a grandparent, but places the child in the custody of the secretary of DCF for placement, then a grandparent who requests placement shall receive substantial consideration in the evaluation for placement.

SB 320, Juvenile offender proceedings

SB 320 increases the standard for placement in a juvenile detention facility by incorporating a probable cause finding during the detention hearing. It also clarifies rules of evidence to govern those detention hearings.

HB 2534, Reporting the death or disappearance of a child

HB 2534 creates a new crime of failing to report the disappearance of a child. This bill was patterned after a measure in Florida dealing with the Casey Anthony case.

Probate and Trust Law

HB 2655, Amends the Kansas Uniform Trust Code

This bill proposed three primary changes that include a modi-
fication to the material purpose of a spendthrift trust, the procedure for disposal of claims against trust property upon the death of the trust settlor and the removal of taxpayer identification number from the certification of trust form. The Senate passed this bill 39-0. However, the Kansas House had concerns with the second provision dealing with creditor rights. During the conference committee debate Sen. Jeff King (R-Independence) was able to resurrect two provisions originally from SB 291 that were acceptable to the House members. The conference committee report was approved and the bill was signed into law.


SB 403, Conversion of unitrust

SB 403 would allow a trustee to reconvert an unitrust without judicial procedure if the trustee determines the intent of the settlor or testator is no longer served by the unitrust. The trustee may also modify the percentage utilized in determining the unitrust distribution, with proper notice and no objections from beneficiaries once approved by the district court. SB 403 was passed by both chambers and signed into law by Gov. Brownback on April 3, 2012.


Special Notice

While it may be difficult to think about the 2013 legislative session when the 2012 legislature has just completed its work, perseverance is necessary. KBA Legislative Policy requires that all legislative proposals be submitted in final form by October 1, 2012. Individual members, local bar associations, committees, and sections may all submit proposals. Each proposal will be reviewed by the appropriate section or committee before consideration. Therefore, it is imperative that you begin drafting your proposal now and submitting it to the appropriate section.

The KBA Legislative Committee will meet after the October 1 deadline to consider all legislative proposals for the 2013 session.

All proposals should be sent to Joseph N. Molina at:

Kansas Bar Association
1200 SW Harrison Street
Topeka, KS 66612
Email: jmolina@ksbar.org

About the Author

Joseph N. Molina III is the director of governmental and legal affairs for the Kansas Bar Association. Prior to joining the KBA, he was chief legal counsel for the Topeka Metropolitan Transit Authority, where his practice involved insurance subrogation, and labor and employment law. He also previously served as an assistant attorney general, acting as the chief of the Kansas No-Call Act. Molina holds a Bachelor of Arts in political science, philosophy, and economics from Eastern Oregon University and a juris doctorate from the Washburn University School of Law.

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Kansans Deploy to Horn of Africa
By Bill Yanek, Timothy Stock, and Cody Phillips

In the 10 years following September 11, 2001, the United States increased its military presence in high-visibility deployments from Iraq to Afghanistan. The Kansas Army National Guard participated in a number of those deployments. However, in a less visible, yet strategically important effort, Kansas Army National Guard Battalions also deployed to Camp Lemonnier in Djibouti, Africa, beginning in 2010 and continuing into early 2012. As the military looks toward the future, Camp Lemonnier and the continent of Africa is poised to play an increasingly important role in U.S. military efforts abroad. The Kansas National Guard can boast that it served on the vanguard of the increased focus on Africa.

The Kansas Guard delivered force protection to the camp of more than 3,000 soldiers, sailors, airmen, and Marines. Kansas Guardsmen in Africa also participated in military to military engagements across the continent. As part of the guard force, I deployed to Djibouti. In Djibouti, I served with Staff Sgt. Timothy Stock, a Kansas attorney and KBA member since 2004 and Sgt. Cody Phillips, who plans to begin law school in the fall of 2012.

Stock is a solo practitioner in Topeka. He is a graduate of Washburn University School of Law. His practice consists primarily of domestic relations cases and probate matters. Stock enlisted in the Kansas National Guard in 1992. During his 20 years of service, Stock has served as a radio operator, an infantry squad leader, and a field artillery forward observer. Africa is his third deployment. He mobilized to Fort Leavenworth in 2002 and deployed to Iraq in 2007. In Iraq, Stock worked in an intelligence analysis cell.

Cody Phillips hails from Augusta is a graduate of Wichita State University. He joined the Army in 2007 and his military legal experience sparked an interest in law school. While deployed, Phillips took his Law School Admissions Test in Rome, Italy.

The Battalion Mobilizes

For 1-161 FA, mobilization began in January 2011 with a month of training at Fort Riley and Camp Atterbury, Ind. The bulk of the battalion arrived in Djibouti in late March 2011. U.S. military forces in Africa are under the command of U.S. Africa Command referred to as AFRICOM. Combined Joint Task Force – Horn of Africa (CJTF-HOA) is AFRICOM’s arm in East Africa. Camp Lemonnier is U.S. AFRICOM’s sole forward operating site on the continent and serves as a critical operational and sustainment facility in support of Department of Defense activities in the region.

Within CJTF-HOA, 1-161 FA was part of the Army Component on Camp Lemonnier under the command of Col. John Crews. As the largest tenant of Camp Lemonnier and with a troop strength of more than 500, 1-161 FA operations were a critical part of CJTF-HOA, the Army Component and the battalion’s ability to accomplish its mission in Africa.

The Mission in Africa

In 2011 House Armed Services testimony, U.S. AFRICOM Cmdr. Gen. Carter Ham described the increasing strategic importance of Africa to the U.S.: “A prosperous and stable Africa is strategically important to the United States. An Africa that can generate and sustain broad based development will contribute to global economic growth and vitality—a long-standing American interest. Prosperity and stability in Africa will ensure that it does not become a haven for those who wish to do harm to our citizens and our interests—both in the homeland and abroad.”

U.S. Africa Command’s area of responsibility includes 52 African states, more than 800 ethnic groups, more than 1,000 languages, and a diverse geography three and a half times the size of the continental United States.

In East Africa, CJTF-HOA is essential to U.S. Africa Command’s effort to build the partner capacity necessary to counter violent extremism and address regional security issues. It is the Command’s element for conducting Operation Enduring Freedom – Horn of Africa. CJTF-HOA is a model for multinational and interagency collaboration, and plays a key role in supporting two important Department of State initiatives; the Africa Contingency Operations Training and Assistance program as part of the larger Global Peace Operations Initiative, and the Partnership for Regional East Africa Counterterrorism.

The Command Judge Advocate Section

The legal mission for the 1-161 FA JAG team included advising soldiers and commanders on operational law, rules of engagement (rules for the use of force), and providing legal assistance, which could translate into legal issues from basic estate planning and family law to the Servicemember’s Civil Relief Act.

Operational Law

Operational law provides soldiers with the legal framework to confront threats encountered during a wide variety of missions. On Camp Lemonnier, Yanek briefed soldiers on the rules of engagement that applied to entry control point, flight line, port security, and military missions across Africa.

www.ksbar.org
Legal Assistance

The Army encourages soldiers to have a basic estate plan in place prior to deployment, including a will, living will, and powers of attorney crafted by JAG. Family law issues encountered during the deployment included adoptions, child custody and visitation, children’s rights, child support, spousal support, separation agreements, and divorce.

Military Justice

Administering military justice for the deployed battalion involved enforcing the Uniform Code of Military Justice (UCMJ), which is a standard set of procedural and substantive criminal laws for all the U.S. military services. The UCMJ applies to all members of the military, including those on active duty, students at military academies, prisoners of war, and, in some cases, retired or reserve personnel. The rights of individuals serving in the military are similar but not as extensive as civilians’ rights due to the overriding demands of discipline and duty. The Constitution recognizes this need for a separate body of regulations to govern the military under Article I, Section 8, Clause 14, which empowers Congress “to make Rules for the Government and Regulation of the land and naval Forces.” Under the UCMJ, offenses include failure to obey an order or regulation and being intoxicated on duty.

Nonjudicial Punishment

Article 15 of the UCMJ allows for nonjudicial punishment. Most minor violations of the UCMJ are processed under this article. The accused appears before his commanding officer, who passes judgment and imposes the sentence, if any. Procedurally, the UCMJ provides for a three-level system of courts that is similar to the structure of civilian courts. Criminal matters are handled by courts-martial, which are analogous to civilian trial courts.

UCMJ and General Order Number 1

Reminds me of my safari in Africa. Somebody forgot the corkscrew and for several days we had to live on nothing but food and water. –W.C. Fields

In deployed environments, military leaders restrict soldier off-duty activities in order to maintain good order and discipline and enhance force protection. Typically, restrictions come in the form of “General Orders.” The CJTF-HOA General Order Number 1 allowed the consumption of alcohol under limited circumstances. The 1-161 FA JAG section advised commanders and soldiers on the various aspects of complying with the General Order. Even under a General Order and strict restrictions on alcohol use, soldiers have due process rights that must be protected. Commanders must enforce the orders in a consistent manner. Enforcement and the aftermath of General Order violations took significant time and efforts of our JAG team.

Lt. Col. Tom Burke, 1-161 FA Battalion commander, recognized the critical role the 161 FA JAG team played in the success of the Djibouti mission.

“I depended on the 1-161 FA JAG team for more than legal interpretations of the law,” Burke said. “As a commander of over 500 personnel, I needed multiple options that balanced the needs of the organization with the individual.”

“Yanek and Phillips were an essential part of my special staff that served the commander and the soldiers alike,” he continued. “Without their availability and specialized knowledge, the deployment would have been much more challenging and certainly not as responsive to incidents. They allowed me to focus on leading the battalion and gave me the legal expertise necessary to successfully tackle the deployment.”

Djibouti: A Unique Deployment On and Off Duty

Stock spent most of his deployment working as the Battle NCO in the contingency operations center. The COC is the nerve center for all camp force protection and infrastructure operations. Camp Lemonnier is considered by the Navy as an expeditionary base, which in part mean it must be completely self-sufficient. This involves generating its own power, treating its own well water supply, and processing waste. Camp operations require 24/7 monitoring, which the COC spearheads. The deployment gave Stock experience he does not encounter in his work as an attorney.

“The solo practice of law is an individual endeavor,” Stock said. “My work as a noncommissioned officer involves being a small part of a much larger battalion team. In the COC, I gained a unique perspective of how our battalion fit into the much larger camp, CJTF-HOA, and AFRICOM effort.”

Outside of my command judge advocate work, I traveled to Rwanda in support of a State Department African Contingency Operation Training Assistance mission. My mission entailed mentoring a battalion-level staff planning exercise, which prepared the unit to deploy to Darfur in mid-2012 for a peacekeeping mission. The staff acumen of the Rwandan military is impressive. I worked as one of two military mentors during a two-week exercise based on the unit’s pending deployment to Darfur. Rwanda is a country on a mission to continually improve its military and become a leader in East African affairs. During a break in the exercise, I traveled to Volcanoes National Park and trekked gorillas through the same Rwandan mountains that provided the setting for the movie “Gorillas in the Mist.”

Members of the Combined Joint Task Force – Horn of Africa and 1-161 FA JAG Sections. Cody Phillips (second from left), Bill Yanek (far right). (U.S. Air Force photo by Senior Airman Jarad Denton)
Djibouti’s unique geographic location as a small desert country with a strategic port provided fantastic opportunities for morale, welfare, and recreation activities. Kansas soldiers, including Phillips, earned their SCUBA diving certification and explored beautiful coral reefs and shipwrecks throughout the deployment. The Guardsmen also swam with whale sharks, gentle giants of the sea, during their annual migration through the area. The ocean’s beauty and tranquility provided a much-needed break and a fantastic experience for soldiers from the land-locked state of Kansas.

The Grand Bara Desert is a perfectly flat, hard-packed and dry lake bed surrounded by mountainous Djiboutian terrain. On December 8, 2011, the Grand Bara provided the setting for the 29th annual Grand Bara 15K Run. Cody Phillips and I ran the race along with more than 1,300 other U.S., French, German, and Djiboutian runners. In true military fashion, a formation of three low flying French Mirage fighter jets replaced the traditional starting gun as the signal to begin the race. Phillips finished in the top half of the race field and I placed in the top half of the more seasoned runners. We earned a certificate of completion and a T-shirt to commemorate the accomplishment.

Return from Africa

As the Kansas Guard mission in Africa neared its end, Camp Lemonnier Army Component Commander Colonel John Crews reflected on the performance of the Kansas Guard JAG team.

“I relied on the 1-161 FA Command Judge Advocate section for efficient and fair administration of administrative and military justice issues,” Crews said. “In order to maintain good order and discipline across the component, JAG support must ensure due process for soldiers while allowing the chain of command to accomplish its mission. The 1-161 FA JAG team did just that, often under significant time constraints and in a deployed environment.”

For Phillips, Stock, and me, the end of the deployment meant a return to the civilian world. I resumed my work as President of Centric Management and Consulting Inc. in late February. Stock returned to his solo practice, which will bring quite a change of scenery from participating in the war on terror. He plans to retire from the military this year. Phillips will face the daunting prospect of his 1L year in law school. He reflected on his time in Africa: “One year is a long time to be away from my family and friends. The experience I gained in Africa will last a lifetime.”

About the Author

Bill Yanek lives in Lawrence. He is a graduate of the University of Kansas School of Law and currently works as president of Centric Management and Consulting Inc. in Topeka. He began his military career in 1992 after graduation from West Point. After six years of active duty in the Field Artillery, he moved to the U.S. Army Reserve while attending KU School of Law. In 2002, he branch transferred into the Army’s Judge Advocate General’s Corps. Moving to the National Guard in early 2011, Yanek’s stateside military assignment is command judge advocate for the 635th Regional Support Group in Hutchinson.

Endnotes
ATTORNEY DISCIPLINE

ORDER OF DISBARMENT
IN RE WILLIAM BRUCE DAY
NO. 13,556 – JUNE 8, 2012


HELD: Court, having examined the files of the office of the disciplinary administrator, found that the surrender of the respondent’s license to practice law was in great emotional distress during her divorce and the related physical suffering, writing letters and filing federal lawsuits surely were intentional, not negligent, acts. Court stated Ireland suggested that her behavior was “reckless” but that she did not intend to cause harm to Judge Moriarty or the legal system. It is not credible, however, to maintain that an attorney could file a disciplinary complaint and a civil law suit against an individual without understanding that those actions would cause harm to the individual. Court noted that Ireland’s professional misconduct was not limited to a single instance but consisted of repeatedly making false accusations against a judge. Those allegations became a matter of public concern when they were set out in a lawsuit and were discussed in the media. Ireland subsequently acknowledged that most of her accusations were false, yet she continued to suggest that the real problem was her failure to document her accusations adequately. Court suspended Ireland from the practice of law in the state of Kansas for two years.

TWO-YEAR SUSPENSION
IN RE KIMBERLY J. IRELAND
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 105,322 – MAY 25, 2012

FACTS: This is a contested original proceeding in discipline filed by the office of the disciplinary administrator against Kimberly J. Ireland an attorney admitted to the practice law in Kansas in 2005. On October 22, 2009, the office of the disciplinary administrator filed a formal complaint against Ireland, alleging violations of the Kansas Rules of Professional Conduct (KRPC) related to her allegations and complaint against Judge Kevin Moriarty and his actions during Ireland’s divorce from her husband Kevin Ireland.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that Ireland be indefinitely suspended from the practice of law.


HOLD: On the conflict of interest claim, Court held the KRPC does not permit an attorney to suffer a unilateral information embargo by one client to compromise his advice to or strategies on behalf of another concurrent client. This particular evidence demonstrates that there was not merely a substantial risk that Johnson’s representation of one spouse would be materially limited by his representation of the other; the risk was fully realized. Court held there was clear and convincing evidence that Johnson practiced law while
his license was administratively suspended. Court accepted the evidence of Johnson's fraudulent billing. Court stated it was especially alarmed by Johnson's inability to appreciate or unwillingness to accept the existence of a concurrent conflict of interest between his clients. His misrepresentations in his exceptions, brief, and oral argument were troubling. Court ordered a one-year suspension.

**ORDER OF REINSTATEMENT**

**IN RE JAMES M. ROSWOLD**

**NO. 105,257 – MAY 10, 2012**

FACTS: On April 22, 2011, the Kansas Supreme Court suspended James M. Roswold from the practice of law in Kansas for a period of one year. See *In re Roswold*, 292 Kan. 136, 249 P.3d 1199 (2011). Before reinstatement, Roswold was required to pay the costs of the disciplinary action, comply with Supreme Court Rule 218 (2011 Kan. Ct. R. Annot. 379), and comply with Supreme Court Rule 219 (2011 Kan. Ct. R. Annot. 380). On March 23, 2012, Roswold filed a petition with this court for reinstatement to the practice of law in Kansas. The petition was referred to the disciplinary administrator for consideration by the Kansas Board for Discipline of Attorneys, pursuant to Supreme Court Rule 219.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator affirmed that the respondent met all requirements set forth by the court.

HELD: The Kansas Supreme Court, after carefully considering the record, accepted the findings and recommendations that Roswold be reinstated to the practice of law in Kansas. Roswold was reinstated to the practice of law in the state of Kansas conditioned upon his compliance with the annual continuing legal education requirements and upon his payment of all fees required by the Clerk of the Appellate Courts and the Kansas Continuing Legal Education Commission. When Roswold has complied with the annual continuing legal education requirements and has paid the fees required by the Clerk of the Appellate Courts and the Kansas Continuing Legal Education Commission, the clerk is directed to enter respondent's name upon the roster of attorneys engaged in the practice of law in Kansas.

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**Appellate Practice Reminders . . .**

From the Appellate Court Clerk’s Office

Revised Supreme Court Rules Adopted by the Court, Effective July 1, 2012

From July 2010 through January 2012, the Judicial Council Supreme Court Rules Advisory Committee, at the request of the Kansas Supreme Court, met to restyle existing district and appellate court rules. The Committee recommended some substantive changes during the course of its review. The Supreme Court authorized a public comment period from February 24 – April 20, 2012. The Committee made additional revisions based on comments received.

After consideration by the Supreme Court, the revised rules were adopted, effective July 1, 2012.

Go to www.kscourts.org to the “What’s New” section to access a clean copy or a redline copy of the revised district court and appellate rules. The “Court Rules” section under “Featured Links” has also been updated. Forms which have been removed from rules may now be accessed at www.kansasjudicialcouncil.org.

The Judicial Council also maintains an historical file of the project which includes a redline with explanatory comments about substantive changes to the rules. That file will not reflect the final order adopted by the Supreme Court; however, the comments may be helpful. See “Report of the Supreme Court Rules Advisory Committee” at www.kansasjudicialcouncil.org/StudiesReports.shtml.

Members of the Judicial Council Committee were: Carol G. Green, Chair, Topeka; Hon. Bruce Brown, Wichita; Sen. Terry Bruce, Hutchinson; Hon. Brenda M. Cameron, Olathe; Prof. Jim Concannon, Topeka; Hon. Daniel D. Creitz, Iola; Hon. Brian Grace, Lincoln; Tod M. Heitschmidt, Salina; Hon. Marla J. Luckert, Topeka; Cindy MacDonald, Abilene; Dave Snapp, Dodge City; Sara Stratton, Topeka; and Nancy Strouse, Judicial Council executive director.

For questions about these or other appellate procedures and practices, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
Appellate Decisions

The Tribe identified several families that could meet the mother's adoption criteria, but none of the families could pay the Agency's $27,500 fee. D.R.W. gave birth to T.S.W. on September 14, 2009, and the Agency sought to terminate the parental rights of the potential fathers. Court-ordered paternity tests determined that J.A.L. was the father. J.A.L. was in jail, but he objected to the petition and stated that his mother would raise the child. The Tribe intervened in the termination action. The Agency sought to deviate from the Indian Child Welfare Act (ICWA) and the placement preferences of ICWA. The district court ordered T.S.W.'s prospective adoptive placement with the non-Indian family selected by D.R.W. The district court terminated J.A.L.'s parental rights and deviated from ICWA's placement preferences based primarily upon D.R.W.'s desire that the child be placed with the adoptive couple selected by D.R.W. and the threat to withdraw her consent if her choice was not honored. Without notice to the Tribe, the adoption decree was finalized. The Tribe appealed.

ISSUES: (1) ICWA and (2) adoption

HELD: Court stated that it lacked statutory authority to hear the case because there was no final order. However, Court held that under the unique factual circumstances of this case, the collateral order doctrine exception to the final order requirement for appellate review provided jurisdiction over the district court's decision to deviate from the ICWA placement preferences because the order (1) conclusively determined the disputed issue of whether to permit deviation from ICWA's placement preferences; (2) resolved an issue wholly separate from the merits of the proceeding, which concerned the termination of the biological father's parental rights; and (3) is effectively unreviewable upon appeal from a final judgment as a result of the appellee's action in proceeding with a final adoption without notice to the appellant. Court held that the record contains no indication that Mother requested confidentiality with respect to T.S.W.'s placement. Rather, Mother simply did not want T.S.W. placed with Father's extended family members or members of the Tribe. Court concluded the district court erred in permitting Mother's preference to override ICWA's placement factors absent some request for confidentiality and reversed the district court's decision deviating from ICWA's placement preferences.

STATUTES: K.S.A.20-3018(c); K.S.A. 59-2111, -2401a, -2402a; and K.S.A. 60-2102

KANSAS RESTRAINT OF TRADE ACT, PRICE-FIXING, AND ANTITRUST
O’BRIEN ET AL. V. LEEGIN CREATIVE LEATHER PRODUCTS INC.
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED
NO. 101,000 – MAY 4, 2012

FACTS: Brighton is a designer, manufacturer, and retailer of fashion accessories and luggage. It primarily markets its accessories...
to independent retailers, but it also maintains retail stores of its own called “Brighton Collectibles” manufactured by Leegin Creative Leather Products Inc. The first Brighton Collectibles store opened in 1999, and there are now more than 100 stores nationwide. A substantial portion of Brighton’s profits come from its own retail stores. Since April 1997, Brighton has provided its retailers with copies of its suggested pricing and promotional policy. Brighton’s policy calls for retailers to sell Brighton products at “keystone,” which is an amount equal to twice wholesale plus a small amount that varies by product. Under the policy, retailers may discount out-of-season products and products that are not selling well that the retailer will not reorder. Brighton ships its products to its retailers with tags displaying the manufacturer’s suggested retail price (MSRP). For at least one year, Brighton required its retailers to initial and sign an acknowledgement that a violation of its pricing policy was grounds for dismissal. O’Brien, the class representative, filed a class action against Brighton alleging violations of the Kansas Restraint of Trade Act (KRTA) for the arrangements made between Brighton and its retailer dealers for the purpose of controlling the price of Brighton goods to the customer and constituting prohibited trust arrangements. The district judge held that O’Brien’s claims that Brighton’s resale price maintenance (RPM) agreements and RPM policy violate the KRTA were to be evaluated under a “rule of reason” framework. The district judge cited both K.S.A. 50-101 and K.S.A. 50-112 in this portion of his summary judgment decision, but he failed to address the statutory language in either statute or any potential differences between the two provisions. Although the district judge ruled that genuine issues of material fact remained on whether Brighton’s RPM policy or agreements were unreasonable, the district judge also ruled that O’Brien would be unable to prove antitrust injury. The judge therefore granted Brighton’s summary judgment motion. Judge Goering also determined that O’Brien did not make out a claim of horizontal price-fixing. District Judge William Sioux Woolley held that O’Brien’s claim for treble damages was subject to a one-year statute of limitations, while O’Brien’s full consideration claim was subject to a three-year statute of limitations. Judge Goering did not reach Brighton’s motion to decertify the class.

ISSUES: (1) KRTA, (2) price-fixing, and (3) antitrust

HELD: Court held that after a thorough review of the record and the parties’ extensive arguments on this appeal and cross-appeal, the district judge erred in his demand for proof of a “concrete injury” in this price-fixing case under K.S.A. 50-101 and K.S.A. 50-112. This holding requires reversal of the district judge’s summary judgment in favor of defendant Brighton, and this case must be remanded to district court. Brighton also was not entitled to summary judgment under a “rule of reason,” which is not applied in a price-fixing action brought under K.S.A. 50-101 and K.S.A. 50-112 of the KRTA. The district judge erred in ruling that the claims of the plaintiff class do not involve horizontal price-fixing. The named plaintiff and class have made an alternative allegation of unlawful horizontal restraint. Court affirmed in part and reversed in part on the district judge’s statute of limitations rulings. The limitations provision applicable to the class claims for both full consideration damages and treble damages is the three-year statute of K.S.A. 60-512(2). Court held that the district judge correctly determined that a genuine issue of material fact remained for trial on the issue of whether there was an unlawful combination or arrangement under K.S.A. 50-101 and K.S.A. 50-112 between Brighton and its retailers who had no express agreements as Heart Stores or luggage sellers. Court also held the insufficiency of the district judge’s findings of fact and conclusions of law on class certification preclude meaningful appellate review of the predominance issue raised in Brighton’s cross-appeal. On remand, Brighton’s motion to decertify the class will be ripe for decision under the guidance of this court’s opinions in Dragon I, 277 Kan. at 778-93, and Dragon II, 282 Kan. at 360-64.

STATUTES: K.S.A. 50-101, -101 Fourth, -102, -103, -108, -109,
REAL PROPERTY, COMMISSIONS, AND NON-LICENSED PARTY
STEWART TITLE OF THE MIDWEST V. REECE & NICHOLS REALTORS ET. AL.
JOHNSON DISTRICT COURT – AFFIRMED
NO. 103,233 – MAY 11, 2012

FACTS: Reece & Nichols Realtors Inc. (RAN), the listing broker of a residential real estate transaction, refused to split the brokerage commission with Patrick E. McGrath, who acted as the broker for the buyer. McGrath is a licensed Kansas attorney but is not licensed under the Kansas Real Estate Brokers’ and Salespersons’ License Act (KREBSLA), K.S.A. 58-3034 et seq. RAN contended it is statutorily prohibited from paying a commission to any person not licensed under the KREBSLA. McGrath, on the other hand, maintained that, as an attorney, he is exempt from the requirements of the KREBSLA. Stewart Title filed an interpleader action asking the court to require McGrath and RAN to be interpled in the action and to settle the rights to one-half of a brokerage commission. Both parties filed summary judgment motions arguing their respective positions. The district court granted RAN’s motion for summary judgment finding there was no language of the KREBSLA that would exempt RAN from the requirement and permit it to pay a commission to a non-licensee regardless of whether the non-licensee is an attorney.

ISSUES: (1) Real property, (2) commissions, and (3) non-licensed party

HELD: Court held that an attorney is exempt from the provisions of the KREBSLA, including the prohibition in K.S.A. 2011 Supp. 58-3062(a)(10) against splitting a fee with a nonlicensee, only to the extent he or she is performing activities that are encompassed within or incidental to the practice of law, are within the context of an attorney-client relationship, and are consistent with the attorney’s professional duties. This attorney exemption does not create an exception to the commission-splitting prohibition of KREBSLA because: (1) a brokerage commission is earned by producing a ready and willing buyer or seller and not by primarily performing services encompassed within the practice of law and (2) splitting a brokerage commission is inconsistent with several provisions of the Kansas Rules of Professional Conduct governing attorneys and, therefore, is inconsistent with an attorney’s professional duties. Consequently, an attorney who is not licensed under the KREBSLA cannot share in a real estate brokerage commission.

STATUTE: K.S.A. 58-3034, -3035, -3036, -3037(c), -3062(a), (c), -3065, -30,101

WORKERS COMPENSATION, GOING AND COMING RULE, AND NEGLIGENCE
SCOTT ET AL. V. HUGHES
BARTON DISTRICT COURT – REVERSED AND REMANDED
NO. 102,690 – MAY 4, 2012

FACTS: Hughes was the driver in a one-car accident that killed passenger Jeffery Wade Scott and injured passengers Jeffrey Wagner and Adam Stein. At the time of the accident, the four were traveling together to work on a drilling crew for employer Duke Drilling Inc. (Duke Drilling). Hughes ultimately pled no contest to possession of methamphetamine and vehicular homicide. Scott’s surviving wife filed a workers compensation claim and reached a settlement of that claim, as did Wagner and Stein. Hughes also filed a workers compensation claim. Duke Drilling challenged Hughes’ right to recover because it alleged that he was intoxicated at the time of the accident. The passengers and survivors also filed a civil lawsuit against Hughes. After a prior remand from the Kansas Supreme Court, the district court summarized the issues in the pretrial order as factual issues of whether Hughes was acting in the scope and course of his employment with Duke Drilling Inc. at the time of the wreck, and whether Scott, Wagner, and Stein were acting in the scope and course of his employment with Duke Drilling Inc. at the time of the wreck. As for legal issues, the pretrial order stated whether defendant was in the course and scope of employment when the accident occurred and whether plaintiffs’ claims are barred by the “exclusive remedy” of workers compensation. At the close of the evidence, the trial court rejected both sides’ motions for judgment as a matter of law without explanation. After deliberations, the jury decided that neither Hughes nor the plaintiffs were in the course and scope of their employment at the time of the accident. Because Hughes was not in the course and scope, he was not covered by fellow servant immunity under the Act, and judgment was entered for plaintiffs in a previously agreed-upon amount of $500,000.

ISSUES: (1) Workers compensation, (2) going and coming rule, and (3) negligence

HELD: Court held the evidence in this case could only show that the travel in which Hughes was engaged on the morning of the accident that killed Scott and injured Wagner and Stein was an intrinsic part of Hughes’ job. The going and coming rule under K.S.A. 44-508(f) thus did not apply, and Hughes was within the course and scope of his employment. This means he was entitled to fellow servant immunity under K.S.A. 44-501(b), and plaintiffs’ civil lawsuits against him were barred. The district court’s decision is reversed and the $500,000 judgment against Hughes is therefore vacated, and this case is remanded for entry of appropriate orders dismissing all of the plaintiffs’ claims.

STATUTE: K.S.A. 44-501, -504, -508

CRIMINAL

STATE V. ANDERSON
DOUGLAS DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 99,123 – MAY 11, 2012

FACTS: Jury convicted Anderson of intentional second-degree murder and reckless aggravated battery for shooting two men in Lawrence. Anderson appealed claiming: (1) jury was improperly instructed to consider degree of certainty expressed by eyewitness when determining reliability of eyewitness identification; (2) in closing argument the prosecutor improperly appealed to jury’s emotions and vouched for evidence credibility; (3) trial court failed to inform Anderson of right to testify and obtain waiver on the record; and (4) cumulative error denied Anderson a fair trial. In unpublished opinion the Court of Appeals affirmed the convictions. Review granted on all issues.

ISSUES: (1) Eyewitness identification instruction, (2) prosecutorial misconduct, (3) sua sponte inquiry into right to testify, and (4) cumulative error

HELD: Similar challenge to PIK Crim. 3d 52.20 addressed in State v. Mitchell, decided this same date, which held that the degree of certainty factor should not be included in the pattern instruction because it prompts the jury to conclude that eyewitness identification is more reliable when witness expresses greater certainty. As in Mitchell, trial court erred in giving the instruction without omitting the degree of certainty factor, but under facts of case, jury could not have reasonably been misled.

Prosecutor’s redemption comment, and demeaning reference to Anderson as “a little, little man,” were improper. Close call whether taken together these comments were gross or flagrant or demonstrated ill will, but given evidence against Anderson, reversal of Anderson’s convictions is not required.
STATE V. FRYE
RILEY DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED

FACTS: Frye convicted in bench trial of aggravated battery. He appealed, claiming district court failed to insure Frye’s waiver of jury trial, and claiming insufficient evidence supported his conviction for severity level 7 aggravated battery rather than severity level 4 aggravated battery. In unpublished opinion, Court of Appeals reversed on jury trial issue, and declined to decide claim of insufficient evidence. State petitioned for review on both issues, claiming jury trial issue was not preserved for appeal, or alternatively, Frye’s handwritten waiver signed at beginning of bench trial was a knowing and voluntary waiver of right to jury. State also claimed sufficient evidence supported the district court’s guilty verdict.

ISSUES: (1) Appellate jurisdiction, (2) waiver of right to jury trial, and (3) sufficiency of the evidence

HELD: Under circumstances in case, Court of Appeals had jurisdiction to consider validity of waiver of right to jury trial. State v. Luna, 271 Kan. 573 (2001), is discussed. No error in Court of Appeals’ determination to apply exception to general rule that issues not raised in district court cannot be raised on appeal. Factors in State v. Irving, 216 Kan. 588 (1975), discussed and applied to facts of case, finding district court failed to advise Frye of his right to a jury trial or to effectively accept a jury trial waiver. Bench trial verdict is reversed.

Sufficiency of evidence claim is examined to determine whether remedy is outright reversal or remand for new trial. Sufficient evidence supports district court’s verdict of guilty of severity level 7 aggravated battery. Case is remanded for new trial.


STATE V. GILLILAND
SALINE DISTRICT COURT – CONVICTION AFFIRMED, SENTENCE VACATED, AND CASE REMANDED WITH DIRECTIONS
NO. 102,265 – MAY 11, 2012

FACTS: Gilliland was charged with the aggravated criminal sodomy of the 12-year-old daughter of his girlfriend. Gilliland suffers from epilepsy and is also an alcoholic, which aggravates his epilepsy condition. Gilliland claimed that he was unconscious and suffering from an epileptic seizure at the time he was seen giving oral sex to the 12-year-old. Officers testified that when they spoke with Gilliland after the incident he told them he was giving oral sex to the girl. Gilliland presented expert testimony of his epilepsy condition. The jury apparently rejected the claim that Gilliland was having a seizure and convicted him of aggravated criminal sodomy.

ISSUES: (1) Suppression of evidence, (2) exclusion of rape shield evidence, (3) suggestive interviewing techniques, and (4) departure sentencing

HELD: Court held there is substantial competent evidence to support the trial court’s conclusion that Gilliland was not intoxicated enough to prevent a voluntary statement. Court stated that Gilliland was coherent, responsive to questions, and able to remember many details about the day. Gilliland did not exhibit any physical signs of intoxication, except an odor of alcohol that could be detected only when the officer was close enough to place Gilliland in handcuffs. He was familiar with Miranda warnings from past encounters and demonstrated his right to exercise his right to remain silent by cutting off Moreland’s interview. Court held there were no other factors suggesting that the statement was involuntary. Court also held that trial court did not err in denying Gilliland’s motion to suppress his jailhouse telephone conversations with his girlfriend where he talked about his defense strategy, his hopes the daughter would not testify, and how to help his girlfriend avoid testifying. Court held that given the warnings at the beginning of a telephone conversation that telephone conversations would be monitored and might be recorded, Gilliland knowingly consented to the recording of his phone conversations through his action of using the phone, and whatever rights he had under K.S.A. 21-4001 and K.S.A. 21-4002 were not violated, and the trial court did not err in denying Gilliland’s motion to suppress the recorded jailhouse conversations. Court found the trial did not err in excluding evidence of the daughter’s sexual behavior. Court stated that even if it was error, the jury would still have to believe Gilliland’s defense that he was unconscious at the time of the incident to support his theory that the daughter climbed on top of him and requested oral sex. Court found no error in the trial court’s decision to deny Gilliland’s motion to hold a pretrial taint hearing to determine the reliability of the daughter’s trial testimony and statements to the police due to allegedly suggestive interviewing techniques. Court held there were no unduly suggestive or unduly leading techniques established. Court found no error in the Allen-type instruction and cumulative error.

However, Court was unable to determine the legality of Gilliland’s sentence because the trial court did not impose the statutorily defined sentence and any reason for departure was unclear.

STATUTES: K.S.A. 21-3501, -3506, -3525, -4001, -4002, -4643, -4701; K.S.A. 22-2514, -2515, -3414, -3504; and K.S.A. 60-261, -401(b), -404, -408, -417, -2105

STATE V. JABEN
JOHNSON DISTRICT COURT – APPEAL DENIED
NO. 102,383 – JUNE 1, 2012

FACTS: Jaben convicted in 1997 of rape, attempted rape, aggravated sodomy, aggravated kidnapping, and aggravated battery. He was paroled in 2001, and released from parole in 2004. In 2008 he filed petition to expunge his 1977 convictions. Pursuant to statute in effect at time of his offenses, K.S.A. 21-4617 (Weeks), district court expunged Jaben’s convictions. State appealed on question reserved and K.S.A. 60-2103, claiming district court should have applied statute in effect at time Jaben filed his expungement petition, K.S.A. 21-4619(c), which prevents expungement of those convictions.

ISSUE: (1) Appeal from expungement order and (2) retrospective application to K.S.A. 21-4619

HELD: Because K.S.A. 21-4916(d)(6) requires expungement petition to be docketed in original criminal action, state not permitted to directly appeal the district court’s expungement order under procedural rules applicable to civil appeals. Appeal on a question reserved provides the only basis for state’s appeal in this case.

Because legislature did not clearly indicate an intent for retrospective application of K.S.A. 21-4619, it applies only prospectively. District court correctly applied expungement statute in effect at time of the commission of crimes underlying the convictions sought to be expunged. Appeal denied.

STATUTES: K.S.A. 2011 Supp. 21-6614c; K.S.A. 20-3018(c); K.S.A. 21-3511, -4617, -4619, -4619(c), -4619(c)(22), -4619(d) (6); K.S.A. 22-3602(b)(3); K.S.A. 60-2103; K.S.A. 1986 Supp. 21-4619(c)(6); and K.S.A. 21-4617, -4617(a)(Weeks)
STATE V. MITCHELL
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 99,163 – MAY 11, 2012

FACTS: Mitchell convicted of aggravated robbery based entirely on victim's eyewitness identification. On appeal he claimed in part the district court erred in issuing pattern cautionary eyewitness identification instruction, PIK Crim. 3d 52.20, without deleting the factor regarding degree of certainty demonstrated by witness in identifying the accused. Court of Appeals affirmed in unpublished opinion. Review granted on this single issue.

ISSUE: Cautionary eyewitness identification jury instruction

HELD: PIK Crim. 3d 52.20 should continue to be given, but the eyewitness certainty factor in that instruction should no longer be used because it prompts the jury to conclude that eyewitness identification evidence is more reliable when the witness expresses greater certainty. Here, eyewitness knew his attacker and expressed 100 percent certainty in his identification which was critical to the prosecution. Under facts of case, where jury was thoroughly exposed to facts and circumstances both in favor of and against the accuracy of identification, jury could not reasonably have been misled by the instruction.

STATUTE: K.S.A. 20-3018(b)

STATE V. PEPPERS
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 101,551 – MAY 4, 2012

FACTS: Peppers convicted of first-degree premeditated murder and attempted first-degree murder. On appeal Peppers alleged: (1) district court erred in admitting gang affiliation evidence with limiting jury instruction; (2) district court erred in given Allen-type instruction; and (3) prosecutorial misconduct in closing argument by commenting on facts not in evidence, endorsing credibility of state witness, attempting to shift burden of proof to Peppers, and expressing personal opinion of Peppers' guilt.

ISSUES: (1) Admission of gang affiliation evidence, (2) Allen jury instruction, and (3) prosecutorial misconduct

HELD: Following State v. Conway, 284 Kan. 37 (2007), no abuse of discretion in district judge's determination that gang affiliation evidence in this case was material and probative to identity and motive, and prejudicial effect was limited by district judge's limiting instruction. Also, Peppers' argument that res gestae prohibits this evidence is rejected as an over-reading of State v. Gunby, 282 Kan. 39 (2006).

District judge stated she would not give Allen instruction if either side objected, and defense counsel raised no objection after reviewing the instruction. Peppers' on-the-record agreement to wording of the instruction is invited error.

Each allegation of prosecutorial misconduct is fully examined, finding error only in two comments expressing prosecutor's personal opinion on Peppers' guilt. Given the cumulative magnitude of evidence against Peppers, however, no reasonable possibility the prosecutor's improper comments affected the jury's verdict.

STATUTES: K.S.A. 2010 Supp. 21-4704(k); K.S.A. 22-3414(3), and K.S.A. 60-401(b), -455

STATE V. SPRUNG
CLOUD DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND SENTENCE VACATED IN PART
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 99,704 – MAY 4, 2012

FACTS: Sprung convicted of various charges including two counts of aggravated indecent liberties with a child. On appeal Sprung claimed: (1) his conviction on both counts of aggravated indecent liberties was multiplicitious; (2) prosecutorial misconduct during closing argument comment on credibility of victim, Sprung's expert witness, and Sprung's investigator; (3) district court erred in denying Sprung's motion to compel psychological examination of victim; and (4) district court unconstitutionally imposed aggravated presumptive sentence without jury determination of aggravating factors. In unpublished opinion, Court of Appeals affirmed the convictions, and dismissed sentencing challenge for lack of jurisdiction. Supreme Court granted Sprung's petition for review on all claims.

ISSUES: (1) Multiplicity, (2) prosecutorial misconduct, (3) compelled psychological examination, and (4) sentencing

HELD: Sprung's aggravated indecent liberties convictions are multiplicitious. Charges arose from same act or transaction, and plain language of K.S.A. 21-3504(a)(3)(A) provides only one unit of prosecution rather than two. Second conviction is reversed and sentence for that conviction is vacated.

Agrees with Court of Appeals' determination that state demonstrated beyond reasonable doubt that prosecutor's statement regarding credibility of victim, expert witness, and investigator – even if improper – did not affect outcome of trial in light of entire record.

Under totality of circumstances, no abuse of discretion by district court in denying Sprung's motion to compel an examination of the victim. No evidence the victim was mentally unstable. Evidence of victim's prior dishonest conduct did not relate to her contact with Sprung or any matter material to allegations against him. And no evidence that victim made similar charges against others that were later proven false.

No appellate jurisdiction to consider Sprung's claim regarding presumptive sentence imposed.


STATE V. WARRIOR
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 101,799 – MAY 4, 2011

FACTS: Jury convicted Warrior of premeditated first-degree murder of husband, and conspiracy to commit first-degree murder. On appeal Warrior claimed trial court erred in: (1) not suppressing statements Warrior made to officers without Miranda warnings during interviews while Warrior was hospitalized; (2) not granting new trial for Brady violation in state's failure to disclose exculpatory evidence of prior juvenile adjudication of key state witness; (3) allowing state to present hearsay testimony by victim which indicated trouble in Warrior's marriage; and (4) erred in giving Allen-deadlocked jury instruction prior to deliberations. Warrior also challenged constitutionality of Kansas hard 50 sentencing scheme, and claimed cumulative error denied her a fair trial.

ISSUES: (1) Suppression of hospital interviews, (2) failure to disclose exculpatory evidence, (3) hearsay regarding marital strife, (4) deadlocked jury instruction, (5) constitutionality of K.S.A. 21-4635, and (6) cumulative error

HELD: Factors to be considered in determining if interrogation is investigatory or custodial are stated and applied. A law enforcement interview of accident victim at hospital is not custodial interrogation unless victim's confinement is instigated by law enforcement or controlled for custodial purposes. Fact that Warrior was considered possible suspect by third and fourth interviews did not trigger need for Miranda warnings. Substantial competent evidence supports trial court's finding that Warrior was not in custody, and under totality of circumstances, a reasonable person would have felt free to terminate the interviews.

Undisputed that evidence in question was exculpatory, and that state failed to timely produce the evidence. To determine if evidence was material so as to establish prejudice, a reasonable probability test is applied. Sliding scale test of materiality utilized in U.S. v. Agurs, 427 U.S. 97 (1976), is no longer used to determine whether there
has been a Brady violation, and Kansas cases utilizing that test are disapproved. Trial court’s determination as to existence of a Brady violation is reviewed de novo with deference to findings of facts; trial court’s denial of motion for new trial is reviewed for abuse of discretion. Under facts in case, no reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different.

Even if error assumed in admitting evidence of marital strife, it was harmless.

As set forth in State v. Salts, 288 Kan. 263 (2009), Allen-type deadlocked instruction prior to jury deliberations was error, but no real possibility in this case that jury would have rendered different verdict had error not occurred.

No grounds presented for reconsidering prior holdings that have rejected Apprendi challenges to the hard 50 sentencing scheme.

In light of record as a whole, no reversible error under cumulative error doctrine. Noting that role of failure to disclose evidence that is not a Brady violation in a cumulative error analysis seems to be a matter of debate with federal courts, Kansas Supreme Court reserves determination of the question for another day.

STATUTES: K.S.A. 21-3302, -3401(a), -4635; K.S.A. 22-3414(3), -3501(1), -3601(b)(1); and K.S.A. 60-261, -2105

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**Court of Appeals**

**Civil**

**ANNEXATION**

**PISHNY V. BOARD OF COUNTY COMMISSIONERS**

**JOHNSON COUNTY**

**JOHNSON DISTRICT COURT – AFFIRMED**

**NO. 105,595 – MAY 4, 2012**

FACTS: City of Overland Park (City) initiated proceedings to annex 15 square miles of Johnson County land. Annexation opposed by group of landowners (No Coalition). Board of Commissioners for Johnson County (Board) held public hearing in October 30, 2007, and announced record would close in 30 days with decision seven days later. Prior to that initial closure date, Board extended public hearing and time for comment, closing record February 15, 2008. A week later, Board divided annexation area into five parts, and approved annexation of three areas. In No Coalition’s appeal, district court affirmed Board’s decision, finding Board’s action was supported by substantial evidence, and Board acted lawfully and within scope of its authority. No Coalition appealed claiming: (1) Board lacked jurisdiction to enter final order because it did not act in a timely fashion; (2) insufficient evidence supported annexation because evidence did not apply to area actually annexed, the Board considered the wrong plan, and district court applied incorrect standard of review; (3) landowners’ right to due process was violated by continuous changes to City’s plan without a public hearing to address the new information, and ex parte communications between the County, City, and Fire District related to the annexation; and (4) Board and City failed to comply with annexation statutes.

ISSUES: (1) Board’s jurisdiction, (2) evidence supporting Board’s decision, (3) procedural due process, and (4) compliance with annexation statutes

HELD: Board did not lose jurisdiction to render annexation decision. As issue of first impression, for purposes of annexation statute, “adjourn sine die” in K.S.A. 12-521(d) means when the board will no longer take evidence on the annexation matter. Applied to facts of this case, Board made a conditional adjournment on October 30, 2007, and left the record open. Also, the seven-day time limit in K.S.A. 12-521(d) is a procedural requirement that is directory in nature rather than mandatory. Fact that Board required City to later reach an agreement with Aubry Township is not ultra vires, and No Coalition abandoned this issue.

District court’s finding of Board’s substantial compliance is affirmed. Annexation statutes clearly provide for annexation of lesser amount of area proposed for annexation. No statutory requirement for Board to have amended plan or amended information in order to consider or grant partial annexation. Refinements made to service extension plan offered by City did not make it the wrong plan as No Coalition contends. No Coalition’s argument that district court applied wrong legal standard is rejected.

No procedural due process errors found. No Coalition was provided adequate notice and opportunity to be heard. No legal authority requires a public hearing every time an annexation record is supplemented with additional information. Annexation statutes contemplate only a single public hearing. No showing that No Coalition’s rights to due process were violated as a result of ex parte communications concerning fire services agreement, an inconsistent procedure for communicating with the court, or email communications between commissioners and persons from the community.

Additional specific allegations of statutory noncompliance by City and Board are separately addressed and summarily rejected.

STATUTES: K.S.A. 12-520a(a)(3), -520b(a)(1), -520b(a)(2), -521 et seq., -521(a)(2), -521(b), -521(c), -521(c)(7), -521(c)(8), -521(d), -521a, -531(a), -531(b); and K.S.A. 77-621, -621(c)(7)

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**CHILD SUPPORT**

**STATE EX REL. SRS V. KETZEL**

**JOHNSON DISTRICT COURT – REVERSED AND REMANDED**

**NO. 105,470 – MAY 4, 2012**

FACTS: Bradish had daughter while living in Kansas. Ketzel was declared the father in SRS parentage action, and ordered to pay child support. Bradish and daughter moved to Hong Kong in September 2008 and remain there still. By March 2009 when Bradish filed March 2009 motion in Johnson County District Court to increase child support, Ketzel was living in Missouri. District court modified the child support order. Ketzel filed motion to set aside the modified order, alleging district court lacked subject matter jurisdiction to modify the support order under the Uniform Interstate Family Support Act (Act). District court denied the motion, finding Kansas had not lost continuing, exclusive jurisdiction under the Act because Bradish was still domiciled in Kansas pursuant to statements in her affidavit and the definition of “residence” in In re Estate of Phillips, 4 Kan. App. 2d 256, rev. denied 227 Kan. 927 (1980). Ketzel appealed.

ISSUE: Uniform Interstate Family Support Act

HELD: History and purpose of Act is discussed. No Kansas court has held the term “residence” under K.S.A. 23-9.205(a)(1) is synonymous with domicile. Applying definition in K.S.A. 77-201 Twenty-third, ample evidence in record supports finding that Bradish and daughter were residents of Hong Kong and not residents of Kansas when motion to modify was filed. Specific claims in Bradish’s affidavit are examined and refuted. District court’s finding that Bradish is a Kansas resident is not supported by competent evidence, and court ignored other competent evidence that she is not a Kansas resident. District court’s legal conclusion that Bradish is a Kansas resident were residents of Hong Kong and not residents of Kansas when motion to modify was filed. Specific claims in Bradish’s affidavit are examined and refuted. District court’s finding that Bradish is a Kansas resident is not supported by competent evidence, and court ignored other competent evidence that she is not a Kansas resident. District court’s legal conclusion that Bradish is a Kansas resident.
Appellate Decisions

**FORECLOSURE AND RESTRICTIONS ON WARRANTY DEED**

**COREFIRST BANK & TRUST V. JHAWKER CAPITAL LLC**

**GEARY DISTRICT COURT – AFFIRMED**

**NO. 106,201 – JUNE 15, 2012**

FACTS: A mortgage foreclosure action was filed by CoreFirst Bank & Trust against JHawker Capital LLC (JHawker) on property in a Junction City subdivision development commonly referred to as Mann's Ranch. CoreFirst named Linda and James David Alexander (the Alexanders) as defendants in the foreclosure action because of their interests claimed in the Affidavit of Equitable Interest (affidavit) in the real estate recorded with the register of deeds in Geary County on April 2, 2007. While the foreclosure action was pending, on August 13, 2009, the Alexanders and Outwest Investments LLC (Outwest) filed a third-party petition against Junction City Abstract & Title Co. Inc. (JCAT). In the third-party petition, the Alexanders and Outwest alleged that JCAT was liable for failing to include a restriction on the warranty deeds. The warranty deeds had the Affidavit of Equitable Interest attached. David signed the deed on behalf of Outwest on March 13, 2007. Both Alexanders signed the Affidavit of Equitable Interest on March 28, 2007; the signatures on both of those documents were notarized. The deed and affidavit were filed with the register of deeds. There was no restriction listed on the warranty deeds. The Alexanders and Outwest alleged that JCAT had a duty to include their restrictive covenant on the deeds it prepared. David signed the warranty deed JCAT prepared on behalf of Outwest. On March 21, 2011, the Geary County District Court filed a journal entry granting summary judgment to JCAT and denying the claims of the Alexanders and Outwest. The court held that the retained interests the third-party plaintiffs claim were transfer fee covenants, and our legislature has statutorily deemed that these covenants are void, unenforceable, and against public policy under K.S.A. 58-3821 and K.S.A. 58-3822. The court also rejected arguments that the transfer fees fit within the exceptions to the rule for real estate commissions or additional consideration. Thus, JCAT could not be liable for failing to adequately protect an unenforceable interest. Second, the court denied the claims for damages for future lost profits, finding them too speculative and remote.

ISSUES: (1) Foreclosure and (2) restrictions on warranty deed

HELD: Court agreed with the district court that if the contracts would have included only the retained interests of David in the exclusive listing agreement, this might have been a closer case requiring the court to resolve the parties' various arguments. But that is not the case. The plain language of the contracts alternatively granted either the Alexanders or Outwest future commissions upon the sales of the individual, fully developed lots, and the election between those alternatives was left up to the buyers (JHawker) or the other buyers. The interests of the Alexanders and Outwest were inseparable and could not, therefore, fall within the real estate commission exception to bar transfer fee covenants. Court also held that because the appellants were not the sole grantors, the payments due to the Alexanders or Outwest alone cannot be considered “subsequent additional consideration” to the “grantor” for the sale. Consequently, court did not consider JCAT’s alternative contention that resident misapplied probate law concepts to this proceeding. All states adopting the Act agree that state issuing a child support order loses subject matter jurisdiction once all parties and the children no longer reside in the issuing state. District court did not have continuing, exclusive jurisdiction to modify the child support order. Reversed and remanded with directions to forward matter to the appropriate tribunal in Missouri where Ketzel is a resident.

STATUTES: K.S.A. 8-248, 23-9,101 et seq., -9,205(a), -9,205(a) (1), -9,306, -9,611(a); and K.S.A. 77-201 Twenty-third
the contract terms and deposition testimony offered to support their arguments in favor of summary judgment indicate that appellants have already received full compensation for Mann’s Ranch from the buyers, so their retained interests cannot be deemed “additional consideration.” Court also concluded that the district court did not err in granting JCAT summary judgment on the alternative ground that appellants’ claimed damages for future lost profits depend upon future developments that are contingent, conjectural, and improbable, i.e., are speculative and not reasonably ascertainable.

STATUTE: K.S.A. 58-3821, -3822

FOREIGN JUDGMENTS AND GARNISHMENT
MASTER FINANCE CO. OF TEXAS V. POLLARD
JOHNSON DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 106,673 – JUNE 22, 2012

FACTS: Master Finance Co. of Texas (Master Finance) and Kim Pollard entered into a payday loan contract. Master Finance loaned Pollard $100 with a 199.91 percent interest rate. Pollard defaulted on the loan payment, and Master Finance filed a lawsuit in Missouri against Pollard. When Pollard failed to answer or appear, Master Finance was granted a default judgment against Pollard in Missouri, with the post-judgment interest rate set at the contract rate – 199.91 percent. Later, the Missouri judgment was filed in Kansas as a foreign judgment. Master Finance requested an order for wage garnishment, which was granted. Pollard objected to the wage garnishment. After a hearing, the district court adjusted the postjudgment interest rate to the Kansas statutory interest rate, ordered the parties to enter into a voluntary withholding order, and ordered Master Finance to release the wage garnishment.

ISSUES: (1) Foreign judgments and (2) garnishment

HELD: Court stated that Pollard failed to allege any exemption recognized under Kansas law, and she likewise failed to present any evidence at the hearing entitling her to an exemption under Kansas law. Court held the district judge abused his discretion by essentially creating his own exemption. He compared Pollard’s income and expenses and determined that she could not afford the garnishment of 25 percent of her disposable income. But the Kansas garnishment statutes do not allow for any consideration of the debtor’s actual expenses. Calculation of the garnishment amount is based solely upon the debtor’s income. Therefore, the district court’s decision fell outside the statutory framework. The result was the quashing of a garnishment that complied with all legal requirements. Likewise, the district judge lacked the statutory authority to order the judgment debtor to complete a “voluntary” withholding order, and he lacked the authority to order Master Finance to release its garnishment and accept less money per Pollard’s pay period than it was entitled to under the law. Court also held that because the Missouri judgment includes the applicable interest rate in the judgment itself, there is no conflict and the judgment as a whole, including the post-judgment interest rate, must be given full faith and credit.

Court agreed that the facts of this case cry out for equitable relief. But any challenge to the Missouri judgment must be raised before the Missouri courts and not in a collection action in this state.

STATUTES: K.S.A. 16-204, -205; K.S.A. 16a-2-404; K.S.A. 60-719, -731, -735, 2310; and K.S.A. 61-3504, -3508

JUDGMENTS
CHURCH OF GOD IN CHRIST INC. V.
BOARD OF TRUSTEES
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 104,859 – JUNE 8, 2012

FACTS: Facts detailed concerning lengthy dispute and litigation between international Church of God in Christ Inc. (COGIC) and one of its local congregations, Emmanuel Church of God in Christ over ownership and control of real property in Wichita. Emmanuel Church established in 1945 as member of COGIC, belonged to Kansas Southwest Jurisdiction since 1967, and purchased Wichita property in 1972 for worship services and church business. Dispute over bishop’s choice for pastor resulted in some Emmanuel Church members (defendants) forming corporation and transferring the Wichita property to that corporation in 2004. COGIC filed lawsuit for injunctive relief and to quiet title when defendants locked out bishop and the designated pastor. Motion for default judgment filed when defendants failed to file answer. At hearing on the motion, district court found defendants had not adequately explained their failure to file answer, this was not an isolated incident given defendants’ past noncompliance with court civil procedure rules, and defendants had delayed progression of the litigation. Default judgment and permanent injunction entered, with compensatory damages awarded to COGIC. Defendants appealed, challenging subject matter jurisdiction of courts over church matters, default judgment, and damages award. Defendants also claimed district court should have dismissed case based on res judicata and collateral estoppel, and claimed default judgment should be reversed because corporation purportedly holding title to the property was not named as a party.

ISSUES: (1) Subject matter jurisdiction – civil vs. ecclesiastical matters, (2) entry of default judgment, (3) affirmative defenses, (4) failure to name corporation as a party, and (5) damages

HELD: While dispute between parties over authority to appoint or call a pastor is an ecclesiastical issue, the dispute over property rights is a civil issue. District court had subject matter jurisdiction to resolve the property dispute, and there is subject matter jurisdiction to consider this appeal.

Under facts of case, there was no abuse of district court’s discretion by entering default judgment. Defendants did not file motion
Lindemuth paid the invoices for three years before raising an issue to the adequacy of the invoices. Based on Lindemuth’s past conduct of paying the invoices, it is now estopped from objecting to the invoices. Last, court rejected Lindemuth’s argument that the trial court should have conducted an evidentiary hearing for two reasons: (1) the issue was not raised below; and (2) the parties agreed in the case management order that no additional discovery would be allowed and that the case would be decided on the record.

CONCURRENCE: Judge Atcheson would affirm, but on the ground that Lindemuth exceeded any allowable time to make objection to the amounts KDHE submitted to it for payment. Judge Atcheson stated that Lindemuth should have been able to ascertain and present any concerns about a given invoice in the 30 days before payment came due.

STATUTE: K.S.A. 77-625

KANSAS WAGE PAYMENT ACT AND COMMISSIONS
DEEDS V. WADDELL & REED INVESTMENT
JOHNSON DISTRICT COURT – AFFIRMED
NO. 104,949 – MAY 4, 2012

FACTS: Waddell & Reed hired Charles Deeds as vice president of marketing and client service for the Southeast region in 1998. There was no employment contract that specified the duration of Deeds’ employment, and the parties agree that Deeds was an at-will employee of Waddell & Reed, so the company was free to end Deeds’ employment at any time. Deeds complained about a 2005 commission change at the company to Waddell & Reed’s management at least five times. Deeds admitted he didn’t know what the law was under the Kansas Wage Payment Act (Act) at the time of these complaints. Deed said that he wanted “A fair compensation plan or return of those trailer commissions.” Waddell & Reed fired Deeds on April 9, 2007. His supervisor told Deeds that Waddell & Reed decided not to change the commission schedule, so the company terminated Deeds’ employment because management knew Deeds wasn’t going to be happy about the decision. The supervisor assumed Deeds’ largest account and received its commissions. About a year after Deeds was fired, he filed a wage claim under the Act with the Kansas Department of Labor for more than $1 million. In 2009, a hearing officer denied Deeds’ wage claim. An administrative review of the hearing officer’s order was pending as of July 2010. In 2009, Deeds brought claims against Waddell & Reed under four theories related to his termination and commissions: retaliatory discharge, wrongful discharge, prevention, and unjust enrichment. The district court granted Waddell & Reed’s motion for summary judgment August 2, 2010.

ISSUES: (1) Kansas Wage Payment Act and (2) commissions

HELD: Court held Deeds has not set out a valid retaliatory-discharge claim under the Act. He was unaware of the Act and made no attempt to claim its protection, let alone notify Waddell & Reed of such a claim before he was fired. Moreover, the statements he made to his employer were equivocal with regard to a potential claim under the Act: while he complained about the change in the terms of compensation, he said that he could be satisfied either with return of the prior terms or some “fair compensation plan.” The latter option does not suggest a claim under the Act for specific wages due under his employment agreement. Court declined Deeds’ invitation to create two new causes of action: (1) that an employer cannot fire an employee to avoid paying a commission that has already been earned; and (2) that an employer cannot fire an employee to prevent the employee from earning additional commissions. Court held that because Deeds has an adequate statutory remedy under the Act, his equitable unjust-enrichment claim is pre-empted and cannot proceed.

STATUTES: K.S.A. 20-20-11; and K.S.A. 44-313, -520
FACTS: On September 20, 2005, James W. Howie executed a promissory note to U.S. Bank in the amount of $151,600 plus interest. The note was signed solely by James. That same day, James and his wife, Georgia Howie, executed a mortgage granting a security interest in certain real property located in Ottawa to secure payment of the note. Under the terms of the mortgage, the Howies were named as “Borrower,” U.S. Bank was named as “Lender,” and Mortgage Electronic Registration Systems Inc. (MERS) was named as the mortgagee “acting solely as a nominee for Lender and Lender’s successors and assigns.” James died on February 23, 2008, leaving Georgia as the surviving joint tenant with right of survivorship in the property. At some point, Georgia stopped making payments on the underlying debt and by May 1, 2009, the note was in default. On October 28, 2009, MERS assigned the mortgage to U.S. Bank, and on November 10, 2009, U.S. Bank filed a petition to foreclose the mortgage. U.S. Bank later clarified that it was pursuing only its in rem remedy to foreclose the mortgage against the property and that it was not seeking a personal judgment against Georgia under the note. Georgia argued that she was not personally liable for the debt because she never signed the note and further that her husband’s estate was not liable under the note because U.S. Bank had failed to demand payment within the time prescribed under K.S.A. 59-2239(1) after her husband’s death. She also argued that U.S. Bank could not foreclose against the property under the mortgage because the note, held by U.S. Bank, and the mortgage, initially held by MERS and later assigned to U.S. Bank, had been irreparably severed.

Following a hearing, the district court found that even if there were no agency relationship between U.S. Bank and MERS such that the note and mortgage were severed, any severance was “cured” by MERS’s subsequent assignment of the mortgage to U.S. Bank, thereby permitting U.S. Bank to foreclose on the mortgage.

ISSUES: (1) Mortgage and (2) foreclosure

HELD: Court concluded that the plain language of the mortgage herein provided sufficient and undisputed evidence that MERS was acting as an agent of U.S. Bank at all relevant times. Because MERS was acting as an agent of U.S. Bank, the mortgage and the note were never severed and U.S. Bank, as present holder of both the note and the mortgage, was entitled to foreclose on the mortgage. Although the district court relied on different grounds in deciding the case, it reached the correct result and its decision will be upheld even if it relied upon the wrong ground or assigned erroneous reasons for its decision.

STATUTES: K.S.A. 59-2239(1); and K.S.A. 60-219(a)

MORTGAGE AND FORECLOSURE
U.S. BANK V. HOWIE ET AL.
FRANKLIN DISTRICT COURT – AFFIRMED
NO. 106,415 – JUNE 8, 2010

FACTS: On September 20, 2005, James W. Howie executed a promissory note to U.S. Bank in the amount of $151,600 plus interest. The note was signed solely by James. That same day, James and his wife, Georgia Howie, executed a mortgage granting a security interest in certain real property located in Ottawa to secure payment of the note. Under the terms of the mortgage, the Howies were named as “Borrower,” U.S. Bank was named as “Lender,” and Mortgage Electronic Registration Systems Inc. (MERS) was named as the mortgagee “acting solely as a nominee for Lender and Lender’s successors and assigns.” James died on February 23, 2008, leaving Georgia as the surviving joint tenant with right of survivorship in the property. At some point, Georgia stopped making payments on the underlying debt and by May 1, 2009, the note was in default. On October 28, 2009, MERS assigned the mortgage to U.S. Bank, and on November 10, 2009, U.S. Bank filed a petition to foreclose the mortgage. U.S. Bank later clarified that it was pursuing only its in rem remedies to foreclose the mortgage against the property and that it was not seeking a personal judgment against Georgia under the note. Georgia argued that she was not personally liable for the debt because she never signed the note and further that her husband’s estate was not liable under the note because U.S. Bank had failed to demand payment within the time prescribed under K.S.A. 59-2239(1) after her husband’s death. She also argued that U.S. Bank could not foreclose against the property under the mortgage because the note, held by U.S. Bank, and the mortgage, initially held by MERS and later assigned to U.S. Bank, had been irreparably severed.

Following a hearing, the district court found that even if there were no agency relationship between U.S. Bank and MERS such that the note and mortgage were severed, any severance was “cured” by MERS’s subsequent assignment of the mortgage to U.S. Bank, thereby permitting U.S. Bank to foreclose on the mortgage.

ISSUES: (1) Mortgage and (2) foreclosure

HELD: Court concluded that the plain language of the mortgage herein provided sufficient and undisputed evidence that MERS was acting as an agent of U.S. Bank at all relevant times. Because MERS was acting as an agent of U.S. Bank, the mortgage and the note were never severed and U.S. Bank, as present holder of both the note and the mortgage, was entitled to foreclose on the mortgage. Although the district court relied on different grounds in deciding the case, it reached the correct result and its decision will be upheld even if it relied upon the wrong ground or assigned erroneous reasons for its decision.

STATUTES: K.S.A. 59-2239(1); and K.S.A. 60-219(a)
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for summary judgment against Doris and ultimately were awarded a judgment of $321,242.49 against her. However, the district court granted summary judgment in favor of the other defendants because the children's claims were barred by the applicable statute of limitations or statute of repose.

ISSUES: (1) Probate, (2) breach of contract, (3) conversion, (4) statute of limitations, and (4) statute of repose

HELD: Court rejected the children's equitable estoppel argument that Lincoln Life had an obligation to speak and remained silent when Lincoln Life failed to provide Phillip with periodic reports and also failed to notify Phillip when Doris cashed in the annuity. Court stated that had Phillip received the quarterly reports during the life of the annuity, he would not have acted upon them by bringing the action any sooner. Court also stated that the Lincoln Life contract provided that any joint owner could exercise any ownership rights in the contract. Lincoln Life was entitled to summary judgment on the contract claims. Court also held Lincoln Life was entitled to summary judgment on the tort claims because they were outside the 10-year statute of repose and for the same reasons as the contract claims and that equitable estoppel did not bar the statute of repose. Court also rejected any equitable estoppel of claims against Breault and his firm for breach of fiduciary duty finding there was no evidence that Breault intended by his silence or inaction to deceive or mislead the children. Court denied the children's claims of continuous representation and fraudulent concealment against Breault and his firm.

STATUTE: K.S.A. 60-511, -513

UNIFORM COMMERCIAL CODE, KANSAS CONSUMER PROTECTION ACT, KANSAS PRODUCT LIABILITY ACT, AND DENTAL VENEERS

GOLDEN V. DEN-MAT CORP. ET AL

SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS

NO. 103,952 – MAY 4, 2012

FACTS: Brenda Golden purchased dental veneers – porcelain overlays meant to improve the appearance of teeth – that Defendant Den-Mat manufactured and marketed and Defendant Dr. Carissa M. Gill, a dentist, put in place. Golden contends the veneers became discolored and stained despite representations from Den-Mat and Dr. Gill that they would retain their appearance. So she sued them in Sedgwick County District Court on the grounds that Den-Mat and Dr. Gill engaged in deceptive acts or practices in violation of the KCPA; and (5) whether Den-Mat or Dr. Gill improperly attempted to limit those implied UCC warranties in violation of the KCPA. However, Court concluded the district court properly granted summary judgment on Golden's claim that any attempt to limit the UCC warranties amounted to an unconscionable act or practice under K.S.A. 50-627 in violation of the KCPA because such an attempt specifically violates K.S.A. 50-639 and is outside the scope of K.S.A. 50-627. Court stated that the judgment for Den-Mat and Dr. Gill is reversed, except as to Golden's claim based on an unconscionable act or practice violating K.S.A. 50-627(b)(7), and remedied for further proceedings, including trial. Golden may proceed with her claims for breach of express warranty, for breach of implied warranty of merchantability under K.S.A. 84-2-314, for breach of implied warranty of fitness for a particular purpose under K.S.A. 84-2-315, for deceptive acts and practices under K.S.A. 50-626, and for improper limitation of implied warranties under K.S.A. 50-639.


CRIMINAL

STATE V. BELLINGER

POTTAWATOMIE DISTRICT COURT – AFFIRMED

NO. 105,008 – JUNE 22, 2012

FACTS: On charges arising from heated argument and rifle shot in longstanding dispute between two brothers, jury convicted Bellinger of aggravated assault and criminal threat, and acquitted on all other charges. Bellinger appealed, claiming district court erred in denying request for instructions on self-defense and defense-of-property.

ISSUES: (1) Jury instruction on self-defense and (2) jury instruction on defense-of-property

HELD: K.S.A. 2010 Supp. 21-3213 is discussed and applied. No error in refusing to give self-defense instruction. Under facts of case, reasonable juror could not conclude Bellinger acted in justifiable self-defense. Instead, evidence suggests that all of Bellinger's actions were those of an aggressor. As in self-defense instruction, Bellinger's actions fall squarely within actions that bar an individual from claiming defense-of-property defense.

DISSENT (Atcheson, J.): Extensive dissent outlines additional facts and examines current law of self-defense, including material change in 2006 amendments to include a sweeping no-duty-to-retreat provision. Believes evidence viewed in its entirety and under proper standard required district court to instruct jury on self-defense in this case, and failure to do so denied Bellinger a fair trial. Would reverse Bellinger's convictions and remand for new trial.

STATUTES: K.S.A. 2010 Supp. 21-3211, -3211(a), -3211(b), -3213, -3214, -3214(b), -3220, -3221(a)(1), -3221(a)(1)(B), -3221(a)(1)(C), -3231(a)(2); K.S.A. 21-3211, -3301, -3401(a), -3408, -3410, -3410(a), -3414(a)(1)(A), -3419(a)(1); and K.S.A. 2006 Supp. 21-3211(c)
STATE V. COLEMAN  
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS  
NO. 105,199 – MAY 25, 2012

FACTS: On April 9, 2010, Coleman walked into a Dillon’s grocery store in Wichita and attempted to cash a check at the store’s customer service counter. The check was drawn on the account of Estes Enterprises (Estes) and made payable to Coleman for $640.37. Due to unusual features on the check, the Dillon’s employee working behind the counter had concerns about whether the check was legitimate. While talking with Coleman, Webb signaled to another employee to call 911. Wichita Police Department eventually arrived and arrested Coleman. Coleman told Police that he cleaned buildings for Estes and that the check was payment for his work. The State charged Coleman with two counts of forgery under K.S.A. 21-3710(a)(2) and (a)(3). The jury ultimately found Coleman guilty of both counts of forgery. The district court imposed concurrent prison sentences, which resulted in a controlling sentence of 21 months.

ISSUES: (1) Alternative means, (2) forgery, and (3) multiplicity

HELD: The court set forth several legal principles. Each act within the phrase “making, altering or endorsing” set forth in K.S.A. 21-3710(a)(1) represents the act of creating a fraudulent written instrument for the purpose of a first or subsequent negotiation and is intended by the legislature to be one means of committing forgery. Each act within the phrase “issuing or delivering” as set forth in K.S.A. 21-3710(a)(2) represents the act of transferring a fraudulent written instrument and is intended by the legislature to be one means of committing forgery. “Issuing or delivering” a written instrument knowing it to have been fraudulently “made, altered or endorsed” as set forth in K.S.A. 21-3710(a)(2) prohibits the act of transferring a written instrument knowing it to have been fraudulently created and constitutes one means of forgery. Possession, with intent to “issue or deliver,” of a written instrument knowing it to have been fraudulently “made, altered or endorsed” as set forth in K.S.A. 21-3710(a)(3) prohibits the act of possessing, with the intent to transfer, a written instrument knowing it to have been fraudulently created and constitutes one means of committing forgery. Court rejected all of Coleman’s alternative means arguments. However, court reversed Coleman’s conviction under K.S.A. 21-3710(a)(2) as multiplicitious. Court stated the facts presented at trial showed that Coleman’s possession of the check and his later delivery of the check to Dillon’s occurred during the same course of conduct. Court held there is no language to conclude that the legislature intended to permit multiple forgery convictions based on the exact same criminal conduct. And the rule of lenity applied and only one of Coleman’s convictions could stand.

CONCURRING IN PART AND DISSENTING IN PART: Judge McAnany agreed with the majority’s analysis on the multiplicity issue. Coleman’s possessing the fraudulent check and then transferring it to another were not separate crimes for which he could be convicted and punished twice. But Judge McAnany disagreed with the majority’s analysis of the alternative means issue and the contention that “making, altering, or endorsing” are all related to the creation of an instrument.

STATUTES: K.S.A. 21-3710; and K.S.A. 84-3-104, -105, -201, -204, -405, -407

STATE V. DOUGLAS  
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED  
NO. 105,236 – JUNE 15, 2012

FACTS: Douglas convicted in 1991. Sentencing court ordered costs to be paid, but did not specify amount. Court of Appeals affirmed the sentence in unpublished opinion, with issue of court costs not raised in that direct appeal. In 2010 Douglas filed motion seeking dismissal of court costs, which by then had been turned over to collection agency. Douglas claimed costs were no longer collectable because he was never provided itemized statement of costs pursuant to K.S.A. 22-3803, and because statute of limitations barred collection of court costs after three years. District court denied the motion. Douglas appealed.

ISSUES: (1) Itemization of court costs, (2) statute of limitations, and (3) dormancy

HELD: Record supports Douglas’ claim of not being provided an itemized statement of costs. K.S.A. 22-3803, however, is directory rather than mandatory in nature, and contains no provision for non-compliance. State’s failure to provide a complete statement of costs to Douglas does not make collection of court costs unenforceable.

K.S.A. 60-512 does not apply here. Imposition of court costs in a criminal case pursuant to K.S.A. 22-3801(a) constitutes a civil judgment for payment of money. This judgment is enforceable as any other civil judgment and carries with it the same protections and exemptions applicable to other civil judgments. It may be collected whenever a defendant has sufficient property to satisfy the judgment.

No Kansas case has squarely addressed issue of whether court costs in criminal cases can become dormant and extinguished under K.S.A. 60-2403(a). Cases addressing similar issue regarding restitution under K.S.A. 60-2403(d) are examined and compared. No provision in Kansas law excepts judgments for criminal court costs from the requirement that execution thereon must timely issue or dormant occurs. A judgment for court costs in a criminal case may become dormant and unenforceable just as other civil judgments. Dismissal of Douglas’ motion to dismiss costs is reversed. Case is
remanded to trial judge to determine whether judgment for court costs in this case became dormant and unenforceable under K.S.A. 60-2403(a).

STATUTES: K.S.A. 22-3801(a), -3803; K.S.A. 28-172a; K.S.A. 60-512, -2403, -2403(d), -2404; and K.S.A. 75-719(d)

STATE V. DUGAN
DOUGLAS DISTRICT COURT – REVERSED AND REMANDED
NO. 106,152 – MAY 4, 2012

FACTS: Dugan left scene after hitting stopped car. Police officer observed car believed to be Dugan’s and followed car to Dugan’s residence. Officer inserted foot to prevent automatic garage door from closing and confronted Dugan who appeared intoxicated, admitted awareness of the collision, performed poorly on standard field sobriety tests, and was arrested. Dugan charged with felony DUI, but charge later dropped to misdemeanor offense of leaving scene of noninjury accident. Dugan filed motion to suppress all evidence obtained after officer entered residential garage. District court denied the motion, and convicted Dugan on stipulated facts. Dugan appealed the denial of his motion to suppress.

ISSUE: Fourth Amendment

HELD: Strong discussion of Fourth Amendment rights and warrant exceptions. Factors in State v. Platten, 225 Kan. 764 (1979), for assessing exigent circumstances are considered and applied to facts of case. Under totality of circumstances, district court erred in denying motion to suppress. No exigent circumstances permitted warrantless entry into Dugan’s home. Officer did not engage in “hot pursuit” as that term embodies an exigency dispensing with Fourth Amendment warrant requirement. Even if such pursuit, facts do not outline the sort of immediacy and urgency that would excuse obtaining a warrant. Although probable cause had been well established, offense was comparatively minor. Inside his home, Dugan posed no danger to officers or others and presented no realistic threat of escape. Officer acted aggressively to achieve entry to residence as garage door closed, and did so not because of a genuine exigency but to avoid resorting to investigative methods that might be ineffective (getting Dugan’s consent) or time consuming (securing warrant from a judge). Also, where officer entered garage with no information or firsthand observation that Dugan had been drinking, the warrantless entry could not have been based on reasonable belief that evidence of intoxication would otherwise have been lost.

STATUTES: K.S.A. 8-1567, -1602, -1603; K.S.A. 21-3808(a), -4516; and K.S.A. 22-2302(1), -2401(c)(2)(A), -2402(1)

STATE V. GRAVES
JOHNSON DISTRICT COURT – AFFIRMED

FACTS: Graves pled guilty to criminal threat, sentenced for 93 days spent on bond while a resident in Johnson County Community Corrections Residential Center prior to sentencing. District court denied the request. Graves appealed.

ISSUE: Jail credit for time in community corrections facility

HELD: Cases interpreting K.S.A. 21-4614 examined, including State v. Guzman, 279 Kan. 812 (2005), which is dispositive in this case. A defendant released on an appearance bond while awaiting disposition of a criminal case may not receive jail time credit under K.S.A. 21-4614 for time spent in a community correctional residential services program. K.S.A. 21-4614 and K.S.A. 21-4614a reflect legislative intent to treat predisposition and post-disposition jail time credit differently.

STATUTES: K.S.A. 21-3419, -3409(b)(1), -3435, -4113, -4614, -4614a, -4614a(a); and K.S.A. 33-16,135

STATE V. JONES
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 105,169 – MAY 5, 2012

FACTS: Jones convicted of dealing in pirated recordings of recently released movies. District judge placed Jones on probation, and left issue of restitution open for 30 days to allow for agreement on amount or further hearing. Final restitution order entered two months later. On appeal, Jones argued he was not allowed to argue in closing argument that he was not aware of the law and thus did not know the DVDs were illegally produced. State asserted this issue was raised for first time on appeal. Jones also claimed on appeal that a jury instruction directed a verdict on knowledge element of K.S.A. 21-3749(a), and claimed he was denied a fair trial by prosecutor injecting a nonissue of domestic violence for which there was no evidentiary basis. Jones also claimed he was denied a unanimous jury verdict because state failed to present evidence to support each alternative means of committing crime of piracy of recordings under K.S.A. 21-3748, and claimed cumulative error denied him a fair trial. Finally, Jones claimed district court lacked jurisdiction to enter restitution after date of sentencing, or alternatively, lost jurisdiction to order restitution 30 days after sentencing.

ISSUES: (1) Appellate jurisdiction, (2) right to present defense, (3) jury instructions, (4) prosecutorial misconduct, (5) alternative means, (6) cumulative error, and (7) restitution

HELD: Close call, but court concludes issue preserved for appeal by counsel’s rambling and confusing colloquy with court at instruction conference.

Even if court’s comments can be construed as limiting Jones’ ability to address element of knowledge in his closing argument, any error was harmless under facts of case.

Challenged instruction accurately stated the law and did not obviate state’s need to establish knowledge element of K.S.A. 21-3749(a). Nor did the instruction invade jury’s role as factfinder.

Jones failed to make timely and specific objection to prosecutor’s attempt to discredit witness testimony by inquiring into domestic violence. Even if issue had been preserved, outcome of trial was not affected by this isolated but improper inquiry.

Jones was charged, instructed, and convicted of dealing in pirated recordings in violation of K.S.A. 21-3749(a). Because jury was instructed as to one means of dealing in pirated records, there is no doubt that jury’s verdict was unanimous.

Two harmless errors at most in case. Given overwhelming evidence against him, Jones not entitled to relief under cumulative error doctrine.

Following Kansas Supreme Court precedent, no merit to claims of error in restitution.

CONCURRENCE (Atcheson, J.): Agrees no grounds require reversal of Jones’ conviction, but addresses two points. First, majority interpreted K.S.A. 21-3749 more favorably to Jones than statutory language requires. Would argue Jones had no legal basis to argue that his ignorance of the law or his failure to appreciate illegality of his conduct amounted to a defense, thus no legal detriment suffered by closing argument permitted by the court. Second, majority glosses over seriousness of prosecutor’s misconduct that was deliberate and flagrant in deploying calculated line of questions to discredit witness where there was no factual basis that the witness had been domestic abuse victim.

STATUTES: K.S.A. 21-3202(1), -3203(1), -3748, -3749, -3749(a), -4303(a); K.S.A. 22-3421; and K.S.A. 60-421

STATE V. RICKERSON
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
NO. 105,863 – MAY 18, 2012

FACTS: Rickerson arrested for DUI and not allowed to post bond for six hours pursuant to a 1999 administrative policy adopted
by Johnson County District Court, readopted in 2006, mandating a six-hour hold on all defendants arrested for DUI. State charged Rickerson with DUI and two other traffic charges. Magistrate judge granted Rickerson’s motion to dismiss all charges. State appealed. District court conducted evidentiary hearing, finding dismissal was not warranted because officers were following district court’s administrative detention order, and because Rickerson did not lose an opportunity to prepare a defense. Rickerson appealed from his conviction in bench trial on stipulated facts.

ISSUE: Mandatory-minimum detention and Kansas Constitution Bill of Rights

HELD: Applying State v. Cruchoy, 270 Kan. 763 (2001), no dispute that district court’s administrative policy violated § 9 of Kansas Constitution Bill of Rights because it did not require an individualized determination as to whether the driver was a danger to him/her self or others if released on bond. Under facts in case, as in Cruchoy, dismissal is an appropriate sanction for institutional noncompliance and systematic disregard of the law. District court is reversed. Case is remanded with instructions to vacate Rickerson’s conviction and dismiss the DUI charge. Also, dismissal of case against Rickerson as sanction should have no deterrent effect on any jurisdictions that have chosen either knowingly or negligently to disregard Supreme Court jurisprudence.


STATE V. TETER
RENO DISTRICT COURT – AFFIRMED
NO. 105,495 – MAY 11, 2012

FACTS: In 2008, Reno County Sheriff’s Deputy Rick Newton was assigned the task of visiting pharmacies in Reno County and examining the purchase logs they are required to keep by law. Newton’s investigation uncovered the fact that Teter had purchased 322 tablets of pseudoephedrine-based medication during a 24-day period in January 2008. Teter was charged with unlawful acquisition of pseudoephedrine, a Class A misdemeanor, by purchasing more than 9 grams of pseudoephedrine base within a 30-day period. Teter was found guilty following a bench trial before a district magistrate judge, and he appealed to the district court. Teter filed a motion to dismiss before the district court, arguing that K.S.A. 2007 Supp. 65-7006(d) is unconstitutionally vague because the average citizen would not know how much pseudoephedrine base or ephedrine base was contained in cold or allergy medication sold in conventional blister packaging. Teter also argued that the statute is constitutionally overbroad because it criminalizes potentially legitimate activity. The district court then found that an adequate foundation had been laid for the conversion factor of determining the amount of pure anhydrous pseudoephedrine in the drugs purchased and that the purchase records were reliable evidence that Teter had made the purchases. The district court found Teter guilty as charged and sentenced him to 12 months in the county jail with probation.

ISSUES: (1) Drug statutes, (2) vague, (3) overbroad, and (4) due process

HELD: Court found it is clear that the legislative intent of K.S.A. 2007 Supp. 65-7006 is to prevent the manufacture of controlled substances, particularly methamphetamine, which is clearly a legitimate goal. To advance that goal, the Kansas legislature chose to limit the availability of pseudoephedrine and ephedrine, which are precursor drugs essential to the manufacture of methamphetamine. Court held the acquisition limitations put in place by the Kansas legislature in K.S.A. 2007 Supp. 65-7006(d) promote the legitimate goal of preventing the manufacture of methamphetamine in Kansas. Teter made no attempt to challenge this contention. The acquisition limits set forth in the statute are rationally related to this goal and do not substantially intrude upon an individual’s right to purchase pseudoephedrine-based medication for legitimate personal use. Court concluded the statute does not unconstitutionally violate due process.


STATE V. WEIS
SALINE DISTRICT COURT – AFFIRMED
NO. 104,295 – JUNE 15, 2012

FACTS: Weis charged with aggravated battery against three men in a single confrontation that left one man paralyzed from knife wound. Jury found Weis guilty of lesser offenses of reckless aggravated battery against two men, and acquitted on charges involving the third man. Jury also found Weis guilty of criminal use of weapon. Sentencing included offender registration requirement. Weis appealed claiming: (1) trial court erred in admitting evidence under K.S.A. 60-455 that Weis had slapped girlfriend prior to the armed confrontation; (2) trial court erred in wording K.S.A. 60-455 limiting instruction, and in omitting the no-duty-to-retreat language in the self-defense instruction; (3) there was no substantial evidence that he was the person who used or possessed a knife; (4) trial court’s finding that Weis used a deadly weapon in commission of reckless aggravated battery, for purpose of requiring registration under Kansas Offender Registration Act, violated Weis’ constitutional rights under Blakely and Apprendi; and (5) cumulative error denied him a fair trial.

ISSUES: (1) Admission of K.S.A. 60-455 evidence, (2) jury instructions, (3) sufficiency of the evidence, (4) offender registration, and (5) cumulative error

HELD: Under facts of case, the K.S.A. 60-455 evidence was highly disputed, was material to Weis’ claim of self-defense, and was probative without unfair prejudice. Under unique facts of case, trial court properly limited the jury’s consideration of the K.S.A. 60-455 evidence. Omission of the no-duty-to-retreat language did not come into play because self-defense did not apply to any of the conviction offenses. Evidence of case viewed in light most favorable to the prosecution was sufficient for rational factfinder to find Weis guilty beyond reasonable doubt of both crimes of conviction.

Trial court’s finding that Weis used a deadly weapon in committing reckless aggravated battery did not violate Blakely and Apprendi. Same legal argument regarding registration requirements recently rejected in State v. Unrein, 47 Kan. App. 2d 366 (2012). No error supports claim of cumulative error.

DISSENT (Green, J.): Dissents from majority’s holding that trial court properly admitted evidence of an uncharged slapping incident between Weis and his girlfriend. Evidence of slapping was irrelevant to the charged crimes, was not relevant to prove a material fact under K.S.A. 60-455, was inadmissible to show motive, prejudicial effect of the evidence substantially outweighed any probative value, and error in admitting this evidence was not harmless under facts of case. Also dissents from majority’s holding that omission of no-duty-to-retreat language from self-defense instruction did not deny Weis a fair trial. Under facts of case, there is a real possibility the jury would have ruled a different way had it been properly instructed. Would reverse the convictions and remand for a new trial.

STATUTES: K.S.A. 2010 Supp. 22-4902(a)(7), -4904(e); K.S.A. 21-3414, -4201(a)(1); K.S.A. 22-3414(3), -4901 et seq., -4903; and K.S.A. 60-261, -455, -455(a), -455(b)
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