The Evolution of Commercial Mediation in the Midwest: Best Practices, Confidentiality and Good Faith
WHO’S WATCHING YOUR FIRM’S 401(k)?

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The American Bar Association Members/State Street Collective Trust (the “Collective Trust”) has filed a registration statement (including the prospectus therein [the “Prospectus”]) with the Securities and Exchange Commission for the offering of Units representing pro rata beneficial interests in the collective investment funds established under the Collective Trust. The Collective Trust is a retirement program sponsored by the ABA Retirement Funds in which lawyers and law firms who are members or associates of the American Bar Association, most state and local bar associations and their employees and employees of certain organizations related to the practice of law are eligible to participate. Copies of the Prospectus may be obtained by calling (877) 947-2272, by visiting the Web site of the American Bar Association Retirement Funds Program at www.abaretirement.com or by writing to ABA Retirement Funds, P.O. Box 5142, Boston, MA 02206-5142. This communication shall not constitute an offer to sell or the solicitation of an offer to buy, or a request of the recipient to indicate an interest in, Units of the Collective Trust, and is not a recommendation with respect to any of the collective investment funds established under the Collective Trust. Nor shall there be any sale of the Units of the Collective Trust in any state or other jurisdiction in which such offer, solicitation or sale would be unlawful prior to the registration or qualification under the securities laws of any such state or other jurisdiction. The Program is available through the Kansas Bar Association as a member benefit. However, this does not constitute an offer to purchase, and is in no way a recommendation with respect to, any security that is available through the Program.
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Notice: The counties comprising District 9 of the Kansas Bar Association Board of Governors were listed incorrectly in the November/December issue of The Journal of the Kansas Bar Association. Please see page 10 for corrected listing. We apologize for any inconvenience.
**WHY IS THE LRS GOOD FOR BUSINESS?**

“I participated in the KBA Lawyer Referral Service for much of the nearly 20 years that I practiced in Dodge City. During the time I was involved with the LRS, I also advertised intensively in the local telephone directory. Although paid advertising and LRS referrals both generated a substantial volume of inquiries from potential new clients, I found that LRS-generated clients tended to bring more ‘solid’ legal matters and were more reliable than those who initially responded to phone book advertising.”

“The effectiveness in my experience of LRS referrals is demonstrated by my having sent a check to LRS for its 10 percent referral fee of nearly $54,000.”

- Henry Goertz, Goertz Law Office, Dodge City

Your trusted legal source.
Chief Justice
Robert E. Davis
Welcomes and
Thanks Kansas
Legal Services
Awardees

The cover photograph is a representation of a mediation.
Participants are (l-r) Alex Boyer, Lawrence; Rebekah Romm, Topeka; Alan V. Johnson, Sloan, Eisenbarth, Glassman, McEntire & Jarboe LLC, Topeka; Larry R. Rute, Associates in Disputes Resolution LLC, Topeka; Melissa L. Ness, Connections Unlimited Inc., Topeka; and Dawn Dawson, Associates in Disputes Resolution LLC, Topeka.

Cover photograph and design by Ryan Purcell.
lawyers craft resolutions all the time. Corporate lawyers draft resolutions to shape the policies of their corporate clients. Lawyers in the Legislature pass resolutions about varied subjects. Judges and lawyers work hard to bring about the resolution of disputes in court proceedings. I would bet, though, that the most common resolutions lawyers make, occur around the new year, so for this January column, I thought musing about New Year’s resolutions seemed appropriate.

I was thinking about my normal promises: eat less, get fit, stop and smell more roses, and spend better quality time with my friends and family. But I wondered whether there was something else I should be thinking about, so I looked up the word “resolution” in the dictionary and found that one definition is the act of breaking down a complex idea into simpler ones.

This prompted me to think about some complex issues facing the legal profession today, and it didn’t take too long before I came up with one where I could help and so can you: Providing legal representation to all who need meaningful access to justice.

Kansas Legal Services (KLS), public defender offices, and other similar organizations are all underfunded and understaffed. Convincing the legislative branch, both federal and state, that more money should be appropriated to defend those accused of crimes or for other financially disadvantaged people seeking counsel is always a challenge. Yet in Gideon v. Wainwright 372 U.S. 335, the U.S. Supreme Court recognized the necessity of providing legal services to those whose liberty was being threatened, a principle which holds truer than ever almost 50 years later.

The concept of “civil Gideon” is a fairly recent development that appears to be gaining momentum around the country. If you are unfamiliar with this term, it is the idea that certain civil cases are so important that society owes an obligation to provide counsel for litigants who can’t afford an attorney. For example, there may be child custody, eviction, or other high-stakes litigation where the potential impact on the party demands a level playing field. While this concept is noble, important, and something most of us would not dispute, it faces the challenging resource problems.

By now I am sure you know where I am headed. I would like to encourage all KBA members to adopt a special resolution this year. Simply put, would you resolve to do one meaningful pro bono project?

Fulfilling this resolution could be as easy as you wish: simply think about what you can contribute and do it. Every fulfilled commitment aids the goal of providing adequate legal representation to those who need but can’t afford our unique, special and necessary services.

Perhaps the best and most obvious way to contribute is to handle a matter on a pro bono basis. While there is an opportunity cost in spending “billable” time on a pro bono matter, there is little or no out-of-pocket expense. Not only will you learn from and feel good about your experience, but the rest of the bar and the bench will appreciate your efforts. Some of my most rewarding cases were ones I handled pro bono.

You don’t have to be a litigator to help. The KBA’s Project Call-Up has been providing estate planning and other services to members of the armed forces for several years. Transactional lawyers can provide incorporation and other legal services to nonprofits. The KBA will match lawyers seeking to provide free legal services with those groups that need help.

Creativity in providing legal services can also pay extra dividends. My former law partner, Gene Balloun, found a way to help children and parents. For years, Gene and other lawyers in his firm have provided pro bono services for parents adopting foster children. (In October, I wrote about the beauty of naturalization ceremonies in federal court. In state court, an equivalent may be adoption proceedings. They are joyous and happy occasions, which seal the legal bond between parents and children. I encourage you to represent adoptive parents.)

The beauty of the plan is that the State of Kansas reimburses legal fees, which Gene and Shook Hardy & Bacon donate to provide college scholarships for foster children. They have provided more than 150 scholarships worth more than $220,000. Gene would be delighted to help you start a similar program.

Another simple and easy way to help is by contributing money to the Kansas Bar Foundation (KBF), KLS, or other organizations that help provide access to justice. Because of my position with the court (which prevents me from taking cases pro bono), I am writing checks to both the KBF and KLS. While perhaps not as personally or professionally rewarding as providing legal services, I know that the money is desperately needed and will aid our struggle to provide access to justice to those who are in dire financial situations.

Will you join me in resolving to contribute? ■

Tim O’Brien may be reached by e-mail at tobrien@ksbar.org, by phone at (913) 551-5760, or post a note on our Facebook page at www.facebook.com/ksbar.
like many of my fellow law school friends and colleagues, I did not marry a high school sweetheart or a college boyfriend. Instead, I waited until law school to meet Mr. Right. Plenty of other lawyers I know found their significant others after law school graduation amongst other practicing lawyers. Which means … lawyers are marrying lawyers. This is hardly news and in fact, has been happening for quite some time. But inherent in this fact is the issue that conflicts will arise. Ethical rules will sometimes need to be considered.*

The Model Rules of Professional Conduct state, in pertinent part:

**Rule 1.7 Conflict of Interest: Current Clients**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involved a concurrent conflict of interest.

Rule 1.7 later states in the comments, paragraph 11, “When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer’s family relationship will interfere with both loyalty and independent professional judgment … The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.”

**Rule 1.10 Imputation of Conflicts of Interest: General Rule**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

A variety of conflicts may arise when two married lawyers work in private practice and represent clients in litigation, business transactions or any other potentially adverse scenario. My husband and I have developed a loose set of rules that while not perfect, do allow us the ability to continue work in the private practice with potentially little to no conflicts of interests cropping up.

(1) General knowledge of each other’s clients. While I certainly do not know the names of all of my husband’s or his firm’s clients, I know generally who his firm represents. When I evaluate a new client’s case, I immediately consider whether the case might be adverse to a client represented by his firm. If I know for a fact the client’s interests are adverse to a client represented by my husband’s firm, I refer the potential client down the road (first to someone in house, then to an outside attorney). If I think it is possible that the client’s interests are adverse, then I keep my knowledge of the case limited to figuring out who the potential adverse parties are. I only open the file and send letters of retention after I am fairly certain that my husband’s firm will not represent the opposing party.

(2) No work on ANY FILE where spouse’s firm represents a party is on the other side of the “V,” at least until you confirm that your spouse is not involved. No exceptions. If your spouse represents a client as a plaintiff, as defense counsel you cannot touch the file. That doesn’t mean you can research a legal question and then just not appear at a court hearing on the case. It means no work on this file, PERIOD. In some instances, you may want to notify the client of your work on the file and the potential conflict and possibly even obtain a written waiver/consent to the conflict. The important thing is that if you and your spouse’s offices are directly adverse, practically speaking both spouses should avoid working on it and never can both spouses work on the file.

(3) Careful work on any file/transaction/lawsuit where spouse’s firm is on the same side of the “V.” My husband and I both practice at traditionally defense firms. Sometimes there’s more than one defendant and sometimes those defendants point the finger at each other. When a file comes in and my husband’s firm is listed as a co-defendant, I review the file closely with another attorney in my office to determine the likelihood of the two defendants placing blame. Once it appears that the defenses to the suit are joint defenses and that the parties will have a unified front against a plaintiff’s claims, only one spouse should work on this file.

(4) Know the open cases where your spouse’s firm is involved. Ask whoever in your office that manages conflicts of interest to provide you an updated list of all cases where your spouse’s firm is involved. Then, if another lawyer in your office asks you to work on the file, you can determine whether the case falls under “2” or “3” and you can decide whether a conflict exists between the parties.

(5) Referrals to spouse. If you are lucky, you and your spouse will have ZERO conflicts. In fact, you may practice in inherently different spheres with no conflicts ever arising. If husband is an estate planner and wife is a personal injury lawyer, the conflicts are few and far

(Continued on Page 16)
As I begin my 50th year I am still intrigued about whether the technological advances that invade the practice of law are a blessing or a curse. At the time I was in law school they were introducing useful tools, such as Westlaw and Lexis to aid in research. As I entered the law practice, I first began to wonder whether these were good things. They required a cash outlay to speed up a process to assist a client who my firm was billing hourly. When the client’s billing guidelines suggested they would not pay for computerized research but would pay for our hours I wondered what was wrong with the old way. I have never been an accomplished researcher and the free use of Casemaker from the Kansas Bar Association (KBA) has enabled me to plod along without incurring huge time charges for my clients. That feature and the work of our very smart young attorneys keeps my research on the cutting edge.

My practice involves travel to all four corners of Kansas and the blessings of a GPS devise are clear. The days of calling doctor’s offices in remote areas for directions or secretaries of lawyers for directions to an office are gone. That information is now readily available on my telephone and it is certainly a blessing.

Time is a lawyer’s greatest commodity. When my children started using Facebook I vowed I would never get involved. I was sure I did not want to know everyone’s daily routine or thoughts. However, I fell into the trap. I have never been brave enough to tell a good client who sends me a Facebook request that I “decline” to be their friend. The panic that ensues when I get a “do you want to be my friend” request from someone I do not recognize is very real. Am I slipping? Is this someone I should know? Was it sent to me in error? Will I offend someone by rejection?

Just what is a Facebook friend? I know what my obligations are to real-life friends. What are the obligations I have to a digital friendship? I do not even know how to get out of it once I say yes. Of course, once you step over the abyss there is no end in sight. Requests pour in from Myspace, Facebook, Twitter, YouTube, LinkedIn, and many other sites purporting to involve business and/or social settings.

The KBA now has a Facebook page. I certainly see the merit in being able to communicate with other professionals on areas of interest and I am not dismissing the upside. I do believe that all old adages have some truth to them and perhaps I am best described as an old dog who cannot be taught new tricks. The way the younger members of my firm use the technology is awesome and frightening at the same time.

On a more serious side, there are certainly legal and ethical implications to social networking. We all overcome the privacy issues with the use of e-mail and we are now delving into discovery issues and ethical issues on discovery by getting into parties’ social networking pages. With e-mail, I consider the reply all button to be the bane of everyone’s existence. If one of our clients posts legal advise on a social networking site is the entire privilege waived? Can one party seek out another parties social networking information? Certainly they cannot do so at the direction of counsel. A recent advisory opinion in Pennsylvania concluded that utilizing a third party to contact a witness through a “friend” request on Facebook and using the information contained on that Facebook profile is deceptive and a violation of the Pennsylvania rules of professional conduct. I believe that same result would be present in Kansas. But open and above board requests for continued requests of all Facebook postings and the request to the court to prevent deletion of the same would seem to be above board and legally permissible.

I guess the lesson we all must take to heart is that change is inevitable. We have got to learn to keep up or get out of the way. The trick seems to be to avoid the prospect of the escalation of these tools to the point they consume our lives.

About the Author


The Journal of the Kansas Bar Association

January 2010

www.ksbar.org
Chief Justice Robert E. Davis Welcomes and Thanks Kansas Legal Services Awardees

In July, the Legal Services Corp. board of directors held their meeting in Topeka. This group funds Kansas Legal Services and other groups that provide civil legal services to low income persons. They were welcomed to Kansas by a reception at the Brown v. Board National Historic Site. The reception was hosted by Kansas Legal Services Inc. and the Kansas Bar Foundation. Chief Justice Robert E. Davis welcomed this group to Kansas. His address was directed to both the funders of civil legal services and the dedicated staff of Kansas Legal Services who are directly involved in providing access to the justice system for many.

Chief Justice Robert Davis’ address: Thank you! During the last several days as I was reflecting on my remarks for this evening and on the invaluable services you provide to the people of our state and nation, I was reminded of the words of Ralph Waldo Emerson. In the final stanza of his poem, “A Nation’s Strength,” Emerson describes the people who make our American dream possible. He writes: “Brave men [and women] who work while others sleep, Who dare while others fly...They build a nation’s pillars deep and lift them to the sky.”

We are here this evening to celebrate the 35th anniversary of the signing of the Legal Services Corporation Act in 1974. Your achievements over the years have deepened our nation’s pillars of justice and lifted the hopes and hearts of those whose voice might not otherwise be heard in our legal system.

The Brown v. Board of Education National Historic Site is an appropriate place for us to gather to celebrate the work of Kansas Legal Services, as well as the 35th anniversary of the act establishing the national Legal Services Commission. I understand that we have with us this evening several members of that distinguished national organization. I welcome you to Kansas, and a special welcome to He laine Barnett, national president of LSC, Frank Strickland, chairman, LSC board. (Note: Appointed by the president and confirmed by the Senate.)

I extend to you my deep gratitude for all you have done and continue to do for the powerless in our society.

This important civil rights landmark illustrated the impact that civil court decisions can have on people’s lives throughout our country, even people whom society has written off as faceless and unimportant. This is a fitting place for us to celebrate the rule of law and your efforts to provide access to justice to those men, women, children, and families who, without you, would be denied such access.

Clients of Kansas Legal Services are given the opportunity to have their disputes resolved through the judicial process, and, if necessary, to have their day in court. The individuals you serve are people whom our world tends to view as faceless-voiceless-helpless. A segment of our society say they are “victims of circumstance.” They say, “We are sorry for them and their problems, but we do not have the time or resources to help” and ignore them.

But you, you are the conscience of our great society. You are the professionals who do not look away, who do not forget that those being served are human beings with faces and names, with life stories and life needs. You meet these people every day with a promise that they will have access to justice.

Last year, the 13 offices of Kansas Legal Services provided legal advice or representation to more than 20,000 individuals. The efforts of the organization’s 41 attorneys and their staff, as well as the numerous other lawyers across Kansas who volunteer their services, make this possible.

Whether or not you are aware of it in your day-to-day lives, the practical effect of your dedication is to say to these women, men, and children:

YOU are not faceless. We care about your life and your problems.
YOU are not voiceless. You have a voice, and we hear you calling.
YOU are not powerless. We are here to help you.

Our system of justice depends on the energy, courage, and sacrifice of people like you to make our nation strong. As Emerson noted in his poem, our state and nation need you, because you dare to act when others turn away; you provide access to justice to those whom would otherwise be ignored.

And so, as you reflect on your achievements and challenges this evening, I ask you to keep in mind our surroundings at this historic location. Standing here before you, I am touched by the words of one of the great leaders of our nation’s civil rights movement.

Robert Kennedy once said: “Each time [a person] stands up for an ideal or acts to improve the lot of others or strikes out against injustice, [that person] sends forth a tiny ripple of hope.” Never forget that through your efforts each and every day, you provide hope to many who would otherwise have none. For that, we are all immensely proud and grateful. Thank you.

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Advance Notice
Elections for 2010
KBA Officers
and
Board of Governors

It’s not too early to start thinking about KBA leadership positions for the 2010-11 leadership year.

OFFICERS

KBA President-elect: (Current – Glenn R. Braun, Hays)
KBA Vice President: (Current – Rachael K. Pirner, Wichita)
KBA Secretary-Treasurer: (Current – Gabrielle M. Thompson, Manhattan)
KBA Delegate to ABA House: Linda S. Parks is eligible for re-election.

The KBA Nominating Committee, chaired by Thomas E. Wright, Topeka, is seeking individuals who are interested in serving in the positions of President-elect, Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates. If you are interested, or know someone who should be considered, please send detailed information to Jeffrey Alderman, KBA Executive Director, 1200 SW Harrison St., Topeka, KS 66612-1806, by Friday, Jan. 15, 2010. This information will be distributed to the Nominating Committee prior to its meeting on Friday, Jan. 29, 2010. In accordance with Article V, Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for the above positions may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

BOARD OF GOVERNORS

There will be four positions on the KBA Board of Governors up for election in 2010. Candidates seeking a position on the Board must file a nominating petition, signed by at least 25 KBA members from that district, by Friday, March 5, 2010. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for any open position(s). KBA districts open for election in 2010 are:

• District 1: Incumbent Kip A. Kubin is eligible for re-election. Johnson County.


• District 7: Incumbent Laura L. Ice is not eligible for re-election. Sedgwick County.


For more information
To obtain a petition for the Board of Governors, please contact Kelsey Hendricks at the KBA office at (785) 234-5696 or via e-mail at khendricks@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Thomas E. Wright at (785) 271-3166 or via e-mail at twright21@cox.net or Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
The KBA Awards Committee is seeking nominations for award recipients for the 2010 KBA Awards. These awards will be presented at the Joint Judicial Conference and KBA Annual Meeting from June 9-11, in Wichita. Below is an explanation of each award, and a nomination form can be found on Page 12. The Awards Committee, chaired by Hon. Michael B. Buser, Topeka, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee's attention! Deadline for nominations is Friday, March 5.

**Distinguished Service Award:** This award recognizes an individual for continuous long-standing service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

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

- The recipient need not be a member of the legal profession or related to it, but the recipient's service may include responsibility and honor within the legal profession.
- The award is only given in those years when it is determined that there is a worthy recipient.

**Professionalism Award:** This award recognizes an individual who has practiced law for 10 or more years who, by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession.

**Outstanding Young Lawyer:** This award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

**Outstanding Service Awards:** These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

- A total of six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.
- Outstanding Service Awards may be given in recognition of law-related projects involving significant contributions of time; • Committee or section work for the KBA substantially exceeding that normally expected of a committee or section member; • Work by a public official that significantly advances the goals of the legal profession or the KBA; and/or • Service to the legal profession and the KBA over an extended period of time.

**Pro Bono Award:** This 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. In addition to the Pro Bono Award, the KBA 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 services 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.

**Distinguished Government Service Award:** This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a worthy recipient.

**Courageous Attorney Award:** This award recognizes a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. Examples of recipients of this type of award in other jurisdictions include a small town lawyer who defended a politically unpopular defendant and lost most of his livelihood for the next 20 years, an African-American criminal defense attorney who defended two members of the white supremacist movement, and a small town judge who lost his position because he refused the town council’s request to meet monetary quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient.

**Diversity Award:** This 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, which include the following criteria:

(continued on next page)
• A consistent 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 within 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;
• Consideration and adoption of plans to continue to improve diversity within the law firm or organization, whereas;
• Diversity shall be defined as differences of gender, skin color, religion, human perspective, as well as disablement. The award will be given only in those years when it is determined there is a worthy recipient.

KBA Awards Nomination Form

Nominee’s Name ____________________________

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed.

- Phil Lewis Medal of Distinction
- Outstanding Service Award
- Outstanding Young Lawyer Award
- Distinguished Government Service Award
- Distinguished Service Award
- Diversity Award
- Professionalism Award
- Pro Bono Award/Certificates
- Courageous Attorney Award

______________________________

______________________________

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Nominator’s Name ____________________________

Address ____________________________

Phone ____________________________ E-mail ____________________________

Return Nomination Form by Friday, March 5, 2010, to:

KBA Awards Committee
1200 SW Harrison St.
Topeka, KS 66612-1806
The Diversity Corner

Making the Solo Firm ADA Compliant

By Kelly Lynn Anders

From the Editor: “The Diversity Corner” is a column dedicated to answering questions KBA members may have about diversity in the work place.

Question:

Dear Kelly,

I am a solo practitioner, and my office is located in my home. It’s a beautiful, well-maintained Victorian in a quiet, established neighborhood. I’ve decorated my office in a traditional style — lots of wood, an Oriental rug, and furniture that looks like it belongs in a stately law office — and I keep it separate from areas in the home where my family and I relax and “live.” Since I specialize in issues related to personal concerns families may have, such as divorce and estate planning, I find that this sort of environment is very comforting to my clients, and I routinely receive compliments about how welcoming it is. However, this is not always the case. Recently, a potential client was very upset with me because my office is not ADA compliant. She uses a cane and is sight-impaired, and she and her granddaughter stopped by my office for an impromptu visit, not realizing that there are several steps to the front door. The granddaughter and I helped her inside, but it was very awkward. With the current state of the economy, I cannot afford to open an office away from home, or make the necessary adjustments to make my home ADA compliant, but I recognize the importance of being sensitive to the needs of clients with disabilities. What do you suggest?

Solo, Esq.

Answer:

Dear Solo,

Although this was clearly uncomfortable for everyone involved, it sounds like it could have been avoided with communication and forethought. My first suggestion is to ensure that all current and prospective clients are aware of the limited accessibility of your home office to those with disabilities. Mention the structure of your office to every client, and ask whether they might prefer to have meetings in another venue. If cost is a factor when considering leasing office space away from home, you might check into the possibility of either sharing space or “borrowing” a conference room from a colleague who is working in an office space. Public locations, such as restaurants and coffeehouses, might also be useful alternatives, provided you are not discussing information that needs to remain confidential. Please also note that public venues can be noisy, and you may be expected to purchase food or beverages to keep your spot.

Your office sounds very inviting, and there are ways to increase the accessibility of your home without breaking the bank. Although there are steps leading into your home, it may be possible to purchase a portable ramp that can be used when necessary. Rearrange furniture so that pathways can accommodate wheelchairs. Ensure that there is lighting that can be enhanced or dimmed. You can also increase the font sizes in documents so that they are easier to read, and you may also want to contact your telephone carrier to determine the cost of investing in a TDD machine. Office supply stores carry inexpensive pens that are ergonomically friendly, and you might also consider investing in a brochure that lists your services in Braille. Finally, one of the simplest and least expensive suggestions is to ensure that clutter is removed from the floor so that guests don’t stumble over the stacks, regardless of any disabilities.

Call with Questions

The Diversity Corner seeks questions about diversity issues for future columns. Names will be withheld by request. Please forward questions to: Lisa Montgomery, Member Services Director, Kansas Bar Association, 1200 SW Harrison St., Topeka, KS 66612, or send an e-mail to lmontgomery@ksbar.org.

About the Author

Kelly Lynn Anders, associate dean for Student Affairs at Washburn University School of Law, is the 2009-10 chair of the KBA Diversity Committee and author of “The Organized Lawyer” (Carolina Academic Press, 2009).
Baby Boomers Rule!

By Anne McDonald, Kansas Lawyers Assistance Program, executive director

So what’s new about that, you say? In fact, we’re all pretty tired of even hearing about Baby Boomers, unless we are one, in which case we find ourselves fascinating. And we’ve already heard that boomers are getting older and what an impact that will make on Medicare and Social Security in a few short years. But did you know there was a specific task force that focused on aging within the legal profession?1

They came to a number of conclusions:

• The number of lawyers 65 and older is expected to double in the next five years;2
• Although most people 65 and older are in good health and fully functional, many will develop age-related impairments, physical, or mental;3
• We need ways to assist those who are no longer able to withdraw from the active practice of law with dignity;
• Even those who do not have major impairments may eventually wish to retire and the sooner they prepare for not only the financial but also the emotional effects, the better off they will be.

“Lawyers at Midlife”4 was written by staff at the Oregon Lawyer Assistance Office to map out a path to a secure and satisfying retirement and two of the key messages of the book are “start now” and “plan for emotional fulfillment as much as financial security.”

The book has detailed documents to help with planning the financial part. But it also has stories about Bill, who had given up a love of planes and piloting to practice law and who, after retirement, went back to flying. And John, who joined the Peace Corps and is now helping develop low-income housing — he says he’s not retired, just on a sabbatical since 1996. And Jane, who wanted to leave full-time practice but stay connected to the law so she began to mentor young attorneys and do more pro bono work. Some lawyers make the transition into a completely different area, often one that represented a dream deferred, while others take an of counsel position and limit the number of cases they accept.

It takes a person with a strong personality to be a lawyer and for many of us, becoming a lawyer has become our primary identity and source of validation. If we let it, the practice of law can consume pretty much every waking hour and crowd out relationships, hobbies, and activities that broaden and enrich our life. So what happens when a lawyer like that has a stroke and either can’t practice at all or must greatly curtail her case load? In addition to struggling with possible residual physical effects of the stroke, and financial effects of a scaled back practice, they have suddenly also lost their main source of personal well being, status, and role in their community. It is a major blow. It would be less of a blow if they already had strong relationships and diverse interests that they had nurtured through the years. And of course having already made the necessary financial arrangements for emergencies will go a long way to lighten the load of expense and worry that often accompany an adverse event.

Teenagers aren’t the only ones who believe they are indestructible and will live forever. Many of us who know better still can’t quite make that leap from acknowledging we are mortal to actually taking steps to prepare for all aspects of aging, retirement, or ill health. The longest journey begins with a single step so consider one of these: Keep making new friends, eat healthier, and stop smoking.

About the Author

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

3. Although the first thing we think of is Alzheimer’s disease, there are many other functional limitations that can affect our everyday life, as well as our ability to be active in the practice of law. The Resource Center lists several of them:
   • Functional Limitations Caused by Physical Disabilities: Diseases commonly associated with aging include arthritis, stroke, and Parkinson’s.
   • Functional Limitations Caused by Cognitive/Language Disabilities: Age-related diseases in this group include Alzheimer’s disease and dementia. www.nationalserviceresources.org/practices/17884
Reflections on Life and Chuck Noland

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

Hollywood executives have a recipe for a best-selling movie. You start with a likeable character, throw in some conflict, dial up the tension, then forge a resolution, with a great soundtrack to boot. Along the way, the audience needs an emotional connection, a nexus with someone or something that makes them say “I know that feeling” or “that has happened to me.” Sports movies play this card. They always have some loser who becomes a winner. Like “Rocky,” “Rudy,” or “Remember the Titans,” “Hoosiers” or even the recent movie “The Blind Side.” You tear up, spread the word, and bingo, Brad Pitt has nine kids.

The other popular movie theme is a “coming of age” type movie. When the lead character discovers his priorities were all screwed up and then finds religion and cures cancer. Think “Almost Famous,” “Planes, Trains & Automobiles,” “Rain Man,” or even “A Christmas Carol.” Lawyers have their share of movies. “Michael Clayton” is an example. So is “The Firm.”

A first cousin to the “coming of age” movie is the one where the lead actor’s perfect life is disturbed by some tragedy. Through that prism then, everything is viewed by a new metric. See “Shawshank Redemption,” or even “To Kill a Mockingbird.”

And in this genre of movies, there is one that has no peer. An incredible movie that if you haven’t seen, you must – “Castaway.” Released in 2000, nominated for Best Picture, and directed by Alan Zemekis, with a soundtrack by another Hollywood legend, Alan Silvestri. It has earned $429 million worldwide.

“Castaway” is actually three movies – an obsessive-compulsive executive – Tom Hanks – on the fast track, is suddenly reduced to appreciating the most simple conveniences on a deserted island, and then returning home to piece together what’s left in his life. And if right now you are saying to yourself “what’s this got to do with my life?” I’m about to explain. Because Hanks’ character was preoccupied with time – squeezing more out of every day. Early in the movie he tells an audience of FedEx workers: “We live and we die by time. Your priorities may never be the same again. If watching that scene doesn’t prompt a rush of Kleenex, stop the DVD and call your physician. You have an undiagnosed medical condition. You’re dead.

So the next time you head out of town for a client trip that seems the most important thing in your life, leaving your spouse, your children, your family dog, and likely missing a couple other family commitments, and you reassure them all – “I’ll be right back” think of Noland. Then freeze, call the client and suggest, respectfully, that time and money can be saved in conducting the meeting by phone. And that evening gather the family and watch (or watch again) “Castaway.”

Eventually Noland is rescued, and there is a scene when he reconnects with his best friend, a fellow Federal Express employee. They are on a plane flying back to Memphis and it’s a perfect capstone for the Noland’s sense of priorities before his disappearance. His buddy, describing Noland’s old girlfriend, Kelly, says this: “Kelly had to let you go. She thought you were dead. And we buried you. We had a funeral, and a coffin, and a gravestone. The whole thing.” Noland ponders the enormity of it all. “You had a coffin? What was in it?” “Well everybody put something in. Just a cell phone or a beeper, some pictures. I put in some Elvis CDs.”

Imagine if at your funeral the embodiment for your life was a time sheet. Or a Dictaphone. Or a Blackberry. Or God forbid – Elvis. Because while lawyers don’t deliver packages, we are meticulous about time. And sometimes – and this may shock you – lawyers’ sense of life’s priorities is screwed up.

In the movie, there is a final scene when Noland reconnects with Kelly, now married. Selvestri’s soundtrack is playing, and Noland has one last shot to get her back and rebuild his life. Noland admits to his backward priorities: “I never should’ve gotten on that plane. I should’ve never gotten out of the car.” She nods, “You said you’d be right back.” And then she embraces him – “I always knew you were alive, I knew it. But everybody said I had to stop saying that. That I had to let you go. I love you. You’re the love of my life.” “I love you too, Kelly. More than you’ll ever know.”

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
Members in the News

CHANGING POSITIONS

Heath M. Anderson, Robert C. Hagedorn, Korb W. Maxwell and Anthony L. Springfield became shareholders at Polsinelli Shughart P.C.

Lauren M. Bristow has joined the Leavenworth County Attorney’s Office, Leavenworth, as an assistant county attorney.

Matthew R. Burgardt and Diana G. Edmiston have joined the Hinkle Elkkouri Law Firm LLC, Wichita.

Adam R. Burrus has joined Fleeson, Goggin, Coulson & Kitch LLC, Wichita.

Kevin S. Carver has joined the Federal Deposit Insurance Corp., Dallas.

Krystle M.S. Dalke is now a law clerk for Hon. Monti Belot of the U.S. District Court for the District of Kansas, Wichita.

Danielle N. Davey has joined Sloan, Eisenbarth, Glassman, McIntire & Jarboe LLC, Topeka, as an associate.

Tracey T. Denton has joined Hanson & Jorns LLC, Pratt.

Kenneth W. Estes has joined the Estes Law Group, Wichita.

Lance J. Formwalt has joined Seigfreid Bingham Levy Selzer & Gee P.C., Kansas City, Mo.

Joshua C. Howard has joined Clark, Mize & Linville Chtd., Salina.

Paul J. Kasper II has joined Peterson & Kasper Law Office, Ellsworth.

Mark E. Klinkenberg has joined TKM Law LLC, Kansas City, Mo.

Laura E. Lane has joined Martin Pringle Oliver Wallace & Bauer LLP, Overland Park, and Mark A. Lippelmann and Douglas L. Longhofer have joined the firm’s Wichita office.

Mick W. Lerner has joined Douthit Frets Gentile & Rhodes LLC, Kansas City, Mo.

Travis D. Lenkner has joined Gibson Dunn & Crutcher, New York.

Angela Y. Madathil has joined Withers, Gough, Pike, Pfaff & Peterson LLC, Wichita, as an associate.

Nicholas J. Means has joined Maughan & Maughan, Wichita.

Matthew D. Mentzer has joined Chapin Law Firm LLC, Shawnee.

Zoe F. Newton has joined Hartman Oil Co., Inc., Wichita.

Danielle A. Rider has joined Hampton & Royce L.C., Salina.

Danielle K. Schulte has joined Bever Dye L.C., Wichita.

Dianne M. Smith-Misemer has joined Hovey Williams LLP, Overland Park, as of counsel.

William R. Thornton, Atchison, has been appointed by Gov. Mark Parkinson as the new Kansas Secretary of Commerce.

Stephen M. Turley has joined Floodman Wagle & West, Wichita.

Nanette C. Turner is a law clerk for Hon. Wesley Brown, of the U.S. District Court for the District of Kansas, Wichita.

Molly E. Walsh has joined Stinson Morrison Hecker LLP, Wichita.

CHANGING LOCATIONS

Patrick G. Copley has started the Law Offices of Patrick Copley LLC, 601 N. Murlen, Ste. 20, Olathe, KS 66062.

Kari D. Coulits has started Coulits Wealth Strategies LLC, 4031 E. Harry, Wichita, KS 67218.

Milfred D. “Bud” Dale has opened the Law Offices of Bud Dale, 2201 SW 29th, Topeka, KS 66611.

Reese H. Hays has moved to the USAF Offutt AFB Legal Office, 711 Nelson Dr., Ste. 118, Offutt AFB, NE 68113.

The Murphy Law Firm LLC and attorneys Mark D. Murphy and Jeffrey M. Cook have moved to 7400 W. 130th St., Ste. 130, Overland Park, KS 66213.

Victor C. Panus has formed Panus Law Firm LLC, 4131 N. Mulberry Dr., Ste. 200, Kansas City, MO 64116.

Harold T. Pickler has moved to The Quarters Building, 310 W. Central, Ste. 104, Wichita, KS 67202.

Rebecca L. Pilshaw has moved to 1540 N. Broadway, Ste. 203, Wichita, KS 67214.

The Law Offices of Daniel C. Reichman LLC has moved to 405 E. 13th St., Ste. 3000, Kansas City, MO 64106.

Saunders & Saunders has moved to 731 W. Main St., Ada, OK 74820.

Scott S. Sumpter, Attorney at Law, has moved to 2357 SW Westport Dr., Topeka, KS 66614.

MISCELLANEOUS

Richard D. Ewy, Wichita, is a member of the 2009-10 Board of Directors for the American Red Cross Midway–Kansas Chapter.

Dennis C. Jones, Lakin, received the Lifetime Achievement Award at the Kansas County and District Attorneys Association Fall Conference.

Sylvia Bribiesca Penner, Wichita, received the Alumni Medallion Award from Tabor College.

Zackery E. Reynolds, Fort Scott, has become a Fellow of the American College of Trial Lawyers.

Ann E. Swegle, Wichita, has been elected president and Barry R. Wilkerson has been elected to the board of directors of the Kansas County and District Attorneys Association.

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

Til Conflicts

(Continued from Page 7)

between. But what if the course of drafting a will, husband’s client is injured in an accident and client asks husband if he knows any good lawyers to help him? What if wife and husband have different last names? Clearly, the husband is free to refer the business owner to his wife, but transparency is key. The potential client should know from the outset that the husband is making a referral to his spouse.

The number one thing that married lawyers can do to protect their clients is to be open and honest with everyone. The other lawyers at your firm need to know that you are married to another lawyer, who that lawyer is, where that lawyer works, and generally the type of work your spouse and his firm is involved in. The clients that you regularly work with probably also need to know you are married to another lawyer. Transparency can save a world of headaches down the road.

*All of the conflicts as it relates to married lawyers also applies to the immediate family. Therefore, if your brother, sister, father, mother, or in-laws are in the legal business, you might have to consider these rules as they apply to you.

Jennifer Hill may be reached at (316) 263-5851 or by e-mail at jhill@mtsqh.com.
The Externship Experience: Teaching New Dogs New Tricks

By Captain Brian K. Carr, Washburn University School of Law

It’s not enough to be a smart law student or a smart lawyer. Law firms want lawyers who are not going to be a liability to the firm.

— Former Florida Supreme Court Justice Raoul G. Cantero III

For most new law students, January means dusting off their résumés and preparing cover letters to send to prospective summer employers. It is a time of making difficult choices, taking risks, and predicting outcomes for their summer opportunities. Unfortunately for most students, lucrative summer employment opportunities will not be an option this year. However, the great variety of externships offered by area law schools can be just as palatable to the appetite of the ambitious law student, as well as to their future employers.

Nationwide, the American Bar Association, employers, educators, and students have been calling upon law schools to produce attorneys who are better-prepared upon graduation to practice law. One way in which our area law schools have responded to the demand for more skills training has been to develop externship programs.

An externship provides an excellent opportunity for a student to participate in an unpaid legal position for academic credit, while typically working under the supervision of a licensed attorney. “Linking theory and practice, externships provide experience ... and direct exposure to a legal work setting.” Law schools generally award externship credit for legal work performed at nonprofit organizations, government agencies, judicial offices, and in-house counsel at corporations, but not at private law firms.

When hiring new attorneys, employers should consider externship experiences as valuable as paid internships. A recent law school graduate with externship experience provides the firm with an attorney who is already experienced in many core legal skills and without additional costs or liability. An externship opportunity encourages students to refine their legal skills and to diversify their breadth of knowledge in other areas of the law. For example, suppose that a law student accepts a summer externship at a firm with an attorney who is already experienced in many core legal skills. The students who participate in externship programs develop the critical legal skills that employers want in new attorneys. The students receive a valuable education and it does not cost the law firm a dollar. What a deal!

In conclusion, although many factors go into the decision to hire a new attorney, most law firms today are looking for new hires who can bring to the table not just academic achievement, but also varied experience, independence, professional judgment, and professional behavior. Law students who participate in externship programs develop the critical legal skills that employers want in new attorneys. The students receive a valuable education and it does not cost the law firm a dollar. What a deal!

About the Author

Captain Brian K. Carr is a second-year student attending Washburn University School of Law on active duty through the U.S. Army’s Funded Legal Education Program. He is a staff writer for the Washburn Law Journal. Prior to entering law school, Capt. Carr was an Army aviator and served overseas in support of Operation Iraqi Freedom from 2007 to 2008. He is married and the proud father of two children. He may be contacted at brian.carr@washburn.edu.

FOOTNOTES


3. According to Kelly Lynn Anders, Associate Dean for Student Affairs and Director of the Externship Program at Washburn University School of Law, “Students are doing everything they can to be competitive and you can’t blame them. They want to work.” Emily Heller, The Recession Makes Externships a Sweeter Deal For Students, Nat’l J. L., Sept. 7, 2009.

4. See Blankenship, supra note 1.


7. The American Bar Association (ABA) generally discourages externships at private law firms. Although the ABA permits students to work for pay in a legal internship with a private law firm, this paid experience can never qualify for academic credit, and thus is not an externship.

8. See Blankenship, supra note 1.
2009 Outstanding Speakers Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars for September through December 2009. Your commitment and invaluable contribution is truly appreciated.

Matthew D. All, Blue Cross and Blue Shield of Kansas, Topeka
Gary A. Anderson, Gilmore & Bell P.C., Kansas City, Mo.
Curtis G. Barnhill, Attorney at Law LLP, Lawrence
Russell A. Berland, BearingPoint, Lawrence
John V. (“Jack”) Black, Black’s Law Office P.A., Pratt
Craig C. Blumreich, Larson & Blumreich Chtd., Topeka
Stacia G. Boden, Kutak Rock LLP, Wichita
Carol R. Bonebrake, Law Office of Carol Ruth Bonebrake, Topeka
Jeanie A. Botkin, Polsinelli Shughart P.C., Kansas City, Mo.
John W. Broomes, Hinkle Elkouri Law Firm LLC, Wichita
Mert F. Buckley, Adams Jones Law Firm P.A., Wichita
Hon. Terry L. Bullock (Ret.), Topeka
Christopher F. Burger, Stevens & Brand LLP, Lawrence
Robert P. Burns, Stinson Morrison Hecker LLP, Wichita
Micki Buschart, McCormum Immigration Law Group, Kansas City, Mo.
John W. Campbell, Kansas Insurance Department, Topeka
Derek S. Casey, Prochaska, Giroux & Howell, Wichita
Brent N. Coverdale, Seyferth Blumenthal & Harris LLC, Kansas City, Mo.
John J. Cruciani, Husch Blackwell Sanders LLP, Kansas City, Mo.
Timothy A. Davis, Constanzy Brooks & Smith LLP, Kansas City, Mo.
Emily A. Donaldson, Stevens & Brand LLP, Lawrence
Diana G. Edmiston, Hinkle Elkouri Law Firm LLC, Wichita
Monica M. Fanning, Polsinelli Shughart P.C., Kansas City, Mo.
Roger D. Fincher, Bryan Lykins Hejtmanka & Fincher, Topeka
Bradley R. Finkeldei, Stevens & Brand LLP, Lawrence
Gary Flory, Kansas Institute of Peace and Conflict Resolution, North Newton
Kenneth G. Gale, Adams Jones Law Firm P.A., Wichita
Aubrey Gann-Redmond, AGR Legal Services LLC, Kansas City, Kan.
Thomas, D. Haney Jr., Henson, Clark, Hutton, Mudrick & Gragson LLP, Topeka
Professor Phillip E. Harris, University of Wisconsin, Madison, Wis.
N. Russell Hazlewood, Graybill & Hazlewood LLC, Wichita
Mark D. Hinderks, Stinson Morrison Hecker LLP, Overland Park
Wyatt A. Hoch, Foulston Siefkin LLP, Wichita
Professor Michael Hoefflich, University of Kansas School of Law, Lawrence
Matthew H. Hoy, Stevens & Brand LLP, Lawrence
Professor Christopher R. Hoyt, University of Missouri-Kansas City School of Law, Kansas City, Mo.
Patrick B. Hughes, Adams Jones Law Firm P.A., Wichita
Kenny C. Hulshof, Polsinelli Shughart P.C., Washington, D.C.
Mark M. Iba, Stinson Morrison Hecker LLP, Kansas City, Mo.
Pamela S. Jacobs, Kansas Coalition Against Sexual and Domestic Violence, Topeka
Stacey L. Janssen, of counsel, Dwyer & Dykes L.C., Overland Park
Vernon L. Jarboe, Sloan Law Firm, Topeka
Allen G. Jones, Shook, Hardy & Bacon LLP, Kansas City, Mo.
Larry W. Joyce, Stinson Morrison Hecker LLP, Kansas City, Mo.
James M. Kaup, Kaup & Shultz L.C., Lawrence
Katherine L. (“Kathy”) Kirk, Law Offices of Jerry K. Levy, Lawrence
Laurel A. Klein Searles, Kansas Coalition Against Sexual & Domestic Violence, Topeka
Carole Levitt, Internet for Lawyers, Rio Rancho, N.M.
Thomas J. (“T.J.”) Lynn, Stinson Morrison Hecker LLP, Kansas City, Mo.
Ryan M. Manies, Polsinelli Shughart P.C., Kansas City, Mo.
Hon. J. Thomas Marten, U.S. District Court, Wichita
John G. McCannon Jr., Kansas Corporation Commission, Wichita
Roger E. McCallan, Sherwood Companies, Wichita
Professor Roger A. McEown, Iowa State University Center for Agricultural Law and Taxation, Ames, Iowa
Jack Scott McInteer, Depew Gillen Rathbun & McInteer L.C., Wichita
Faye McNew, Kansas Department of Wildlife and Parks, Emporia
Mira Mdivani, Mdivani Law Firm, Overland Park
Professor Keith G. Meyer, University of Kansas School of Law, Lawrence
Leslie M. Miller, Stevens & Brand LLP, Lawrence
David P. Mudrick, Henson, Clark, Hutton, Mudrick & Gragson LLP, Topeka
Patrick R. Nichols, Associates in Dispute Resolution LLC, Lawrence
Robert J. O’Connor, Stinson Morrison Hecker LLP, Wichita
Richard A. Olmstead, Kutak Rock LLP, Wichita
James R. (“Jim”) Orr, Westwood
Professor John C. Peck, University of Kansas School of Law, Lawrence
Kathy Perkins, Kathy Perkins LLC, Lawrence
Curtis J. Petersen, Polsinelli Shughart P.C., Kansas City, Mo.
Christopher F. Pickering, Smith Law Group, Shawnee
Professor David E. Pierce, Washburn University School of Law, Topeka
Bradley J. Prochaska, Prochaska, Giroux & Howell, Wichita
Philip D. Ridenour, Ridenour & Ridenour, Cimarron
Hon. Roy M. Roper, 22nd Judicial District, Troy
Mark Rosch, Internet for Lawyers, Rio Rancho, N.M.
Recognition of 2009 Journal Authors

The Kansas Bar Association and its Journal Board of Editors would like to extend a special thank you to the following authors who gave their time and expertise in writing substantive legal articles for the Journal of the Kansas Bar Association. Your commitment and contribution is greatly appreciated.

Brian J. Moline – “Deception and Misrepresentation in the Practice of Law” (Published posthumously with family’s permission) – January
James P. Muehleberger – “Reflections on Lincoln’s Kansas Campaign” – November/December
James D. Oliver – “Education of Attorneys on Appeal and/or Cross Appeal” – March
Jonathan Paretsky – Waiting for Judgment Day: Negotiating the Interlocutory Appeal in 8 Easy Lessons – April
Robert W. Parnacott – “Anthrax, Smallpox and Flu, Oh My! The Law of Infectious Disease Control in Kansas” – October
John C. Peck – “Land Description Errors: Recognition Avoidance and Consequences” – September
Christopher L. Steadham – “Land Description Errors: Recognition Avoidance and Consequences” – September

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So Simple a Lawyer Can Use It

By Larry N. Zimmerman, Valentine & Zimmerman P.A., Topeka

2 Ounce Internet

The Novatel Wireless MiFi is the perfect new gadget for lawyers who came up a bit short at the Christmas gift exchange, getting only ties, fruitcakes, or subscriptions to Gourmet magazine. The tiny MiFi device is about the size of a credit card and thinner than a stack of Christmas credit card bills (about ¼ inch) capable of providing a wireless Internet access point for up to five devices over Verizon’s and Sprint’s 3G data networks. (An AT&T and T-Mobile device is ready as well but service plans are not yet available.)

When out of the office or away from home, finding Internet access can be a challenge. Universally available Wi-Fi is still a pipedream even in larger cities. One solution involves planning ahead using sites like wi-fihotspotlist.com or wifinder.com to look for hotspots near your destination. Unfortunately, those sites are not fail-proof and miss many sites or misreport the public availability of others. It is far more convenient to simply bring your own 2 ounce portable Internet.

So Simple a Lawyer Can Use It

The MiFi makes setting up a Wi-Fi hotspot effortless. Simply press the power button and it logs into the Sprint or Verizon network and is available to your devices in under a minute. There is no software to install and, if you forego security options, no settings to adjust. Macs, PCs, iPod touch, or Gameboy – the MiFi serves up quick 3G Internet to any Wi-Fi device just about anywhere. It simply works and works perfectly every single time. Up to five devices can connect simultaneously so one MiFi can keep a small meeting connected or even provide Internet for adjacent hotel rooms. Beware though, that sophisticated moochers may notice the device and try to hop onto your connection with or without asking. Better to lock it up a bit.

Advanced configuration settings are possible with the MiFi allowing more robust security via internal software is all internal accessed through your browser. Internal software also accesses a GPS chip for navigation via Google Maps or other navigation software. Note, however, that there may be some differences between Verizon’s and Sprint’s configuration tools. For example, a Verizon user indicates the service set identifier (SSID) cannot be changed or hidden on his but I can do both on the Sprint version.

Speed on the MiFi is not blazing but adequate. Speedtest.net evaluated the MiFi’s performance on the Sprint network as 1.07 MB/s download and 0.42 MB/s upload speed. The same test on my wired connection through Cox showed a 4.37 MB/s download and 1.74 MB/s upload speed. Sites load slower over the MiFi but streaming video from Hulu and YouTube or music from Pandora work without a hitch. Even Skype hums along fine turning a netbook into a video conferencing cell phone.

The MiFi has an internal battery that advertises a four-hour use per charge though my experience indicates that figure is closer to three hours with heavy use from multiple devices. Fortunately, the MiFi will work while charging with its slim, micro-USB charger. The micro-USB plug is not quite the standard that mini-USB is yet so Blackberry chargers cannot do double duty for both phone and MiFi devices. The wonderful 3Gstore.com Web site does, however, offer a $50 extended battery with adapters to power MiFi and cell phones for up to 10 hours. 3Gstore.com also offers a MiFi-ready car charger for $20."

Pricey Convenience

The price this moment for the MiFi through Verizon is $50 with a two-year contract and online purchase discount. Sprint’s current price is $100 with a two-year contract. Note that these prices are moving targets and the carriers seem to trade off who has the best deal. Online coupons come and go often but carriers will occasionally price match for new customers. Negotiate.

Monthly service through either carrier is currently $60 with a 5 gigabyte (GB) data cap. Unfortunately, the truly unlimited data plans are gone but 5 GB provides a significant amount of freedom from the tethers of the office. Sure, many “smart phones” offer Internet when tethered by cable or Bluetooth to a laptop. None provide access as conveniently to multiple users at once and sometimes cause problems if you need make or take calls while online. Specialization is the Novatel MiFi’s strength and makes it my pick for most perfect gadget.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine & 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 Collection Attorneys 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.

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
Thinking Ethics

Conflicts and Confidentiality: Duties When A Lawyer Changes Firms

By J. Nick Badgerow, Spencer, Fane, Britt & Browne LLP, Overland Park

E
evryone has observed a marked increase in the number of lawyers moving between firms over the past several decades. The lawyer who remains with the same firm for an entire career is becoming more rare all the time. There are several reasons for this phenomenon, most of them monetary, signaling a shift in lawyers’ general philosophy about employment.

The shift is characterized by the observation that private practice lawyers today, unlike those who preceded them, do not necessarily expect nor pursue a lifelong employment covenant with law firms. Similarly, there is far less certainty within firms that the talent hired today will remain with the firm for the future. The totality of the paradigm shift has engendered a new protocol in the profession: Both lawyers and law firms have quietly acknowledged that there is a rationale and purpose in lawyers changing law firm employers.[1]

Given this shift, it is clear that lawyers and law firms must be even more vigilant in complying with their ethical obligations to clients. In addition, initial discussions about a lateral move do not always lead to a change in employment. In short, lawyers must make sure that a lateral move will not create conflicts of interest, to the detriment of their clients (and themselves), but they must also make sure that client confidential information is maintained and not disclosed.³

Moreover, once a lawyer decides to change firms, the failure to avoid a conflict can be detrimental to both the lawyer and the firm, mainly in the form of potential disqualification from the representation of one or both clients involved in the conflict. Under Rule 1.10(a), the law firm is prohibited from representing a client if the lateral coming into the firm has a conflict. Under this Rule, a lawyer entering a firm brings all the former client conflicts he had in his prior firm, at least to the extent that the matter is the same or substantially related to one in which the lawyer’s prior firm represented the client; and the lawyer had acquired confidential information from or about the client, which is material to the matter about to be handled.⁴

Avoiding Conflicts. Conflicts with current and former clients are prohibited generally by Model Rules 1.7 and 1.9, respectively. When changing firms, lawyers have a duty to make sure there are no conflicts created by the change.⁵ The comments to Rule 1.7 direct that a law firm adopt reasonable procedures to detect and resolve conflicts.⁶

Maintaining Confidentiality. A lateral lawyer and his prospective new firm can comply with the obligation to detect and resolve conflicts only by exchanging information regarding their respective clients. But, information about the representation of clients is confidential under Rule 1.6.

Formal Opinion 09-455, issued by the ABA on Oct. 8, 2009, addresses this tension, and sets some basic parameters for those considering the lateral move of a lawyer to a different firm.

1. The Lateral Lawyer and The Law Firm Share the Duty. Both the lateral lawyer and the prospective law firm employer have the duty to identify and resolve conflicts.⁷ Indeed, under the concept of imputed disqualification under Rule 1.10, both the lawyer and the law firm will suffer if this duty is not fulfilled.

2. Disclosure of Client Information is Necessary and Permitted. In performing this task, disclosure of client information is permitted, despite the proscription against revealing confidential information in Rule 1.6.⁸

(Continued on next page)

FOOTNOTES

1. Executive Summary, “The Lateral Lawyer: Why They Leave and What May Make Them Stay,” available online at www.nalpfoundation.org/reslat2.html. Valuable guidance on additional subjects related to a lawyer’s lateral transfer may be found in JACK P. SAHL, Thinking About Leaving: The Ethics of Departing One Firm for Another, 19 The Professional Lawyer 2 (2008), available online at works.bepress.com/cgi/viewcontent.cgi;article=1029&context=john_sahl.
2. See Rules 1.7 and 1.9, Model Rules of Professional Conduct, found at Rule 226, Rules of the Kansas Supreme Court [hereinafter MRPC].
3. See Rule 1.6, MRPC.
5. ABA Formal Opinion 99-414 (Sept. 8, 1999).
6. Rule 1.7, MRPC, Comment 2. See also Rule 5.1(a), Comment 2, MRPC.

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3. Disclosure of Client Information Should Be Limited. Although disclosure is allowed, no more information should be disclosed “than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest.” 

Such disclosure should initially be limited to client names and the area(s) of practice in which the lateral lawyer is engaged. When even the identity of the client is a matter of confidence, client consent should be obtained in order to make the disclosure.

As to those few matters for which a more intensive factual analysis is required (such as a comparison of a current matter and a former matter to determine if they are “substantially related”), then the lateral lawyer should (a) obtain client consent, (b) give up the lateral move, or (c) find alternative means of resolving the conflict, such as appointing an independent attorney to review the facts, so the lateral lawyer and his prospective employer do not learn disqualifying confidential information.

4. Timing of the Disclosure “is also Important.” Without providing more specific guidance, the Opinion states that this investigation should be made only when “reasonably necessary,” at some point after the initial stages of the lateral discussions, but no sooner than necessary, so that client information is not unnecessarily disclosed.

In summary, ABA Op. 09-455 is instructive for those considering a lateral move, to help insure the avoidance of disqualifying conflicts of interest.

About the Author

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9. *Id.*, at p. 4.
10. *Id.*
2010 Legislative Outlook
By Joseph N. Molina, Kansas Bar Association Director Governmental & Legal Affairs

With the Kansas legislative session opening on Jan. 11, two topics dominated much of the early legislative discussion: the budget and the 2010 elections. The state continues to feel the pinch of a recovering economy and Gov. Mark Parkinson was forced to make another round of budgetary cuts in November. Parkinson needed to cut an additional $258 million to balance the FY 2010 budget and avoid another recession bill. These changes were introduced to the House Appropriations Committee on Nov. 24, 2009. Parkinson hopes to have these cuts passed by lawmakers in the first few weeks of the session.

Parkinson also asked the Legislature for $5 million to fix the Kansas Judicial Branch’s budget. This money replaces the funds mistakenly cut during last session’s budget discussions. However, this still leaves the judicial branch with a $3 million hole. Initially, Gov. Parkinson sought $8 million to avoid a massive furlough of judicial branch employees. It was proposed that the judiciary would be shut down for one week per month for the final six months of the fiscal year. With the shortfall now at $3 million, the judiciary is still looking at furloughing court employees. Chief Justice Robert E. Davis has stated that court employees may be forced to take up to 12 days of unpaid leave.

Note: The election information below was up-to-date as of the drafting of this article, but will most likely change.

On the election front, 2010 is shaping up to be a monumental election year. Kansans will be electing a governor, a U.S. senator, three U.S. representatives and a new Kansas secretary of state. Not to mention a challenge by state Sen. Laura Kelly for the 2nd district seat held by U.S. Rep. Lynn Jenkins and a challenge to Attorney General Steve Six by state Sen. Derek Schmidt.

The dominos began to fall when U.S. Sen. Sam Brownback announced his candidacy for Kansas governor. Sen. Brownback will face off against Tom Wiggans, a pharmaceutical executive who was born and raised in Fredonia. The race to replace Brownback in the U.S. Senate is being waged by two prominent Republicans, U.S. Reps. Jerry Moran (District 1) and Todd Tiahrt (District 4). The Democrats have two hopefuls in Charles Schollenberger, Prarie Village, and Stanley Wiles, Ottawa.

With Reps. Moran and Tiahrt vacating their seats to run for the U.S. Senate and Rep. Moore deciding against reelection, three of Kansas’ four U.S. districts will have a new face in office. In District 1, state Sens. Jim Barnett and Tim Huelskamp and Tracey Mann are vying for the Republican nomination. The Democrats are banking on former Salina Mayor Alan Jilka. In U.S. Dist. 2 Rep. Lynn Jenkins will face-off against state Sen. Laura Kelly. In a surprising turn of events the District 3 seat is up for grabs and the list of candidates and potential candidates grows by the day. So far former state Rep. Patricia Lightner and former state Sen. Nick Jordan are in a likely-to-be very crowded Republican field with many more considering the race, including House Appropriations Chair Kevin Yoder and former democrat state Sen. Mark Gilstrap (now a Republican) among others. The District 4 election is equally as crowded with state Sens. Dick Kelsey and Jean Schodor, state Rep. Raj Goyle, Republican National Committeeeman Mike Pompeo, and a few others contending for the open seat.

Other than the governor’s race, the most interesting state-wide elections feature races for the attorney general, where Attorney General Steven Six faces state Sen. Derek Schmidt, and the race for secretary of state. Kris Kobach, J.R. Claey, and Securities Commissioner Chris Biggs have announced that they will seek the post. Insurance Commissioner Sandy Praeger also has a challenger in David J. Powell.

With the budget and elections dominating the legislative landscape, several legislative measures are of concern. The most significant bills concern the judiciary.

HCR 5005: A proposition to amend section 5 of article 3 of the Kansas Constitution, relating to the selection of justices of the supreme court.

HB 2123: An act creating the court of appeals nominating commission; appointment of judges.

These measures were introduced into the House Judiciary Committee at the request of Chairman Lance Kinzer during the 2009 session. Each proposal creates a new nominating commission, one for the Supreme Court and another for the Court of Appeals. The composition of the nominating commission would include three appointees each made by the president of the Senate, speaker of the House and the governor. Of those nine appointees only three could be attorneys. Each commission would nominate three candidates for consideration by the Governor with Senate confirmation following the governor’s selection. Various procedural steps are included in the measure, including timelines, what happens with a rejection by the Senate, failure to consider, etc.

Interestingly, Rep. Kinzer has stated that he intends on introducing another proposal with the same basic outline as those offered in 2009 but the new proposal would also include a provision for lifetime appointment of judges.

SCR 1612: Constitutional amendment to have Supreme Court justices’ appointments subject to confirmation by the senate.

SCR 1612 was introduced at the request of Sen. Susan Wagle (R-Wichita) and 16 other senators. The measure would make changes to the current Supreme Court Nominating Commission, expanding the commission by two members, both of whom would be nonlawyers and one each appointed by the speaker of the House and the president of the Senate.

SCR 1612 was not given a hearing during the 2009 session but the Senate Judiciary Committee agreed to hear the issue in 2010.

Repeal of K.S.A. 20-301b (one judge per county rule)

On Oct. 13, 2009, Rep. Kevin Yoder, chairman of the House Appropriations Committee, introduced a bill to repeal K.S.A. 20-301b, concerning the one judge per county rule. A hearing was held on Nov. 24, 2009, even though no bill language had been crafted. The hearing drew three opponents, Kathy Porter from the Office of Judicial Administration, and, on behalf of the Kansas District Magistrate Judge’s Association, Judges Michael A. Freelove and Blaine A. Cater.

HB 2348 would make professional services subject to a sales tax. The bill was referred to the House Taxation Committee but failed to be given a hearing. However, the bill carries over to the 2010 session and may get a longer look if the economy continues to falter.
The Evolution of Commercial Mediation in the Midwest:
Best Practices, Confidentiality and Good Faith

By Larry R. Rute
Over the past decade, the use of mediation and even co-mediation, to resolve complex commercial disputes has grown exponentially. Mediation is now commonly used in every aspect of business-related litigation. In part, this growth can be attributed to modification of court rules and legislative enactments that have encouraged the use of mediation. In some jurisdictions, mediation is offered as a voluntary option. In others, mediation is mandated. Mediation may be offered early or late in the pretrial process, and may be conducted by a judge or a trained private mediator. It is no longer uncommon to conduct mediation prior to the commencement of litigation.

In recent years, the scope of mediation has expanded to encompass class actions, mass tort settlements, and a host of complex multi-party matters. Mediation of multi-party matters may sometimes prove to be an attractive option when the anticipated costs of litigation outweigh costs of settlement. Perhaps the most notable recent use of multi-party mediation has been the Hurricane Mediation Program. This program was established by the Louisiana Department of Insurance to mediate property-damage disputes between insurers and Louisiana policyholders arising from damages to residential property caused by hurricanes Katrina and Rita.

Mediation has also grown as a necessary component to our appellate system. Currently, all 13 U.S. Courts of Appeals have mediation programs governed by Rule 33 of the Federal Rules of Appellate Procedure.

In addition to the formal mediation programs sponsored by the courts, government agencies, bar associations, business organizations, universities, civic and religious groups, and other organizations have developed extensive training programs that have encouraged and enhanced the use of mediation. As a result, mediators and advocates alike have become more sophisticated in developing mediation strategies to resolve difficult issues in a timely and cost-effective manner.

This article will explore the continuing development of mediation practice and provide practical suggestions for the effective use of mediation in the commercial context. It will also explore emerging concepts of mediation confidentiality and good faith in Kansas and our sister state, Missouri.

I. Mediation Best Practices

In February 2008, the Task Force on Improving Mediation Quality (Task Force) of the American Bar Association Dispute Resolution Section (Section) issued its report. The Section formed the Task Force in January 2006 to address issues of quality in mediation and to provide recommendations for improving mediation practice. The 17 Task Force members included lawyers who represent clients in mediation, lawyer and nonlawyer mediators, academics, and administrators of court-annexed mediation programs. The Task Force focused its examination on mediation quality and private practice civil cases (including commercial, tort, employment, construction, and other types of disputes that are typically litigated in civil cases but not family law, or community disputes). The Task Force conducted its research by organizing a series of 10 group discussions (focus groups) in nine cities across the United States and Canada.

In addition to the focus group discussions, the Task Force collected more than 100 responses to questionnaires from mediation users and mediators. This process included conducting telephone interviews with 13 individuals who have been parties to the mediation process.

The focus group participants, questionnaire respondents, and parties who were interviewed consistently identified four issues as important to mediation quality:

- Preparation for mediation by the mediator, parties, and counsel;
- Case-by-case customization of the mediation process;
- “Analytical assistance” from the mediator; and
- “Persistence” by the mediator.

A. Preparation by the mediator and mediation participants

The majority of participants in the Task Force focus groups and party interviews identified preparation by the mediator, the parties, and the parties’ counsel as important for success of the mediation’s outcome. But the Task Force found that actual premediation discussions among mediators and among parties and counsel varied widely. Traditionally, many mediation training programs have not paid substantial attention to the context of premediation discussions. The Task Force reached consensus that mediator preparation prior to the mediation was essential.

1. The premediation conference

Ten or 15 years ago, it was quite common for commercial mediators, immediately following her or his engagement, to simply set the date, time, and location for the face-to-face mediation and take no further action until the mediation was convened. Upon arrival at the mediation location, the old-school mediator would often engage in a relatively inflexible fixed mediation process.

In the increasingly sophisticated world of commercial mediation, the failure of the mediator to schedule a meeting with legal counsel and/or the parties by telephone or in person in advance of the face-to-face mediation is more the exception than the rule. This meeting provides the opportunity to customize the mediation process. The more common practice today is for commercial mediators to conduct one or more prenegotiation conferences with the attorneys who will be attending the mediation. Some mediators telephone legal counsel individually. Other mediators may conduct premediation telephone conferences jointly with all attorneys who will be attending the mediation. There is no “right” or “wrong” approach. In multi-party mediation, a common method is for the mediator to establish one or more face-to-face conferences with attorneys and/or their clients to establish a protocol or negotiation strategy for a successful face-to-face mediation.

In whatever form, the premediation conference permits the mediator to obtain an invaluable “feel for the case.” Often, the commercial mediator will request counsel to provide a general factual overview, information regarding the amount of damages sought, the status of discovery, the status of insurance coverage (if any), the persons attending mediation with settlement authority, and a general overview of previous settlement discussions between counsel. The mediator may also seek information regarding the emotional temperament of the participants, the type and form of confidential submissions to the mediator, a candid appraisal of the strengths and weaknesses of
of the case, an overview of unique legal issues, and the overall “theme” of the case.

Some mediators may inquire whether the attorney or his or her client intends to make or respond to an opening statement during the mediation. Many mediators reserve opinion as to whether opening statements will be given at the face-to-face mediation until such time as the mediator has had an opportunity to discuss the relative value of an opening statement. In those cases, which have not yet been filed in court or which are mediated pursuant to an “early settlement” court order, some form of opening statement may prove to be quite beneficial. For example, in many commercial cases, particularly employment cases, it is common for legal counsel for plaintiff and respondent to propose joint opening statements. This is because “early settlement” cases often require that the mediation be conducted before significant discovery has taken place. Mediations undertaken with only nominal discovery may benefit from the enhanced opportunity to exchange information in the form of short, concise opening statements to clarify and establish positions.

The mediator might learn at the pre-mediation conference that one attorney prefers to make an opening statement and the other prefers that no opening statement be conducted. This is very important information for the mediator to have well in advance of mediation. Any dispute regarding whether opening statements will be conducted may require early intervention on the mediator’s part.

If there is an agreement that opening statements will be given, it is always important for the mediator to determine and perhaps direct the proposed format of the presentation. For example, it is not unusual in employment or other complex commercial cases for plaintiff or defense counsel to suggest the use of demonstrative evidence in the form of a PowerPoint presentation or various video or audio presentations. When the mediator becomes aware that one party or the other intends to utilize an extensive PowerPoint presentation, the mediator may choose to encourage counsel to reduce the length of their planned presentation to 30 minutes or less. PowerPoint presentations that are too long in duration tend to antagonize or polarize the other side. Naturally, if one side intends to present electronic information, it is important the opposing party be aware of this in order to avoid surprise or unnecessary time constraints.

On those occasions when the mediator has not independently initiated contact, it is increasingly common for attorneys to affirmatively seek a pre-mediation conference with the mediator. Counsel may wish to discuss the mediator’s approach to mediation, possible settlement approaches, or modification of the overall mediation procedure. There is no prohibition to ex parte communication in mediation.

B. Preparation by counsel and parties

Task Force focus groups and party interviews emphasized the importance of preparation by the parties and their counsel. The Task Force found that counsel should routinely help their clients understand the issues in their case and their opponent’s case in preparation for both mediation and trial. But counsel’s explanation of what will happen during the two processes will differ, requiring a more creative discussion about the client’s possible settlement options for mediation purposes. Just as attorneys commonly prepare their clients for trial, it is equally important that attorneys meet with their clients before mediation to consider and discuss overall strengths and weaknesses of the case and to develop a risk-benefit analysis to aid in an overall negotiation strategy. Should the client be unfamiliar with mediation, attorneys must educate their client regarding the mediation process.

To objectively evaluate a case before mediation, the attorney may wish to ask his or her client, “OK, what is really important to you about this dispute, and why?” The concept of determining client needs and interests is nothing new. In their remarkable book, “Getting to Yes,” Roger Fisher and William Ury provide a powerful problem-solving model by discussing, the best alternative to a negotiated agreement (BATNA). Fisher and Ury suggest that negotiators identify their best alternative in the event the negotiated settlement is not successful. BATNA lays the groundwork for a series of questions that can be utilized in formulating a risk analysis for clients. Typical questions that may lead to a constructive risk analysis include, but are not limited to, the following:

- What is the likely monetary outcome if the trial is successful?
- What are the chances of succeeding at trial?
- What are the monetary and nonmonetary costs of litigation?
- The likelihood of collecting a monetary judgment?
- The likelihood of appeal?

Other questions that negotiators may consider discussing with their clients before mediation include:

- What client interests are at stake in this negotiation?
- What interests may be at stake for the other side?
- What additional information would you like to obtain from your opponent?
- What additional information would you be willing to reveal to your opponent?
- What information, if any, would you be careful not to reveal?
- What concessions would you be willing to make and in what order?
- What concessions will you push to receive?

C. Case-by-case customization of the mediation process

The Task Force commented that some mediators, parties, and counsel may rely upon essentially identical mediation approaches in each case. The Task Force found that “[i]n most cases, however, mediators would best be advised to make an effort to evaluate each case on its own and develop a process, in coordination with the parties and counsel, that is best suited for that particular case. Similarly, parties and counsel should pay close attention how best to prepare for mediation on a case-by-case basis.”

1. Timing of the mediation

The Task Force survey respondents indicated that the preferred time for mediation is generally after “critical” discovery is completed, but before full completion of discovery. There was a significant disagreement among the surveyed mediators and users whether mediation would be appropriate before suit is filed. The timing of the mediation is a critical element to success. In general, cases should be mediated neither too early nor too...
late. Nonetheless, mediation may be successfully conducted well before suit is filed. In an employment case, successful mediations have been conducted well in advance of the filing of the discrimination charge with the Equal Opportunity Employment Commission or other appropriate agency. If the mediator or the parties believe that each party has sufficient information to make an informed decision, mediation is likely appropriate. In the alternative, if the available information is grossly insufficient, the mediator might wish to suggest a pre-mediation discovery agreement. Certainly, the more discovery conducted, the more likely it is that “bottom line” positions become frozen and settlement opportunities lost. While each party requires sufficient information to make an informed decision, unnecessary or overly costly information gathering may needlessly run up the cost of litigation while providing only marginally useful additional benefits.

2. Confidential information to the mediator

Mediators commonly suggest that counsel prepare a written confidential statement for the mediator’s review in advance of the date of the mediation. It is often requested that the statement include a summary of the facts surrounding the dispute, a list of key witnesses, legal and damage analysis, an analysis of the strengths and weaknesses, and a summary of negotiations to date. Many mediators recommend that the confidential statement be no longer than two to five pages. Depositions, exhibits, motions, and expert witness reports should be summarized rather than attached, whenever possible. Many mediators use the confidential statement to summarize the facts of the case, including key dates and witnesses.

3. Initial meeting at mediation

Many mediators utilize the initial meeting (sometimes referred to as the initial joint session or the mediator’s monologue) with attorneys and the parties for the purpose of:

- Allowing the opportunity for introductions,
- Reviewing the agreement to mediate,
- Discussing confidentiality,
- Establishing or revising the suggested format for the mediation,
- Describing the role of the mediator,
- Explaining the process, and
- Answering any questions the parties or their attorneys may have.

Even though counsel may have been through the mediation process many times (indeed many counsel are now themselves mediators), many of the clients are experiencing mediation for the first time. The comfort level of the participants may be enhanced if they are given the opportunity for informal personal contact at the initial meeting prior to undertaking the more formal mediation process.

The initial meeting provides the mediator with an opportunity to describe the mediation process as a means of problem solving that is distinctly different than an adversarial courtroom proceeding. The initial meeting also permits the mediator to ensure that those unfamiliar with the mediation process clearly understand the role of the mediator as a facilitator and not as a judge or jury.

A good mediator utilizes the initial meeting to build rapport and establish trust among the participants. The participants’ choice of a skilled mediator and the agreed-upon design of the mediation process can be critical to the success of the mediation.

4. Opening Statements

There are divergent views about the usefulness of opening statements by either counsel or the parties. In focus groups, some felt that in high-conflict cases with angry clients, explosive statements can generate more hostility, thus impeding settlement. In other situations, opening statements can help frame the issues with clarity and facilitate the process.

Mediators understand legal counsel may sometimes take the position that there may be little new information to be gleaned through the mediation process. According to this view, negotiation is used simply to determine “how much” by way of a monetary settlement. So, too, when the parties’ emotions are particularly high, there may be an understandable reluctance by counsel to present an opening statement for fear that anything said will become contentious, polarizing, and/or unproductive. Some mediators have observed opening statements that were so inappropriate or so disingenuous that chances for resolution were substantially undermined. Mediators have also described exceptional opening statements that have created an atmosphere of trust and setting the stage for mutual resolution of the problem.

The opportunity for legal counsel to exchange important information during the opening statement often provides the groundwork for a satisfactory settlement. Indeed, without an effective opening statement, much more information must be exchanged through the mediator during private sessions (caucus). This third-party exchange of information prolongs the mediation and creates a risk of miscommunication.

A well-presented opening statement also presents the opportunity for counsel to paint a picture (the “theme”) of her or his case directly to the other party with little risk of miscommunication. The opening statement can also be used to communicate new information, both in terms of the facts and/or the law surrounding the case. For example, important information, such as corroborative witnesses or newly discovered evidence can be presented, as well as old information in a new context. It affords the parties an additional advantage of having their positions heard in an open forum, giving clients their “day in court.” An attorney may choose, as a matter of negotiation strategy, to permit her or his client(s) the opportunity to speak directly to the other party without intervention or interruption during the opening statement.

An effective opening statement not only gives counsel and the parties an opportunity to share different subsets of information, it also presents an opportunity for participants, sometimes for the first time, to gauge the credibility of the parties and their respective positions. Rather than a static, depersonalized process, the mediation becomes, through the communication exchange between the parties, more about the real concerns of people rather than disembodied entities. Through the strategic use of opening statements, stereotypes, false assumptions, and factual discrepancies can be clarified, thereby promoting a more productive negotiation process.

The joint session also presents litigators with the opportunity to encourage the parties to alter their perspectives and to set the stage for a psychological process directed at moving the parties toward settlement. There is, of course, the le-
A joint session is an issue that should be discussed well in advance with the mediator or through separate discussions with and/or between opposing counsel. When emotions run high, there is a strong risk of miscommunication. Nonetheless, whether to conduct an opening statement is an issue that should be discussed well in advance with the mediator or through separate discussions with and/or between opposing counsel.

**Practice Tips for a Successful Opening Statement**

An effective opening statement often can be utilized to accomplish one or more of the following objectives:

- The opportunity to reintroduce you and your client to the other side.
- Demonstrate your complete command of the case.
- Demonstrate a willingness to listen.
- Anticipate emotional issues and do not make comments to the other party that will trigger a strong emotional response. Acknowledge that you understand, although you do not agree with, how the other party feels.
- Humanize your client.
- Demonstrate your preparedness and organization.
- Confront potential weaknesses in your case early on.
- Avoid exaggeration or overstatement.

**Consider the following techniques:**

- Do not underestimate or overstate your abilities at trial (do not “saber rattle”).
- Compliment (when appropriate) the opposing party’s legal counsel.
- Demonstrate that you understand the opposing party’s position or concerns.
- Do the unexpected, i.e., apologize, express concern, or regret.
- Use humor, when appropriate.
- State your support for the mediation process.
- State a genuine desire to act in good faith to resolve the case.
- State a desire to be creative in developing settlement solutions.
- State that you are not there to impose solutions, but rather to listen and work through problems.
- Emphasize that settlement will be in everyone’s interest.
- Express sympathy, but do not sound disingenuous or insincere.
- Consider whether to provide important documents, important evidence or case law to the opposing party during the opening statement.
- Never engage in theatrics or personal attacks.
- Direct your comments to each member of the opposing party’s negotiation team (not the mediator).
- Do not discuss monetary demands.

**D. “Analytical” techniques used by the mediator**

The Task Force data revealed that many sophisticated mediation users expect mediators to provide certain services, including analytical techniques. For example, mediators can be helpful by asking pointed questions and suggesting options for consideration. The Task Force parties observed that the following techniques were beneficial in most cases:

- Pointed questions that raise issues (95 percent);
- Analysis of case, including strengths and weaknesses (95 percent);
- Prediction about likely court results (60 percent);
- Possible ways to resolve issues (100 percent);
- Recommend a specific settlement (84 percent); and
- Pressure to accept a specific solution (74 percent).22

On the other hand, nearly half of the users surveyed indicated there are times when it is not appropriate for a mediator to give an assessment of strengths and weaknesses or recommend a specific settlement. There is a wide disparity of opinions on how various factors might affect a user’s view of whether it was appropriate for a mediator to provide an assessment of the strengths and weaknesses,23 including the following:

- Whether assessment is explicitly requested,
- Extent of the mediator’s knowledge and expertise,
- Degree of confidence mediator expresses in assessment,
- Degree of pressure mediator exerts to accept assessment,
- Whether assessment is given in joint session or caucus,
- How early or late in process assessment is given,
- Whether assessment is given before apparent impasse or only after impasse,
- Nature of issues (e.g., legal, financial, emotional),
- Whether all counsel seem competent, and
- Whether mediator seems impartial.24

**E. Mediator’s private meetings with the parties**

The parties and litigants who have participated in a successful mediation sometimes refer to “the magic” of the mediation process. If sorcery is involved, it is more than likely apparent during and following the mediator’s private meetings (caucus) with the individual parties.

Generally, one of the mediator’s first strategic decisions is to determine which party to meet with first. The mediator may decide to meet with a party who appears to be more emotionally vulnerable. Often mediators meet first with the plaintiff if an initial demand has not previously been presented. It is possible the mediator might determine with whom he or she will first meet simply by “gut instinct.”

The private meeting offers the participants a safe atmosphere in a confidential setting. Such a setting provides the mediator with the opportunity to discuss, directly with the individual parties, their perception of the strengths and weaknesses of legal and factual positions. The private meeting also gives the mediator an opportunity to develop personal insight into the personality and emotional state of the individual participants. This allows the mediator to focus on the parties’ interests rather than legal positions, develop rapport, and consider creative approaches to settlement. The mediator must be nonjudgmental and empathetic, may use humor when appropriate, and must assist the parties in developing flexible and creative solutions.25
Many mediators use an “interest-based” or “problem-solving” approach. In doing so, the mediator assists both parties with identifying and focusing on individual needs and interests, and searching for mutually satisfactory solutions. Other mediators may use an evaluative decision-tree approach. To assist the parties, the mediator may choose to ask nonjudgmental questions. Generally these questions are open-ended as opposed to leading questions. The mediator may wish to summarize the answers to the questions in the form of summary or reframing statements that help the mediator ensure the information has been adequately communicated. The mediator may also make observations or suggestions should the parties get stuck during the negotiation process.

Effective mediation requires objective analysis, active listening, utilization of a wide range of people skills, and principled negotiation. A skilled, experienced mediator assists the parties in objectively evaluating their positions and in presenting those positions in a sequential and constructive manner. Mediators can and do serve as “coaches” to assist the parties in their negotiation strategy and assist in making credible offers and demands. Finally, the mediator must be alert and sensitive to volatile emotional issues as such matters can arise at any time in the process with unpredictable results.

Nonetheless, at the end of the day, the parties retain control over the outcome of their dispute. Self-determination by the parties is the central feature of mediation. In this respect, mediation is fundamentally different from adjudication. In judgment, the power to determine the outcome of the dispute is ceded to a hearing officer, judge, jury, or arbiter.

F. Mediator’s persistence and patience

Task Force respondents overwhelmingly stated that patience and persistence are necessary attributes of a good mediator. Persistence is needed to keep people at the table, to get the case settled by exerting some “pressure” and to get people back to the table after a first mediation fails to resolve the case. Participants expressed great dissatisfaction if mediators are merely “messengers” or “potted plants” or gave up too easily when negotiations become difficult. If the mediation ends without agreement, but has some potential to reach one, the vast majority of Task Force participants believe that the mediator should contact the lawyers after a week or two to ask whether they want additional assistance from the mediator.

It is important that the mediator not become discouraged or give up on the mediation prematurely. Mediation sessions commonly “bog down” at some point during the day. At such a juncture, the mediator must address and fully understand the underlying issues and interests of the parties and affirmatively develop an alternative to the previously unsuccessful negotiation strategy. In purely monetary negotiations, for example, a skilled mediator might coach or suggest that the party make an offer or counteroffer in a reasonable negotiation zone by making the “first credible offer.” An approach suggesting reciprocal or even asymmetrical concessions may be a successful tactic. Other techniques might include a decision-tree analysis of the probability of prevailing, a discount-model analysis, a cost-benefit analysis, or, with the permission of all parties, an independent evaluation or analysis of the case.

Mediators commonly contact the parties following a mediation that does not fully settle the case. If the parties were particularly close to settlement, the mediator may contact the parties a few days or even a few hours after the mediation. On other occasions, the mediator may refrain from contacting the parties until after key depositions are concluded or, perhaps, in anticipation of the close of motion practice.

It is certainly not uncommon for a mediator to receive a telephone call on a confidential basis from one of the parties requesting that an attempt be made to “kick-start” settlement negotiations. In such a case, the mediator may choose to telephone or write the other side without disclosing the prior communication. Litigation counsel may also request that the mediator write a confidential letter to the insurance representative, general counsel, or client regarding the mediator’s evaluation of the case. This technique often generates a useful and productive response, which can be used to facilitate additional discussion.

G. Confidentiality

Confidentiality is the bedrock of a successful mediation. Mediators work in a confidential setting to identify, assess, and understand the underlying concerns and interests of the parties. From the parties’ perspective, the disclosure of certain factual information may sometimes be treated as a strategic disadvantage or be considered an admission against interest without strong confidentiality protections. To encourage candor, the parties and the mediator often execute, at the beginning of the mediation process, a written agreement not to disclose mediation discussions to others outside of the process. In addition to seeking protection from disclosures within the litigation process, the parties may also desire privacy from the press or public. The natural conflict between the competing interests of confidentiality and candor can be a challenge, requiring skill by the mediator and trust by the parties.

A number of legal mechanisms exist to afford varying degrees of protection against disclosure of communications made during mediation. These mechanisms include mediator professional responsibility requirements, evidentiary exclusionary rules, court rules, state statutory confidentiality provisions, statutory privileges, case decisions, and written agreements of the parties.

1. Mediation professional responsibility

Confidentiality within the mediation process is an obligation of the mediator as a matter of professional responsibility. Kansas Supreme Court Rule 903, Ethical Standards for Mediators, provides:

A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.

The Model Standards of Conduct for Mediators, adopted in 2005 by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution, provide:

A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.
2. Federal rules of evidence
To encourage settlement of disputes, Rule 408 of the Federal Rules of Evidence provides confidentiality protection for settlement discussions. In addition to settlement offers, Rule 408 renders inadmissible evidence of conduct or statements made in compromise negotiations.

3. Kansas statutory provisions
In Kansas, dispute resolution confidentiality is governed by K.S.A. 5-512 and K.S.A. 60-452a. The statutes are identical in their construction. They provide that all verbal or written information transmitted between any party to a dispute and a neutral person conducting the proceeding shall be considered confidential communications. No admission, representation, or statement made in the proceeding will be admissible as evidence or subject to discovery. In addition, the neutral person (mediator) conducting the proceeding “shall not be subject to process requiring the disclosure of any matter discussed during the proceedings unless all of the parties consent to a waiver.”

The confidentiality statutes also establish a unique “privilege” for any party participating in the proceeding and the neutral person conducting the proceeding to “refuse to disclose, and to prevent a witness from disclosing, any communication made in the course of the proceeding. The privilege may be claimed by the party or the neutral person or anyone the party or the neutral person authorizes to claim the privilege.”

The protections provided by the confidentiality statutes are not unlimited. The confidentiality and privilege requirements do not apply to:

- Information that is reasonably necessary to allow investigation of ethical violations against the neutral person conducting the proceeding or the staff of an approved program conducting the proceeding.
- Any information that the neutral person is required to report under K.S.A. 38-1522 (mandatory reporting statute).
- Any information that is reasonably necessary to stop the commission of ongoing crime or fraud or crime or fraud in the future.
- Any information that the neutral person is required to report under specific provisions of any statute or order of a court.
- Any report to the court that a party has issued a threat of physical violence against a party, party’s dependent, family member, the mediator, or officer or an employee of the court, with the apparent intention of carrying out such threat.

K.S.A. 5-513 provides that “no neutral person, staff member, or member of a governing board of an approved [mediation] program may be held liable for civil damages . . . unless such person acts, or fails to act, in a manner constituting gross negligence with malicious purpose or in a manner exhibiting willful disregard of the rights, safety, or property of any party” to the dispute resolution process.

4. Missouri Supreme Court rules
Missouri law likewise preserves the confidentiality of the mediation process. Missouri Supreme Court Rule 17.06 provides that any communication relating to the subject matter of the dispute made during the alternative dispute resolution process by a participant or any other person present at the mediation is considered to be a confidential communication. No admission, representation, statement, or other confidential communication made either in the setting up or conduct of the process will be admissible as evidence or subject to discovery. But this protection does not immunize the facts of the case by virtue of their disclosure during mediation. If a fact is independently discoverable, it is admissible despite its disclosure during mediation.

Under Rule 17.06, no individual or organization providing alternative dispute resolution services shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process. The rule requires that a settlement be memorialized by a written document containing the essential terms of the agreement and that an individual providing dispute resolution services may be called in an action to enforce the settlement agreement only for the limited purpose of describing events.

5. Federal district court confidentiality rules
In addition to the dispute resolution confidentiality requirements established by state statute or Supreme Court rule, U.S. District Court Local Rules also establish confidentiality requirements for alternative dispute resolution matters under federal jurisdiction.

(a) U.S. District Court for the District of Kansas
D. Kan. Rule 16.3(i) addresses confidentiality, providing that the mediator, all counsel, the parties, and any other persons involved in the mediation shall treat as “confidential information” the contents of written mediation statements, anything that happened or was said, positions taken, and the view of the merits of the case formed by any participant. Such information shall not be:

- Disclosed to anyone not involved in the mediation process,
- Disclosed to the trial judge, or
- Discoverable or subject to compulsory process or used for any purpose.

Unless the disclosure is necessary to:

- Prevent manifest injustice,
- Help establish a violation of law or ethical violation, or
- Prevent harm to the public health or safety of such magnitude in the particular case to outweigh the integrity of the dispute resolution proceedings in general by reducing the confidence of the parties that in future cases their communications will remain confidential.

The Kansas rule also provides limited exceptions to confidentiality, including:

- Disclosures that may be stipulated to by all parties and the mediator,
- Disclosure of an agreement by all parties that appears to constitute a settlement agreement if necessary to determine the existence of a binding settlement contract,
- A report or inquiry by the alternative dispute resolution administrator regarding possible violation of local rules,
- A report of a possible violation of a court order,
- A response by any participant or the mediator to an appropriate request for information duly made by a person authorized by the court to monitor or evaluate the court’s ADR program, or
- Disclosures as otherwise required by law.
(b) U.S. District Court for the Western District of Missouri

In Missouri, the U.S. District Courts for the Western District and Eastern District have developed distinct confidentiality provisions.48 The U.S. District Court for the Western District has established its confidentiality rules within its Early Assessment Program.49 The court treats as confidential all written and oral communications, not under oath, made in connection with or during the Early Assessment Program session, with limited exceptions.50 Similarly, any communication under oath made in connection with the Early Assessment Program shall not be disclosed to anyone unrelated to the program by the parties, their counsel, mediators, or any other participant in the program. Such communications cannot be used for any purpose in any pending or future proceeding in the court except by consent of the parties or as allowed under the Federal Rules of Evidence.51

The Early Assessment Program Rules establish four exceptions to confidentiality:

- The administrator may attend any program session or may discuss with any mediator, designated individual or party any communication, comment, assessment, evaluation, or recommendation;52
- The administrator may require any attorney or party to provide status reports on any ADR matter;53
- The administrator, mediators, and designated individuals may communicate to the assigned judge or court regarding noncompliance by parties or lawyers with this General Order;54 and
- Nothing shall prevent any party, the administrator, mediator or designated individual from discussing with any other participant in the program, any communication made in connection with the program.55

6. Private confidentiality provisions

Confidentiality may also be established by written agreement. At the onset of the mediation process, parties often execute agreements to keep mediation discussions confidential.

Written agreements to mediate are enforceable contracts that, if breached, could give rise to a cause of action for monetary damages.56

Private confidentiality provisions may provide that all statements made during the course of the mediation process will remain confidential and privileged and cannot be disclosed to third parties, except in conformity with applicable law. The agreement may also disallow the introduction into evidence of any information learned in the course of the mediation unless the information may be discovered through some other means. Some agreements have a provision not to call the mediator or any staff member of the mediator to testify or submit evidence regarding any confidential aspect of the mediation in any proceeding. In addition, some agreements provide that any party to the private agreement may obtain injunctive relief to prevent disclosures of any confidential aspect of the mediation process.

7. Recent confidentiality decisions

Several states have grappled with mediation confidentiality provisions. For example, the California courts have zealously adhered to an extensive statutory scheme protecting the confidentiality of mediation proceedings which, with few exceptions, seemingly provides an absolute mediation confidentiality rule.57 Other states, such as Virginia, Colorado, and Utah, have not construed mediation confidentiality provisions as strictly as California. See, e.g., Perreault v. The Free Lance-Star58 (holding Virginia statute addressing confidentiality of written mediated settlements did not allow a court to keep confidential the terms of a mediated compromised settlement of a wrongful death claim), GLN Compliance Group Inc. v. Aviation Manual Solutions59 (Colorado Court of Appeals, in a split decision, concluded it could not enforce a mediated settlement agreement in the absence of a signed writing, even though the retired judge who acted as mediator called in a stenographer and set forth the settlement terms and obtained each party's agreement "on the record"), and Reese v. Tingey Construction60 (reversing trial court’s order requiring deposition of counsel for

(Continued on next page)
the purpose of determining existence of oral settlement agreement, concluding the mediated settlement agreement must be reduced to writing to be enforceable).

H. Good faith/bad faith participation in mediation

K.S.A. 5-518 provides that “the avoidance of mediation … without just cause or excuse shall constitute evidence of bad faith.” Upon a finding that a party to a dispute has acted in bad faith by deliberately and intentionally avoiding mediation, the court may order the party to pay reasonable attorney fees directly related to the mediation.61

In Crandall v. Grbic,62 the Kansas Court of Appeals held summary judgment was appropriate where home-buyer plaintiffs filed suit without first attempting to mediate as required by a mediation agreement entered into with defendant real estate agent. The home buyers’ legal action against their real estate agent for breach of fiduciary duty, fraud, misrepresentation, and violation of the Kansas Consumer Protection Act was barred by plaintiffs’ failure to honor the contract provision requiring mediation prior to filing suit.63

In June 2009, the Kansas Court of Appeals reached a similar holding in Santana v. Olguin.64 The contract to purchase residential real estate in Santana contained a provision for the buyer to elect an inspection of the property for “defects” and a provision that any dispute or claim arising out of the contract be submitted to mediation. After closing on the property, Santana discovered alleged latent defects to the property. She brought an action against three defendants for negligence, fraud, and violations of the Kansas Consumer Protection Act.65 After defendants filed their answer, Santana offered to mediate and ultimately filed a motion to compel mediation. In response, the defendants filed motions to dismiss based on plaintiff’s failure to mediate pursuant to the contract. The district court granted defendants’ motions to dismiss and the Kansas Court of Appeals affirmed, finding the contract to be unambiguous and otherwise enforceable.66 In determining whether the district court erred in dismissing Santana’s claims for failure to submit the claims to mediation, the court cited favorably the Court of Appeals decision in Crandall v. Grbic and found no abuse of discretion in the trial court’s dismissal of Santana’s claims.67 In addition, a number of federal and state decisions have addressed the failure to mediate prior to pursuing arbitration or litigation.68

With the growth of court-ordered mediation, the courts have increasingly required “good-faith” participation in the mediation process. Bad faith, however, is perhaps easier to identify than good faith. The spectrum of potential bad-faith issues may include:

- Counsel’s failure to submit a requested premediation statement,
- Failure to attend court-ordered mediation,
- Failure to bring a client/corporate representative with full settlement authority, or
- Failure to submit a monetary or nonmonetary offer.69

Although the issue of good-faith participation in mediation is very complex, court rules and decisions, unfortunately, do not always give clear guidance on prohibited conduct.70 Answers to these questions are difficult as evidenced by a lack of consensus among legal scholars supporting good-faith participation.71

Occasionally, court rules place the burden on mediators to report bad faith.72 Placing the burden on mediators to report bad faith can compromise neutrality, intrude into mediation confidentiality, and impact negatively on the overall integrity of the process. For example, an ethics committee in Florida advised mediators that they may not report to a court that a party has failed to negotiate in good faith for the principal reasons that the mediator’s report would (1) constitute a breach of confidentiality, (2) impair parties’ right to self-determination, and (3) destroy mediator impartiality in appearance and in reality.73

The Section of Dispute Resolution recently adopted a resolution opposing the use of broad good-faith requirements.74 The Section suggests court-imposed sanctions be imposed only for violation of rules specifying objectively-determinable conduct. An example is failure of a party, attorney, or insurance representative to attend a court-ordered mediation or to provide a written response to the mediator prior to the mediation. The Section points out that rules and statutes that permit courts to sanction a wide-range of subjective behavior create a grave risk of undermining core values of mediation and creating unintended problems including a reduction in the overall confidence in the system of mediation.

In recent years, state and federal courts have addressed court-imposed good-faith requirements. For example, the Eighth Circuit Court of Appeals held the district court acted within its discretion by concluding a party failed to participate in good faith in a court-ordered ADR process where the party failed to provide the mediator a summary of the disputed facts and its position on liability and damages.75 Additionally, the party appeared at the mediation through its outside legal counsel and a corporate representative who had no independent knowledge of the facts of the case and settlement authority of only $500. Any settlement offers of more than $500 had to be relayed by telephone to in-house counsel, who chose not to attend the mediation on advice of outside counsel.

The Eighth Circuit affirmed separate sanctions in the amount of $1,390.63 against both the respondent and their outside counsel. The court also ordered respondent to pay a $1,500 fine to the court and $30 to plaintiff for the costs she incurred in attending the ADR conference. Not only did the court deny a subsequent motion to reconsider, but it imposed additional sanctions against respondent and respondent’s counsel in the amount of $1,150 each for vexatiously increas-
ing the cost of litigation by filing a frivolous motion.

Similarly, the U.S. District Court for the District of Kansas imposed attorney fees and expenses in the amount of $3,000 and ordered defendant to pay the plaintiff’s portion of the mediator’s fees and expenses. The sanctions were imposed when local defense counsel appeared at the mediation without any corporate representative with settlement authority. In addition, local counsel was not able to reach his corporate representative by telephone or otherwise.

In an unpublished decision, the Tenth Circuit grappled with an attempt by plaintiff to withdraw from a settlement at the conclusion of the mediation. In Dehning vs. Child Development Services of Fremont Co., a former employee brought a Title VII suit for sexual harassment and retaliation. The parties engaged in mediation and reached an agreement in which the plaintiff agreed to settle her claims against the defendant in exchange for a monetary payment and the defendant’s agreement to hire her as an independent contractor. Later, however, Dehning refused to follow through with the settlement, maintaining she had never agreed to compromise her sexual harassment claim. At the enforcement hearing, the mediator provided testimony regarding the issues discussed during mediation and the resulting settlement agreement. The court, noting its power to summarily enforce settlement agreements, rejected plaintiff’s attempt to withdraw from the settlement and upheld the agreement. The Tenth Circuit affirmed, including the lower court’s award of costs and fees against the plaintiff.

II. Conclusion

The use of mediation to resolve complex commercial disputes is likely to continue to increase. Mediation is often viewed in the corporate culture as an appropriate and preferred step prior to trial. There are various reasons supporting this perception.

First, the business community believes, whether true or not, that litigation is increasingly expensive and protracted. Many business entities who are otherwise prepared to litigate may, nonetheless, wish to first try negotiation and, if negotiation is not successful, consider a relatively inexpensive round of mediation.

Second, many business disputants prefer mediation because it permits a degree of party control, which is gradually lost as the litigation process is engaged. Even if the mediation is unsuccessful, each party can learn a great deal about their own case and the other party’s position.

Third, commercial disputes are very often between parties who have a legitimate business reason to maintain long-term relationships. Litigation has the potential to completely destroy an otherwise valuable business relationship. By contrast, mediation of relationship-based issues, if successful, avoids the disruption of the relationship and allows it to continue.

Fourth, one or both parties may be concerned about the disclosure of confidential information. Mediation avoids disclosure of sensitive information either to the public or to the other party. Generally, everything said in mediation is protected as confidential settlement discussions and cannot be introduced in litigation or discussed publicly.

Finally, in an era of declining judicial resources, it remains likely that the courts will continue to develop and enhance existing case management systems that will track cases based upon complexity, anticipated discovery, time before a trial and the overall amount of court resources required. The use of case management mechanisms (including neutral evaluation, mediation, and arbitration), involves the use of different alternative dispute resolution processes. This case management approach is reminiscent of Professor Frank E.A. Sander’s 1976 Proposal for the Development of a “multi-door” courthouse, in which he supports the utilization of a wide variety of alternative dispute resolution techniques.

Increasingly, successful practitioners acknowledge the need to inform clients at the beginning of the professional relationship about the availability of mediation and other dispute resolution procedures. The practitioner’s enhanced understanding of the mediator’s role permits the client to be properly prepared for mediation and allows maximization of benefits that may be derived from the mediation experience.

About the Author

Larry R. Rute is a partner and co-founder of Associates in Dispute Resolution LLC, in Topeka. His practice encompasses a full range of dispute resolution services. He received his Juris Doctorate from Washburn University School of Law and his Masters of Law Degree from the University of Washington. He teaches Alternative Dispute Resolution at Washburn University School of Law. He is a Distinguished Fellow and member of the Board of the International Academy of Mediators. He has twice received the KBA’s Outstanding Service Award.

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ENDNOTES
5. Focus groups were conducted in Atlanta, Chicago, Denver, Houston, Miami, New York, San Francisco, Toronto, and Washington, D.C.
6. Id. at 4.
7. Id. at 5.
8. Id. at 6.
9. Survey respondents felt it was important, very important, or essential...
for mediators to know the file and read the documents to encourage a constructive approach to the mediation and to discuss who will attend the mediation session. Id. at 7.

10. For a more detailed explanation of the use of mediation in employment cases, see Larry Rute, Patrick Nichols & John R. Phillips, Mediation Round Table: Improving the Quality & Effectiveness of Mediation, Vol. XXVI No. 4, J. Kan. Trial Law. Ass’n 11 (March 2003) [hereinafter Rute, Nichols & Phillips].

11. Id. at 10.
12. Id. at 11.

15. Id.
17. Task Force, supra note 4, at 12.
18. One exception to the length of the confidential statement would be the need to provide extensive background information in highly complex multi-party or class/collective action matters.
20. Id. at 12.
23. In recommending a specific assessment, 84 percent of users thought it would be helpful in half or more cases and 75 percent in most or almost all cases. Only 18 percent of mediators thought it would be helpful in most, all or almost all cases, and only 38 percent thought it would be helpful in half or more. Id. at 15.
24. Id. at 14-15.
26. Id. at 17.
27. Id.

32. ABA Model Standards of Conduct for Mediators V (B).
33. K.S.A. 60-452 also provides that an offer to compromise is inadmissible as evidence or subject to discovery.
34. K.S.A. 60-452a provides that an offer to compromise is inadmissible as evidence or subject to discovery.

35. K.S.A. 5-512(a) and K.S.A. 60-452a(a).
36. K.S.A. 5-512(b)(1) and K.S.A. 60-452a(b)(1).
37. K.S.A. 5-512(b)(2) and K.S.A. 60-452a(b)(2).
38. K.S.A. 5-512(b)(3) and K.S.A. 60-452a(b)(3).
39. K.S.A. 5-512(b)(4) and K.S.A. 60-452a(b)(4).
40. K.S.A. 5-512(b)(5) and K.S.A. 60-452a(b)(5).
41. Mo. Rev. Stat. § 435.014, provides: “No admission, representation, statement, or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.”
42. Mo. Sup. Ct. R. 17.06(a).
43. Id. at 17.06(b).
44. Id. at 17.06(c).
45. Id. at 17.06(d).
tractual obligation to mediate as precondition to initiating litigation or arbitration, concluding mediation contracts are not subject to enforce-
ment under the Federal Arbitration Act and no enforceable contract existed under state law because defendant employer could not prove employees had notice of the newly adopted mediation requirements); Adams v. Newport Crest Homeowners Assn., 2009 WL 2875361, (Cal. App. 4 Dist. 2009) (clause in homeowner's association settlement agreement that forced parties to enter mediation prior to seeking judicial relief is enforce-
able); Darlington v. Nissan N. Am. Inc., 117 F. Supp. 2d 54 (D. Me. 2000) (notwithstanding claims pursuant to Motor Vehicle Dealer's Act were ripe for judicial review, case dismissed without prejudice where plaintiff failed to make a written demand for mediation as required by the Act); LBL Skysystems Inc. v. APG-America Inc., 2005 WL 2140240 (E.D. Penn. Aug. 31, 2005) (concluding defendant waived right to enforce contractual obligation to mediate prior to initiating legal proceedings by not filing motion to stay proceedings pending mediation and, instead, impleading other parties, asserting counterclaims and filing in limine and summary judgment motions).

69. John Lande, Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. Rev. 69 (2002).


73. Id.

74. E.D. Mo. L.R. 6.05 provides a "the neutral shall report to the judge any willful or negligent failure to attend any ADR conference, to substantially comply with the Order Referring Case to Alternative Dispute Resolution or otherwise participate in the ADR process in good faith. The [c]ourt may impose any sanctions deemed appropriate." See Employer’s Consortium Inc. v. Aaron, 698 N.E.2d 189, 190 (Ill. App. Ct. 1998) (accepting neutral's report of the parties' level of participation in the ADR process).

75. Supra note 72.


77. See Gee Gee Nick v. Morgan's Foods Inc., 270 F.3d 590 (8th Cir. 2001).


79. 262 Fed. Appx. 75, 2008 WL 1235333 (10th Cir.).


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Civil

Habeas Corpus
Rowland v. State
Sedgwick District Court
Reversed and Remanded
Court of Appeals – Affirmed in Part and Reversed in Part
No. 98,351 – November 20, 2009

FACTS: Rowland convicted of aggravated burglary and attempted rape. On appeal he claimed trial judge erred in not instructing jury on voluntary intoxication and claimed trial counsel was ineffective. In unpublished opinion, Court of Appeals affirmed, finding the ineffective counsel claim could be decided on direct appeal. Rowland then filed K.S.A. 60-1507 motion challenging the evidence as insufficient and alleging an additional ineffectiveness claim. District court denied relief, finding insufficiency of the evidence claim improper under 60-1507 and ineffectiveness claim had been decided in direct appeal. In unpublished opinion, Court of Appeals affirmed. Rowland’s petition for review granted.

ISSUES: (1) Ineffective assistance of counsel and (2) sufficiency of the evidence

HELD: Procedure pursuant to State v. Van Cleave, 239 Kan. 117 (1986), for remand of ineffective assistance of trial counsel claim to the district court, is discussed. Problem in this case was no Van Cleave hearing before Rowland’s ineffective assistance claim was decided on direct appeal. Court of Appeals’ direct appeal decision on claim that counsel should have sought a voluntary intoxication instruction was premature and not decided on a sufficient record. Because that claim did not receive complete review it was due during direct appeal, Rowland may advance further arguments in support of the claim in his 60-1507 motion. Court of Appeals is reversed and case is remanded for further proceedings.

Even if assumed that error by trial or appellate counsel was sufficient to establish exceptional circumstances for failing to challenge sufficiency of the evidence in direct appeal, this claim has no merit because ample evidence of Rowland’s guilt.

STATUTE: K.S.A. 60-1507

Judgments
Padron v. Lopez
Franklin District Court – Affirmed in Part and Reversed in Part
No. 100,763 – November 25, 2009

FACTS: Florida resident Padron filed Kansas action under Uniform Enforcement of Foreign Judgments Act (FJA) to enforce an ex parte temporary injunction issued by a Florida court regarding a plane being repaired in Kansas by Dodson. Pursuant to that filing, Padron removed the plane. Dodson filed motion to quash the temporary injunction under FJA is affirmed, 249 Kan. 117 (1991), is distinguished. District court’s refusal to enforce Florida’s ex parte temporary injunction under FJA is affirmed, but district court lacked subject matter jurisdiction to order plane’s return to Kansas and to order additional bond to be posted. Contempt order is void due to Dodson’s failure to personally serve Padron with district court’s show cause order.

Although some courts have recognized and enforced a foreign jurisdiction’s temporary injunction under doctrine of comity, no such relief was warranted under circumstances in this case.

STATUTES: K.S.A. 20-1204a(b), K.S.A. 58-201; and K.S.A. 60-901, -903, -905, -2103(a), -3001 et seq., -3002, -3004(a), -3006, -3007

Lawyer Referral Fee
Shambberg, Johnson & Bergman v. Oliver
Johnson District Court – Reversed and Remanded with Directions
No. 97,584 – October 30, 2009

FACTS: Hotchkiss came to Oliver at the Wallace, Saunders, Austin, Brown & Enochs Chtd. (Wallace Saunders), after she experienced severe medical complications. Oliver referred the case to Victor Bergman of the Shambberg, Johnson & Bergman firm wherein Oliver would receive 25 percent of Shamberg’s contract contingent fee of 40 percent of net recovery. Hotchkiss was identified in Oliver’s files as a contingent fee client. The fee-sharing arrangement was modified over a year after the initial referral providing a graduated fee sharing. Oliver resigned as an employee and director of Wallace Saunders in January 2005. Wallace Saunders and Oliver disagreed on entitlement to any fee from the Hotchkiss case. When Oliver left Wallace Saunders, he took the Hotchkiss file at the client’s request. Oliver continued working on the Hotchkiss case. Court files indicated that Wallace Saunders had entered an appearance on behalf of the Olathe Medical Center after the Hotchkiss file was opened by
Wallace Saunders in February 2004. Shamberg settled the lawsuit against certain physicians in July 2005. The claim against Olathe Medical Center was settled during trial. The total amount of referral fee is $582,881.90. Shamberg paid the fee into court. The district court granted summary judgment to Wallace Saunders giving them the entire referral fee.

ISSUE: Lawyer referral fee

HELD: Court held that Oliver did not have standing to enforce the disciplinary rule of Wallace’s conflict with Olathe Medical Center as a procedural weapon to prevail in a civil action. Court held that Wallace Saunders, through its agent Oliver, had an attorney-client relationship with the Hotchkisses, which required the firm to provide the client with advice and counseling throughout the medical malpractice litigation. The clients agreed to compensate for those services by consenting to the referral agreement, which gave Wallace Saunders a share of the contingency fee. When Oliver departed the firm, the referral fee had not been fully earned because the clients were still entitled to services, i.e., the referral agreement remained executory. Court held that Oliver’s Deferred Compensation Agreement (DCA) with Wallace Saunders effectively measured the departing attorney’s share of the value of the firm by utilizing a fixed rate of $150 for each and every work-in-process file, including those retained by the firm with a contingent fee arrangement. Upon paying for retained work-in-process files under the DCA, the firm was entitled to receive all of the future fees generated by those files. If the Hotchkisses had not requested Oliver to take their file, Oliver’s employment agreement would have left that file with Wallace Saunders. The firm would have paid Oliver for his percentage share of $150 on that file, being approximately $5,22, and subsequently kept the referral fee of more than a $50,000. The DCA made no provision for treating a withdrawn file with a referral fee arrangement any differently. Oliver paid the agreed-upon value for the Hotchkisses’ file under the DCA, and he, likewise, was entitled to the future fees generated by that file. Court reversed and order summary judgment in favor of Oliver.

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

CRIMINAL

STATE V. APPLEBY

JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND SENTENCE VACATED IN PART NO. 98,017 – NOVEMBER 20, 2009

FACTS: Appleby convicted of capital murder and attempted rape. Kansas (Kan.) detectives interrogated him in Connecticut (Conn.) after his arrest in that state on outstanding Conn. warrant. He waived Miranda rights and admitted killing the Kan. victim. On appeal, Appleby claimed: (1) convictions were multiplicitous and violate Double Jeopardy Clause, (2) right against self-incrimination violated by admission of statements made to Kan. detectives after he had asked about counsel while being booked on Conn. charges, (3) right to confrontation violated by admission of computer-generated report regarding population statistic related to DNA testing, (4) jury instruction on premeditation impermissibly added language beyond PIK instruction and unduly favored state’s theory, (5) trial court abused its discretion in weighing aggravating and mitigating circumstances in imposing hard 50 sentence, and (6) hard 50 sentencing scheme is unconstitutional under Apprendi. Appeal stayed pending decisions in Melendez-Diaz v. Massachusetts, 557 U.S. ___ (2009), and Montejo v. Louisiana, 556 U.S. ___ (2009).

ISSUES: (1) Multiplicity of capital murder and attempted rape, (2) suppression of confession, (3) population statistics related to DNA testing, (4) jury instruction on premeditation, (5) weighing aggravating and mitigating factors, and (6) constitutionality of K.S.A. 21-4635


Applying Davis v. U.S., 512 U.S. 452 (1994), trial court correctly examined timing, content, and context of Appleby’s questions about counsel. Appleby’s references to an attorney during book-in process on the Conn. charges were ambiguous and not a clear invocation of Fifth Amendment right. Interplay of Fifth and Sixth amendments right to counsel and Montejo are discussed.

Applying Melendez-Diaz, population frequency data and statistical programs used to make that data meaningful are nontestimonial. Based on this scientific data, experts in this case developed personal opinions, and were available for cross-examination regarding their knowledge or lack of knowledge regarding that data.

Use of PIK instructions is strongly advised, but not mandatory. State v. Beebe, 244 Kan. 48 (1988), is the most helpful and analogous case to Appleby’s. Instruction merely informed jury of law recognizing that premeditation must be present before the homicidal conduct, but does not have to be present before a struggle begins. It did not direct jury how to apply the evidence or unduly emphasize the state’s case.

No abuse of discretion demonstrated in trial court’s finding that aggravating circumstance outweighed Appleby’s mitigating circumstances.

K.S.A. 21-4635 is constitutional and does not violate Apprendi.

CONCURRENCE (Johnson, J.): Would reverse trial court’s denial of the suppression motion. Under facts of case and applying reasonable standard, Appleby effectively invoked Fifth Amendment right to counsel with respect to the Conn. charges and could not thereafter be approached for further interrogation by Kan. detectives. Concurs with majority’s result on other issues, but voices concern that multiplicity test using K.S.A. 21-3107 is not true to separation of powers doctrine, and voices frustration with case law development of premediation.


STATE V. BALLARD

SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED NO. 100,057 – NOVEMBER 6, 2009

FACTS: Ballard entered guilty plea to charge of aggravated indecent liberties with a child. District court denied Ballard’s request for disposition departure to probation, but imposed 55-month prison term as a departure sentence from Jessica’s Law, with 36-month post-release supervision and eligibility for good time credit. After hearing on state’s objection, district court increased post-release supervision to life, and held Ballard was not entitled to good time credit. Ballard appealed, claiming district court abused its discretion in denying a downward dispositional departure to probation. State argued the appellate court had no jurisdiction to review a presumptive sentence that was ultimately calculated through grid block. Ballard also claimed district court had no jurisdiction to increase post-release supervision and claimed district court erred in holding Ballard ineligible for good time credit.

ISSUES: (1) Appellate jurisdiction, (2) discretion in sentencing,
STATE V. MORLOCK
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 97,447 – NOVEMBER 6, 2009

FACTS: Traffic stop of van in which Morlock was a passenger resulted in discovery of 113 pounds of marijuana and Morlock’s conviction on drug charges after district court denied Morlock’s motion to suppress. On appeal, Morlock claimed the arresting officer unconstitutionally asked travel questions unrelated to purpose and scope of the traffic stop, and exceeded the scope and duration of the stop when he ran a warrant check on Morlock’s driver’s license without reasonable suspicion of criminal activity. Divided Court of Appeals’ panel reversed the trial court’s denial of motion to suppress, and set aside Morlock’s conviction. 40 Kan. App. 2d 216 (2008).

ISSUES: (1) Questions about travel plans and (2) warrant check on passenger.

HELD: After Court of Appeals’ decision, U.S. Supreme Court confirmed that an officer’s inquiries into matters unrelated to justification for stop, without measurable extension of the traffic stop, did not necessarily require reasonable suspicion. Arizona v. Johnson, 129 S. Ct. 781 (2009). Here, officer’s questions about driver’s travel plans were proper because they were permissible incidents to a routine traffic stop, and travel questions to Morlock were constitutionally permissible under facts in this case. Cases from federal circuit courts, including Tenth Circuit, are compared.

Under facts of case and officer’s training and experience, sufficient information justified the officer taking Morlock’s license to the patrol vehicle to run a warrant check.

STATUTES: K.S.A. 22-2402, -2402(1), -3602(e); K.S.A. 65-4163(a)(3); and K.S.A. 79-2504

STATE V. RASCHKE
RICE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 98,861 – OCTOBER 30, 2009

FACTS: Raschke convicted of four counts of forgery. He did not object to imposition of $325 fine, the sum total of the four forged instruments. On appeal, Raschke claimed for first time that in setting the fine, the sentencing court failed to consider on the record Raschke’s financial resources and the nature of the burden on Raschke to pay the minimum fine. Raschke also claimed his 19-month sentence was unconstitutional because it was based in part on criminal history not proven to a jury beyond a reasonable doubt.

ISSUES: (1) Preservation of issue for appeal, (2) consideration of defendant’s financial circumstances in setting minimum fine, and (3) sentencing

HELD: Issue raised for first time on appeal is considered as exception to general common-law rule that issue must be preserved for appellate review.

Extensive discussion of when “shall” is directory rather than mandatory, distilling factors to be considered in making that determination to include: (1) legislative history, (2) substantive effect on a party’s rights versus merely form or procedural effect, (3) existence or nonexistence of consequences for noncompliance, and (4) subject matter of the statutory provision, e.g., elections or notice on charges for driving under the influence. Applied to K.S.A. 21-3701(b)(2)-(4), the minimum fines for forgery are mandatory, thus sentencing judge did not have to take into account Raschke’s financial resources or the nature of the burden that payment of the fine would impose.

Raschke’s Apprendi claim is rejected as controlled by State v. Ivory, 273 Kan. 44 (2002).

STATUTES: K.S.A. 8-1567, -1567(f); K.S.A. 21-3710, -3710(a)(1), -3710(b), -3710(b)(2)-(4), -4603d(a)(9), -4603d(1), -4604(e)(1), -4607, -4607(3); K.S.A. 22-3405, -3424(a), -3504, -3803; and K.S.A. 60-404
Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office


For nearly 30 years, the Kansas Bar Association published the “Kansas Appellate Practice Handbook” as a service to the bar and its members. In 2005, the Association generously donated its rights to the Kansas Judicial Council in order to effect a wider distribution of the handbook online at no cost to the public and the bar. The Judicial Council, through their Appellate Procedure Advisory Committee, published a 4th edition of the handbook in 2007 and recently released a 2009 update.


Free online access to the 2009 update is available at www.kscourts.org. Choose “Appellate Clerk” in the banner at the top of the page and go to “Appellate Handbook.” All or part of the handbook may be printed at no cost. A printed version of the handbook is also available for purchase from the Kansas Judicial Council in a loose-leaf binder with divider tabs. See “Publications” at www.kansasjudicialcouncil.org.

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FACTS: Canaday alleged that from 1984 to 1988, while he was 12-17 years old and a student at Midway, Robert Baird, a counselor, coach, and teacher at Midway, sexually abused him on as many as 100 occasions, employing various types of sexual contact. Canaday filed his action against Baird and Midway in 2007, but Baird was dismissed from the action prior to summary judgment. Following discovery, Midway filed a motion for summary judgment on the ground that Baird’s acts toward Canaday were not foreseeable. The district court ultimately granted summary judgment to Midway concluding that mere rumors that were investigated and found to be unsubstantiated did not impart adequate notice to establish foreseeability of harm. As part of the summary judgment ruling, the district court granted Midway’s motion to strike several witnesses, including several fellow student witnesses and a former janitor who could testify that he observed clear evidence of the abuse and reported it to the district superintendent.

ISSUES: (1) Exclusion of witnesses, (2) negligence, and (3) foreseeability

HELD: Court first held that Midway did not stand to be materially prejudiced or surprised by the testimony of the disputed witnesses; any such prejudice could have been cured by a belated deposition, even if on short notice and at Canaday’s cost; any disruption in the trial scheduled could have been easily avoided by a less severe action, such as the belated depositions; and there was no bad faith or willfulness shown or suggested on the part of Canaday or his counsel. Accordingly, even if Canaday can be said to have violated some aspect of the case management order, it was an abuse of discretion to strike the disputed witnesses. Court also held the district court erred in granting summary judgment to Midway, when viewing a host of facts and inferences in the light most favorable to Canaday, indicate that summary judgment was not proper in this case. It can be reasonably inferred that Midway’s superintendent had substantial knowledge that Baird had a proclivity to inappropriate relationships with students and he had direct knowledge of a potentially inappropriate relationship between Canaday and Baird. Although the jury may decide that the superintendent’s investigation discharged any further duty, foreseeability was a genuine issue of material fact and plaintiff was entitled to jury consideration of that issue.

STATUTE: K.S.A. 60-216(c), (b), (e), (f)

HABEAS CORPUS
BAKER V. STATE
SEDGWICK DISTRICT COURT
REVERSED AND REMANDED
NO. 100,501 – NOVEMBER 20, 2009

FACTS: On June 9, 2006, Supreme Court affirmed Baker’s conviction for first-degree murder, but vacated the sentence and mandated for resentencing. Mandate issued July 5, 2006. Baker resented on Dec. 21, 2006. He filed K.S.A. 60-1507 motion Aug. 6, 2007, alleging ineffective assistance of counsel. District court denied the motion as time barred because it was not filed within one year of Supreme Court’s decision or mandate. Baker appealed, arguing appellate jurisdiction did not terminate until 10 days following his resentencing.

ISSUE: Timeliness of K.S.A. 60-1507 motion

HELD: No Kansas case has addressed this issue. Wilkerson v. State, 38 Kan. App. 2d 732 (2007), is distinguished. Where Supreme Court ordered Baker to be resentenced after a direct appeal, the one-year time period under K.S.A. 60-1507(f) starts to run after the period for a direct appeal has expired.

STATUTES: K.S.A. 22-3608; and K.S.A. 60-1507, -1507(a), -1507(f)

REVERSAL DISCHARGE AND WHISTLEBLOWING
SHAW V. SOUTHWEST KANSAS GROUNDWATER MANAGEMENT DISTRICT
FINNEY DISTRICT COURT
REVERSED AND REMANDED
NO. 101,416 – NOVEMBER 20, 2009

FACTS: Southwest Kansas Groundwater Management District (GMD) is an organization created by statute to ensure the proper management and conservation of Kansas’ groundwater resources. Shaw was hired by GMD in 1990 and worked as a conservationist. One of Shaw’s duties as a conservationist was to perform field investigations regarding alleged waste of water violations. In 2004, Shaw observed evidence that he believed constituted a waste of water from farmland operated by Peterson, GMD’s board president. Shaw reported the violation. Shaw was fired and filed a petition for retaliatory discharge for whistleblowing. The district court granted summary judgment to GMD, ruling that Shaw’s complaint did not constitute whistleblowing. The district court found that under Kansas law “a report must be made to an outside agency in order to qualify as whistle blowing.”

ISSUES: (1) Retaliatory discharge and (2) whistleblowing

HELD: Court held that internal whistleblowing is recognized as an actionable tort in Kansas in circumstances where the employee seeks to stop unlawful conduct pertaining to public health and safety and the general welfare by a co-worker or an employer through the intervention of a higher authority inside the company. Court found Shaw satisfied the higher authority standard in this test. Court also found that the violation was a safety hazard and that Kansas had a strong public interest in groundwater management and preventing groundwater waste from runoff. Court held there was no question that Shaw had found a waste of water violation on the farmland operated by Peterson. According to Shaw, Peterson admitted at the executive committee meeting that a violation had occurred and that he expected to receive a written notice. The record before the district court belied GMD’s assertion that its employees had a legitimate disagreement about how to apply the rules and regulations. Court reversed the summary judgment and remanded for further proceedings.

STATUTE: K.S.A. 82a-1020, -1027
with subordinate liens on all three parcels of real estate. The judgment debtor filed a motion to set aside the sheriff’s sale and return of purchase money. The Wetzel buyers filed a motion for interest on the money they had borrowed from another bank to purchase the real estate at the sheriff’s sale. The district court ruled that although the Wetzel buyers were parties to the foreclosure action, they had standing to pursue their claim for interest. The district court ordered FNB to reimburse the Wetzel buyers for their interest expenses in the amount of $3,709.43.

**ISSUES:** (1) Sheriff’s sale and (2) interest

**HEL D:** Court held that because the Wetzel buyers became a party to the record with the right to be heard on any claim relating to the subject matter of the sheriff’s sale, they had a sufficient stake in the outcome of the controversy to pursue their claim for interest expenses against FNB. However, court held equitable remedies cannot be imposed in the absence of the breach of a duty. FNB breached no duty to the Wetzel buyers because the Wetzel buyers themselves had the obligation to check the title to the property they were purchasing. Equity cannot be invoked to save the Wetzel buyers from the consequences of their own negligence. Court concluded that the district court erred in awarding the Wetzel buyers a judgment against FNB for their interest expenses.

**STATUTES:** None.

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**CRIMINAL**

**STATE V. BRITTINGHAM**

**HARVEY DISTRICT COURT – AFFIRMED**

**NO. 100,888 – OCTOBER 30, 2009**

**FACTS:** Brittingham convicted of drug offenses based on evidence discovered in plain view by police called to the apartment when public housing maintenance officials entered apartment with passkey to investigate a sewage problem and found Brittingham and another person nonresponsive. On appeal, Brittingham claimed the district court erred in finding the maintenance staff were not government employees subject to Fourth Amendment and in denying Brittingham’s motion to suppress.

**ISSUE:** Fourth Amendment and private person

**HEL D:** Status as public housing employees does not automatically invoke Fourth Amendment protections, and under facts of case, their entry into Brittingham’s apartment was not done at the direction of, or in participation with, law enforcement and was not done in furtherance of government’s objectives. Police involvement was appropriate to check on welfare of nonresponsive occupants. District court properly denied Brittingham’s motion to suppress.

**STATUTE:** K.S.A. 2008 Supp. 65-4152(a)(2), -4160

**STATE V. GREGG**

**CRAWFORD DISTRICT COURT – AFFIRMED**

**NO. 100,452 – MARCH 13, 2009**

**PUBLISHED VERSION FILED OCTOBER 27, 2009**

**FACTS:** Gregg convicted of violating protection from abuse (PFA) order that directed him not to contact his mother. Gregg admitted and trial court found, Gregg had followed his mother at Walmart and asking her to drop the PFA. On appeal, Gregg claimed the district court misunderstood Gregg’s testimony, that the contact in Walmart had been brief, and that his insistence to drop the protective order had occurred in a different conversation.

**ISSUE:** Sufficiency of the evidence

**HEL D:** Under facts of case, evidence of saying “hello” in Walmart was sufficient to prove beyond a reasonable doubt that Gregg had contacted his mother contrary to the PFA and in violation of K.S.A. 21-3843.

**STATUTE:** K.S.A. 21-3843

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**STATE V. KNIGHT**

**JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS**

**NO. 100,167 – NOVEMBER 6, 2009**

**FACTS:** Knight was pulled over on suspicion of DUI after his vehicle weaved in and out of his proper lane of traffic. The trial court denied his motion to suppress finding that independent of the officer’s suspicion that Knight was driving while intoxicated, Knight had committed actual traffic infractions sufficient to justify the officer’s stop. After a bench trial on stipulated facts, including stipulation to possessing the handgun discovered during the stop, the trial court found Knight guilty of carrying a concealed firearm, a misdemeanor, and possession of a firearm, a felony. Knight was found guilty on the firearm charges due to his prior conviction of possession of cocaine.

**ISSUES:** (1) Traffic stop, (2) motion to suppress, (3) criminal possession of a firearm, and (4) concealed firearms

**HEL D:** Court held the officer had an independent basis for reasonable suspicion independent of K.S.A. 8-1522 to stop Knight’s vehicle – (1) the time of day - 11:24 p.m. and (2) the driver’s driving over the left and right lane marker several times. Knight testified he was concerned Knight was either intoxicated or sleepy. The officer’s observation of Knight’s car weaving in and out of lanes without signaling and his car’s weaving within its proper lane of travel, standing alone, created sufficient reasonable suspicion for the officer to believe that Knight was driving while intoxicated or sleepy, which justified a temporary investigative stop. Court held that because the separate crime of attempted possession of cocaine is not explicitly included within K.S.A. 21-4204(a)(4)(A), that such crime cannot be used to convict a defendant of criminal possession of a firearm under K.S.A. 21-4204(a)(4)(A). Accordingly, court reversed Knight’s conviction for criminal possession of a firearm. Court rejected Knight’s constitutional claim concerning concealed firearms. Court held the concealed firearm prohibitions to be presumptively constitutional under the Second Amendment. Court also reversed finding the trial court erred in ordering Knight to pay Board of Indigents’ Defense Services fees without first making the proper inquires on Knight’s financial resources.

**STATUTES:** K.S.A. 8-1514, -1522; K.S.A. 21-3301, -3107(2)(c), -3439, -4201, -4204(a), -4642, -4643(a)(1), -4708; K.S.A. 22-4513; and K.S.A. 65-4159, -4160

**STATE V. MADKINS**

**GEARY DISTRICT COURT – AFFIRMED**

**NO. 100,593 – NOVEMBER 20, 2009**

**FACTS:** Junction City police officers arrested Calvin Dotson, an alleged drug dealer, pursuant to a federal warrant. When the officers performed a stop of Dotson’s car, Madkins was a passenger in the car. The officers reportedly observed Madkins throw a bag of crack cocaine out of the passenger’s side window of the car. Madkins was subsequently arrested and charged with possession of cocaine with intent to sell and having no drug tax stamp. During voir dire, the trial court prohibited Madkins from posing certain questions to prospective jurors. Prior to the prohibition, Madkins’ counsel had been exploring any ties or connections the prospective jurors had with police officers. The questioning briefly left the topic of police officers and focused on whether any of the prospective jurors worked with each other. Counsel then returned to the police officer topic by asking whether the prospective jurors could believe that a police officer might not tell the truth on the witness stand and whether they necessarily believed something happened just because a police officer said it happened. At this point, the judge interrupted questioning, ordered counsel to approach the bench, and prohibited defense counsel from asking any further questions about whether
police officers lie. Following jury deliberations, Madkins was convicted of possession of cocaine, the lesser-included crime of possession with intent to sell, and for having no drug tax stamp.

ISSUES: (1) Prosecutorial misconduct, (2) presumption of innocence, (3) burden of proof, and (4) voir dire

HELD: Court found the prosecutor's comments went beyond the wide latitude allowing in discussing the case, but that the prosecutor's comments did not prejudice Madkins or deny him a fair trial. Court found no reversible error in the prosecutor's attempt to shift the burden of proof either. Court addressed the issue of whether prohibiting voir dire regarding prospective juror opinion on police credibility violates a defendant's constitutional right to trial by an impartial jury. Court found the prohibited inquiry was cumulative and provided no additional benefit in discovering whether any of the potential jurors held a general bias in favor of police officer testimony. Court held the district court's decision to prohibit further voir dire questions regarding prospective juror opinion on police credibility did not violate Madkins' constitutional right to trial by an impartial jury and did not constitute an abuse of discretion.

STATUTES: K.S.A. 22-3408(3), -3410(2)(i); and K.S.A. 60-261

STATE V. MCKNIGHT
SHAWNEE DISTRICT COURT – AFFIRMED NO. 100,246 – NOVEMBER 13, 2009

FACTS: McKnight placed on probation with underlying 30-month prison term and 24-month post-release supervision. When probation was later revoked for technical violations, district court ordered him to serve a modified 22-month prison sentence with no post-release supervision. On state's motion to correct sentencing error, district court reinstated the 24-month period of post-release supervision. McKnight appealed, claiming district court was authorized to modify the sentence upon revocation of probation, but lacked jurisdiction to subsequently reinstate post-release supervision.

ISSUE: Probation revocation sentencing

HELD: Mandatory period of post-release supervision may not be reduced upon probation revocation unless K.S.A. 2008 Supp. 22-3716(e) applies to the offender. No dispute that McKnight was not eligible for that statutory exemption because offense fell within a border box of applicable guidelines grid. District court's attempted sentence modification upon probation revocation was illegal. No error in granting state's motion to correct an illegal sentence and reinstate post-release supervision.

STATUTES: K.S.A. 2008 Supp. 22-3716(b), -3716(e) - 3717(d)(1), -3717(d)(1)(D)(I); and K.S.A. 22-3504(1)

STATE V. MURPHY
GEARY DISTRICT COURT – AFFIRMED NO. 100,178 – NOVEMBER 13, 2009

FACTS: Murphy convicted of drug offense based on evidence discovered in his car when officer stopped Murphy for speeding, and after issuing ticket telling Murphy he was free to go, then questioned Murphy about illegal drugs and asked for permission to search the car. Murphy filed motion to suppress, claiming his consent to search of his vehicle was an illegal seizure. District court's denial of Murphy's motion to suppress is affirmed.

STATE v. LATURNER controls confrontation claim, 289 Kan. __ (2009), which applied principles in Crawford and held the objection, timing, and waiver provisions of K.S.A. 22-3437(3) remain in effect. Under Laturner, district court did not err in overruling Murphy's objection for being untimely raised under the statute.

DISSENT (Greene, J.): Does not agree that under totality of the circumstances a reasonable person would have felt free to go. Officer's conduct and use of "by the way" to preface further questions and request to search signaled a command for further conversation that a reasonable person would interpret as an extension of the detention rather than an invitation for a brand new and voluntary conversation. Murphy's consent to search of his vehicle was an illegal extension of his detention for speeding. Evidence from the search should have been suppressed.

STATUTE: K.S.A. 22-2402(2), -3437, -3437(3)

STATE V. RIVERA
MCPherson DISTRICT COURT – AFFIRMED NO. 100,703 – NOVEMBER 6, 2009

FACTS: Rivera convicted of aggravated criminal threat for calling manufacturing plant to report a bomb. No bomb was found when plant was evacuated. On appeal he claimed: (1) his phone call was not a threat under Kansas law, but was instead a simple warning, of an existing state; (2) an officer's cross examination testimony improperly communicated to the jury that Rivera had a prior criminal conviction, in violation of the court's order in limine; and (3) trial court improperly allowed his phone records to be introduced into evidence.

ISSUES: (1) Sufficiency of the evidence, (2) order in limine, and (3) admission of phone records

HELD: Under facts of case, statement, “You have a bomb in the plant. Get everyone out,” was a threat for purposes of K.S.A. 21-3419a.

Rivera lodged no objection to officer's statement, and the district court immediately admonished the jury. No substantial evidence to Rivera in light of other evidence against him.

Substantial competent evidence supported trial court's admission of phone records over Rivera's claim they were unreliable and lacked a proper foundation. Claim that phone records were unfairly prejudicial was not preserved for appeal. Claim that admission of phone records violated his constitutional right of confrontation, raised for first time on appeal, is not considered.

STATUTES: K.S.A. 21-3419a, -3419a(a), -3419a(a)(1), -3419a(c); K.S.A. 22-3501; K.S.A. 60-404; and K.S.A. 1971 Supp. 21-3419

STATE V. RIVERA
KINGMAN DISTRICT COURT – AFFIRMED NO. 100,470 – NOVEMBER 25, 2009

FACTS: Rivera convicted of two separate rapes based on events occurring at a car in a rural area and then at a Kingman apartment. On appeal he claimed: (1) district court relieved state of its burden to prove the rape took place in Kingman County; (2) district court failed to make state specify actions for each rape charge, which resulted in possibility of nonunanimous jury verdict; (3) district court failed to appoint new attorney after conflict arose with existing attorney; and (4) prosecutorial misconduct tainted the jury trial.

ISSUES: (1) Venue, (2) unanimity of jury verdict, (3) conflict free attorney, (4) prosecutorial misconduct, and (5) remaining claims of error

STATUTES: K.S.A. 21-3419a, -3419a(a), -3419a(a)(1), -3419a(c); K.S.A. 22-3501; K.S.A. 60-404; and K.S.A. 1971 Supp. 21-3419

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HELD: Trial court erred by giving inconsistent instructions. Pattern “elements instruction” is discussed. In the ordinary case, venue is shown by proof the crime occurred in the county where the trial takes place. When one of the exceptions to this general rule applies, district court should modify the pattern jury instruction to fit facts of case. Trial court’s error did not require reversal given facts in case.

The evidence supports each count of rape. Neither count is by itself a multiple-acts offense. State presented the two events in a way that left no real possibility of a nonunanimous jury.

District court properly examined Rivera’s claim of a conflict of interest between Rivera and his attorney. Under facts, no error in district court’s denial of Rivera’s motion to dismiss his attorney.

Prosecutor’s comments in closing argument are examined and no error is found. Even if error, under facts it did not prejudice Rivera or deny him a fair trial.

Claim of cumulative error fails because no error was found. Constitutional claim against sentence is defeated by controlling Kansas Supreme Court cases.

STATUTES: K.S.A. 21-3501, -3502; and K.S.A. 22-2602, -2603, -2604, -2606, -2611, -2616

STATE V. SANCHEZ-LOREDO
RENO DISTRICT COURT – REVERSED AND REMANDED
NO. 101,912 – NOVEMBER 25, 2009

FACTS: Officers had probable cause that Sanchez-Loredo was transporting drugs, but continued to follow and stop her car once she was in Reno County. Sanchez-Loredo charged with drug offenses based on evidence found in search of car. District court granted motion to suppress, finding officers had probable cause to stop and search the car when it left Dodge City, but no exigent circumstances existed as car continued and entered Reno County, and where it still remained practical to obtain a warrant. State appealed.

ISSUE: Vehicle stop and exigent circumstances

HELD: District court erred because exigent circumstances automatically exist with a vehicle’s mobility. A search without a warrant is allowed when probable cause is combined with exigent circumstances; in the case of potential evidence in a car, the mobility of the car provides the exigent circumstances. District court’s rationales would impose unwise and impractical rules.

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

STATE V. ULATE
SUMNER DISTRICT COURT – AFFIRMED
NO. 101,093 – NOVEMBER 20, 2009

FACTS: Jon Paul Ulate appeals his conviction of aggravated indecent liberties with a child. He raises numerous issues on appeal: (1) The district court erred by allowing the state’s witnesses to testify that the victim had been sexually abused and that Ulate was the abuser, (2) the district court erred by allowing the state’s expert witness to testify that she diagnosed the victim with posttraumatic stress disorder, (3) the district court violated Ulate’s right to a public trial under the Sixth Amendment to the U.S. Constitution by excluding his family from the courtroom during the victim’s testimony, (4) the district court erred by denying Ulate’s motion for a mistrial, (5) the district court erred by allowing the state to admit evidence of Ulate’s bad character, (6) Ulate was denied a fair trial based on prosecutorial misconduct during closing argument, (7) there was insufficient evidence to support Ulate’s conviction, and (8) Ulate was denied a fair trial based on cumulative error.

ISSUES: (1) Expert testimony, (2) right to a public trial, (3) character evidence, (4) prosecutorial misconduct, (5) sufficiency of the evidence, and (6) cumulative error

HELD: Court held the district court did not err in allowing one of the state’s experts to testify about common patterns exhibited by sexually abused children and that the victim exhibited the behavior, another expert to testify there were no indications that anyone other than Ulate committed the sex acts, and another expert to testify regarding the victim’s posttraumatic stress disorder. Considering the amount of testimony at trial, the court found if there was any error in the admission of expert testimony, it was harmless. Court found no error in the district court’s sequestering of witnesses during the victim’s testimony and the sequestration did not violate Ulate’s constitutional right to a public trial. Court found the district court did not err in denying Ulate’s request for a mistrial based on allegations that one of the experts noticed Ulate’s father making threatening faces at the victim’s father, that the expert whispered to Ulate’s father to stop, and then the two left the courtroom for further discussion. Court stated the district court investigated the incident and then made a general inquiry whether the jury’s verdict was the result of anything in the courtroom that did not come from the witness stand. Court ruled that Ulate opened the door to character evidence and any error in the admission of the evidence was harmless. Court found no prosecutorial misconduct in the prosecutor’s closing argument where he commented on the credibility of several state’s witness. Court stated that defense counsel severely impugned the state witness’s credibility in closing by stating they were disregarding the truth and were not going to investigate anything that did not go to Ulate’s guilt. Court found sufficient evidence to support Ulate’s conviction and that only one error was insufficient to support reversal for cumulative error.

STATUTES: K.S.A. 22-3423; K.S.A. 60-261, -404, -456(d); and K.S.A. 65-6404(b)(3)

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Topeka, Kan.

259 U.S. Courthouse
500 State Avenue
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Interested persons may obtain further information and application forms at www.ksd.uscourts.gov or by contacting the clerk of court at (913) 551-5734.

Applications must be submitted by applicants only and not on behalf of another potential nominee and must be received no later than 4:30 p.m., Jan. 29, 2010.
THE DIRECTOR OF WORKERS COMPENSATION for the state of Kansas is accepting applications for two (2) potential administrative law judge openings, for a term of four (4) years beginning June 1, 2010, and ending July 1, 2014, pursuant to K.S.A. 44-551. In order to be considered by the nominating committee, each applicant shall be an attorney regularly admitted to practice law in Kansas for a period of at least five (5) years, and at least one year of experience practicing law in the area of workers compensation. Excellent writing skills are required and a demonstrated ability to handle a large case load. Please send your application and/or resume by Feb. 28, 2010, addressed to: Paula S. Greathouse, Director, Division of Workers Compensation, 800 SW Jackson, Ste. 600, Topeka, KS 66612-1227.

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**CLE Docket**

**JANUARY**

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**Tuesday, January 12, Noon – 1 p.m.**  
When to Patent an Invention, and When Not To  
Marshall Honeyman, Lathrop & Gage LLP,  
Overland Park  
Telephone CLE  

**Wednesday, January 13, Noon – 1 p.m.**  
PROTECT AND SERVE: Navigating Trademarks for Your Clients  
Cheryl L. Burbach, Hovey Williams LLP,  
Overland Park  
Telephone CLE  

**Friday, January 15, 9 a.m. – 2:55 p.m.**  
Government Law Update  
Kansas Law Center, Topeka  

**Friday, January 22, 9 a.m. – 3:45 p.m.**  
Focus on the Solo and Small Firm Practitioner*  
(including a Young Lawyers Section reception following)  
Rolling Hills Zoo Conference Center, Salina  

**Friday, January 29, 8:40 a.m. – 5:05 p.m.**  
(reception following)  
**Saturday, January 30, 8:30 a.m. – 12:05 p.m.**  
10th Annual Slam Dunk CLE  
Co-sponsored by the Kansas State University Foundation  
Clarion Hotel, Manhattan  

**FEBRUARY**

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**Wednesday, February 3, Noon – 1 p.m.**  
Military topic*  
TBD  
Telephone CLE  

**Tuesday, February 9, Noon – 1 p.m.**  
Misuse of Technology in Schools (Tentative title)*  
Cynthia L. Kelly  
General Counsel – USD 501  
Topeka  

**Friday, February 12, 6–8 p.m. (Reception)**  
**Saturday, February 13, 9 a.m. – 4:45 p.m.**  
Social Security Claimant’s Representatives  
Tenth Circuit Winter Meeting*  
Hyatt Regency, Wichita  

**Thursday, February 24, Noon – 1 p.m.**  
Family Harmony Estate Planning*  
Timothy P. O’Sullivan, Foulston Siefkin LLP,  
Wichita  
Telephone CLE  

**Friday, February 25, Noon – 1 p.m.**  
Family Harmony Estate Planning*  
Timothy P. O’Sullivan, Foulston Siefkin LLP,  
Wichita  
Telephone CLE  

**Friday, February 26, 9 a.m. – 12:10 p.m.**  
Administrative Law – The Conflict Between Federal and State Agency Jurisdiction: Don’t Be A Casualty*  
Kansas Law Center, Topeka  

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*The Kansas Bar Association’s eJournal* is an informative weekly online newsletter FREE to members. The eJournal contains digests of the previous week’s Supreme Court and Court of Appeals decisions, a schedule of upcoming CLEs with links to our Web site to register, and important KBA Bookstore announcements.

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