Reservations at the Host Hotel

Our reservations and CLE sessions will be held at the Hyatt Regency Wichita, which sets the standard for Wichita hotels with stunning views of the scenic Arkansas River and a vibrant cityscape. Rates are $118 for single/double occupancy and $138 for triple/quadruple occupancy. For reservations, just call (402) 592-6464 / (888) 421-1442 or feel free to book online at http://alturl.com/stth. The deadline to reserve is May 18, 2010.

Learn more about the Hyatt Regency Wichita at http://wichita.hyatt.com.

Annual Meeting Questions
Deana Mead, CLE Director
Phone: (785) 234-5696
E-mail: dmead@ksbar.org
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Being a KBA member has its benefits.

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Behind Every Good Lawyer ...

By Matthew Keenan

Cover layout & design by Ryan Purcell, KBA graphic designer

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Behind Every Good Lawyer ...

By Matthew Keenan

KANSAS BAR ASSOCIATION

ANNUAL MEETING & JOINT JUDICIAL CONFERENCE 2010

Hyatt Regency Hotel, Wichita, KS

June 9 – 11, 2010
number of years ago, the KBA produced an excellent video for high school and college students interested in pursuing legal education. The program, narrated by Bill Kurtis, was to be a realistic assessment of a lawyer’s life in Kansas. Lawyers from around the state were interviewed about what they thought about practicing law. Shortly thereafter, a family friend asked if I knew of any resources that would help explain to his daughter the life of a lawyer. After I gave him the video, he was hesitant to show it to his daughter. He explained that the video was depressing and it would be difficult to convince her to go to law school after she saw it. The video showed the lawyers’ stresses, concerns, and difficulties in addition to all the good things. I don’t think he ever let her watch it. Yet, by all accounts, it was an accurate assessment of lawyers’ lives and views on their profession.

As the video demonstrated, the truth is that being a lawyer is hard work and not at all like the television depictions in “L.A. Law,” “Ally McBeal,” “Boston Legal,” “The Deep End,” or even “Perry Mason.” We all know that practicing law is tough and requires extraordinary devotion. Some might be well-rewarded financially in their law practice. The majority, however, will not become rich at least monetarily.

I recently ran across a quote that I thought accurately describes a lawyer’s legacy:

He who merits the honorable name of lawyer can be no sinecurist. His life is one of intense activity and incessant labor. But if he appreciates the privileges and opportunities afforded for usefulness to the world by his profession, and measurably strives to embrace them, his consciousness of having done so will richly reward him.

FOOTNOTES

1. I had to retreat to my Black’s Law Dictionary to determine that a sinecurist is one who draws a salary for doing little or no work. President Milliken was certainly right about that view and it hasn’t changed over the years.

2. John D. Milliken was a lawyer who practiced in McPherson and had an interesting and storied career. He came to Kansas from Pennsylvania in 1861 when he was 13. Before becoming an attorney, he was elected Marion County surveyor. He practiced 28 years in Kansas and apparently became a judge. He taught constitutional law at the University of Kansas and was a director of the Kansas State Historical Society. From 1899-1903, he was an honorary vice president of the ABA, where he had previously been active. In 1907, he moved to Denver, where he continued practicing law. He served as counsel to the Union Pacific and Rock Island railroads and other companies. He died at age 95 in 1943.

3. Although the use of masculine pronouns seems peculiar, especially since there were already women lawyers in Kansas. However, those women did not have the same rights as men. In his address, Milliken noted that a year before, in 1894, a referendum “conferring the privilege of exercising the right of franchise upon women” had been defeated in Kansas. He further opined: “Like all others who can see no valid reason why one half of our citizens, morally better and intellectually as good as the other half, should be denied a voice in administering that government of which they are subjects, I stand aside and try to analyze the causes that made such a result possible, and pensively gaze into the vista of the future, wondering how long it will be before prejudice, arrogance, and egotism will yield to that spirit, which concedes to every other the rights we claim and exercise for ourselves.” The right to vote was granted to women in Kansas in 1912.

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.
Attorneys are not unfamiliar with service. In fact, it’s what we do. As attorneys, our calling is to solve other people’s problems. Sometimes we agree with our clients, sometimes not. Sometimes the problem we solve is vital to a person’s life and well-being and sometimes it’s not. But regardless of the gravity of the problem or our own personal convictions, we serve through our profession. Those attorneys who see their careers as a vocation and not merely a job inevitably secure a much deeper and greater appreciation for their own work. At the end of the day, the attorney who acts as a “servant” is more likely to feel fulfilled in their work.

But regardless of what your personal attitude is about the legal profession, each and every one of us should seek additional opportunities to serve beyond just reporting to work. Most attorneys I know spend time committed to community service. It’s a natural fit. Our professional has turned us into smart, diligent leaders. When a nonprofit organization needs help raising money or rewriting their bylaws, often attorneys are the people who step in to help. It’s well understood that communities are often as strong as the lawyers that live and serve in them.

It is in this light that the KBA Young Lawyers Section is proud to promote two public service projects this spring. The first is a tried and true opportunity: Mock Trial. The second project is an amazing opportunity for lawyers and high school students to interact and discuss the constitution and civil rights.

This spring, many high school students from across the state are preparing for trial. They are preparing to act as witnesses and as lawyers for the annual mock trial tournament. These students are exploring what the rules of evidence are and more importantly, they are gaining priceless experience in public speaking and communication skills. You can help! These tournaments require extensive service and volunteer efforts from the bar. There are two regional tournaments, one in Wichita and one in Olathe (both at the county courthouses) on March 6. The state tournament is in Wichita on March 27. If you can spare an hour and a half on a Saturday, please contact Danny Back, mock trial chair, at back@hitefanning.com. He would love any time you could give. And trust me, when you watch a 17-year-old grilling an expert witness on cross-examination, you will get so much more out of it than you put into it.

In addition to our annual service project, the KBA young lawyers section is implementing, “They Had a Dream Too,” a service project created by the American Bar Association Young Lawyers Division. This project teaches about the civil rights movement, constitutional law, and what role attorneys played in this part of our history. The project is geared towards high school juniors and seniors. (More information about the project is available online at www.abanet.org/yld/thadt/.) This year, the KBA YLS has hosted an event, for local high school students, at the Brown v. Board of Education National Historic Site in Topeka. They watched a film on the civil rights movement and most importantly, heard from Professor William Rich, Washburn University School of Law, and Lawrence Williamson Jr., Williamson Law Firm LLC, Kansas City, Kan., about what role civil rights play in our current society.

Rich co-authored the second edition of “Modern Constitutional Law” and served as a staff attorney at the Legal Aid Society of Wichita. Williamson received his Juris Doctor from Washburn in 2003 and practices in the areas of civil rights and employment and labor issues. He received the Chester I. Lewis Distinguished Service Award from the NAACP in 2005.

No matter what the size of your town or school, we can implement the project for your community too. If you know any high school teachers who are looking for a new and exciting way to teach about the Constitution, have them get in touch with the KBA young lawyers. Contact myself or Melissa Doeblin at melissadoeblin@gmail.com to see about how we can bring this amazing project to your community. Special thanks to Professor William Rich and Lawrence Williamson for speaking at the Topeka event!

The KBA offers countless ways to serve our profession and our community at large. No matter how busy you are and no matter how many directions you might be pulled, always try to make time for service. Every dedicated volunteer I know sincerely believes that the rewards of service are much greater than the efforts expended. This seems to hold true whether you are working at a soup kitchen or taking a case pro bono. I challenge each of you to find a way to carve a little time out of your life to give back.

In the words of Martin Luther King Jr., “An individual has not started living until he can rise above the narrow confines of his individualistic concerns to the broader concerns of all humanity.”

Jennifer Hill may be reached at (316) 263-5851 or by e-mail at jhill@mtsqh.com
When I was asked to serve as president of the Kansas Bar Foundation, I readily accepted because of the opportunity I saw to help enhance the reputation of the Bar and the needy citizens of Kansas. I was unaware of the added benefit of being given this platform to espouse opinions, which I have never been short of. I hope the readers understand that these opinions are those of the Foundation president and not the Foundation or the Kansas Bar Association.

I regularly read the Wichita Eagle online and my primary focus of interest is the sports page. However, on January 24, I noticed an article written by John Hannah describing a political interest group’s efforts to unseat one of our Supreme Court justices over discontent on a particular decision. Another interest group has listed Senate confirmation of new justices as a key item for legislative action in the current legislative session. This column will not name the interest groups because the issues they espouse are not the focus of my thoughts; rather, the value of depoliticizing our appellate judges’ selection process is my focus.

There has been a lot written on this topic lately and retired Justice Sandra Day O’Connor has been very vocal about the topic and the danger of our appellate judges being the subject of politics. I read a John Grisham novel, “The Appeal,” last year. In Grisham’s work of fiction, corporate interest bankrolled a candidate for the state supreme court in the hopes of reversing a large damage verdict against the company. In Grisham’s work, the corporate defendant was portrayed as evil and the prospect of the election of a right-thinking judge was viewed as an evil because the result would have been depriving a character cast as deserving of its damage award. In my view, the real trouble is the process. Even if the goal of those pushing for election had been noble, the ends do not justify the means.

Popular election is not quite the same as Senate confirmation but does anyone think the litmus test questioning of the Senate Judiciary Committee on U.S. Supreme Court justices does anything to enhance the quality of judges selected, the reputation of our governing body or the reputation of our Court? I personally think otherwise. Even the rules relating to judicial conduct speak of the importance of an independent and impartial judiciary. Kansas Code of Judicial Conduct Rule 1.2 specifically states “a judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.” It seems odd to me that members of the Judiciary Committee can engage in litmus test questioning, which can only be viewed as something to prove a prospect’s partiality.

I think if we take stock of what happens in our courts, we realize that in almost every case that goes before an appellate judge someone is unhappy. Someone is unhappy enough to take the appeal and inevitably, in litigation from disparate sides, someone will be unhappy with the court’s decision. I do not think it is good for our profession or our citizens to respond to judicial defeats by political attacks on our judges.

We have been blessed with quality judges in our district courts and our appellate courts. There are different selection methods for district judges in various districts in our state. Recently in Johnson County, the citizens overwhelmingly approved to retain a merit selection process. That is a testament to the citizens’ perception of the quality of our judges. In other parts of our state the citizens have overwhelmingly approved election. From my view, that seems to be a referendum on the opinion of the quality of the judiciary rather than the process. Our judges decide a plethora of issues. The current vetting process is designed to find judges of proven rational thought, intellect, and most importantly impartiality and integrity. Politicizing the process may allow a citizen to select a judge from whom they think they can predict an opinion on a certain topic but it can do nothing to enhance our ability to find judges with these qualities.

About the Author

John D. Jurcyk, McAnany, Van Cleave & Phillips, Roeland Park, Kansas Bar Foundation president

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Kansas Lawyers Assistance Program 2010 Board Members

The Kansas Lawyers Assistance Program (KALAP) would like to take this opportunity to highlight our board members. Some have been with us since the inception of KALAP and others are brand new. Please feel free to call on any of us with questions or comments regarding KALAP or an attorney in need. The level of confidentiality remains the same as does the level of dedication for each and every board member and/or volunteer.

**Billy Rork**, Chair, Topeka
Phone: (785) 234-1650
E-mail: rork@rorklaw.com
Area of Practice: Criminal
Washburn University School of Law, Class of 1979
Rork began with the state and local lawyers assistance programs in 1987 and has been with KALAP since its beginning in 2001.

**Sue Dickey**, Vice Chair, Olathe
Phone: (913) 971-7755
E-Mail: sdickey@olatheks.org
Area of Practice: Criminal Prosecution
University of Kansas School of Law, Class of 1986
Dickey joined the Kansas Bar Association lawyers assistance committee in 1988. She became so interested in the subject matter that she went on to get her certification in drug and alcohol counseling.

**Carol R. Bonebrake**, Secretary, Topeka
Phone: (785) 234-4661
E-mail: carol@crblawtopeka.com
Area of Practice: Health Law, Employment Law, Governance of Not-for-Profit Organizations
University of Kansas School of Law, Class of 1986
“I wish to support a broad brush program that can assist all lawyers with challenges to their practice, including the care giving responsibilities faced by many women attorneys that compete with their opportunities to excel professionally.”

**Lara Blake Bors**, Garden City
Phone: (620) 272-3568
E-mail: ca07@finneycounty.org
Area of Practice: Criminal Prosecution
Washburn School of Law, Class of 2001
Bors has worked for the Finney County Attorney’s Office since August 2001. She is married and has two children. Bors became a volunteer for KALAP in 2005 and then became a commissioner in 2008.

**Al “Jack” Focht**, Wichita
Phone: (316) 291-9519
E-mail: jfocht@foulston.com
Areas of Practice: Employment Law, Civil Litigation, White Collar Crime
Washburn University School of Law, Class of 1960
“I serve both on the Wichita Bar Committee on Lawyer Assistance and as a commissioner of KALAP precisely because of the 12th step I learned in AA. It was the spiritual awakening of realizing that I had available the power of something greater than myself to lead me to full recovery from my own addictive behavior and which demands of me that I help others find that same power. I have seen lead me to full recovery from my own addictive behavior and which

**Wayne Hundley**, Topeka
Phone: (785) 234-3833
E-mail: wayneh28@sbcglobal.net
Area of Practice: Semiretired, General Practice
Washburn University School of Law, Class of 1959
Hundley was an early member of the KBA lawyers assistance committee and then was an initial member and the first chairman of KALAP in 2001.

**Thomas M. Kowalski**, Olathe
Phone: (913) 712-8014
E-mail: kowalskilawoffice@comcast.net
Area of Practice: General Practice
University of Kansas School of Law, Class of 1982
Kowalski was appointed chairman of the Johnson County Impaired Lawyers Committee in 1994 then began with the KALAP Commission in 2001. His area of concern is helping attorneys who have been stricken with a disability. He was the first disabled/blind person to graduate from the University of Kansas School of Law.

**Steve Smith**, Overland Park
Phone: (913) 661-0222
E-mail: stevesmith@gsflegal.com
Area of Practice: Civil Litigation
Washburn University School of Law, Class of 1978
Smith is a new board member who has become a well-known speaker at CLE programs and in the law schools. His story of overcoming depression and disbarment is compelling. Presently in Johnson County, he practiced for many years in Wichita.

**Hon. Karen Humphreys**, Wichita
Phone: (316) 269-6164
E-mail: ksd_humphreys_chambers@ksd.uscourts.gov
Area of Practice: Chief Magistrate Judge
University of Kansas School of Law, Class of 1973
“I was appointed to the KALAP Board in July 2008. My ‘qualifications’ relate to many years of service on the Wichita Bar Association’s Lawyer Assistance Committee. I have encountered depression and its impact on lawyers and their families and clients with some frequency as a judge. It is both challenging and satisfying to work with lawyers as they learn to live with the disease of addiction and mental illness and recapture their commitment to the legal profession.”

**Lauren E. Reinhold**, Lawrence
Phone: (785) 838-4658
E-mail: lauren@sunflower.com
University of Kansas School of Law, Class of 1996
“Through the process of being on the board and helping others, it was helpful to me and my own recovery process.” Gunderson has been on the KALAP Board since 2001.
Music to My Ears in the Workplace

By Kelly Lynn Anders

Question

Dear Kelly,

Although I am an Irish-American man, my musical tastes are far from the “Riverdance” variety. I grew up in a large city, where I was exposed to all sorts of music, including rhythm and blues, rap, and hip-hop. Some of my favorite artists include ’70s R&B groups, such as The O’Jays and The Spinners, and I also like modern artists, such as Anthony Hamilton and Floetry. I work in a very traditional and conservative law firm, and there is no diversity. I would like to play music softly in my office while I am working, but, frankly, classical music puts me to sleep. I don’t want to make anyone uncomfortable with the music I love, but I really would like to have something playing in the background that I enjoy. This may not qualify as a “dilemma,” but I would appreciate any advice you may have.

Music Lover

Answer

Dear Music Lover,

One of my personal goals with this column is to encourage readers to think about the concept of diversity in new and refreshing ways, and I think this is a great question. We all want to feel like we can be ourselves and be accepted for who we are, and that can include musical tastes. Sharing a love of various genres of music can help bind people together so that they feel that they share a common interest, and music has historically served as a bridge across racial lines. With a little creativity, you can listen to music you enjoy while also maintaining the “traditional and conservative” atmosphere of your professional environment. One idea would be to find instrumental versions of popular R&B songs played in a “smooth jazz” format. Since classical music causes you to want to hit the “snooze” button, playing “smooth jazz” would be a way to keep your fingers tapping with a professional tone.

New Diversity Survey

The mission of the Kansas Bar Association’s Diversity Committee is to support the KBA’s efforts to increase diversity within the Kansas legal profession, with the ultimate goal of ensuring that the demographics of the legal profession mirror those of the general population by the year 2020. Currently, there are no records available with definitive data on the current percentage of attorneys in the state of Kansas who are members of minority groups due to race, disability, or sexual orientation. The Diversity Committee has created a brief survey to obtain demographic information to better determine what kinds of services and support are needed. Please help by completing the survey online at www.surveymonkey.com/s/QDG6DM5 or see survey form on Page 11.

Call for Questions

The Diversity Corner seeks questions about diversity issues for future columns. Names will be withheld by request. Please forward questions to: Kelly Anders, Associate Dean for Student Affairs, Washburn University School of Law, 1700 SW College Ave., Topeka, KS 66621, or send an e-mail to kelly.anders@washburn.edu.

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).
2010 Kansas Bar Association Diversity Membership Survey

The mission of the Kansas Bar Association’s Diversity Committee is to support the KBA’s efforts to increase diversity within the Kansas legal profession, with the ultimate goal of ensuring that the demographics of the legal profession mirror those of the general population by the year 2020. Currently, there are no records available with definitive data on the current percentage of attorneys in the State of Kansas who are members of minority groups due to race, disability, or sexual orientation. The purpose of this survey is twofold:

1. To obtain information about members of the Kansas Bar Association who are members of minority groups due to race, disability, or sexual orientation; and
2. To better determine what kinds of services and support are needed.

1. Please print the following (information will be kept confidential):
   a. Name: ____________________________________________
   b. City/County/State: ____________________________________________
   c. KBA Member Number (if available): ____________________________

Please check the appropriate categories that describe your background:

Male ___ White ___ LGBT ___
Female ___ Black ___
Hispanic ___ American Indian/Alaskan Native ___ Other: ___________________
Asian/Pacific Islander ___ Other: ___________________

2. Do you have a disability or an impairment?

Physical Disability ___ Mental Disability ___
Deaf/Hard-of-Hearing ___ Parkinson’s Disease ___
Blind/Vision-Impaired ___ PTSD ___
Alcohol/Drug Impairment ___ Cerebral Palsy ___
Multiple Sclerosis ___ Multiple Disabilities ___
Dyslexia ___ Other: ____________________________

3. Would you be interested in the KBA Diversity Committee providing the following?
   __ Legal Diversity Summit
   __ Annual Seminar on Diversity, Minority, and Disability Issues at KBA and local bar seminars
   __ Twice-Yearly Legal Diversity Electronic Newsletter
   __ Other: ____________________________

4. Would you be willing to serve on the ___ KBA Diversity Committee or ___ any other Committee?
   a. E-mail address: ____________________________

Please return this survey to: Lisa D. Montgomery, Member Services Director, Kansas Bar Association, 1200 SW Harrison St., Topeka, KS 66612; Phone: (785) 234-5696; Fax (785) 234-3813; E-mail: lmontgomery@ksbar.org.
A Nostalgic Touch

Behind Every Good Lawyer ...

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

Greatness is rarely the product of singular acts or one person’s vision. Historians tell us the grand leaders, the true visionaries always have a partner, a wingman, an associate, a sidekick. Someone who facilitates the creative energy, and helps shape plans that eventually come to fruition. Bill Gates had Paul Allen, Martin had Lewis, Newman had Redford, Samson had Delilah, Hall? – Oats. Bert? – Ernie. Laverne? – Shirley.

Central to the role of the wingman is candor; a reality checkmate. Politicians frequently credit their spouses for this role. David McCullough’s biography of John Adams, for example, is an interesting illustration of the role Abigail Adams played in the success of our second president. Attorneys often rely on a partner or even paralegal. But secretaries may function in this role better than anyone else. They will tell you on the eve of trial “your case stinks,” “I’d take the offer,” “your tie clashes,” “you have spinach in your teeth.” And more important advice – “don’t miss your daughter’s play tonight.” Spouses can serve this role but client confidentiality can pose limits to what they can do.

Secretaries know everything and say nothing. The great ones represent relationships forged over decades. It’s more than knowing the routine; it’s an intimate command of what the boss needs, even thinks, making him look brilliant and then disclaiming credit. It’s part of the yin and yang, hitter and yon, and other meaningless clichés.

Della Street was the original. She was part secretary, part paralegal, part private eye, part tease. She was not above a wink or giggle; wearing a camisole when she needed Hamilton Burger to disclose the whereabouts of a key fact witness. Good wingmen protect the boss. Telling lies if necessary. “I’m sorry, he’s not available right now.” [translation: He’s in the restroom.] “I’m sorry he’s presently tied up on business.” [He’s putting for par.] “Getting ready for court.” [Finishing last month’s time sheets.] Old-school secretaries have no use for voicemail. They screen everything. Forewarn and foreshadow as appropriate. “May I tell him what this is about? A settlement offer? I believe he is conducting jury research right now…”

The great ones adapt to change. Seamlessly transforming from shorthand, to dictation, to e-mail. WordPerfect to Word. Counter checks to debit cards. Flat files to flash drives. The equivalent of going from cavemen to astronauts. All the while, still using the age-old rubber stamp that says “Original Signed by _______."

No other profession is so dependent on subordinates. Doctors have nurses but even they can’t compete with legal secretaries. Nurses ask you questions, check the BP, but then leave the room for the prostate exam. Pilots have flight attendants but anyone can tell a passenger “beer is five bucks.” Accountants have assistants too. They’re called calculators.

My dad’s practice owes much of its success to three assistants whose skill sets do not fit squarely into one title. Take Joann Koriel for instance; in the early years she was the voice, the face of Keenan, Mauch & Keenan (KMK). Her tenure there now extends 45 years, having started work at age 2. She was the receptionist – took the calls, screened the clients, and knew the code to the huge cast-iron safe in the back closet. The one that preposterously declared, in size 20 point font, “This safe contains no money.” Among her other skills was keeping Keenan kids at bay. For example, when my brothers had a crisis – like finding a lost fishing pole – calls to Pops at KMK got us nowhere. “I’m sorry, Larry is at the law library.” At that moment, Larry was at the Petroleum Club having a shooter with Judge Rohleder.

But soon it became clear that Joann needed help. So Larry hired Marla Napolitano in 1974. Joann had the front door, Marla, the back. Together they could lie in harmony. And then Larry added Jolene Hetzke, CPA – the office manager, accountant, keeper of the office kitty for 25 plus years. More than anyone else, Jolene helped assure employee loyalty in one important respect, keeping payroll. The three of them are like a Bermuda triangle where pesky past-due clients fade from radar.

So if you stop by to see Larry, and find a line of clients in need of problem solving, perhaps now you have a keener appreciation for why he’s enjoyed success over these years. And if its 5:15 and Joann tells you in her charcoal voice that Larry is “away from his desk” – you can take this much to the bank: he’s at the VFW. ■

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
I feel like I should make it clear at the outset that I have no particular musical ability. I can sing, I guess. Not well, but I can physically move my voice up and down in what could loosely be called a tune. For a few years that spanned middle school and high school I studied the piano. However – and I’m ashamed to admit this now – playing the piano was less a labor of love than it was just a labor, something I had to do every day lest I suffer the wrath of my 4-foot tall, 85-pound instructor.

I was far too cool for all of that. And yet, music haunts me. Like “bad wolf” haunts the Doctor, it is constantly in the background, occasionally pushing itself into the fore. I can hardly think of a childhood memory that doesn’t involve music in one way or another. In fact, my brother (who shall remain nameless to protect his dignity) and I used to sing songs on car trips, and when he was very young, I would sing him to sleep. If I remember correctly, we even wrote out our own lyrics to “Dreidel, dreidel, dreidel” because we did not know the words.

Despite its ubiquitous nature, my musical obsession has more or less lay dormant for many years. My iPod was filled with episodes of “This American Life” and “Start the Week” instead of the albums of Franz Ferdinand and Flogging Molly. But, like many things in life, I rediscovered music when I needed it the most: the beginning of law school.

That first semester was definitely an emotional low point. It did not take long for the stress to start to weigh heavily on my shoulders. Soon, it became almost too much to bear. The overwhelming desire to break into tears was balanced only by my pride. It became clear that either I was going to be the master of my life or law school was. I had to decide which, no matter what my Constitutional Law grade is and for those shining 30 minutes a day, neither do I.

It was then that I realized why music had been lurking in the background of the white noise of my life. Music has the almost mystical power of being able to make sense of any situation. Its gravitational pull draws my life into an elegant or almost mystical power of being able to make sense of any situation. Its gravitational pull draws my life into an elegant orbit. Music makes what I am feeling legitimate and completely unexceptional. I am neither overreacting nor forsaken. Music envelops me in a community, even when I am all alone.

Looking back, I am astounded at how well music helped me cope. As a third-year law student, my emotional state oscillates between Green Day’s “Waiting” and Paramore’s “Pressure,” but I’m here, and I’m happy. In an environment seemingly designed to strip a student of his or her last vestige of compassion, I kept mine. Music is my link to the world; it keeps what I learn in context. The chords connect my beating heart to those on the outside and remind me that law school is not only about learning rules, but making sure those rules are just. Without music, my law school education simply would not be complete.

But even more than that, my rediscovery of music lead me back my band of choice. You know that band. The one that knows your soul better than you do, the one that writes the songs you would write if you had any talent for that sort of thing. For me, that band is Green Day.

I know, I know … it’s terribly uncool to love Green Day. I listen to NPR. I should be obsessed with Neko Case, Wilco, or Peter Bjorn and John. But I’m not. I worship at the altar of the “Jesus of Suburbia.” For reasons inexplicable, I connect with every word. “Android” expresses better than I ever could the understated but ever-present fear that I will fail at life. “Hitchin’ a Ride” explores the highs and lows of kicking an addiction (in the song, alcohol; in my life, Dr Pepper and chocolate-covered mini donuts). “King for a Day” takes on binary gender norms. I could go on, but that would be gilding the lily. A badass, punk rock lily.

And so it is, that nearly a decade after abandoning the piano for what I thought were more pressing concerns, I have reintroduced myself to a musical instrument. This time, it is the guitar. An electric, red and white Squire by Fender, to be precise. After a few months of practice, I can almost play “Kum-baya.” I had forgotten how cathartic playing an instrument can be. My guitar doesn’t care what my Constitutional Law grade is and for those shining 30 minutes a day, neither do I.

So when I sit in class feeling the baby calluses developing on my formerly squishy fingertips, I remember not only that I have a life outside of law school, but that it is also pretty great. I have a supportive family that loves me and that I love in return, a cat that occasionally deigns to recognize my existence, and a bright red electric guitar, on which I will – eventually – rock out like there is no tomorrow. And that is a beautiful feeling.

About the Author

Mindy Townsend is a third-year law student at Washburn University School of Law. She is from Fort Scott, Kan., and graduated from Pittsburg State University in 2007. She can be reached at melinda.townsend@washburn.edu. She loves Earl Grey tea with honey and will always choose The Beatles over the Rolling Stones.
Members in the News

Changing Positions

Jessica M. Agnelly has joined Baty, Holm & Numrich, Kansas City, Mo.
Alene D. Aguileria has joined Brennan Law Group, Wichita.
Bradley E. Ambrosier has been appointed by Gov. Mark Parkinson as a district judge of the 26th Judicial District, Ellkhart.
Angela S. Armenta has joined Seigfreid, Bingham Levy Selzer & Gee P.C., Kansas City, Mo., and Christopher M. McHugh has become a shareholder.
Eric W. Barth and John W. Broomes have become members of Hinkle Elkouri Law Firm LLC, Wichita.
Jill K. Best has joined McDowell, Rice, Smith & Buchanan, Kansas City, Mo.
Lori Ann Bolton-Fleming has joined Wilbert & Towner P.A., Pittsburg.
Shannon M. Braun and Will B. Wohlford have become shareholders and directors at Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita.
Michael L. Brown has been elected a shareholder and director at Wallace, Sanders, Austin, Brown & Enochs Chtd., Overland Park.
Ryan C. Brunton, R. Anthony Costello, and Greg S. Steinberg have been elected partners with Husch Blackwell Sanders LLP, Kansas City, Mo.
Adam R. Burrus has joined Fleeson, Gooing, Coulson & Kitch LLC, Wichita, as an associate.
Cassie J. Carpenter has joined Tatlow, Gump, Faia, and Wheelan, Moberly, Mo.
Stephan Cott has joined Koehn, Cott & Tahirkhel LLC, Garden City.
William P. Denning and Sean M. Sturdivan have been elected partners with Sanders, Warren & Russell LLP, Overland Park.
W. Rick Griffin has been elected a partner with Martin, Pringle, Oliver, Wallace & Baur LLP, Wichita.
Scott M. Hill has been named a partner in the law firm of Hite, Fanning & Honeyman LLP, Wichita.
Anthony E. LaCroix has joined Edgar Law Firm as a new associate, Kansas City, Mo.
Kirsten Schroeder Larsen has joined Glenn E. Bradford & Associates P.C., Kansas City, Mo.
David L. LeFevre and Thomas G. Stoll have joined Dunn & Davison LLC, Kansas City, Mo.
Joseph P. Mastrosimone has become chief legal counsel for the Kansas Human Rights Commission, Topeka.

Christopher M. McHugh has joined Seigfreid Bingham Levy Selzer & Gee P.C., Wichita, as a shareholder.
Mark Pemberton has joined Wise & Reber L.C., McPherson, as an associate.
Leena D. Phadke has joined the Social Security Administration Office of the General Counsel, Kansas City, Mo.
Bradley G. Rigor has joined Quares & Brady LLP, Naples, Fla.
Calin M. Ringelman has joined The Wolf Law Firm P.C., Southlake, Texas.
Elizabeth D. Rogers has joined Manson & Karbank, Lawrence, as an associate.
Katie M. Shetlar has joined Sunflower Title, Wichita.
Anthony L. Springfield has become a shareholder with Polsinelli Shughart P.C., Kansas City, Mo., and Michael M. Tamburini has joined the firm as of counsel.
Douglas C. Stuhlsatz has joined Spirit AeroSystems Inc., Wichita.
L. Allison Tanner has joined Swanson Midgley LLC, Kansas City, Mo.
David J. Wood has joined Security 1st Title, Wichita.
Thomas E. Wright has been reappointed as chairman of the Kansas Corporation Commission, Topeka, by Gov. Mark Parkinson.
Debra A. Vermillion has joined Scharnhorst, Ast & Kennard P.C., Kansas City, Mo.
David L. Zeiler has joined Mitchell & Associates L.C., Blue Springs, Mo.

Changing Locations

Burton M. Harding has started his own practice, 107 ½ Prairie, Girard, KS 66743.
Kenneth W. Delaughter has started his own practice, Delaughter Law Office, 223 S. Main, PO Box 834, Chanute, KS 66720.
Law Office of Timothy L. Dupree P.A. has moved to 825 N. 7th St., Ste. 300B, Kansas City, KS 66101.
Carly E. Farrell has started his own practice, Law Office of Carly E. Farrell, 100 E. Park St., Ste. 207, Olathe, KS 66061.
Charles F. Harris has moved to 310 W. Central, Ste. 106, PO Box 1482, Wichita, KS 67201.
James & Leu LLP has moved to 1255 W. 15th St., Ste. 400, Plano, TX 75075.
The new law firm of McCormick, Gordon, Blokey & Poirier is at 9900 W. 109th St., Ste. 250, Overland Park, KS 66210.
Mulvihill & Hunter has moved to 4035 Central St., Kansas City, MO 64111.
Michael D. Strong has started his own firm, Strong Law Firm LLC, 12604 W. 130th St., Overland Park, KS 66213.

Miscellaneous

Dustin J. Denning, Salina, has been installed as the 2010 secretary by the Kansas Association of Defense Counsel. The firm of Gilliland & Hayes P.A. is pleased to announce the opening of a second office at 320 Sunset Ave., Ste. B, Manhattan, KS 66502-3757. Lisa M. Ward and Jeffrey L. Heiman will be working in the firm’s Manhattan office.
Sabrina K. Standifer, Wichita, has been reappointed by Gov. Mark Parkinson as chairwoman of the Kansas Governmental Ethics Commission.
Jason West, Sterling, has become a member of the Sterling College Board of Trustees. The firm of Bremyer & Wise LLC, McPherson, is now Wise & Reber L.C.
Judy Yi, Kansas City, Mo., has been selected as president of the Asian American Bar Association of Kansas City.

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

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Obituaries

Patricia E. Baker
Patricia E. Baker, 62, of Topeka, died at her home on December 17. She was born January 24, 1947, in Newton, the daughter of Frank and Elizabeth “Betty” (Hogan) Torline. Baker served as deputy executive director/general counsel for the Kansas Association of School Boards (KASB).

She graduated from Benedictine College, magna cum laude, with a bachelor's degree in political science in 1976 and graduated from Washburn University School of Law, with Dean's Honors, with a juris doctorate in 1979 at which time she began work at the KASB as a staff attorney.

She was a member of the Kansas Bar Association; Kansas School Attorneys Association; and the National School Boards Association Council of School Attorneys, where she served not only as the first woman chairperson in 1989-90, but also the first state staff member elected to that position.

Survivors include three sons, Bill Baker, of Olathe, Matt Baker, of Marysville, Mo., and Jeff Baker, of Overland Park; one daughter, Anne Geisler, of Plymouth, N.M.; one brother, John Torline, of Newton; five sisters, Jan Sickbert, of Argenta, Ill., Judy Nagy, of Topeka, Roberta Nieto, of Golden, Colo., Rosemary Thorne, of Durham, N.C., and Theresa “Traci” Henning, of Hays; and eight grandchildren.

Douglas Fred Martin
Douglas Fred Martin, 56, of Manhattan, died December 27 at Wesley Medical Center in Wichita. He was born October 18, 1953, in Clay Center and raised in the Broughton area. He graduated from the U.S. Naval Academy in 1975 and was a Navy jet pilot until 1981. He earned his M.B.A. from Webster College and graduated from the University of Kansas School of Law in 1984.

He was a Navy veteran of Desert Storm and was assistant attorney general for the state of Kansas, Shawnee County counselor, and in private law practice in Topeka until moving to Clay Center in 1996. He was the Clay Center attorney from 1997 to 2005 and in private practice with Bosch & Martin LLC. In 2005, he joined the Pottroff Law Office in Manhattan. He was a member of the Kansas Bar Association, Lions Club, and 2nd District Republican Party.

He is survived by his wife, Debra Martin, of Clay Center; three sons, Thomas, of Wamego, Daniel, of Clay Center, and Joshua, of Clay Center; a daughter, Anne, of Clay Center; a brother, Philip, of Clay Center; a sister, Marita Wolgast, of Cedar Rapids, Iowa; and parents, Gene and Marilyn, of Clay Center.

Richard L. “Dick” Reep
Richard L. “Dick” Reep, 80, of El Paso, Texas, died October 27. Reep was born June 2, 1929, in Oil Hill, the son of Charles Emerson and Margaret (Wiles) Reep. He attended schools in El Dorado and received his law degree from Washburn University School of Law. He practiced law for many years in Texas and served his country in the U.S. Army.

Survivors include his brothers Charles E. Reep, of Wichita, Robert D. Reep, of Amarillo, Texas, and Donald R. Reep, of Larned; two nephews; four nieces; one great-niece; two great-nephews; and six great-great-nieces. Reep was preceded in death by both parents.

Richard I. Stephenson
Richard I. Stephenson, 72, of Wichita, died December 30. He was born October 13, 1937, in Augusta, the son of Paul N. and Dorothy (Ismert) Stephenson.

He graduated from the University of Kansas in 1958, receiving his bachelor's degree, with honors, in political science. He received the Hildon Gibson Award Outstanding Student in the Social Sciences and was a member of the Pi Sigma Alpha and Beta Theta Pi general for the state of Kansas, Shawnee County counselor, and in private law practice in Topeka until moving to Clay Center in 1996. He was the Clay Center attorney from 1997 to 2005 and in private practice with Bosch & Martin LLC. In 2005, he joined the Pottroff Law Office in Manhattan. He was a member of the Kansas Bar Association, Lions Club, and 2nd District Republican Party.

He is survived by his wife, Debra Martin, of Clay Center; three sons, Thomas, of Wamego, Daniel, of Clay Center, and Joshua, of Clay Center; a daughter, Anne, of Clay Center; a brother, Philip, of Clay Center; a sister, Marita Wolgast, of Cedar Rapids, Iowa; and parents, Gene and Marilyn, of Clay Center.

(continued on next page)
fraternities. Stephenson graduated from the Navy's Officer Candidate School in 1959 as an ensign and was stationed at the naval base in Guam and was an intelligence analyst at the National Security Agency in Fort Meade, Md., and in 1972, he was honorably discharged as a lieutenant.

He received his juris doctorate from the University of Michigan Law School in 1965. Stephenson went into private practice with the Wichita firm of Fleeson, Gooing, Coulson & Kitch as an associate attorney, 1962-72, and as a partner, 1973-95. In 1996, he became general counsel for RAGE Inc. and its affiliate companies. He was a special trial counsel for Wichita State University (NCAA investigations in the 1980s).

He was a member of the American, Wichita, and Kansas bar associations; International Association of Defense Counsel; Defense Research Institute; American Bar Association Forum Committee on Franchising; American Bar Association Committee on Tax and Insurance Practice; Federal Mediation; and was listed in the Who's Who on American Law and Who's Who in the World.

Stephenson was preceded in death by his parents and sister, Cynthia Beckman. Survivors include his wife, Linda Cox Stephenson; son, Richard W. Stephenson, of Overland Park; daughters, Anne Keller, of Florida, and Tamara January, of Hesston; two nephews; two grandchildren; and one great-grandchild.

**Professor James Bryce Wadley**

Professor James Bryce Wadley, 64, of Topeka, died January 1. He was born in Salt Lake City in 1945 to Bryce and Angelyn Wadley and was raised in Cache Valley, Utah. He received his bachelor's and master's degrees from Utah State University and received his law degree from Tulane University School of Law in New Orleans.

Wadley had been a professor at Washburn University School of Law since 1979. While at Washburn, he taught many subject areas, including agricultural law, creative thinking for lawyers, water rights, entertainment law, Native American law, and patents, trademarks, and copyrights. He authored a number of books as well. He was also active outside the law school, serving as a circuit court judge for the Iowa Tribe of Kansas and Nebraska, and a district court judge for the Prairie Band of Potawatome Nation.

He is survived by his wife Frances; five children, Catherine, James, Michael, Brian, and Randall; one brother, Bob; three sisters, Ann Ebert, Carma Wadley, and Joy Erekson; and five grandchildren. He was preceded in death by his parents and one child.

**John Joseph Ziegelmeyer**

John Joseph Ziegelmeyer, 91, of Prairie Village, died December 13. He was born January 16, 1918, to Irene Sims and Otto Ziegelmeyer in Rosedale. He graduated from the University of Kansas in 1938, where he was a member of the Sigma Alpha Epsilon fraternity and graduated from the University of Kansas School of Law in 1941. He was admitted to the Kansas Bar that same year.

In 1941, Ziegelmeyer joined the Federal Bureau of Investigation and was stationed in Atlanta, East St. Louis, Ill., and Kansas City. He began the practice of law in 1946 at the Kansas City, Kan., firm of Williamson, Cubbison, and Vaughn, and independently for more than 60 years. He was a member of the Ex-Agents of the FBI, Kiwanis, chairman of the Red Cross during the 1951 flood, and served on the boards of Donnelly College and First State Bank.

He is survived by his wife, Mary Jeanne Fitz-Gerald; three children, Molly Ziegelmeyer Helling, of Dallas, Martha Ziegelmeyer Suess, of San Antonio, and John Joseph Ziegelmeyer Jr., of Lawrence; seven grandchildren; and 11 great-grandchildren.
Law Practice Management Tips & Tricks

ABA TECHSHOW – Practical Technologies for Transforming Your Practice

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

“N ow that spring is in the air, shiny gadgets are everywhere. When you see them, I’ll be there.” Those might be the lyrics from “Seasons in the Sun” but even if not, they describe my excitement for March and the annual ABA TECHSHOW Conference and Expo. This premiere conference draws more than 1,500 lawyers and legal staff from around the globe to Chicago for three days of training with the latest legal technology and experts from more than 100 vendors. This year’s show runs March 25-27 at the Hilton Chicago on Michigan Avenue and is unique for Kansas legal professionals in that the Kansas Bar Association is an event promoter of the TECHSHOW. Register with code EP1027 and claim a $150 discount on registration.

Training by Tracks

The CLE and training portion of TECHSHOW offers 60 one-hour sessions divided into 17 different tracks. The broad topic areas of the tracks cover best practices for emerging legal technologies like Practice in the “Cloud” for online practice management tools and Marketing and Social Networking demonstrating case histories for use of sites like Twitter, Facebook, and LinkedIn. There are also tracks aimed at specific firm structures. The Solo/Small Firm tracks always provide solid strategies for leveraging technology to work cheaper, faster, and better while the Large Firm/Corporate Counsel track hits on managing the large, far-flung infrastructures common to bigger shops.

Many attorneys use the TECHSHOW to “kick the tires” of new gizmos and procedures before they make an investment. There are even quite a few who show up to get training on newly deployed systems. Skill-specific tracks accommodate both of those groups. The litigation tools get special coverage in the E-Discovery and Litigation & Trial Skills tracks. Those with more basic or broader technology interests can take their Mac or PC management tricks to the next level or hone new Word, Outlook, and Acrobat skills in two Power User tracks while the IT and Mac tracks hit on security and operating system strategies.

Vendors, Vendors, Vendors

The huge Expo hall opens its doors early in the TECHSHOW and provides a great chance to dig deeper into some of the tools covered in the show tracks. My favorite example of the EXPO’s value is the Adobe Acrobat booth. Each year I show up with a problem and their team sits me at a laptop and walks me through solutions. Feedback at the TECHSHOW also guides the tutorials at the Acrobat for Legal Professionals blog, blogs.adobe.com/acrolaw. Even Apple has sent out “spies” who bring lunch and listen for how they can better serve their emerging legal market.

The big guns anchor the expo — LexisNexis, West, Hewlett-Packard — and provide training, demonstrations, and sales for their full product lines but more bespoke tools are available from a broad array of vendors. It really would be possible to completely scratch-build an office from paper clips to practice management at the expo, and the TECHSHOW discounts offered could easily cover the registration fee if you go home with a new tool or toy.

Networks

TECHSHOW’s best value is the people. I first attended the TECHSHOW as a law student in 1999 when it looked like electronic filing would forever change the legal landscape. Some of the best and brightest in that field were presenting, and I hoped merely to attend their lecture. It was an unexpected bonus getting to spend two days over lunch and dinner swapping war stories and strategies.

Legal technology geeks are hopelessly social animals. Every night is an ad hoc dinner affair where presenters, authors, and attendees gather at various local hot spots for food, drinks, and brainstorming. An evening with a geek over a plate of spring rolls has solved more than one seemingly intractable issue that support calls could not. That same informal collegiality extends to the sessions themselves. Every session is calculated to be interactive and address specific interests and questions from the audience. If you have a question, they will have an answer.

CALL NOW!!!

I know this article catches some off guard. After all, the ABA TECHSHOW is just a few weeks off. Do not make an excuse though – go! Chicago is wonderfully accommodating to last-minute plans and the KBA discount is waiting for you. ■

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine, Zimmerman & Zimmerman P.A. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas 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

Ghostwriting and Unbundled Legal Services

By Mark Iba, Stinson Morrison Hecker LLP, Kansas City, Mo.

Your brother has been sued for failing to disclose water problems in the home he sold several years ago. His finances were hit hard in this economy, and he is representing himself in the litigation, but has asked if you would give him occasional assistance on legal strategy and in drafting some of the pleadings he needs to file. Can you assist him without entering your appearance in the matter?

With the recent downturn in the economy, there seems to be a resurgence in questions about “ghostwriting” and limited-scope representations. Most recently, the chief justices of New Hampshire and California reported that economic conditions have expanded the ranks of unrepresented litigants to include many in the middle class and small-business owners who lack the resources to pay for needed legal assistance.1 Applauding efforts to close what they referred to as the “justice gap,” they called on lawyers to make unbundled legal services work for all who need them.

Kansas has taken several steps designed to allow greater use of unbundled legal services. In 2007, Kansas joined a majority of other states in adopting the American Bar Association’s (ABA) Model Rule 1.2(c), which states that “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” And, on November 24, 2009, the Kansas Ethics Advisory Opinion Committee issued KBA Legal Ethics Op. 09-01 (Opinion). The Opinion notes the upward trend of self-representation and explains that KRPC 1.2(c) was “intended to provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal services to low-or moderate-income persons who otherwise would be unable to obtain counsel.”2

In addition to emphasizing that lawyers may provide discrete task representation to clients, the Opinion establishes guidelines under which lawyers may “ghostwrite” pleadings for pro se litigants. This is a significant development in Kansas, because the federal District of Kansas had previously found that the practice of ghostwriting may violate KRPC 1.2(d)’s prohibition against counseling or assisting a client to engage in criminal or fraudulent conduct, evade responsibilities imposed on lawyers by Fed. R. Civ. P. 11, and lack candor required under KRPC 3.3.3 Observing that the liberality formerly accorded to pro se pleadings has now been discarded, the Opinion generally follows ABA’s recent Formal Op. 07-446, which determined that there is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to pro se litigants, as long as the lawyer does not do so in a manner that violates rules that otherwise would apply to the lawyer’s conduct. Notably, in ABA Formal Op. 07-446, the ABA rejected the notions that nondisclosure of legal assistance violates Rule 8.4(c)’s injunction against engaging in dishonesty and circumvents court rules, such as Fed. R. Civ. P. 11, because the lawyer is making no statement to the forum or third party concerning the nature or scope of the representation and is not signing the pleadings. The ABA also observed that the lawyer may be obligated under Rules 1.2 and 1.6 not to reveal the fact of the representation. The Kansas Ethics Advisory Opinion Committee apparently did not feel comfortable going quite so far as the ABA on these points. Departing from the ABA’s opinion, the Kansas committee explained that it remains concerned with the appearance and the impression, which are left by pleadings prepared with the assistance of an attorney without disclosing that assistance. Determining that the nondisclosure implicates the lawyer’s duty of candor to the tribunal under KRPC 3.3, the committee concluded that “ghostwriting” assistance should be clearly disclosed on the pleadings.

In a useful summary of the issues, KBA Legal Ethics Op. 09-01 concludes with seven points that Kansas lawyers should follow when engaging in unbundled representations or ghostwriting:

1. An attorney in Kansas may represent a client on the basis of a limited scope, so long as the limitation is reasonable under the circumstances, and the client gives informed consent. The scope of the representation should be stated in a written engagement letter, specifying the tasks to be performed by the attorney, and confirming the consultation, which led to the client’s informed consent.

2. The attorney’s duty to communicate under Rule 1.4 compels the attorney to make adequate disclosure, to insure the client’s understanding of the limited scope of the representation, as well as the risks and available alternatives to the limited representation.

3. The attorney’s duty of competence under Rule 1.1 compels the attorney to make sufficient inquiry of the client, to obtain all the facts necessary to give good legal advice.

4. On any pleadings or documents prepared by the attorney or with the assistance of the attorney, the following legend shall be clearly stated: “Prepared with Assistance of Counsel.” This also avoids the possibility of encouraging or aiding the unauthorized practice of law, by disclosing the involvement of an attorney in the preparation of the pleadings or documents. To this extent, this Committee disagrees with, and

FOOTNOTES
3. See Wesley v. Don Stein Buick Inc., 987 F. Supp. 884, 886-87 (D. Kan. 1997) (requiring plaintiff to disclose whether she was licensed to practice law in any jurisdiction, whether she had legal training, and whether she had received substantial legal assistance in drafting her pleadings or presenting her claims in the lawsuit). See also KBA Legal Ethics Op. 02-1 (citing Wesley and other authority for proposition that ghostwriting violated KRPC 3.3).
The Kansas Bar Association Young Lawyers Section’s (YLS) Mock Trial Competition presented by Shook, Hardy & Bacon LLP allows KBA members to interact with high school and middle school students statewide. Most people participate by judging at the regional and state tournaments. This year volunteers are greatly needed to help us with this valuable project.

The regional tournament will be held in Overland Park and Wichita on Saturday, March 6 and the state tournament will be held in Wichita on Saturday, March 27. Nationals will be in Philadelphia, May 6-8.

This will be the first year where registration fees for all schools will be waived. We want to encourage rural communities to join forces and compete as well. If you know teachers or students in your area who would like to participate in the mock trial competition, please have them contact us. We are willing to make teams out of several schools, if there are not enough students interested at one school. We are also willing to help find attorneys in your area to help with coaching.

**How You Can Help**

Judges are needed for the tournaments, both at regionals and at state. If you are willing to give a full Saturday, a morning, an afternoon, or even just a couple of hours, we would appreciate your time and expertise. The students work very hard and having attorneys and judges hear their case gives them invaluable feedback.

Attorneys are also needed to help coach perspective teams. This could be a full-time coach position or just going into schools in your area to help them polish their skills for an hour or two. The students really shine when they have a lawyer assist with “real world” experience.

If you would like to learn more about becoming a judge or a coach, please contact Meg Wickham, KBA manager of public services, at mwickham@ksbar.org.

**Objectives of the Mock Trial Project**

- Further understanding of court procedures and the legal system;
- Improve proficiency in basic skills: listening, speaking, reading, and reasoning;
- Promote better communication and cooperation between the educational and legal communities;
- Provide a competitive event in an academic atmosphere;
- Promote cooperation among young people of various abilities and interests.

**The Competition**

The tournaments involve at least two trials, with each team participating in the prosecution and then the defense of the same case. Each team consists of three or four student attorneys and three or four student witnesses. The case materials contain witness statements, which purposefully conflict, and a bare-bones compilation of applicable law. Panels of three volunteer lawyers judge each round of the competition with one serving as presiding judge to rule on disputes and evidentiary objections. The winning state team goes on to compete in the nationals in Philadelphia.

The KBA YLS provides a grant to the state champion in order to participate in the national mock trial competition. This project has been operated successfully for the last eight years, and it has been funded through entrance fees paid by the school, an IOLTA grant from the Kansas Bar Foundation, Shook, Hardy & Bacon LLP, and donations from local bars and other companies.

Mock trials have proven to be an effective and popular part of the comprehensive, law-focused program designed to provide young people with an operational understanding of the law, legal issues, and the judicial process. The essence of the appeal of a mock trial is the fun involved in preparing for, and participating in, a simulated trial. Mock trials are exciting, but more importantly, they provide invaluable learning experiences.

The 2010 problem and rules are on the KBA Web site at www.ksbar.org/public/mocktrial.shtml. For information regarding volunteering contact Daniel Back, Kansas statewide coordinator, at back@hitefanning.com or Meg Wickham, KBA manager of public services, at mwickham@ksbar.org.

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**About the Author**

Mark M. Iba is a partner with Stinson Morrison Hecker LLP and practices in the firm’s business litigation division, focusing on complex civil litigation and arbitration. He also currently serves as assistant general counsel for the firm. He received his juris doctorate from the University of Chicago and is a member of the Kansas and Missouri bars.
Disclosure Obligations of Kansas Private Nonprofit Organizations
by William “Bill” Quick and Amy Hornbeck Abrams
We live in an era of heightened awareness concerning nonprofit governance. Recent revisions to Internal Revenue Service (IRS) Form 990 disclosures required of tax-exempt nonprofits, decimation of nonprofit endowments and invested funds from market downturns and nefarious actions of investment managers, as well as increased incidents of corporate directors being called to task in the press and the courtroom, have many nonprofit directors questioning historically “standard” board practices. In this environment, many nonprofit boards are investigating potential organizational risks and exposures. One such area under consideration is the balance between the disclosures a Section 501(c) nonprofit is required to make by virtue of its tax status and the disclosures a nonprofit is generally recommended to make as a matter of best practices. A second area under consideration is the exposure a nonprofit may face under certain open records and open meeting requirements, often referred to as “sunshine” laws. The purpose of this article is to provide guidance for directors of Kansas nonprofit corporations regarding both potential disclosure and open records/open meetings obligations faced by their corporations.

I. IRS Disclosures Required of Nonprofit Organizations

While most “best practices” guidance suggests various record disclosures for nonprofits, there are few disclosure obligations actually mandated by federal tax law. In general, the only information a nonprofit is legally required to make available for public inspection is (1) its IRS application for recognition of exemption on Form 1023 or 1024 (including documents submitted in support of the application and any letter or other document issued by the IRS regarding the application) and (2) its three most recent Forms 990. In addition to these general disclosure requirements, private foundations and political entities are required to disclose the names and addresses of their donors. Political entities are required to make their Forms 1120-POL and Forms 8872 available to the public, and public charities are required to make their Forms 990-T available to the public. The foregoing are collectively referred to as the “required disclosures.”

The applicable required disclosures must be available for public inspection at a nonprofit’s principal office and certain regional and/or district offices during regular business hours, and must be provided free of charge if requested from the nonprofit. However, a nonprofit does not have to comply with requests for copies of its required disclosures if such information is made widely available. Posting the required disclosures on a Web site, either established and maintained by the nonprofit or as part of a database of similar documents by other exempt organizations maintained by another organization, satisfies the requirement that the documents be widely available.

In addition to the required disclosures, many best practices guidelines insist that nonprofits publish and disseminate an annual report and annual financial statements. The revised Form 990 also asks each nonprofit to describe whether (and if so, how), the nonprofit makes its governing documents, conflicts-of-interest policy, and financial statements available to the public. While making these documents available to the public is recommended as a best practice, there is no legal requirement that such documents be available for public inspection (other than documents that are filed as part of a nonprofit’s IRS application for exemption).

II. Disclosures Required Under the Kansas Sunshine Laws

If a private nonprofit organized under Kansas law is deemed to be a public agency, the nonprofit’s board of directors has the additional burden of ensuring that the nonprofit complies with the Kansas sunshine laws.

Generally, the Kansas Open Records Act (KORA) and the Kansas Open Meetings Act (KOMA) (commonly referred to as sunshine laws) directly apply to all public, government-controlled nonprofit organizations. However, private nonprofit organizations may fall within the purview of the KORA and the KOMA under certain circumstances. In particular, the Kansas attorney general has recognized that whether a nonprofit must comply with the KORA and the KOMA is entirely dependent on the facts surrounding the nonprofit’s (1) creation, (2) powers and duties, and (3) funding.

FOOTNOTES
2. Id. at 108-09; see also 26 U.S.C. § 6104(d)(1), (2); see also Bruce R. Hopkins, The Law of Tax-Exempt Organizations, Ninth Edition § 27.9 (2007).
5. Hopkins & Gross, supra note 1, at 109; see also 26 U.S.C. § 6104(d)(3)(A); see also IRS Form 8872, Schedule A.
7. Hopkins & Gross, supra note 1, at 109; see also 26 U.S.C. § 6104(d)(3); see also IRS Form 990-T; see also IRS Form 8872, Schedule A.
10. Id.; Hopkins et al., supra note 8, at 75, 85; see also 26 U.S.C. § 6104(d)(4).
12. Hopkins & Gross, supra note 1, at 109-110; Hopkins et al., supra note 8, at 85.
13. Id.; see IRS Form 990, Part VI, Line 19.
14. See Hopkins et al., supra note 8, at 85.
15. Hopkins & Gross, supra note 1, at 110; Hopkins et al., supra note 8, at 76.
17. K.S.A. 75-4317 et seq.
a. Kansas Open Records Act as applied to private nonprofit organizations

1. Public agencies subject to KORA

The KORA requires that public agencies make their records available for inspection by the public.21 As used in the KORA “public” means of or belonging to the people at large, and “public inspection” refers to the right of the public to inspect governmental records when there is a laudable object to accomplish or a real and actual interest in obtaining the information.”22 “Public agency” is defined by the statute to include “the state or any political or taxing subdivision of the state or any office, officer, agency, or instrumentality thereof, or any other entity receiving or expending and supported in whole or in part by the public funds.”23 The statute declares that it shall be liberally construed so as to further Kansas’ public policy that public records be accessible to the public.24 However, the statute also provides that no entity is to be deemed to be a public agency solely because it receives public funds in exchange for property, goods, or services.25

In one instance, the attorney general concluded that a nonprofit corporation providing small group living services for persons with mental or developmental disabilities was not a public agency, and thus not subject to the KORA even though the majority of its funding came from state and federal sources.26 In reaching its conclusion, the attorney general relied on the fact that the nonprofit did not provide a strictly governmental service, the services provided by the nonprofit were highly regulated, and the corporation was created and operated by private individuals.27

Similarly, the attorney general concluded that the National Collegiate Athletic Association (NCAA)28 was not a public agency, and thus not subject to the KORA despite its receipt of public funds because, among other things, the NCAA also received funding from member dues and assessments on television gross rights fees, and it was not performing governmental functions.

In spite of the foregoing examples where the attorney general concluded that mere receipt of public funding did not, of itself, subject a nonprofit to KORA compliance, at least one opinion from the Kansas attorney general suggests “that mere receipt of public funds may be enough to trigger [KORA’s] application.”29 In that opinion, the attorney general stated that because the nonprofit corporation was funded 100 percent through public funds, that entity was a public agency and thus subject to the KORA.30

Although Kansas case law addressing whether a nonprofit is deemed to be a public agency under the KORA is scarce, the Kansas attorney general has recognized that case law interpreting other states’ open records laws generally consider the following factors in determining the applicability of their open records acts to private nonprofits: (1) the extent of public funding, (2) whether there is a specific service provided in exchange for the funds, (3) whether the organization was formed by a government entity or a statute, and (4) whether the organization was formed for the purpose of advancing a governmental goal.31 While these factors serve as instructive guidelines in determining whether a nonprofit qualifies as a public agency, a Kansas court may find other factors dispositive depending on the specific facts and circumstances of the nonprofit’s existence and operations.

2. Entities other than public agencies subject to KORA

In addition to the full public disclosure obligations of public agencies under the KORA, certain nonpublic entities are also subject to limited public disclosure requirements. The Kansas statutes provide that: “Each not-for-profit entity that receives public funds in an aggregated amount of $350 or more per year shall be required to document the receipt and expenditure of such funds” and “make available to any requester a copy of documentation of the receipt and expenditure of such public funds.”32 If the nonprofit does not clearly segregate public and private funds, “the not-for-profit’s entire accounting of its expenditures and receipts shall be open to the public.”33 These provisions warn that a nonprofit’s financial records should be carefully maintained to separately account for the receipt and expenditure of public funds. The failure to do so could subject all of the nonprofit’s financial records (including private donor identification) to public disclosure under the KORA.

Thus, while private nonprofit entities are frequently outside the scope of the KORA’s application, before an entity receives public funding, it is in the best interest of the private nonprofit entity to examine the facts concerning its creation, powers, duties, and sources of funding before ruling out the possibility that it may be obligated to make its records available to the public. Further, as a matter of sound corporate practice, the receipt and expenditure of public funds by a private nonprofit entity should include discrete, separate accounting for such funds by the entity.

b. The Kansas Open Meetings Act as applied to nonprofit organizations

The KOMA provides in part that: “[A]ll meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees, and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public….”34

25. K.S.A. 2008 Supp. 45-217(f)(2)(A); see Kan. Att’y Gen. Op. No. 2004-34, 2004 WL 2601288 (concluding that where public funding is the only link and there is a lack of significant governmental controls or ties, such receipt of public funds alone was not sufficient to put the organization within the purview of the KORA).
27. Id.
30. Id. at *3.
33. Id.
34. K.S.A. 2008 Supp. 75-4318(a).
This two part test requires that an organization be both (1) a legislative or administrative body, an agency of the state, or a subordinate committee thereof; and (2) that it receive or expend and be supported in whole or in part by public funds.

Thus, as with the KORA, an absence of public funding will remove an organization from the purview of the KOMA. Receipt of public funding, however, will necessitate a deeper look into the KOMA. The KOMA provides that it is “the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.”

The KOMA “was enacted for the public benefit; therefore, it is construed broadly in favor of the public to give effect to its purpose.” However, the Kansas attorney general has suggested that the KOMA’s application may be narrower than the application of the KORA.

In determining whether a nonprofit organization is subject to the KOMA, a court will generally employ the following analysis:

First the group of people meeting together must be a ‘body or agency’ within the meaning of the Act. Second, the group must have legislative or administrative powers or at least be legislative or administrative in its method of conduct. Third, the body must be part of a governmental entity at the state or local level, whether it is the governing body or some subordinate group. Fourth, it must receive or expend public funds or be a subordinate group of a body subject to the Act. Finally, it must be supported in whole or in part by public funds or be a subordinate group of a body which is so financed.

Similarly, the Kansas Attorney General’s Office has identified the following factors as being important to the consideration of whether a nonprofit is subject to the KOMA: “(a) whether the corporation receives or expends public funds; (b) whether it is subject to control of governmental unit(s); and (c) whether it acts as a governmental agency in providing services or has independent authority to make governmental decisions.”

There are two types of entities that courts have found to be exempt from the requirements of the KOMA: “(1) those which are merely advisory and have no decision-making authority, and (2) those which are basically independent entities which have some connection, by contract or other tie to a governmental entity, but are not actually created by some form of government action.”

After carefully considering the legislative intent behind the enactment of the KOMA, the court in *Memorial Hospital Association Inc. v. Knutson* concluded that a nonprofit corporation that operated the publicly owned county hospital was not a “legislative body,” an “administrative body,” or a “subordinate group of an administrative body” subject to the requirements of the KOMA.

The court relied on the fact that the nonprofit it did not hold an advisory position with the county, which operated the hospital, or with the trustees, who received and disbursed a county mill levy in overseeing the maintenance and capital improvements of the hospital. The court also relied on the fact that the nonprofit did not have the authority to make decisions that involve community resources, that the nonprofit was not created as an alter ego of an administrative agency, and that the nonprofit did not spend public funds.

Thus “the receipt of public funds alone does not automatically trigger application of the KOMA. Rather, the entity in question must also somehow be subject to the control of the governmental entity and/or be acting as a governmental agency in providing governmental services.”

While the court in *Knutson* ultimately concluded that the nonprofit in that case was not subject to KOMA, it added that in some cases, private groups may be subject to KOMA. The court cited as such an instance, a situation “where it can be shown that a public body has intentionally, and for the purpose of avoiding the light of public scrutiny, appointed a board of non-elected citizens to determine for the elected board what course should be pursued, or where the actions of the private citizens are in any way binding upon the elected officials, the meetings of such groups should be open to public scrutiny.”

In one such instance, the attorney general concluded that a nonprofit corporation dedicated to promoting economic development in Finney County was a public agency for purposes of both the KORA and the KOMA. In reaching its determination, the attorney general relied on its conclusions that governmental entities controlled the appointment of more than a majority of the directors, the nonprofit received a substantial amount of its funding from Garden City and Finney County, and based on the large amount of money received, the attorney general assumed that the nonprofit was performing a governmental function.

Conversely, the attorney general concluded that a nonprofit corporation providing small group living services for persons with mental or developmental disabilities (also described in the preceding section discussing KORA interpretation) was not subject to the KOMA. Factors weighing against application of the KOMA included the following: (1) the nonprofit received a substantial amount of its funding from the county hospital, and based on the large amount of money received, the attorney general assumed that the nonprofit was performing a governmental function.
was created and operated by private individuals; (2) the daily operations were entirely controlled by private citizens; (3) the only source of governmental control that had ever been exercised resulted from contractual terms or governmental regulation of this particular type of service and business; and (4) while the majority of the nonprofit’s funding came from federal or state sources, it operated autonomously from those sources in allocating the funds received.\(^{50}\)

Similarly, the attorney general opined that a nonprofit corporation dedicated to furthering the economic development of Prairie Village, Kan., was not within the purview of the KOMA because it did not qualify as a subordinate group of a legislative or administrative body.\(^{51}\) Although the nonprofit received funding from the city of Prairie Village, the entity was not created by any formal action of the city nor was the nonprofit “performing a governmental function or serving as an alter ego of a board that created it.”\(^{52}\) Thus, it appears that in instances where the attorney general will conclude that an organization is subject to the KOMA, there must be “some degree of governmental input in creating the entity or some on-going governmental control over the entity, as opposed to general regulation of the type of business in question.”\(^{53}\)

III. Conclusion

In general, the only records a private 501(c) nonprofit is obligated to make available for public inspection pursuant to the Internal Revenue Code are: (1) its IRS application for exemption, (2) its Forms 990, and (3) if a public charity, its Forms 990-T. However, a nonprofit organization will be subject to the Kansas Open Records Act if it is deemed to be a public agency. In determining whether an organization is a public agency subject to the requirements of the KORA, the following factors, among others, will be considered: (1) whether the nonprofit was created by statute or a governmental entity; (2) whether and to what extent it provides a governmental service; and (3) whether the organization received public funds.

Whether a nonprofit is subject to the requirements of the Kansas Open Meetings Act, on the other hand, turns on whether the organization (1) is a legislative or administrative body or agency or a subordinate group thereof and (2) that receives or expends, and is supported to some extent, by public funds. The KOMA’s application appears to be narrower than the application of the KORA.\(^{54}\) To fall within the purview of the KOMA, the entity in question must also somehow be subject to the control of a governmental entity and/or be acting as a governmental agency in providing governmental services. While the mere receipt of public funds does not generally trigger the application of either the KOMA or the KORA, private nonprofit entities that receive public funds should be cautious of certain factors surrounding their existence that could bring them within the purview of the KORA and/or the KOMA.

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IN RE DAVID J. HARDING
NINETY-DAY SUSPENSION
NO. 103,195 – JANUARY 22, 2010

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against David J. Harding (respondent), of WaKeeney, an attorney admitted to the practice of law in Kansas in 1974. Harding served as city attorney for the city of WaKeeney (City) and county attorney for Trego County from 1978 through February 2007. Harding participated in Kansas Public Employees Retirement System (KPERS) by virtue of his employment with the City. The City paid Harding a $610 retainer and then an hourly rate for items not included in the retainer. The situation became heated when respondent discovered that certain City officials were using City property or allowing their associates to use City property for their personal benefit. Harding disclosed confidential information during investigation of the allegations of misuse, published a letter in a newspaper containing confidential information, and sent a letter to the residents of WaKeeney containing confidential information prior to the election of the mayor where the incumbent mayor was defeated.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be censured and that the censure be published in the Kansas Reports.

HEARING PANEL: The hearing panel determined that the respondent violated KRPC 1.6 (2009 Kan. Ct. R. Annot. 468) (confidentiality) and KRPC 1.13 (2009 Kan. Ct. R. Annot. 501) (organization as client). The hearing panel accepted the recommendation made by the parties and unanimously recommended that the respondent be censured by the Kansas Supreme Court.

HELD: Court determined that the recommendations of the disciplinary administrator and the panel were appropriate. Court also agreed with the panel’s recommendations regarding restitution and further concluded that, consistent with Supreme Court Rule 218 (2009 Kan. Ct. R. Annot. 361) and Rule 219 (2009 Kan. Ct. R. Annot. 376), a hearing be held before any reinstatement of the respondent.

IN RE MELVIN R. HERRINGTON
INDEFINITE SUSPENSION
NO. 103,060 – JANUARY 22, 2010

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against Melvin R. Herrington (respondent), of Gilchrist, Texas, an attorney admitted to the practice of law in Kansas in 2000. On multiple occasions after he was hired by clients and received a retainer fee, Herrington failed to appear in court proceedings, sometimes without excuse. At the time of the disciplinary proceedings, Herrington was allegedly teaching 9th grade world geography in Texas and coaching the boys’ soccer team, and failed to appear in disciplinary proceedings before the Kansas Supreme Court.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be suspended for an indefinite period of time.


HELD: Court determined that the recommendations of the disciplinary administrator and the panel were appropriate. Court also agreed with the panel’s recommendations regarding restitution and further concluded that, consistent with Supreme Court Rule 218 (2009 Kan. Ct. R. Annot. 361) and Rule 219 (2009 Kan. Ct. R. Annot. 376), a hearing be held before any reinstatement of the respondent.

IN RE STEVEN RAY WIECHMAN
ONE-YEAR SUSPENSION
NO. 103,062 – JANUARY 22, 2010

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against Steven Ray Wiechman (respondent), of Topeka, an attorney admitted to the practice of law in Kansas in 1974. Wiechman successfully convinced a female client to join a pyramid marketing scheme called Fortune High Tech. Wiechman also touched the female client inappropriately when they were alone in his office.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be censured and that the
censure be published in the Kansas Reports, that the respondent be ordered to refrain from meeting with female clients unless another female person is present throughout the meeting, and that the respondent be required to undergo a follow-up evaluation to ensure that he refrains from touching female clients in an inappropriate manner.

HEARING PANEL: The hearing panel determined that the respondent violated KRPC 1.8(a) (2009 Kan. Ct. R. Annot. 483) (conflict of interest) and KRPC 8.4(g) (2009 Kan. Ct. R. Annot. 602) (conduct adversely reflecting on lawyer's fitness to practice law). The hearing panel recommended that the respondent be suspended from the practice of law for a period of six months, have a reinstatement hearing, and be required to establish how he addressed the issue of inappropriate touching of female clients.

HELD: Court commented that the violations of respondent are serious as they relate to the Court's responsibility to protect Kansas citizens from the very conduct exhibited by respondent's case. Court stated the respondent also exploited the vulnerability of his female client in conversation and inappropriate touching and contact. Court agreed with the panel majority that suspension is the more appropriate discipline and determine that a one-year suspension is the appropriate discipline, based upon a consideration of the entire record, the public interest, and the interest of respondent.

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CIVIL

NEGLIGENCE, ISSUE PRECLUSION, AND CLAIM PRECLUSION
RHOTEN ET AL. V. DICKSON ET AL.
SHAWNEE DISTRICT COURT – AFFIRMED COURT OF APPEALS – AFFIRMED
NO. 98,837 – JANUARY 29, 2010

FACTS: Officer Frank Pase of the city of Topeka was on duty, driving an unmarked patrol car after a snowstorm. Pase noticed Dickson's truck weaving in and out of traffic and making quick lane changes and a dark-colored car following the pickup as it maneuvered around traffic. Pase did not turn on any lights although his car was equipped with lights, but followed Dickson. Pase saw the pickup accelerate and drive through several green lights before it collided with a van driven by Rhoten traveling the opposite direction as it attempted to turn onto a cross street. Rhoten filed suit in federal court against Dickson, Pase, and the city of Topeka (City). She brought a 1983 claim against Pase and the City and supplemental state law claims for negligence and negligence per se against Pase and the City, and Dickson. The federal district court granted summary judgment on the substantive due process claim in favor of Pase and the City as Pase's actions or inactions were unrelated to plaintiff's injuries. The federal district court then declined to exercise supplemental jurisdiction over the remaining state law claims. The state district court dismissed Rhoten's claims against Pase and the City for failure to state a claim upon which relief could be granted. The district court held the claim preclusion doctrine barred Rhoten's state law claims because the federal due process claim arose from a common nucleus of operative facts, forming part of a single transaction or claim. The district court also held Rhoten's state law claims against Pase and City were barred by the issue preclusion doctrine as the causation question was common to both the state law claims and federal claims as to those particular defendants. The Court of Appeals affirmed the district court's dismissal of the claims against Pase and the City. On the claim preclusion issue, Court of Appeals held Rhoten's state claim arose out of the same transaction as her federal lawsuit and res judicata applied. On issue preclusion, the Court of Appeals agreed that issue preclusion barred Rhoten's negligence claims, but it held the district court erred in finding the negligence per se claims were barred. The Court of Appeals found substantial compliance with Rule 141 by the defendants.

ISSUES: (1) Negligence, (2) issue preclusion, and (3) claim preclusion

HELD: Court held Pase and the City were wrong to have filed their motions to dismiss when they relied on a federal court decision from an earlier litigation between the same parties. The district court was wrong to grant dismissal instead of summary judgment. But Court found the district court's error harmless in this particular instance because the subsequent filings of findings of fact prior to oral arguments allowed for the proper presentation of the minimal number of uncontroverted facts required to establish defendants' entitlement to issue and claim preclusion. Court held that based on Stanfield, 263 Kan. 388, it affirmed the district court and the Court of Appeals' decisions that claim preclusion barred Rhoten from renewing her state law claims in state court after they were dismissed without prejudice in federal court. Court also held that Rhoten's claims of negligence and negligence per se were barred completely under the claim preclusion doctrine.

STATUTES: K.S.A. 8-1506, -1738(d); and K.S.A. 60-212(b), -254(b)

CRIMINAL

STATE V. ARNETT
RENO DISTRICT COURT – AFFIRMED COURT OF APPEALS – REVERSED
NO. 99,508 – JANUARY 22, 2010

FACTS – ISSUES – HOLDING: Facts substantially similar to those in another Reno County forgery case, which presented same issue and was decided on the same date. See digest below for State v. Gilley, Appeal No. 99,156.

STATE V. GILLEY
RENO DISTRICT COURT – AFFIRMED COURT OF APPEALS – REVERSED
NO. 99,156 – JANUARY 22, 2010

FACTS: Gilley convicted on no contest pleas to three counts of forgery. Relying on two prior forgery convictions, district court imposed sentence for a third forgery conviction under progressive sentencing scheme in K.S.A. 21-3710(b)(4). When Gilley argued the two prior forgery convictions could not be counted in criminal history under K.S.A. 21-4710(d)(11), district court agreed and modified it to category G. In unpublished opinion, Court of Appeals vacated the sentence and remanded for sentencing with criminal history of E. Gilley's petition for review granted on same issue raised in companion appeal, State v. Arnett, No. 99,508.

ISSUES: (1) Progressive sentencing and (2) enhancement of penalties

HELD: Progressive sentencing scheme in K.S.A. 21-3710(b) and enhanced penalties provision in K.S.A. 21-4710(d)(11) are interpreted. When a defendant's prior forgery convictions are used to increase the mandatory minimum sentence for the crime of conviction in the progressive sentencing scheme in K.S.A. 21-3710(b)(4), enhancing the applicable penalty for the primary forgery offense, the plain language of K.S.A. 21-4710(d)(11) precludes those prior convictions from being used to calculate the defendant's criminal history score in the same case. Under facts of case, Gilley's three forgery convictions in the present complaint could not serve as basis for her plea to count I being a third conviction under K.S.A. 21-3710(b)(4).

STATUTE: K.S.A. 21-3710, -3710(a), -3701(a)(1), -3701(b), -3710(b)(1), -3710(b)(2)-(5), -4602(c), -4710, -4710(a), -4710(d) (11)
STATE V. MARLER
SUMNER DISTRICT COURT – AFFIRMED
NO. 100,820 – JANUARY 29, 2010

FACTS: Marler convicted of rape, aggravated indecent liberties with a child under age 14, and endangering a child. Two consecutive hard 25 life sentences imposed. On appeal, Marler claimed (1) district court erroneously admitted evidence of Marler’s prior drug use under K.S.A. 60-455 as material facts of “plan” and “preparation,” (2) district court gave an erroneous limiting instruction on this drug use evidence, (3) district court erred in denying Marler’s motion for a downward departure sentence due to mitigating circumstances, and (4) sentences imposed were disproportionately severe in violation of U.S. and Kansas constitutions.

ISSUES: (1) Admissibility of prior drug use, (2) limiting jury instruction, (3) denial of downward departure, and (4) cruel and unusual punishment

HELD: Marler did not preserve for appeal his challenge to the admissibility of evidence of prior drug use, and possibility noted that Marler’s failure to object to this evidence might have been intentional given theory of the defense.

Limiting instruction in this case was not confusing to jury and was not clearly erroneous. Under facts of case, evidence was to be considered solely in context of Marler’s statements regarding a plan that he and his wife agreed to drug and sexually abuse their daughter, and their preparation and execution of that plan. No real possibility that jury would have rendered a different verdict had the instruction not been given.

Pursuant to K.S.A. 21-4643(d), sentencing court shall impose hard 25 life sentence unless judge finds substantial and compelling reasons, following a review of mitigating circumstances, to impose a departure. Under facts of case, district court would have been justified in finding Marler had not presented substantial and competent evidence to support claimed mitigating factors of family support and potential gainful employment. No abuse of discretion in district court’s denial of motion for downward departure sentence.

Marler did not preserve constitutional issue for appeal, and court declines invitation to engage in appellate fact-finding required to consider issue for first time on appeal.

STATUTES: K.S.A. 21-4643(d); K.S.A. 22-3601(b)(1); and K.S.A. 60-404, -455

STATE V. PRESSLEY
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 98,823 – JANUARY 22, 2010

FACTS: On Nov. 8, 2005, Pressley was convicted of multiple robbery and burglary crimes. His sentencing was set for Dec. 15, 2005, but he was arrested in another county on unrelated charges. Pressley’s sentencing occurred on Feb. 22, 2007. Pressley argued before the Court of Appeals that his sentencing delay violated his right to a speedy trial. The Court of Appeals held constitutional speedy trial rights do not apply to post-conviction proceedings and there was no evidence the delay was unreasonable.

ISSUE: Speedy trial

HELD: Court affirmed the Court of Appeals’ decision applying Freeman, 236 Kan. 274, as a bar to Pressley’s presentation of a constitutional right to a speedy sentence under the Sixth Amendment. Court also held that to the extent Pressley wished to raise a statutory claim in addition to the Sixth Amendment challenge, he waived the issue by failing to adequately address the matter in the district court or in appellate motions and briefs.

STATUTES: K.S.A. 21-4721(e)(2); and K.S.A. 22-3424(c)

STATE V. ROBISON
LYON DISTRICT COURT – AFFIRMED
NO. 101,515 – JANUARY 22, 2010

FACTS: Robison entered a no contest plea to aggravated indecent liberties with a child and received a life sentence without the possibility of parole for 25 years under Jessica’s Law. He made no claim before the trial court that his sentence was unconstitutionally cruel or unusual, but raised it on appeal.

ISSUE: Cruel and unusual punishment

HELD: Court held Robison’s argument that his life sentence is cruel and unusual punishment, which was not argued before the district court, cannot be presented for the first time on appeal. Court also held the district court followed the two-step procedure for departure sentencing by considering the mitigating circumstances raised by Robison and by its determination that they were not substantial and compelling reasons for a departure. Court found no abuse of discretion in the decision to deny a downward durational departure sentence.

STATUTE: K.S.A. 21-3594(a)(3)(A), -3601(b)(1), -4643(d)

STATE V. SALES
SEWARD DISTRICT COURT – APPEAL DISMISSED
NO. 102,578 – JANUARY 29, 2010

FACTS: Sales tried and convicted of aggravated criminal sodomy of daughter who disclosed this activity three years later. Trial court granted motion for new trial, finding in part that it erred in allowing Oklahoma State Bureau of Investigation agent to testify as expert on child disclosure issues. Prior to retrial, state appealed from pretrial order prohibiting it from presenting expert witness testimony on delayed reporting by child abuse victims of sexual abuse. Sales challenged the court’s jurisdiction to hear this interlocutory appeal because trial court’s order did not substantially impair state’s ability to prosecute the case.

ISSUE: Appellate jurisdiction for interlocutory appeal, K.S.A. 22-3603

HELD: Cases applying State v. Newman, 235 Kan. 29 (1984), are discussed. In an interlocutory appeal, the prosecutor should be prepared to make a showing to the appellate court that the pretrial order of the district court appealed from substantially impairs the state’s ability to prosecute the case. To make that determination, the evidence available to the state must be assessed to determine how important the disputed evidence is to the state’s ability to make out a prima facie case. Under facts in this case, the excluded evidence cannot fairly be said to substantially impair state’s prosecution. State’s failure to address the jurisdictional issue is also noted. Interlocutory appeal was improvidently taken. No jurisdiction for the appeal.

STATUTES: K.S.A. 20-3018(c); and K.S.A. 21-3506(a)(2), -3601(a), -3603, -3608
**Appellate Practice Reminders . . .**

*From the Appellate Court Clerk’s Office*

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- In the request, specify the proceedings requested and, if more than one court reporter is involved, clearly indicate which reporter took which days of the proceedings.
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*The Journal of the Kansas Bar Association | March 2010*
NOTICE OF AMENDMENT OF LOCAL RULES OF PRACTICE OF THE UNITED STATES DISTRICT COURT

The U.S. District Court for the District of Kansas gives notice of the amendment of local rules 67.1 and 77.6. Copies of the amendments are available to the bar and the public at the offices of the clerk at Wichita, Topeka, and Kansas City, Kan. The offices are open from 9 a.m. to 4:30 p.m. on all days except Saturdays, Sundays, and federal legal holidays. The amendments are also available on the U.S. District Court Web site at www.ksd.uscourts.gov.

Interested persons, whether members of the bar, may submit comments on the amendments addressed to the clerk at any of the record offices. All comments must be in writing and, to receive consideration by the court, must be received by the clerk on or before 4:30 p.m., April 5, 2010.

The addresses of the clerk’s offices are:

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Signed:
Timothy M. O’Brien
U.S. District Court
District of Kansas

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CIVIL

CHILD SUPPORT AND SANCTIONS
IN RE MARRIAGE OF WILSON
JOHNSON DISTRICT COURT
AFFIRMED IN PART; REVERSED IN PART,
AND REMANDED WITH DIRECTIONS
NO. 100,780 – JANUARY 29, 2010

FACTS: Bruce Wilson appeals two orders the district court made in his divorce from his wife, Shannon. The district court ordered Bruce to pay $6,000 per month in child support for the benefit of the parties’ only child, Finley, who was almost 5 years old when the case was tried. The district court ordered that Shannon place $3,500 of that amount each month into a trust fund for Finley’s special needs or future education. Second, the district court sanctioned Bruce $30,000 – to be paid to Shannon – based upon Bruce’s attempt to mislead the court about his income and assets. Bruce contends that he had no duty to update the court about a large increase in his income; that the court’s sanction was excessive under constitutional double jeopardy grounds since the court had already separately awarded one asset to Shannon based upon Bruce’s failure to disclose information about it; and that any fault for failing to disclose the information was that of his attorney, not Bruce.

ISSUES: (1) Child support and (2) sanctions

HELD: Court held that Kansas’ law doesn’t require a parent to provide support to a child after majority, and the district court’s order effectively did so. Court remanded for the district court to determine the proper amount of child support. Court affirmed the district court’s decision of sanctions. Court stated the district court has the inherent power to sanction a divorce litigant who provides misleading information in financial information that the law required to be disclosed as part of that divorce action and there was no abuse of the court's discretion.

STATUTE: K.S.A. 60-1610(a)(1), (b)(1), (2)

COSTS, APPEAL, AND ERROR

MERCY REGIONAL HEALTH CENTER INC. V. BRINEGAR
MARSHALL DISTRICT COURT – AFFIRMED
NO. 100,637 – JANUARY 22, 2010

FACTS: Mercy filed Chapter 61 debt collection proceeding against Brinegars to collect for services rendered in minor surgery for Brinegars’ daughter. Brinegars disputed the debt and filed counterclaim alleging violations of Kansas Consumer Protection Act (KCPA) and Fair Debt Collections Practices Act (FDCPA). Brinegars later agreed to judgment for the outstanding hospital bill ($1,230.57), and voluntarily dismissed their KCPA and FDCPA claims. Parties went to trial on Mercy’s motion for attorney fees and costs. District court held Mercy was not entitled to attorney fees under 15 U.S.C. § 1692k(a)(3), but entered judgment against Jason Brinegar alone under K.S.A. 60-211 and K.S.A. 50-634 for $8,318.50, half the attorney fees being sought. Brinegar appealed, arguing the district court failed to identify any pleading that violated K.S.A. 60-211(c), and claiming there was no factual basis to support a finding that any pleading was done for an improper purpose. Brinegar also claimed trial court erred in denying or failing to rule on motion to compel discovery regarding Medicaid reimbursement rate for the procedures performed. Mercy filed motion for attorney fees and expenses incurred in the appeal.

ISSUES: (1) Attorney fees under K.S.A. 60-211, (2) motion to compel discovery, and (3) attorney fees on appeal

HELD: Attorney fee award under K.S.A. 60-211 was based on Brinegar’s filing of counterclaim. Court notes that K.S.A. 60-211 does not include 1993 amendment to Fed. R. Civ. P. 11. To the extent the district court considered Brinegar’s prosecution of counterclaim after filing, such consideration was improper for purpose of imposing sanction. Under facts detailed in the opinion, however, uncontroverted evidence amply supports trial court’s finding that Brinegar brought counterclaim for an improper purpose. Award was proper under K.S.A. 60-211 and amount was reasonable. Attorney fee award of $8,318.50 is affirmed. Alleged error in awarding fees under K.S.A. 60-50-634 is moot.

No order denying motion to compel discovery is in record on appeal. Any denial of the motion would not be reversible error under facts of case.

Under the circumstances, sanctions for some but not all of the attorney fees expended by Mercy on appeal are appropriate. Mercy awarded an additional $8,300.

CONCURRENCE AND DISSENT (Marquardt, J.): Concurs in affirming award for attorney fees incurred by Mercy while case was litigated in district court, but would award Mercy the full $12,766.45 in appellate attorney fees. Case was baseless from its beginning, and more than sufficient facts support the entire amount of appellate attorney fees requested.

STATUTES: 15 U.S.C. § 1692 et seq., § 1692k(a)(3) (2006); K.S.A. 50-623 et seq., -634, -634(e); K.S.A. 60-211, -211(b)(1), -211(c), -259; and K.S.A. 61-3105(b)

DRIVER’S LICENSE REVOCATION

BYRD V. KANSAS DEPARTMENT OF REVENUE
ATCHISON DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
NO. 101,189 – JANUARY 15, 2010

FACTS: Kansas Department of Revenue suspended Byrd’s driving privileges after a blood test reflected an alcohol concentration of 0.28. After an administrative hearing officer affirmed his suspension, Byrd filed a petition for review in district court. Byrd argued that he was improperly served with a copy of the officer’s certification and notice of suspension, commonly referred to as a DC-27 form, as required by K.S.A. 2007 Supp. 8-1002(c). Deputy Bryan Clark, of the Atchison County Sheriff’s Office and the officer responsible for arresting Byrd for driving under the influence and for requesting that he submit a blood sample for testing, testified that he did not personally mail the DC-27 form to Byrd. Based on procedures established in the sheriff’s office, Clark stated that after receiving the results of a blood test he would complete the DC-27 form and submit it to an administrative assistant, in this case Melissa Hale, and she would be responsible for mailing the form to the address shown on the form. There is no dispute that the DC-27 form was mailed to Byrd and that he received it. Byrd argued that the statute required that Clark personally place the DC-27 form in the mail and because Hale mailed it, his suspension should be reversed. The district court held that K.S.A. 2007 Supp. 8-1002(c) required that the law enforcement officer directing administration of alcohol testing must actually place the DC-27 form in the mail and consequently, reversed his suspension.

ISSUE: Driver’s license revocation

HELD: Court stated that relevant Kansas case law provides that the purpose of K.S.A. 8-1002(c) is to guarantee that a person whose license has been suspended is aware of his or her right to appeal. Court held this purpose was fulfilled under the facts of this case. Though Clark did not place the DC-27 form in the mail, he directed Hale to do so. Though Hale could not specifically remember mailing the form to Byrd, she obviously did so because: (1) Byrd timely requested an administrative hearing and (2) he introduced the DC-27 form he received in the mail to evidence at trial before

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JUDGMENT AND FOREIGN JUDGMENTS
HANKIN V. GRAPHIC TECHNOLOGY INC., JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED NO. 100,838 – JANUARY 8, 2010

FACTS: Hankin utilized Uniform Enforcement of Foreign Judgment Act to register in Johnson County the Pennsylvania judgment he obtained against Graphic Technology Inc. (GTI). Johnson County District Court gave full faith and credit to the foreign judgment, and ordered garnished GTI funds to be held by Johnson County clerk. GTI subsequently “opened” the Pennsylvania judgment, vacated its registration in Kansas, and ordered release of garnished funds. Hankin appealed.

ISSUE: Enforcement of foreign judgment

HELD: Complex facts detailed in the opinion, Pennsylvania law examined, and related issues briefly addressed. Under facts of case, having registered a confessed judgment of a sister state and obtained possession of funds from a valid garnishment, the Kansas district court is obligated to hold all the garnished funds until properly presented with a final judgment from the sister state where the confessed judgment was rendered and subsequently “opened.” When a final judgment from the sister state is properly presented, the Kansas district court shall order and cause the garnished funds to be distributed as such final judgment provides. District court’s rulings are reversed and case is remanded with instruction.

STATUTES: K.S.A. 59-2238(3); and K.S.A. 60-260(b), -260(b)(5), -260(b)(6), -7001 et seq., -3001 et seq., -3002, -3004(a), -3006

MINERAL RIGHTS AND SALTWATER DISPOSAL AGREEMENT

FACTS: This is a dispute between the owner of a tract of land (Schonthaler) and the owner of the mineral rights to that same tract (Dick Properties). The Schonthalers entered into a lease allowing a third party oil and gas lease operator (Paul Bowman Oil Trust) to dispose of saltwater deep beneath the surface of the real estate. Dick Properties objected, arguing anyone wishing to dispose of saltwater on the property must have the consent of both the landowner and the mineral rights owner. The district court disagreed and ruled that since the disposal of saltwater in this case in no way affects oil and gas production, Schonthaler could lawfully make the disposal agreement with Paul Bowman Oil Trust without the consent of the mineral rights owner.

ISSUES: (1) Mineral rights and (2) saltwater disposal agreement

HELD: Court held Dick Properties sold the property but retained the mineral rights. In the deed conveying the property, Dick Properties made no express reservation of the rights to an existing saltwater disposal lease on the property. Court held the district court did not err in determining that the Schonthalers had the right to enter into a saltwater disposal agreement with Bowman Oil. The Schonthalers obtained this right because the original saltwater disposal agreement between Dick Properties and Bowman Oil ran with the land and transferred to the Schonthalers because it was not excepted in the deed from Dick Properties to Schonthaler.

STATUTE: K.S.A. 55-901(a)

MUNICIPAL CORPORATIONS
STEEV V. MCPHERSON AREA SOLID WASTE UTILITY
MCPherson District Court – Reversed and Remanded NO. 100,831 – JANUARY 8, 2010

FACTS: Steed injured in accident with garbage truck owned and operated by McPherson Area Solid Waste Utility (Utility). Finding no designated clerk of the Utility, Steeds served office manager Pywell as the functional clerk. Facing expiration of statute of limitations Steeds filed action in district court six days later without any response from Utility prior to expiration of statutory 120-day notice period. Utility’s answer asserted Steeds failed to serve Utility’s “clerk or governing body.” Steeds filed amended petition to cure their initial premature filing. Utility filed motion for summary judgment, again claiming service on Pywell did not comply with statutory notice requirement, and claiming amended petition was untimely. District court found Steeds substantially complied with notice filing requirements. Although orally noting Steeds’ noncompliance with Rule 141(a) in failing to respond to Utility’s untimeliness claim, journal entry granted summary judgment to Utility for lack of subject matter jurisdiction based on Steeds’ premature filing of the petition. Steeds appealed. Utility cross-appealed from trial court’s finding of substantial compliance with notice filing requirements.

ISSUES: (1) Notice filing requirements in K.S.A. 2008 Supp. 12-105b(d) and (2) subject matter jurisdiction

HELD: The filing of a notice of claim against a municipality is examined against Kansas’ cases. Based on facts of case, and appearance that Pywell served role consistent with that of a clerk, Steeds substantially complied with K.S.A. 2008 Supp. 12-105b(d) by service of its notice of claim upon Pywell. District court properly denied Utility’s motion for summary judgment on this issue.

Journal entry controls, and court also disagrees that summary judgment would be warranted on Steeds not responding to Utility’s claim the lawsuit was untimely. Steeds’ timely filing of their amended petition cured the defect of their original premature petition. District court erred in granting summary judgment to Utility on this basis.

STATUTES: K.S.A. 2008 Supp. 12-105b(d); K.S.A. 60-256; and K.S.A. 77-561 et seq., -6102

NEGligence, expert testimony, and damage caps
mcginnes et al. v. weseney medical center and estephon zayat
Sedgwick district court – affirmed in part and reversed in part NO. 99,896 – JANUARY 29, 2010

FACTS: McGinnes, as administrator for the Estate of Darryl McGinnes, deceased, filed a medical malpractice action against Estephan N. Zayat M.D. (Zayat) to recover monetary damages for personal injury and wrongful death after Zayat performed endoscopic retrograde cholangiopancreatography (ERCP) on McGinnes. McGinnes developed acute pancreatitis and died. Cause of death was cardiac arrhythmia, secondary to a pulmonary embolism, caused by the ERCP-induced pancreatitis. After a lengthy trial, the jury returned a verdict in favor of the plaintiffs that totaled $2 mil-
lion. The plaintiffs appeal the application of statutory caps on damages under K.S.A. 60-1903 and 60-19a02 that reduced the award to $1 million. In his cross-appeal, Zayat claims two evidentiary rulings require a new trial and that the trial court erred in awarding prejudgment interest to the plaintiffs.

ISSUES: (1) Negligence, (2) expert testimony, and (3) damage caps

HELD: Court held Zayat is not entitled to a new trial based on evidentiary rulings excluding Zayat’s opinion that McGinnes was not a candidate for an appropriate and safer diagnostic alternative to ERCP and also excluding expert witness testimony about justification of the ERCP procedure. Court also held the statutory caps on damages do not constitute an avoidance or affirmative defense under K.S.A. 60-208(c) and the statutory caps are constitutional. However, court held the trial court abused its discretion in awarding prejudgment interest to the plaintiffs because the verdict was for unliquidated damages regardless of the application of statutory caps.

STATUTES: K.S.A. 16-201; and K.S.A. 60-208(c), -258, -455, -1903, -19a02

NEGLIGENCE, TRIAL, AND VERDICT
DUNCAN V. WEST WICHITA FAMILY PHYSICIANS PA.
SEDGWICK DISTRICT COURT
REVERSED AND REMANDED
NO. 101,040 – JANUARY 8, 2010

FACTS: Widow and heirs of Duncan filed medical malpractice action against Dr. Hartvickson, claiming the doctor failed to note and treat a pulmonary embolism, which caused Duncan’s death. Jury reported deadlock on third day of deliberations. Over Hartvickson’s objection, trial court gave jury an Allen-type “hammer instruction” and dismissed jury for the evening. The next morning, jury found Hartvickson liable and awarded $982,143 economic damages, with no damages for noneconomic loss. A juror later contacted defense counsel to report the jury reached a compromise verdict. Hartvickson filed motion for new trial based on jury misconduct or for recall of jury. Trial court heard live testimony from the reporting juror, and denied Hartvickson’s motion. Hartvickson appealed.

ISSUES: (1) Jury instruction and (2) juror misconduct and compromise verdict

HELD: A trial court risks error in giving PIK Civ. 4th 181.20 (amended 2008) in a civil case after the jury has announced a deadlock. The risk of error is magnified by the inclusion of language from prior versions of the PIK instruction, particularly language that has been expressly criticized by Kansas’ appellate courts in the criminal context. Error is not structural, and under facts of this case was not reversible error. However, the belated giving of this instruction is considered in determining whether undue coercion was a factor in the jury reaching a verdict.

District court’s denial of defendant’s motion for a new trial was an abuse of discretion. Two methodologies for analyzing whether juror misconduct in compromising a verdict are discussed and applied. Under facts of case, the lack of a noneconomic damages award in a case of hotly contested liability, corroborated with direct evidence from a single juror of a conspiracy to compromise on liability in exchange for reduced damages, substantiates a finding of jury misconduct and this misconduct substantially prejudiced the defendant’s right to a fair trial. This conclusion is also buttressed by the relatively quick achievement of unanimity after district court gave a belated Allen-type dead locked jury instruction under then current PIK Civ. 3d 181.20 and by the compelling testimony of a juror who reported the compromise to defense counsel.

STATUTE: K.S.A. 60-259(a)

REAL ESTATE, FRAUD, AND MISREPRESENTATION
STECHSCHULTE ET AL. V. JENNINGS ET AL.
JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 100,648 – JANUARY 8, 2010

FACTS: In May 1998, Jennings purchased a residence under construction in Leawood. Nearly four years after completion of construction, Jennings contacted the builder regarding water leaks all over the home. During 2003 and 2004, Jennings and the builder attempted to determine the source of and repair the leaks. In February 2005, Jennings listed the home for sale and on the Seller’s Disclosure form indicated there had been no water leakage in the house or repairs to fix water problems, but in another section indicated warranty work had been completed on windows. The Stechschultes hired a professional inspection company to perform a general inspection of the home. The inspection revealed no water intrusion or damage issues, and the Stechschultes closed on the home in June 2005. Before the Stechschultes moved into the home, heavy rains occurred in the Kansas City area in July 2005. The home was filled with water and water damage. The Stechschultes sued the Jennings for negligent misrepresentation and fraud and against the real estate company for negligent misrepresentations and violations of the Kansas Consumer Protection Act. The district court granted summary judgment to Jennings on the claim of negligent misrepresentation and breach of contract. The court agreed with Jennings that the Stechschultes waived their right to make such claims when they signed the buyers’ acknowledgment in the disclosure statement. The court also granted summary judgment on the Stechschultes’ claim of fraud by silence. The court also granted summary judgment to the real estate company finding that by signing the acknowledgment, the Stechschultes waived reliance on any misrepresentations made the real estate agent.

ISSUES: (1) Real estate, (2) fraud, and (3) misrepresentation

HELD: Court found that Jennings represented in the disclosure that “several windows leaked after construction” and “full warranty repairs were performed and correction is complete.” However, discovery revealed that the home warranty expired one year after construction was complete, the more significant repairs were not warranty repairs, and those repairs were made approximately four years after construction was completed. Further, Jennings represented in another section of the disclosure that there had been “No” water leakage or dampness in the home and “No” repairs or other attempts to control water leakage problems. Court held that while Jennings believed he sufficiently disclosed the water intrusion by his subsequent disclosure that “several windows leaked after construction” and that “full warranty repairs” were performed, Jennings’ intent in making these representations was a question of fact to be considered in light of all of the information contained in the disclosure and summary judgment was improper. Court also held that because the Stechschultes’ petition contained numerous allegations of affirmative fraud with respect to Jennings’ misrepresentations in the disclosure statement, the district court erred in treating Stechschultes’ fraud claim solely as a claim of fraud by silence and erred in granting summary judgment on those claims as well. However, court held the record did not reveal that the real estate agent disclaimed any knowledge of the property’s defects or that the buyers agreed to such a disclaimer. Court stated that because the Stechschultes identified no representations made by the real estate agent, which were set forth in writing and signed by her, they are precluded from establishing that they relied upon any negligent misrepresentations. The court made similar findings concerning the consumer protection claims against the real estate agent and company. Because of the court’s ruling that summary judgment was proper in favor of the real estate agent, the Stechschultes appeal the denial of their motion to amend with respect to the real estate agent was moot. However, court held because of the reversal of summary judgment in favor of
Jennings, the Stechschultes will have an opportunity to renew their motion for leave to add a punitive damages claim, should the fraud claim eventually proceed to trial.

STATURES: K.S.A. 50-623, -626, -634; and K.S.A. 60-209, -2103(h), -3703

STANDING, SUBSTANTIAL EVIDENCE, FIRST AMENDMENT, AND SUPERSEDES BOND
FRIENDS OF THE BETHANY PLACE INC. V.
CITY OF TOPEKA ET AL.

SHAWNEE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 100,997 – JANUARY 22, 2010

FACTS: This appeal involves a plan by Grace Episcopal Cathedral (Cathedral), in Topeka and the Episcopal Diocese of Kansas (collectively, the Church) to construct a parking lot on a portion of Bethany Place, a tract of ground on which the Cathedral and two other buildings are located. These two other buildings and the surrounding grounds of Bethany Place (but not the Cathedral itself) are listed on the Register of Historic Kansas Places. The state historical preservation officer (SHPO) opposed the project. The matter came before the Topeka City Council (Council) on the Church's application for a permit for the project. On the day before the hearing on the Church's application, a group of individuals formed Friends of Bethany Place Inc. (FOB), in order to oppose the project. Following testimony from numerous proponents and opponents, the Council voted 9-0 in favor of the Church's application. FOB appealed to the district court. The district court set aside the Council's approval of the project, finding the Council's decision was arbitrary, capricious, and unreasonable. The city of Topeka (City) and the Church have now appealed, in addition to amici curiae briefs from the Kansas State Historical Society and the League of Kansas Municipalities.

ISSUES: (1) Standing, (2) substantial evidence, (3) First Amendment, and (4) supersedes bond

HELD: (1) Does FOB have standing in these proceedings? Court held that after applying statutory and traditional standards for standing, FOB is entitled to seek judicial review of the Council's approval of the Church's permit application. (2) Did the district court erroneously reweigh the evidence before the Council, evidence which provided substantial support for the Council's decision to grant the permit? Court held the district court went beyond the record and reweighed the evidence before the Council in finding what it considered to be feasible and prudent alternatives to the Church's proposed project. The proper scope of review limits a reviewing court to determining (a) whether the Council acted fraudulently, arbitrarily, or capriciously, (b) whether the Council's action is supported by substantial evidence, and (c) whether the Council acted within the scope of its authority. Here, the issue in dispute is whether substantial evidence supports the Council's action. Applying the requisite legal constraints on the scope of our review, court concluded that there is substantial evidence to support the decision to grant the Church's requested permit. (3) Does the district court's decision violate the Church's rights under the First Amendment to the U.S. Constitution or under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2006)? Court held that because of its decision on the substantial evidence, it was unnecessary to consider the First Amendment issue. (4) Did the district court err in refusing to require FOB to post a supersedes bond for this appeal? Court held the FOB prevailed before the district court and did not seek to stay enforcement of the district court's ruling. As the appellee, the provisions for a supersedes bond do not apply to FOB. Court held the Church is entitled to its permit as approved by the Council and to proceed with construction of the project.

DISSENT: Judge Greene dissented and would affirm the district court. Judge Greene concluded that the entire process was materially flawed, that we simply do not know what the Council's decision was based upon, that the statutory considerations were never adequately addressed by the governing body, that there was no hard look at the relevant factors including alternative proposals, that there was absolutely no discussion of exhausting “all possible planning to minimize harm,” that perhaps the most relevant factor – the basis for the SHPO’s opinion – was never considered, that the decision of the governing body was heavily influenced by inappropriate legal concerns, and that the ultimate determination of the Council was not based on the evidence of feasible and prudent alternatives or the minimization of harm, but rather on apparent extraneous factors that should have played no role in whether to override one of the highest priorities of government in Kansas: historic preservation.

STATURES: K.S.A. 60-2101(d), -2103(d)(1); and K.S.A. 75-2715, -2721, -2724(a)(1), -2725

TORTS AND SUMMARY JUDGMENT
HAUPTMAN V. WESLEY MEDICAL CENTER
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 101,855 – JANUARY 29, 2010

FACTS: Families of Ballard Aviation employees killed in ambulance crash brought consolidated wrongful actions alleging Wesley Medical Center failed to perform adequate oversight of Ballard’s operations. Trial court dismissed the petitions for failure to state a claim upon which relief may be granted. Court of Appeals reversed. “Dye,” 38 Kan. App. 2d 655 (2007). On remand, trial court granted summary judgment to Wesley, finding plaintiffs’ negligence claims were not viable under Kansas law pursuant to principles in Dillard v. Strecke, 255 Kan. 704 (1994), and Dye because employees of an independent contractor are not third persons under Restatement (Second) of Torts § 411. Plaintiffs appealed.

ISSUES: (1) Negligent hiring, Restatement § 411, (2) negligence per se, and (3) negligent supervision and negligent undertaking, Restatement §§ 414 and 324A

HELD: Whether an independent contractor’s employee qualifies, as a third person for the purposes of Restatement § 411 is question of first impression in Kansas. Dillard v. Strecke, 255 Kan. 704 (1974), and cases thereafter are discussed, including Herrell v. National Beef Packing Co., 41 Kan. App. 2d 302 (2009), which is currently being reviewed by Kansas Supreme Court. Until that case is decided, whether an independent contractor’s employee qualifies as a third person under Restatement § 411 is guided by Dillard, and trial court properly decided that plaintiffs could not pursue negligent hiring claim.

Wesley abandoned theory that Wesley breached FAA regulations. In any event, Dillard held that a nondelegable duty, such as Wesley’s breach of FAA rules, extended to protection of innocent third parties, not to employees of independent contractors. Kansas law has not yet determined whether an independent contractor’s employee is included as a third party or can bring a cause of action under negligent supervision, Restatement § 414, or negligent undertaking, Restatement § 324A. Based on uncontroversial facts in case, plaintiffs cannot prevail on either claim.

STATURE: K.S.A. 60-256(b) and (e)

UNINSURED AND UNDERINSURED
MOTORIST BENEFITS
OCHS V. FEDERATED MUTUAL INSURANCE CO.
RICE DISTRICT COURT – AFFIRMED
NO. 101,562 – JANUARY 8, 2010

FACTS: Ochs was driving a propane truck for his employer, Ramsey Oil Hutchinson Inc. (Ramsey Oil), when he was seriously injured in a motor vehicle accident involving an alleged negligent third party, Loren L. Hayden. Subsequently, Ochs reached a monetary settlement with Hayden’s insured, State Farm Insurance, in the amount of $50,000. Ochs had a personal automobile policy with Farm Bureau Insurance Co., with which he settled his underinsured motorist claim in the amount of $50,000. Ochs then filed this action against Federated Mutual, the automobile liability insurance
company for his employer Ramsey Oil, seeking additional underinsured motorist benefits. On the day of the accident, Ramsey Oil’s policy with Federated Mutual had a liability limit of $1 million. The issue before the trial court was whether the Federated Mutual policy provided underinsured motorist benefits of $1 million as contended by Ochs or $50,000 as contended by Federated Mutual based on the president of Ramsey (Anderson) selecting an option of a lower uninsured and underinsured benefit level. The trial court granted Federated Mutual’s summary judgment motion, concluding the option form met the requirements of K.S.A. 40-284(c) and was executed by an authorized employee of Ramsey Oil.

ISSUE: Uninsured and underinsured motorist benefits

HELD: Court held: (1) Alderson’s approval and signature on the coverage option form was authorized by Ramsey Oil and constituted a binding election in compliance with K.S.A. 40-284(c); (2) Ramsey Oil’s propane truck was an automobile as defined in the Federated Mutual insurance policy and that definition controls and is not precluded by the more limited definition of an automobile in K.S.A. 40-298; (3) the written rejection of underinsured motorist coverage by Ramsey Oil in conjunction with a previous automobile policy issued by Federated Mutual controls because the insured named in the policy has made no subsequent request in writing for additional coverage; and (4) a reasonably prudent insured would have understood the provisions of the option form to be an election to accept a lower limit for underinsured motorist coverage than the limit equal to the bodily injury liability limit of the policy.

STATUTES: K.S.A. 8-126(c)(x); K.S.A. 40-284(c), -298, -3107(e); and K.S.A. 60-1101, -1102

CRIMINAL

STATE V. DELACRUZ
SEWARD DISTRICT COURT
REVERSED AND REMANDED
NO. 100,654 – JANUARY 22, 2010

FACTS: Jury convicted Delacruz of aggravated battery, a charge arising from his physical altercation with his wife. On appeal, Delacruz alleged there was clear error in the instructions given to the jury on aggravated battery and misdemeanor battery. He also alleged improper comments by the judge and prosecutor denied him a fair trial.

ISSUE: Jury instructions

HELD: Under facts of case, district court should have instructed jury on simple battery. District court also affirmatively and erroneously instructed jury that terms “great bodily harm” and “bodily harm” could not be defined. If PIK instruction had been modified in this case to instruct jury that great bodily harm means something more than slight, trivial, minor, or moderate harm, and does not include mere bruising, a real possibility exists that jury may have concluded the victim suffered bodily harm instead of great bodily harm and convicted Delacruz of the lesser offense of aggravated battery, K.S.A. 21-3414(a)(1)(B), or simple battery, K.S.A. 21-3412(a). Conviction is reversed and case is remanded for new trial. Claims of judicial and prosecutorial misconduct are not considered.


PRIOR FEDERAL PROSECUTION, MULTICIPICITY, AND SENTENCING
STATE V. FILLMAN
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 100,075 – JANUARY 29, 2010

FACTS: Fillman was convicted of two counts of aggravated assault and one count of aggravated battery based on an incident at Tammy Gannon’s apartment, where Fillman fired a .22-caliber rifle at Gannon three times, hitting her once and intentionally missing her twice. Prior to his jury trial, Fillman was charged and convicted in federal court of two counts of possessing an unregistered destructive device and three counts of being a felon in possession of a firearm and ammunition.

ISSUES: (1) Prior federal prosecution, (2) multiplicity, and (3) sentencing

HELD: Court held that because the 292-month federal sentence did not exceed the maximum statutory sentence of 50 years’ imprisonment, aggravated assault and aggravated battery did not become necessary elements of the federal convictions, and consequently, the federal prosecution required factual elements not required in the state prosecution and vice versa. K.S.A. 21-3108(3)(a) did not bar a subsequent prosecution against Fillman for aggravated assault and aggravated battery in state court. Court held that Fillman's convictions were not multiplicious as the separate acts, i.e., the two shots, were fired into the wall 10 minutes apart and there was a fresh impulse, which motivated the second shot into the wall. Last, court rejected Fillman’s Apprendi argument.

CONCURRANCE: Judge Caplinger concurred but would find that the federal court’s use of Fillman’s underlying conduct to enhance his sentence in federal court was not a “prosecution.”

STATUTE: K.S.A. 21-3108(3)(a), -3410(a), -3414(a)(2)(B)
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# 2009-10

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**Kansas Bar Association Districts**

![Map of Kansas Bar Association Districts](image-url)
MARCH

Tuesday, March 2, Noon – 1 p.m.
Intro to Practice before the Court of Tax Appeals
Shawn Leisinger, Office of the Shawnee County Counselor, Topeka
Telephone CLE

Tuesday, March 9, Noon – 1 p.m.
The Use and Misuse of Psychology Experts in Civil Litigation
Brian P. Russell, Attorney & Psychologist, Lawrence
Telephone CLE

Tuesday, March 23, Noon – 1 p.m.
Litigation in Guardianships, Conservatorships, Probate and Trust Administration
Matthew H. Hoy & Leslie M. Miller, Stevens & Brand LLP, Lawrence
Telephone CLE

Wednesday, March 24, Noon – 1 p.m.
Integration of Common Law & Islamic Sharia Law
Steven W. Graber, Steven W. Graber P.A., Manhattan
Telephone CLE

APRIL

*Pending CLE credit approval

Thursday, April 1, Noon – 1 p.m.
Ethical Issues When Working Online*
Brown Bag Ethics (lunch included)
Eric G. Kraft, Duggan Shadwick Doerr & Kurlbaum P.C., Overland Park
Kansas Law Center, Topeka

Thursday, April 8, Noon – 1 p.m.
Everyday Ethics – Prosecutor’s Edition
Brown Bag Ethics (lunch included)
Chadwick J. Taylor, Shawnee County District Attorney, Topeka
Kansas Law Center, Topeka

Friday, April 9, 9:15 a.m. – 4 p.m.
Family Law Institute
The Oread, Lawrence
Co-sponsored by The Bar Plan

Monday, April 12, Noon – 1 p.m.
Avoiding Ethical Violation Minefields
Brown Bag Ethics (lunch included)
Hon. Nancy Parrish, Chief Judge of the District Court, Division 14, Topeka
Kansas Law Center, Topeka

Friday, April 16, 8:30 a.m. – 12:05 p.m.
When Family Courts Collide with Special Needs Children Video Debut*
Four sites statewide – Dodge City, Lenexa, Topeka & Wichita

Friday, April 23, 9 a.m. – 4 p.m.
Bankruptcy Institute*
The Oread, Lawrence
Co-sponsored by The Bar Plan, Stevens & Brand LLP., and Forker, Suter & Rose, LLC

Friday, April 30, 9 a.m. – 3:30 p.m.
Health Law Institute*
DoubleTree Hotel, Overland Park

Register online at:
www.ksbar.org/public/cle.shtml

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- Henry Goertz, Goertz Law Office, Dodge City

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